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—R. 69 (7) — See Co-operative Societies — Tamil Nadu Co-operative Societies Act (1961), S. 100 Mad 1 B

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—R. 69 (7) — See Co-operative Societies — Tamil Nadu Co-operative Societies Act (1961), S. 100 Mad 1 B

—R. 69 (7) — See Co-operative Societies — Tamil Nadu Co-operative Societies Act (1961), S. 100 Mad 1 B

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—S. 48 — Entries in Register of copyright — Evidentiary value — See Ibid, S. 13 Mad 22

—S. 48 — Entries in Register of copyright — Evidentiary value — See Ibid, S. 13 Mad 22

—S. 48 — Entries in Register of copyright — Evidentiary value — See Ibid, S. 13 Mad 22

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—S. 7 (iv) (c) — Suit for declaration of title and possession of share of co-owner — Prayer for khas possession could be granted only in a suit for partition. Gauhati 10 D

—S. 7 (iv) (f) — Suit for dissolution of partnership and rendition of accounts — Preliminary decree passed — Appeal — Defendant whether bound to value relief on the valuation on the plaint. Mach Pra 1 (FB)

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—Cl. 10 (Punjab and Haryana High Court)— Limitation Act (1963), S. 5 — Appeal under Cl. 10 — One day's delay in filing appeal caused by Counsel's bona fide mistaken impression of law — Delay can be condoned Punj 22 A

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—S. 3 (1) — Provision mandatory — An application for substitution filed beyond period of one month is hit by S. 3 (1) and is bound to be rejected — See Houses and Rents — U. P. Urban Buildings (Regulation, Letting, Rent and Eviction) Rules, 1972, R. 25 AI 15 A

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(1) Houses and Rents — W. B. Premises Tenancy Act (1956), S. 17-D Cal 8 A

(2) Letters Patent (Punjab & Haryana), Cl. 10 Punj 22 A

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—S. 6 — Property — Statutory rights of claimants to compensation are separate rights to property of each claimant — Such rights are property within the meaning of section
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Bom 10

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—S. 2 (1) (l' and (g) — Total Disablement — Personal injury to carpenter in the course of employment — Amputation of left hand above elbow — Since carpenter cannot work with one hand disablement is total and not partial
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SC 222 A

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 AIR 1935 All 768 = 1935 All LJ 1000 — Diss. AIR 1976 Orissa 8.
 (1970) Criminal Appeal No. 2072 of 1967, D/- 23-4-1970 (All) — Partly Revers. AIR 1976 SC 199.
 (1971) Cri. Appeal No. 669 of 1968, D/- 3-4-1971 (All) — Revers. AIR 1976 SC 69.

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 AIR 1960 Andh Pra 634 = 1966 Andh LT 866 Diss. AIR 1976 Raj 7.
 AIR 1962 Andh Pra 123 = (1961) 2 Andh WR 96 — Diss. AIR 1976 All 21 A.
 (1972) 2 Andh WR 18 — Revers. AIR 1976 SC 128.

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(1973) Spl. C. A. No. 14 of 1971, D/- 2-8-1973 (Bom) — Over. AIR 1976 Bom 1 A.

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 Observations in AIR 1962 Cal 611 = (1962) 2 Cri LJ 747 — Over. AIR 1976 SC 195.

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 (1975) W. P. No. 6344 of 1974, D/- 5-3-1975 (Kant) — Revers. AIR 1976 Kant 1.

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 (1969) Misc. P. No. 127 of 1966, D/- 20-9-1969 (Madh Pra) — Revers. AIR 1976 SC 214 A.
 AIR 1969 Madh Pra 100 — Revers. AIR 1976 SC 48.
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 (1974) Criminal Appeals Nos. 61 to 63 and Death Reference No. 2 of 1974, D/- 27-2-1974 (Madh Pra) — Revers. AIR 1976 SC 133 A.
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 1973 Lab IC 995 (Mad) — Revers. AIR 1976 SC 213.
 (1974) 88 Mad LW 288 — Revers. AIR 1976 SC 73.

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 AIR 1974 Pat 280 = 1974 BLJR 201 — Not foll. AIR 1976 Pat 14.

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 (1961) 63 Pun LR 865 = ILR (1962) 1 Punj 310 — Held no longer good law in view of AIR 1963 Punj 1 (FB), and AIR 1967 SC 773 AIR 1976 Punj 21.
 (1971) Cri. Appeal No. 1027 of 1969, D/- 25-2-1971 (Punj) — Revers. AIR 1976 SC 91 A.
 ILR (1973) 1 Punj 496 — Over. AIR 1976 Punj 1 A.
 (1974) C. W. No. 4346 of 1974, D/- 4-11-1974 (Punj) — Revers. AIR 1976 SC 57.

RAJASTHAN

(1970) Civil Spl. Appeal No. 172 of 1970, D/- 29-7-1970 (Raj) — Partly Revers. AIR 1976 SC 54.

COMPARATIVE TABLE

(1D-12-1975)

1976 January

All India Reporter = Other Journals

AIR 1976 S C		AIR 1976 S C		AIR 1976 S C		AIR 1976 S C	
AIR	Other Journals	AIR	Other Journals	AIR	Other Journals	AIR	Other Journals
1	---	37	1975 2 Lab	49	---	66	---
10	101 I T R 234		L J 10	54	---	69	1975 Cri L R
27	---		(1975) 4 S C G 389	57	---		(S C) 614
37	1975 Lab I C 1753		(1975) 2 Serv	59	1975 Cri L R	73	1975 Tax L R 2108
	1975 S C C		L R 130		(S C) 617		(1975) 2 S C C 605
	(Lab) 295	48	101 I T R 457	63	---	76	---

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AIR 1976 S C		AIR 1976 Bombay		AIR 1976 J. & K.		AIR 1976 Madras	
AIR	Other Journals	AIR	Other Journals	AIR	Other Journals	AIR	Other Journals
83	---	1	1975 Mah L J 521	1	1975 Kash L J 262	20	88 Mad L W 534
91	---	10	1975 Mah L J 566	5	---		(1975) 2 Mad
98	---	13	---	7	---		L J 341
105	---	23	1975 Mah L J 345	9	---	22	88 Mad L W 575
109	('75) 41 Taxa- tion 53	28	77 Bom L R 352	12	---	24	88 Mad L W 532
123	---			14	---		(1975) 2 Mad
127	---	AIR 1976 Calcutta		AIR 1976 Karnataka			L J 216
133	1975 Cri L R (S C) 624	AIR	Other Journals	AIR	Other Journals	25	(1975) 2 Mad
140	101 I T R 465	1	---	1	(1975) 2 Kant		L J 84
143	1975 U P T C 691	2	---		L J 312	26	88 Mad L W 536
145	1975 U J (S C) 835	8	---	3	(1975) 2 Kant		(1975) 2 Mad
163	---	13	---		L J 138		L J 310
171	---	15	---		ILR (1975)	32	88 Mad L W 649
173	---	17	---		Kant-1612		88 Mad L W 636
176	---	18	---	4	(1975) 2 Kant		(1975) 2 Mad
177	---	21	79 Cal W N 900		L J 352		L J 298
182	---	26	(1975) 2 Cal	10	(1975) 2 Kant	AIR 1976 Orissa	
195	---		L J 156		L J 168	AIR	Other Journals
199	---	32	---		ILR (1975)	1FB	41 Cut L T 1017
202	---	AIR 1976 Delhi			Kant 1513	4	ILR (1975) Cut 553
203	---	AIR	Other Journals	13	(1975) 2 Kant	8	(1975) 1 Cut
211	---	1	---		L J 241		W R 459
214	---	4	---	AIR 1976 Kerala		11	41 Cut L T 494
218	---	11	---	AIR	Other Journals		(1975) 1 Cut
219	---	15	1975 Bajdhani	1	1975 Ker L T 620		W R 178
222	---		L R 478		ILR (1975) 2	12	ILR (1975) Cut 417
224	---	17	---		Ker 507		W R 724
AIR 1976 Allahabad		22	1975 M C C 420	3	ILR (1975) 2	15	ILR (1975) Cut 440
AIR	Other Journals	24	---		Ker 315	AIR 1976 Patna	
1	(1975) 1 All	30	1975 M C C 471	5	1975 Ker L T 472	AIR	Other Journals
	L R 672	31	---	7	---	1	---
7	---	AIR 1976 Gauhati		9	---	2	---
15	(1975) 1 All	AIR	Other Journals	15	---	5	1975 B B C J 548
	L R 580	1	---	AIR 1976 Madh Pra		8	1975 Pat L J R 392
17	1975 Rev Dec	3	---	AIR	Other Journals		---
	225 (All)	5	---	1FB	1975 Jab L J 897	14	---
	1975 All W C 513	7	---	5FB	1975 M P L J 657	15	---
19	---	10	---		1975 Jab L J 779	18	---
21	(1975) 1 All	12	---	8	1975 M P L J 578	22	1975 B B C J 598
	L R 480	15	---		1975 Jab L J 682	24	---
	1975 All W C 493	16	---	11	1975 Jab L J 617	31	---
23	---	AIR 1976 Goa			1975 M P L J 549		---
25	(1975) 1 All	AIR	Other Journals	AIR 1976 Madras		AIR 1976 Punjab	
	L R 497	1	---	AIR	Other Journals	AIR	Other Journals
	1975 All W C 567	2	---	1	88 Mad L W 510	1	---
26	---	4	---	3	(1975) 2 Mad	21	1975 Ren C R 325
35	---	5	---		L J 107	22	---
40	(1975) 1 All	6	---		83 Mad L W 516	24	1975 Rev L R 567
	L R 511	8	---	4	88 Mad L W 518	27	1975 Ren C R 508
42	(1975) 1 All	10	---		(1975) 2 Mad	30	---
	L R 464	11	---	5	88 Mad L W 507	AIR 1976 Rajasthan	
	1975 All W C 433	16	---		(1975) 2 Mad	AIR	Other Journals
44	---	AIR 1976 Gujarat			L J 152	1	1975 W L N 520
47	---	AIR	Other Journals	7	88 Mad L W 460	4	1975 W L N 512
AIR 1976 Andh Pra		1	(75) 16 Guj L R 1	8	83 Mad L W 602	7	1975 Raj L W 218
AIR	Other Journals	8	(75) 16 Guj		(1975) 2 Mad		1975 W L N 465
1FB	---		L R 764	15	(1975) 2 Mad	10	1975 W L N 537
39	---	10	---		L J 175		1975 Raj L W 299
43	(1975) 2 A P L J	13	(75) 16 Guj		88 Mad L W 622	12	1975 Raj L W 228
	(H C) 87		L R 411	17	88 Mad L W 549		1975 W L N 309
45	(1975) 2 Andh	AIR 1976 Him Pra			(1975) 2 Mad	17	---
	W R 68	AIR	Other Journals		L J 167	20	---
	(1975) 2 A P L J	1FB	---	19	88 Mad L W 537	32	---
	(H C) 95	6	---		(1975) 2 Mad		---
	1975 Andh L T 308	16	---		L J 363		---
46	---						
48	(1975) 2 Andh						
	W R 61						

ERRATA

A. I. R. 1975 S C. 2299 (Dec. Part)

- (1) At page 2403, Col. 1, Para 421, Line 6, read 'gesture' instead of 'geusture'.
- (1A) At page 2403, Col. 2, Para 422, Line 22, read "have voluntarily taken" instead of "voluntarily taken".
- (2) At page 2404, Col. 1, Para 425, Line 24, Omit the word "the" after the word "from".
- (3) At page 2415, Col. 1, Line 23, add the word "that" after the word "means".
- (4) At page 2420, Col. 1, Para 494, Line 6, read "something" instead of "whatever".
- (5) At page 2425, Col. 1, Line 8, add the words "those of" before the words "these dignitaries".
- (6) At page 2425, Col. 2, Line 2, read "decided it" instead of "decided in".
- (7) At page 2426, Col. 2, Para 519, Line 7, omit ',' after the word "however".
- (8) At page 2427, Col. 2, Lines 6-7, omit the words "was repealed".
- (9) At page 2428, Col. 2, Lines 13-14, after the words "4th Clause" read "in Article 329A" instead of "in the 39th Amendment".
- (10) At page 2430, Col. 2, Para 533, Line 5, read "Kautilya" instead of "Kau-taliya".
- (10A) At page 2430, Col. 2, Para 534, Line 13, omit the word "been" preceding the word "given".
- (10B) At page 2432, Col. 2, Para 543, Line 6, read 'causes' instead of 'course'.
- (10C) At page 2434, Col. 2, Para 550, Line 9, read "Bonham's case" instead of "Monham's case".
- (11) At page 2435, Col. 2, Para 555, Line 3, after the first sentence ending with the word "Constitution" add the following sentences:
It is noteworthy that the phrase "Sovereignty and integrity of India" was inserted in 1963 in Article 19 (2), (3) and (4), to denote the political independence and wholeness of the country vis a vis other countries. It was also introduced in the oaths of "allegiance" to the Constitution prescribed in the Third Schedule indicating that the duty to uphold "the Sovereignty and integrity of India" follows from a recognition of the Supremacy of the Constitution.
- (12) At page 2437, Col. 1, Para 562, Line 16, read "Hazard" instead of "Howard".
- (13) At page 2439, Col. 1, Line 14, add "it" before the word "places".

- (14) At page 2444, Col. 1, Para 580, Line 22, read "blamed" instead of "balmed".
 - (15) At page 2448, Col. 2, Para 592, Line 2, add the word "to" after the word "resorting".
 - (16) At page 2448, Col. 2, Para 593, Line 8, read "is" instead of "as".
 - (17) At page 2449, Col. 1, Line 19, read "Three notions" instead of "There notions".
 - (18) At page 2449, Col. 1, Line 20, read "of" instead of "or".
 - (19) At page 2449, Col. 2, Para 595, Line 14, read "a declaration given of" instead of "making a declaration of the".
 - (20) At page 2450, Col. 1, Para 597, Line 22, omit the word "the" after the word "under".
 - (21) At page 2450, Col. 2, existing para 600, Line 13, after the sentence ending with the word "that" add the following sentences:
Legislative action can sometimes be made to serve as an unobjectionable substitute for what could and should, strictly and properly, be done judicially. But, could this be done here without legally insurmountable difficulties?
 - (22) At page 2450, Col. 2, existing para "600" to be renumbered as "599A".
 - (22A) At page 2450, Col. 2, existing para 600, Line 13 from the words "The Act of 1951" till the end of existing para treat as separate para and may be numbered as "600".
 - (23) At page 2453, Col. 2, Line 51, read "Article 191 (1) (a)" instead of "Article 19 (1) (a)".
 - (24) At page 2455, Col. 2, Para 624, Line 52, omit "," after the word "however".
 - (25) At page 2455, Col. 2, Para 624, Line 54, read "minority" instead of "minorities".
 - (26) At page 2456, Col. 2, Para 627, Line 2, add the word "Art." after the word "of".
 - (27) At page 2456, Col. 2, Para 628, Line 12, read "329A" instead of "329-A (4)".
 - (28) At page 2457, Col. 2, Para 632, Lines 34-35, read "international question, yet" instead of "international questions. Yet".
 - (29) At page 2458, Col. 2, Lines 41-42, read "Clause (4) of Art. 329A" instead of "Clause 329A (4)".
 - (30) At page 2459, Col. 1, Line 6, read "deemed ever" for "deemed over".
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Supreme Court

AIR 1976 SUPREME COURT 1

(From: Madras)*

**V. R. KRISHNA IYER AND S. MUR-
TAZA FAZL ALI, JJ.**

Ratnam Chettiar and others, Ap-
pellants v. S. M. Kuppuswami Chet-
tiar and others, Respondents.

Civil Appeal No. 685 of 1968,
D/- 18-9-1975.

**(A) Constitution of India, Article
133 — Concurrent findings of fact —
Interference by Supreme Court.**

It is a well-settled practice of the
Supreme Court not to interfere with
a concurrent finding of fact given by
the two Courts below in the absence
of any extraordinary or special rea-
sons. (Para 11)

**(B) Hindu Law — Joint family
— Partition — Partition of immov-
able properties.**

Properties not actually valued ac-
cording to market rate but notional
valuation given in the partition deed
— Capitalised value of the items al-
lotted to the two brothers either on
the basis of their purchase price or
on the basis of the rent fetched by
them being almost equal — Held par-
tition could not be held to be unfair
or unjust. (Paras 10, 12)

**(C) Hindu Law — Partition —
Re-opening of — Minors.**

A partition effected between the
members of the Hindu Undivided

*(Appeal Nos. 329 and 468 of 1959,
D/- 22-11-1963—Mad.)

JS/JS/D731/75/DHZ

1976 S. C./1 I G—1

Family by their own volition and
with their consent cannot be reopen-
ed, unless it is shown that the same
is obtained by fraud, coercion, misre-
presentation or undue influence. In
such a case the Court should require
a strict proof of facts because an act
inter vivos cannot be lightly set aside.

When the partition is effected be-
tween the members of the Hindu Un-
divided Family which consists of
minor coparceners it is binding on the
minors also if it is done in good faith
and in bona fide manner keeping into
account the interests of the minors.

Where, however, a partition ef-
fected between the members of the
Hindu Undivided Family which con-
sists of minors is proved to be unjust
and unfair and is detrimental to the
interests of the minors the partition
can certainly be reopened whatever
the length of time when the partition
took place.

Where there is a partition of im-
movable and moveable properties but
the two transactions are distinct and
separable or have taken place at dif-
ferent times, if it is found that only
one of these transactions is unjust
and unfair it is open to the Court to
maintain the transaction which is just
and fair and to reopen the partition
that is unjust and unfair. Case law
rel. on. (Para 19)

Cases Referred: Chronological Paras
(1967) C. A. No. 2298 of 1966, D/- 20-
3-1967 (SC) 16
AIR 1951 SC 280 = 1951 SCR 548
17

(1897) ILR 21 Bom 333 18
 (1895) ILR 19 Bom 593 18
 (1892) ILR 14 All 498 = 1892 All WN 18
 61 18
 (1873) 18 Bom HCR 444 16

Mr. F. S. Nariman, Sr. Advocate, (M/s. A. Subba Rao, R. V. Pillai and P. Ramaswami, Advocates with him), for Appellants; Mr. M. Natesan, Sr. Advocate, (M/s. P. S. Srisailam and M. S. Narasimhan, Advocates with him), for L. Rs. of Respondent No. 1 and Respondents 2 and 3.

The following Judgment of the Court was delivered by

FAZL ALI, J.— This is the plaintiffs' appeal against the judgment of the High Court of Madras dated November 22, 1963 by certificate. The appeal arises out of a partition suit filed by plaintiffs Nos. 1 to 4 for cancellation of partition made between the father of the plaintiffs who is defendant No. 5, and defendant No. 1 the elder brother of defendant No. 5. It appears that as far back as May 10, 1940 the two brothers, namely S. M. Kuppuswami Chettiar defendant No. 1 and S. M. Ranganatham Chettiar defendant No. 5, who were originally members of Undivided Hindu Family partitioned their shares by virtue of a registered partition deed dated May 10, 1940. At the time when the partition was made plaintiffs Nos. 2 to 4 were minors and defendant No. 3 was also a minor. Under the partition deed both immovable and moveable properties were divided between the two brothers voluntarily through the aid and assistance of D. W. 3 K. Narayanswami who was the family auditor of defendant No. 1 and was his friend and adviser. The partition deed with respect to the immovable properties is Ext. B-1 which appears at pp. 243-248 of the Paper Book. Under the partition deed two Lists were prepared itemising the properties which were to go to the two brothers. The list of properties is contained in Ext. B-115 of the Paper Book. As regards the moveable properties it appears that the partition had taken place a month earlier i.e. on April 12, 1940 and the partition deed is Ext. B-3, which consists of two Schedules — Schedule A and Schedule B — moveables mentioned in Sch. A

were allotted to defendant No. 1 and those contained in Sch. B were allotted to the share of defendant No. 5.

2. The plaintiffs' case was that the two brothers who were members of the Undivided Hindu Family along with the plaintiffs and other minor coparceners betrayed the interests of the minors and the division made between them was both unjust and unfair and had the effect of depriving the minors of their legal shares in the properties the lion's share having fallen to the lot of elder brother defendant No. 1 S. M. Kuppuswami Chettiar hereinafter referred to as 'S. M. K.'. The plaintiffs' father who is defendant No. 5 being a person of weak intellect did not care to protect the interests of the minors and he accordingly accepted any share that was allotted to him without any objection. Defendant No. 5 S. M. Ranganathan Chettiar would be hereinafter referred to as 'S. M. R.'. Plaintiffs also alleged that the partition was secured by practising fraud and undue influence and by suppressing large assets belonging to the family which were taken by defendant No. 1 by taking advantage of the weakness of the plaintiffs' father.

3. We might mention at the outset that Mr. F. S. Nariman the learned counsel for the appellants did not at all press the plea of fraud and undue influence taken by the plaintiffs before the Trial Court and confined his arguments only to the allegation that the partition effected between the two brothers S. M. K. and S. M. R. was at the very face of it unjust and unfair and detrimental to the interests of the minors. The plaintiffs also laid claim to a sum of Rs. 10,000/- from the cash deposit which is said to have been given to the mother of defendants 1 and 5 but this claim was not pressed before us in the course of the arguments. Other minor claims which were also made before the Trial Court were not pressed before us.

4. The suit was resisted by defendant No. 1 S. M. K. and his major sons defendants 1 & 4 and a minor son defendant 3 who however attained majority during the pen-

dency of the suit before the Trial Court. We might also mention here that plaintiffs Nos. 2 to 4 sons of S. M. R. were also minors at the time when the suit was filed but plaintiff No. 2 attained majority on October 3, 1958 just about a month and a half before the judgment in the suit was delivered by the Subordinate Judge, Coimbatore. The defendants stoutly denied the allegations made by the plaintiffs and averred that there was absolutely no disparity in the division of the properties, that no fraud or undue influence had been practised, that the properties were divided between defendants 1 and 5 with the explicit consent of defendant No. 5 and that the division of the properties would show that the partition was neither unjust nor unfair, both parties having taken equal shares in the immovable and moveable properties. A number of other pleas was also raised by the defendants, but it is not necessary for us to deal with them in view of the points pressed before us by the learned counsel for the appellants.

5. The Trial Court framed as many as 18 issues and after considering the oral and documentary evidence produced before it it held that so far as the partition of the immovable properties was concerned which was done by a separate document and was clearly severable from the partition of the moveable properties, the partition was neither unjust nor unfair so as to entitle the minors to reopen the partition after a long period. The learned Trial Judge, however, was of the opinion that so far as the partition of moveable properties was concerned it was *ex facie* unjust and unfair and the plea of the plaintiffs for re-opening the same must succeed. The Trial Court accordingly passed a preliminary decree for re-partition of the moveable properties and directed the appointment of a Commissioner to go into the valuation of the assets sought to be re-partitioned.

6. Both the plaintiffs and the defendants filed separate appeals before the High Court of Madras. The plaintiffs filed an appeal before the High Court against that part of the decree which dismissed their suit for

re-opening the partition of the immovable properties, while the defendants filed an appeal against the decree of the Trial Court directing re-opening of the partition of moveable properties and thus decreeing the plaintiffs' suit to that extent. The High Court decided both the appeals by one common judgment dated November 22, 1963 and by upholding the findings of the learned Subordinate Judge, Coimbatore, the High Court made a slight variation in the decree by setting aside the directions of the Subordinate Judge for the appointment of a Commissioner and by quantifying the value of the disparity in the share of the plaintiffs, the High Court passed a decree to the extent of 2/5th share of Rs. 17,700/-. The plaintiffs alone have filed the present appeal against the judgment and decree of the High Court after obtaining a certificate from that Court.

7. Before going into the merits of the case, it may be necessary to mention a few unique aspects of the present case. It would appear from the findings arrived at by the two courts that defendant No. 1 was undoubtedly an honest man and defendant No. 5 the younger brother appears to be an idealist — a person to whom the value and prestige of the family was a consideration much above mundane monetary matters. Secondly, the partition between the two brothers was voluntarily made about 35 years ago and the father of the plaintiffs had most willingly and with good grace accepted the partition and the shares that were allotted to him. Thirdly, since a very long time had elapsed since the partition took place, it would be well-nigh impossible for any court to determine the value of the assets, some of which might have disappeared, others may be shrouded in mystery, and for determining the rest the necessary data may not be available. It appears to us to be too late in the day in 1975 to appoint a Commissioner in order to go into a situation which existed in 1940 and then to pass a decree which may result in a fresh spate of litigation for another decade. It was possibly this consideration which weighed with the High Court in quantifying the amount of the share of the plaintiffs which

they had suffered under the division of the assets. Finally, the plaintiff's father defendant No. 5 was a shrewd businessman and after his elder brother had suffered from some illness, he was carrying on the business of the family a few years before the partition. Both the parties were assisted by an Auditor Mr. K. Narayanswami in effecting the partition by metes and bounds. In these circumstances, therefore, there could be no question of practising any fraud or undue influence as alleged by the plaintiffs and if the partition was unjust or unfair to the minors it was merely because defendant No. 5 made an error of judgment with respect to some properties. Lastly, we have not been able to find any material to justify the conclusion of the High Court that the difference in the allotment of the shares to the plaintiffs would be $\frac{2}{5}$ th of Rs. 17,700/-. We shall deal with this point a little later and show that the difference is much more.

8. Mr. Nariman, learned counsel for the appellants submitted two points before us. In the first place, he assailed the partition of the immovable properties on the ground that no valuation of the properties was fixed according to the market value and that the plaintiffs were not given any share in the agricultural properties. As regards the moveable properties it was argued that the division was wholly unjust and unfair because the lion's share was taken by defendant No. 1 and the choice made by defendant No. 5, the father of the plaintiffs was neither wise nor prudent and was extremely detrimental to the interests of the plaintiffs. As an instance of the unfairness of the partition Mr. Nariman pointed out that a comparison of Schedules A and B of Ext. B-3 would show that defendant No. 1 was allotted moveable properties worth Rupees 1,10,274-2-0 whereas defendant No. 5 was given properties worth Rupees 90,142-4-0 there being a difference of about Rs. 20,000/- odd. He also pointed out that shares of Lakshmi Textile Mills were allotted to defendant No. 1 which were extremely valuable and gave very rich dividends, whereas defendant No. 5 was

allotted the shares of Lakshmi Sugar Mills which was one of the sick Mills running at a loss whose dividends were insignificant. We shall consider this contention raised by counsel for the appellants a little later.

9. The learned counsel appearing for the respondents Mr. Natesan, however, submitted that the present suit is frivolous and has been filed only with a view to harass the defendants and to re-open a partition which was both just and equitable and which was entered by both the brothers with their eyes open and with the aid of their financial expert. Learned counsel for the respondents, further submitted that there is no reliable evidence to show that there was any cash deposit of Rupees 65,000/- as mentioned in Sch. B, and if there was one it would have been divided on the spot instead of being postponed to a future date. Similarly it was submitted that so far as the shares are concerned they were chosen by defendant No. 5 himself and their valuation was equal.

10. As regards the immovable properties we find ourselves in complete agreement with the arguments of the learned counsel for the respondents that the partition of these properties was fair and just and there is no material on the record to show that the partition worked in any injustice or was detrimental in any way to the interests of the minors. In this connection we might try to illustrate our point from the findings of the Trial Court regarding the valuation of the immovable properties divided between the two brothers. The partition of immovable properties Ext. B-1 which appears at pp. 243 to 248 of the Paper Book consists of two schedules A & B. The Trial Court has, after careful consideration of the evidence, very scientifically itemised the properties allotted to each of the brothers and the value of those properties. For instance, item 1 of Sch. A allotted to defendant No. 1 is a tank-fed nanja land in Kurichi village measuring 3.80 acres and has been valued at Rs. 4,000/-. Item 2 is a similar land in village Kurichi which is self-cultivated and has been valued at Rs. 7,000/-. Thus

the total value of items 1 and 2 of Sch. A comes to Rs. 11,000/-. As against this defendant No. 5 was allotted item 2 of Sch. B which on the basis of capitalised value at the rate of Rs. 60/- per month has been fixed at Rs. 14,000/-. Items 1 and 2 of Sch. A are the only agricultural properties possessed by the family and the Trial Court has rightly pointed out that whereas defendant No. 1 took the agricultural properties, defendant No. 5 got urban properties not only of the same value but of a higher value. Similarly item No. 3 of Sch. A allotted to defendant No. 1 is a house in the Big Bazar Street and has been valued at Rs. 16,500/-. As against this the family house in the Oppanakkara Street has been allotted to defendant No. 5 whose value is much more than item No. 3 of Sch. A. The capitalised value of the family house in the Oppanakkara Street on the basis of rental of Rs. 700/- per month would come to near about Rs. 96,000/-. Item 4 of Sch. A is a house and site in Ramanathapuram and has been valued at Rs. 7,000/- because it was purchased in 1938 for a sum of Rs. 5,650/- vide Ext. E-139 dated March 6, 1938. The learned Subordinate Judge has roughly put the valuation of the said house and site at Rs. 7,000/- in 1940. As against this item 3 allotted to defendant No. 5 is a shop building in the Big Bazar Street carrying a rental of Rs. 30/- per month at the time of the partition whose capitalised value would be Rs. 7,000/-. Item No. 5 of Sch. A which was allotted to defendant No. 1 has been valued at Rs. 2,300/- representing the purchase price of the property mentioned in Exts. B-140 to B-142. As against this item 4 of Sch. B which has been allotted to defendant No. 5 was purchased for a sum of Rs. 2,100/-. It would thus appear that the division of immovable properties is just, fair and equal. It is true that the properties were not actually valued according to the market rate and that a notional valuation had been given in the partition deed. But in view of the detailed examination by the two Courts of the facts regarding capitalised value of the properties allotted to the two brothers it cannot be said that the partition of

immovable properties was either unfair or unjust or in any way detrimental to the interests of the minors. After considering the evidence, the Trial Court found as follows:

"It is thus found from the available evidence that there was no unfairness or inequality in the partition of the immovable properties effected under Exhibit B-1 and that no ground exists for reopening that partition."

The High Court upheld the findings of the Trial Court in these words:

"Thus in regard to the division of the immovable properties it is not possible for us to say that there was unfairness or fraud or irregularity in the allotment of the properties between the brothers. The scheme of the division of the immovable properties seems to us to be fair and we cannot say that the plaintiff's father (5th defendant) acted against the interests of his sons or that the 1st defendant took any advantage of his position as the eldest member of the family and allotted to himself the best among the properties available for division. We therefore confirm the finding of the learned Subordinate Judge that the partition of the immovable properties effected under Exhibit B-1 is binding on the plaintiffs and that the plaintiffs are not entitled to reopen the partition."

11. It is a well-settled practice of this Court not to interfere with a concurrent finding of fact given by the two Courts below in the absence of any extraordinary or special reasons. In the instant case we hold that the finding of the High Court as well as of the Trial Court is based on a full and complete consideration of the evidence both oral and documentary and an elaborate and meticulous discussion of all the surrounding circumstances. We, therefore, do not feel inclined to interfere with this concurrent finding of fact which is hereby affirmed.

12. We might state that the objection regarding the properties not having been properly valued falls to the ground when we find that instead of notional value mentioned in the partition deed which is Rs. 12,547-13-0 for defendant No. 1 and Rs. 12,000/- for defendant No. 5, the capitalised

value of the items allotted to the two brothers either on the basis of their purchase price or on the basis of the rent fetched by them is almost equal. The first contention regarding the partition of immovable properties raised by the learned counsel for the appellants being unfair and unjust must therefore be overruled.

13. We now come to the question of the division of moveable properties. In this connection our attention was drawn by Mr. Nariman to Ext. B-3 which is to be read along with the pencil note of K. Narayanaswami D. W. 3, who was the auditor of defendant No. 1 himself. Exhibit B-3 is the partition deed of moveable properties consisting of shares, deposits, pronotes, mortgage deeds and cash, particulars of which are given in Schs. A. and B. Moveable properties mentioned in Sch. A were allotted to defendant No. 1 and those mentioned in Schedule B were allotted to defendant No. 5 father of the plaintiffs. It will appear from a plain examination of the two schedules that whereas defendant No. 1 admittedly

(Contd. on Col. 2)

got properties worth Rs. 1,10,274-2-6 defendant No. 5 got properties only worth Rs. 90,142-4-0 there being a clear disparity of Rs. 10,000/- because the share of each of the two defendants would be Rs. 1,00,208/-. On the defendants No. 1's own documents, therefore, it is clear that a loss of Rs. 10,000/- was caused to defendant No. 5 in the year 1940 and the share of the plaintiffs in this loss would be 2/5th i.e. about Rs. 4,000/- which would swell into a large amount if we add interest for all these 35 years. That apart, the learned counsel for the appellants has submitted that the document Ext. B-3 deliberately omits to mention a sum of Rs. 65,000/- which was a cash deposit alleged to have been kept in the safe and out of which Rs. 10,000/- were agreed to be given to the mother of the two brothers and the rest, viz. Rs. 55,000/- were to be divided between the two brothers, each defendant getting Rs. 27,500/-. This is undoubtedly proved by Ext. A-2 where these figures are clearly mentioned. Entry No. 1 of Ext. A-2 runs thus:

	(1)	(2)	Total (3)	Settlement (4)	S. M. K. (5)	S. M. R. (6)
Thanichonatham Belonging exclusively*		...	65,000/-	55,000/-	27,500/-	27,500/-

* Scored out in pencil

This cash amount of Rs. 65,000/- is denied by defendant No. 1 and it is said that this amount might have been hidden money which never came to the share of the parties. D. W. 3 K. Narayanaswami has positively admitted in his evidence that he had made this entry in his own hand-writing but he scored out this entry as the amount was not available. Both the Subordinate Judge, Coimbatore and the High Court have accepted the explanation given by D. W. 3 Narayanaswami although the explanation appears to us to be prima facie false and unconvincing. Even assuming that this entry was made due to some mistake and had to be scored out, we cannot believe that a person of the expert knowledge and status of D. W. 3 Narayanaswami Iyer the Auditor would forget to make a corresponding correction in the total amount which is given below the statement of account signed by

him. If the amount of Rs. 65,000/- was scored out, then the total would be Rs. 2,00,116/- in Ext. A-2, but the total shown in pencil in Ext. A-2 is Rs. 2,65,116/- which completely demolishes the case of defendant No. 1 and the explanation given by D. W. 3 that the entry was made due to some mistake. The Courts below have, however, relied on a number of circumstances which are purely of a speculative nature, in order to hold that the plaintiffs have not been able to prove the existence of the cash amount of Rs. 65,000/-. One of the circumstances was that according to the evidence of defendant No. 5 the amount of Rs. 65,000/- was taken out from the safe and counted in the presence of defendants 1 and 5 and yet defendant No. 5 did not care to divide it at that time into two equal parts, nor did he insist on the same. Defendant No. 5 has, however, given an explanation that as his elder brother wanted that

this money should be divided later he did not want to join issue on the subject and trusted his elder brother. A perusal of the evidence of defendant No. 5 clearly shows that he is an extremely emotional sort of a person who believes in the respect of the family above all considerations. It is, therefore, not unlikely that defendant No. 5 quietly accepted the advice of his elder brother to divide the amount later on. It was however argued by the learned counsel for the respondents that defendant No. 5 was a shrewd businessman having managed the family affairs for quite some time and if such a huge amount was concealed from him by his elder brother he would have undoubtedly raised objection at any time before the suit. This conduct of defendant No. 5 cannot, however, put the plaintiffs out of court. He had decided to abide by the advice of his elder brother and if he thought that his elder brother did not want to divide the amount of Rs. 65,000/- he kept quiet which is quite in consonance with the character of this man as revealed in his evidence and the circumstances of the case. Assuming however that defendant No. 5 did not take any objection, as the amount was very huge the silence of defendant No. 5 or even his acquiescence in allowing his elder brother to swallow this amount was not a prudent act and has caused serious detriment to the interests of the minors which he had to protect, because the minors at that time were members of the Hindu Undivided Family. In view of these circumstances, therefore, we are satisfied that the plaintiffs' case regarding the deliberate suppression of the cash amount of Rs. 65,000/- has been proved and if this amount would have been available to defendant No. 5, then the plaintiffs would have got 2/5 share of Rs. 65,000/-, viz. Rupees 27,500/-, as far back as 1940. The argument of Mr. Nariman on this point is, therefore, well-founded and must prevail.

14. The only other point that was stressed before us by the learned counsel for the appellants was that the Trial Court was right in ordering the appointment of a Commissioner for going into the assets of

the moveable properties, particularly the question of the shares of the Lakshmi Mills. We are, however, unable to agree with this argument. Mr. Natesan learned counsel for the respondents has drawn our attention to some important documents to show that the shares were equally divided between defendants Nos. 1 and 5 and were actually chosen by defendant No. 5 with his eyes open. Exhibit B-153 which is a share market report dated April 5, 1940 shows that the paid up value of each share of Lakshmi Sugar Mills was Rs. 50 but the current price of the share at that time was Rs. 41/8/- i.e. it was Rs. 8/8- below the paid-up value and the dividend paid on the share was only Rs. 9/- yearly. It was, therefore, suggested by counsel for the respondents that defendant No. 5 was given the choice to take the shares of the Lakshmi Mills or the Lakshmi Sugar Mills and in view of the low market rate of the Lakshmi Mills he chose to take the shares of the Lakshmi Sugar Mills to the extent of Rs. 10,000/-. In lieu of the shares of other Mills defendant No. 5 took a cash amount of Rs. 13,000/- as would appear from Ext. B-3. It is true that the shares of Lakshmi Textile Mills went up enormously a few years later in view of the international war situation in the continent but defendant No. 5 could not have foreseen such a contingency and if he had made the choice which he thought would be beneficial to the interests of the minors his conduct would have been at best an error of judgment which would not be sufficient to reopen the choice made by him.

15. Mr. Nariman, however, strenuously relied on the evidence of D. W. 3 Narayanaswami Auditor which was to the effect that he expressed great surprise when defendant No. 5 chose the shares of Lakshmi Sugar Mills and in his opinion that was his foolish act. This is, however, a matter of opinion but the fact remains that the market report of the Lakshmi Mills was not encouraging and therefore there was some justification for defendant No. 5 for not opting for the shares of the Lakshmi Mills. In these circumstances we hold that so far as the shares

of the various Mills were concerned there was no unjust or unequal distribution between the parties. This item of moveable properties, therefore, was correctly divided between the parties.

16. Learned counsel for the respondents submitted that taking a broad view of the whole case the Court should hold that it was not a case of unfair or unjust partition, because both defendant Nos. 1 and 5 were persons who had shrewd business experience and had voluntarily accepted the partition of the properties which was by and large equal. The learned counsel relied on the decision of this Court in *Devarajan v. Janki Ammal, C.A. No. 2298 of 1966* decided on 20-3-1967 (SC) where this Court observed as follows:

"Generally speaking, a partition once effected is final and cannot be reopened on the ground of mere inequality of shares, though it can be reopened in case of fraud or mistake or subsequent recovery of family property: [see *Moro Vishvanath v. Ganesh Vithal*, ((1873) 10 Bom HCR 444)]. Further an allotment bona fide made in the course of a partition by common consent of the coparceners is not open to attack when the shares are not absolutely equal or are not strictly in accordance with those settled by law. It is true that minors are permitted in law to reopen a partition on proof that the partition has been unfair and unjust to them. Even

so, so long as there is no fraud, unfair dealing or over-reaching by one member as against another, Hindu law requires that a bona fide partition made on the basis of the common consent of coparceners must be respected and is irrevocable."

It was submitted that the evidence and circumstances of the case clearly show that there was no inequality of shares and the plea of fraud or mistake has not been accepted by the courts and that on the whole the partition was bona fide. It is true that if this was the position the ratio of the decision in *Devarajan's* case would undoubtedly apply to this case. But this Court had taken care to point out in these very observations which are underlined by us that this rule

did not apply to the minors who are undoubtedly permitted in law to reopen the partition once it is proved that the partition was unfair or unjust to them. In view of the concurrent finding of fact of the two Courts below that the partition of moveable properties, excepting those with respect to the shares, was unfair and unjust, even according to the decision mentioned above the partition with respect to the moveable properties has to be reopened.

17. Moreover in an earlier decision of this Court in *Bishundeo v. Seogeni Rai*, 1951 SCR 548 at p. 556 = (AIR 1951 SC 280 at p. 283) it was observed:

"It is well established that a minor can sue for partition and obtain a decree if his next friend can show that that is for the minor's benefit. It is also beyond dispute that an adult coparcener can enforce a partition by suit even when there are minors. Even without a suit, there can be a partition between members of a joint family when one of the members is a minor. In the case of such lastly mentioned partitions, where a minor can never be able to consent to the same in law, if a minor on attaining majority is able to show that the division was unfair and unjust, the Court will certainly set it aside."

In our opinion the present case falls within the ratio laid down by the decision cited above.

18. Apart from that there are numerous authorities which have consistently held that where a partition is unjust and unfair and detrimental to the interests of the minors the partition should be reopened irrespective of the question of bona fide. In *Lal Bahadur Singh v. Sispal Singh*, (1892) ILR 14 All 498 it was observed that even though the ground of fraud and mistake failed, the partition which affected the interests of the minors could be reopened. Similarly in *Chanvirapa v. Danava*, (1895) ILR 19 Bom 593 a Division Bench of the Bom. High Court held that a partition will be binding on the minors only if it was just and legal, but if it was made and finalised there being no means of testing the validity of the assets, the partition was not final. The same

view was taken in *Maruti v. Rama*. (1897) ILR 21 Bom 333.

19. Thus on a consideration of the authorities discussed above and the law on the subject, the following propositions emerge:

(1) A partition effected between the members of the Hindu Undivided Family by their own volition and with their consent cannot be reopened, unless it is shown that the same is obtained by fraud, coercion, misrepresentation or undue influence. In such a case the Court should require a strict proof of facts because an act *inter vivos* cannot be lightly set aside.

(2) When the partition is effected between the members of the Hindu Undivided Family which consists of minor coparceners it is binding on the minors also if it is done in good faith and in bona fide manner keeping into account the interests of the minors.

(3) Where, however, a partition effected between the members of the Hindu Undivided Family which consists of minors is proved to be unjust and unfair and is detrimental to the interests of the minors the partition can certainly be reopened whatever the length of time when the partition took place. In such a case it is the duty of the Court to protect and safeguard the interests of the minors and the onus of proof that the partition was just and fair is on the party supporting the partition.

(4) Where there is a partition of immovable and moveable properties but the two transactions are distinct and separable or have taken place at different times, if it is found that only one of these transactions is unjust and unfair it is open to the Court to maintain the transaction which is just and fair and to reopen the partition that is unjust and unfair.

The facts of the present case, in our opinion, fall squarely within propositions Nos. (3) and (4) indicated above.

20. In the instant case we find from a perusal of the two schedules 'A' and 'B' of Ext. B-3 that there has been *ex facie* a disparity of about Rs. 10,000/- to which must be added Rs. 27,500/- which we have

discussed above. Thus the total disparity comes to Rs. 37,500/- and the share of the minor plaintiffs would be 2/5th which comes to Rs. 15,000/-. This amount of Rs. 15,000/- should have been available to the minor plaintiffs as far back as 1940 when the partition was made and they have been deprived of that amount ever since. We find that in the peculiar facts and circumstances of the case as already stated it will not be in the interests of the minors nor conducive in the interests of justice to order the appointment of a Commissioner for reopening the entire partition when the shares of the minor plaintiffs are easily ascertainable in terms of money and can be quantified. In these circumstances we think the best course is to determine the money value of the share of the plaintiffs and to pass a decree for the same which will protect the minors from protracted litigation which might follow the passing of a preliminary decree. This was the approach made by the High Court but we do not agree with the amount quantified by it. If we add interest at the rate of 6 per cent per annum as prayed for in the plaint on the amount of Rs. 15,000/-, the interest calculated at this rate for 35 years from 1940 to 1975 would come to Rs. 31,500/-. Thus the total amount payable to the plaintiffs comes to Rs. 46,500/-.

21. We, therefore, allow the appeal in part and modify the decree of the High Court to the extent that there will be a decree for a sum of Rs. 46,500/- in favour of the plaintiffs/appellants which represents their share of the moveable properties of which they were deprived of. The plaintiffs would be entitled to future interest at the rate of 6 per cent per annum till payment. In the circumstances of the case, there will be no order as to costs. This course, in our opinion, safeguards the interests of the minors to give them their just due and to protect them from a protracted and fruitless litigation.

Appeal partly allowed

AIR 1976 SUPREME COURT 10*

(From: AIR 1970 Mysore 285)

H. R. KHANNA, M. H. BEG AND
A. C. GUPTA, JJ.

The Sole Trustee Loka Shikshana Trust, Appellant v. The Commissioner of Income Tax, Mysore, Respondent.

Civil Appeals Nos. 2130 and 2131 of 1970, D/- 28-8-1975.

(A) Income-tax Act (1961), Sections 11 and 2 (15) — Word "education" in Section 2 (15) — Meaning — Fourth category of charitable purpose — Ingredients to be proved. AIR 1970 Mysore 285, Affirmed.

Per Khanna and Gupta, JJ.:

The sense in which the word "education" has been used in Section 2 (15) is the systematic instruction, schooling or training given to the young in preparation for the work of life. It also connotes the whole course of scholastic instruction which a person has received. The word "education" has not been used in that wide and extended sense, according to which every acquisition of further knowledge constitutes education. What education connotes in that clause is the process of training and developing the knowledge, skill, mind and character of students by formal schooling. (Para 5)

In order to bring a case within the fourth category of charitable purpose, it would be necessary to show that (1) the purpose of the trust is advancement of any other object of general public utility and (2) the above purpose does not involve the carrying on of any activity for profit. Both the above conditions must be fulfilled before the purpose of the trust can be held to be charitable purpose. (Para 7)

The fact that the appellant-trust is engaged in the business of printing and publication of newspaper and journals and the further fact that the aforesaid activity yields or is one likely to yield profit and there are no restrictions on the appellant-trust earning profits in the course of its

*(Note:— The judgments are printed in the order in which they are given in the certified copy.)

JS/JS/D436/75/CWM

business would go to show that the purpose of the appellant-trust does not satisfy the requirement that it should be one "not involving the carrying on of any activity for profit". (Para 8)

Ordinarily profit motive is a normal incidence of business activity and if the activity of a trust consists of carrying on of a business and there are no restrictions on its making profit, the court would be well justified in assuming in the absence of some indication to the contrary that the object of the trust involves the carrying on of an activity for profit. (Para 9)

By the use of the expression "profit motive" it is not intended that profit must in fact be earned. Nor does the expression cover a mere desire to make some monetary gain out of a transaction or even a series of transactions. It predicates a motive which pervades the whole series of transactions effected by the person in the course of his activity. (Para 9)

The word used in the definition is profit and not private profit and it would not be permissible to read the word "private" as qualifying profit even though such word is not there. (Para 10)

It is also difficult to subscribe to the view that the newly added words "not involving the carrying on of any activity for profit" merely qualify and affirm what was the position as it obtained under the definition given in the Act of 1922. Case Law Discussed. (Para 10)

Per Beg, J.:

A common concept or element of "charity" is shared by each of the four different categories of charity. It is true that charity does not necessarily exclude carrying on an activity which yields profit, provided that profit has to be used up for what is recognised as charity. (Para 40)

The words introduced by the Act of 1961 to qualify the last and widest category of objects of public utility were really intended to bring out what has to be the dominant characteristic of each and every category of charity. They were intended to bring the last and most general category in line with the nature of activities considered truly charitable and mentioned in the earlier categories. (Para 41)

Just as mere taking of profit as a consequence or incident of altruistic activity is not decisive of the real purpose or object of the activity, so also the carrying on of a business for profit does not cease to be so merely because losses are actually incurred in certain years or because those who carry it on call it "education."

(Para 42)

Although the term "education", as used in Sec. 2(15) of the Act, seems wider and more comprehensive than education through educational institutions, such as Universities, whose income is given an exemption from income tax separately under Section 10(22) provided the educational institution concerned does not exist "for purposes of profit", yet, the educational effects of a newspaper or publishing business are only indirect, problematical, and quite incidental so that, without imposing any condition or qualification upon the nature or information to be disseminated or material to be published, the mere publication of news or views cannot be said to serve a purely or even a predominantly educational purpose in its ordinary and usual sense. Case Law Discussed.

(Para 45)

(B) Interpretation of Statutes — Amendment — Reasons stated by the mover of the amendment — Use of, in interpretation.

Per Beg, J.:

It is true that it is dangerous and may be misleading to gather the meaning of the words used in an enactment merely from what was said by any speaker in the course of a debate in Parliament on the subject. Such a speech cannot be used to defeat or detract from a meaning which clearly emerges from a consideration of the enacting words actually used.

(Para 30)

Interpretation of a statutory provision is always a question of law on which the reasons stated by the mover of the amendment can only be used as an aid in interpretation if it helps considerably in understanding the meaning of the amended law.

(Para 32)

Cases Referred: Chronological Paras
AIR 1975 SC 946 = 1975 Tax LR 479

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AIR 1973 SC 1016 = (1972) 86 ITR 2 35
(1971) 81 ITR 147 = (1971) 2 ITJ 174 (Cal) 44
AIR 1967 SC 1066 = (1967) 1 SCR 618 9
AIR 1967 SC 1554 = (1967) 65 ITR 611 43
AIR 1966 SC 843 = (1966) 60 ITR 1 9
AIR 1965 SC 1281 = (1965) 55 ITR 722 26, 43
AIR 1957 SC 832 = (1957) 32 ITR 615 = (1958) 1 SCR 1 35
AIR 1944 PC 88 = (1944) 12 ITR 482 10, 24, 25
AIR 1939 PC 208 = (1939) 7 ITR 415 = (1939) 6 Ind App 241
6, 25, 36, 38, 43, 45
AIR 1935 PC 34 = 153 Ind Cas 1 31
AIR 1930 PC 226 = 57 Ind App 260 43
(1929) 1 Ch 557 = 140 LT 659 27
(1921) 1 KB 64 = 90 LJKB 113 28
(1910) ILR (1910) 37 Cal 760 = 14 Cal WN 713 31
(1909) 5 Tax Cas 408 36
(1891) AC 531 23, 24
(1805) 10 Ves 522 = 32 ER 947 23

Mr. N. A. Palkhivala, Senior Advocate, (Mr. Vineet Kumar, Advocate, with him) for Appellant; Mr. G. S. Sharma, Senior Advocate, (Mr. S. P. Nayar, Advocate, with him) for Respondent; M/s. N. A. Palkhivala and S. T. Desai, Senior Advocates, (Mr. A. G. Meneses, Mrs. A. K. Verma and Mr. P. N. Monga, Advocates and Mr. J. B. Dadachanji, Advocate for M/s. J. B. Dadachanji & Co., Advocates with them) for the Intervener-Tribune Trust, Chandigarh. Mr. V. S. Desai, Senior Advocate, (Mr. J. Ramamurthi, Advocate, with him) for Intervener-Saurashtra Trust, Bombay.

The following judgment of the Court was delivered by

KHANNA, J. (for himself and on behalf of Gupta J.):— The detailed facts of this case have been given in the judgment of our learned brother Beg J. and need not be repeated. The question of law which was referred to the High Court and which has been answered in the negative against the assessee-appellant is as follows:

"Whether on the facts and in the circumstances of the case, the income

of the Lok Shikshana Trust was entitled to exemption under Section 11 of the Income-tax Act, 1961, read with Section 2(15) of the same Act, for the assessment year 1962-63?"

"Charitable purpose" was defined in Section 4(3) of the Indian Income-tax Act, 1922 as under:

"In this sub-section 'charitable purpose' includes relief of the poor, education, medical relief, and the advancement of any other object of general public utility."

The definition of "charitable purpose" as given in Sec. 2(15) of the Income-tax Act, 1961 (hereinafter referred to as the Act) with which we are concerned reads as under:

"(15) 'Charitable purpose' includes relief of the poor, education, medical relief, and the advancement of any other object of general public utility not involving the carrying on of any activity for profit."

2. It would appear from the above that in the definition of "charitable purpose" as given in the Act the words "not involving the carrying on of any activity for profit" have been added at the end of the definition as given in the Act of 1922. We shall see as to what is the effect of the above addition.

3. In order to see as to whether the appellant-trust is for a charitable purpose, we may first go into the question as to what is the object of the appellant-trust. According to Mr. Palkhiwala, learned counsel for the appellant, the object of the appellant-trust is education, while the stand of Mr. Sharma on behalf of the revenue is that not education but the last mentioned category in S. 2(15), viz., the advancement of any other object of general public utility, is the object of the appellant-trust. The reason for the above divergence in the stands of Mr. Palkhiwala and Mr. Sharma is that according to Mr. Palkhiwala, the concluding words of the definition in Section 2(15) of the Act "not involving the carrying on of any activity for profit" do not qualify the first three categories of relief of the poor, education, or medical relief but qualify only the fourth category of "advancement of any other object of general public utility". Once the object of the ap-

pellant-trust is held to be education, the trust would, according to Mr. Palkhiwala, be held to be for a public purpose as defined in Sec. 2(15) of the Act. In such an event, it would be immaterial whether the object of the trust involves or does not involve the carrying on of any activity for profit. As against that, Mr. Sharma has controverted the submission that the concluding words of the definition, viz., "not involving the carrying on of any activity for profit" qualify only the fourth category of "advancement of any other object of general public utility". According to Mr. Sharma, the concluding words qualify the first three categories of relief of the poor, education and medical relief also. In any case, submits Mr. Sharma, the object of the appellant-trust falls in the fourth category of the definition, namely, "any other object of general public utility." It is, in our opinion, not necessary to express opinion in this case on the question as to whether the words "not involving the carrying on of any activity for profit" qualify the fourth object, viz., the advancement of any other object of general public utility, or whether they also qualify the other three objects of relief of the poor, education and medical relief, because we are of the view that the object of the appellant-trust was not education but any other object of general public utility. Clauses 2, 6, 10, 14, 16 and 18 of the trust deed of the appellant read as under:

"2. The object of the Trust shall be to educate the people of India in general and of Karnatak in particular by

(a) establishing, conducting and helping directly or indirectly institutions calculated to educate the people by spread of knowledge on all matters of general interest and welfare;

(b) founding and running reading rooms and libraries and keeping and conducting printing houses and publishing or aiding the publication of books, booklets, leaflets, pamphlets, magazines etc., in Kannada and other languages, all these activities being started, conducted and carried on with the object of educating the people;

(c) supplying the Kannada speaking people with an organ or organs of educated public opinion

and conducting journal in Kannada and other language for the dissemination of useful news and information and for the ventilation of public opinion on matters of general public utility; and

(d) helping directly or indirectly societies and institutions which have all or any of the aforesaid objects in view."

6. The Original Trustee shall have power and authority to spend and utilise the money and the property of the Trust for any of the purposes of this Trust in such manner as to him may appear proper. The Original Trustee shall be entitled to operate all the Banking accounts of the Trust.

10. The Original Trustee shall have full power to take over on such terms as he may deem fit such concern or concerns, or undertakings as, in his opinion, are congenial or conducive to any of the purposes of the Trust.

14. The Original Trustee shall be entitled to appoint a Manager or Managers of institutions of the Trust, Editor or Editors and other subordinates for the purposes of carrying out the printing and publication of any newspaper or newspapers, weeklies, monthlies, magazines, books or other publications, and shall have power from time to time to delegate to any one or more persons by Power of Attorney or otherwise any one or more of the following powers:

(a) To open one or more banking accounts, to operate the same and to deposit and withdraw moneys from the same;

(b) To give receipts or discharges for money or property received by them or any one of them in the course of business carried on by the Trust;

(c) To buy or sell paper ink, machines, books and materials required for the purposes of the business of the Trust;

(d) To enter into contracts with agents, dealers and others in the course of the business of the Trust;

(e) To employ or remove subordinates and workers necessary for the work;

(f) and generally to do all things necessary and expedient in carrying

out the business entrusted to him or them.

16. The Original Trustee or Trustees shall not take any remuneration for discharging his or their duties as a Trustee or Trustees provided that this provision shall not preclude a Trustee or Trustees from being paid out of the Trust fund such remuneration as may be deemed proper for carrying out any work and duty in connection with the conduct or management of institutions of the Trust, or with the business of printing, publishing or other activities carried on by the Trust. A Trustee shall be entitled to be paid all expenses that may be incurred by him in connection with his duties as a Trustee including travelling and other expenses.

18. The Original Trustee or other Trustees shall not be responsible for any loss occasioned to the Trust in respect of any business or dealings carried on on behalf of the Trust unless the same is due to his own fraud or misappropriation or breach of trust and every trustee shall be indemnified by and out of the funds and moneys of the Trust against any loss or damage which the Trustee might suffer in regard to any act, deed, or omission of his in the performance of his duties as a Trustee, including any fines or penalties imposed under the Factory Act or any Labour Legislation or Press Act or any other similar enactment."

The income-tax officer sent a communication to the trust on April 27, 1963 to the effect that since the only activity of the trust was printing, publication and sale of newspaper, weekly and monthly journal, the trust carried on an activity for profit and was not entitled to exemption. In reply to that notice the Sole Trustee stated that the above mentioned activities of the trust were covered by clause (c) of the objects clause of the trust deed. It was added that the above object did not involve the carrying on of any activity for profit. In a further communication dated June 26, 1964 the Sole Trustee wrote:

"The Trust has four objects in its objects clause one of which is to supply the Kannada speaking people with an organ or organs of educated public

opinion etc. (clause 2(c) of Trust Deed). Under this clause we conduct the publication of newspapers. This has not been agreed upon by your honour as a charitable purpose and we have accordingly preferred appeals for relief.

The main object of the Trust is education and this may be achieved by conducting and helping educational institution and by running reading rooms and libraries and helping the institutions having the similar objects as of our Trust. These are all charitable objects. In case the Trust has a surplus income it cannot be spent on any object other than the objects of the Trust. For the present we have been educating the Kannada speaking people through newspapers and journals and we shall be taking up the other ways and means of education as noted in our trust deed as and when it is possible for Trust. We have no option at all except to spend our income on the objects of our Trust which are all charitable without any doubt or ambiguity."

4. We have set out above the relevant clauses of the trust deed and the material part of the communications sent by the Sole Trustee. It would appear therefrom that though a number of objects, including the setting up of educational institutions, were mentioned in the trust deed as the objects of the trust, supplying the Kannada speaking people with an organ of educated public opinion was also one of those objects. The communication sent by the Sole Trustee to the income-tax officer shows that the trust at present is carrying out only the last mentioned object of the trust, namely, supplying the Kannada speaking people with an organ or organs of educated public opinion. The concentration so far of the activities of the trust only on that object is in pursuance of clause 6 of the trust deed, according to which original trustee shall have power and authority to spend and utilise the money and the property of the trust for any of the purposes of the trust in such manner as to him may appear proper.

5. The sense in which the word "education" has been used in Sec. 2 (15) is the systematic instruc-

tion, schooling or training given to the young in preparation for the work of life. It also connotes the whole course of scholastic instruction which a person has received. The word "education" has not been used in that wide and extended sense, according to which every acquisition of further knowledge constitutes education. According to this wide and extended sense, travelling is education, because as a result of travelling you acquire fresh knowledge. Likewise, if you read newspapers and magazines, see pictures, visit art galleries, museums and zoos, you thereby add to your knowledge. Again, when you grow up and have dealings with other people, some of whom are not straight, you learn by experience and thus add to your knowledge of the ways of the world. If you are not careful, your wallet is liable to be stolen or you are liable to be cheated by some unscrupulous person. The thief who removes your wallet and the swindler who cheats you teach you a lesson and in the process make you wiser though poorer. If you visit a night club, you get acquainted with and add to your knowledge about some of the not much revealed realities and mysteries of life. All this in a way is education in the great school of life. But that is not the sense in which the word "education" is used in clause (15) of Section 2. What education connotes in that clause is the process of training and developing the knowledge, skill, mind and character of students by formal schooling.

6. The question as to whether a trust the object of which is to supply the people with an organ of educated public opinion should be considered to be one for education or for any other object of public utility was considered by the Judicial Committee in the case of *In re The Trustees of the 'Tribune'*, (1939) 7 ITR 415 = (AIR 1939 PC 208). In that case a person who owned a press and a newspaper created by his will by which his property in the stock and goodwill of the press and newspaper was made to vest permanently in a committee of certain members. It was the duty of the said committee of trustees under the will "to maintain

the said press and newspaper in an efficient condition, and to keep up the liberal policy of the said newspaper, devoting the surplus income of the said press and newspaper after defraying all current expenses in improving the said newspaper and placing it on a footing of permanency." It was also provided by an arrangement made subsequently that in case the paper ceased to function or for any other reason the surplus of the income could not be applied to the object mentioned above, the same should be applied for the maintenance of a college which had been established out of the funds of another trust created by the same testator. There was surplus income in the hands of the trustees after defraying the expenses of the press and the newspaper. Question arose as to whether that income was liable to be assessed in the hands of the trustees. The Judicial Committee held that the object of the Settlor was to supply the province of the Punjab with an organ of educated public opinion and this was *prima facie* an object of general public utility. Their Lordships unequivocally expressed the view that they were not prepared to hold that the property referred to in the various paragraphs of the will was held for the purpose of "education" in the sense that word was used in Section 4 of the Indian Income-tax Act of 1922. The above decision of the Judicial Committee applies directly to the present case and in view of this decision, we would hold that the object of the appellant-trust was "the advancement of any other object of general public utility."

7. It has been pointed out in the earlier part of the judgment that in the definition of charitable purpose as given in Sec. 2(15) of the Act the words "not involving the carrying on of any activity for profit" have been added at the end of the definition as it was given in Section 4 (3) of the Indian Income-tax Act, 1922. The position as it existed under the Act of 1922 was that once the purpose of the trust was relief of the poor, education, medical relief or the advancement of any other object of general public utility, the trust was considered to be for a charitable pur-

pose. As a result of the addition of the words "not involving the carrying on of any activity for profit" at the end of the definition in Sec. 2(15) of the Act even if the purpose of the trust is "advancement of any other object of general public utility", it would not be considered to be "charitable purpose" unless it is shown that the above purpose does not involve the carrying on of any activity for profit. The result thus of the change in the definition is that in order to bring a case within the fourth category of charitable purpose, it would be necessary to show that (1) the purpose of the trust is advancement of any other object of general public utility, and (2) the above purpose does not involve the carrying on of any activity for profit. Both the above conditions must be fulfilled before the purpose of the trust can be held to be charitable purpose. It is not necessary for the decision of this case, as already mentioned above, to go into the question as to whether the words "not involving the carrying on of any activity for profit" also qualify the first three categories of charitable purpose, namely, relief of the poor, education and medical relief.

8. Question then arises as to whether the purpose of the appellant-trust can be considered to be one not involving the carrying on of any activity for profit. So far as this question is concerned, we find that the appellant-trust started with a sum of Rs. 4,308-10 As. 9 Pies. The schedule attached to the trust deed dated April 10, 1947 shows that the assets of the trust consisted of printing machines, accessories, motor-cars, building, stocks of paper and other miscellaneous things. The total value of the assets was Rs. 2,97,558, out of which the value of the building sites and the buildings was Rs. 47,500. As against that, the liabilities of the trust amounted to Rs. 1,24,086. The net value of the assets of the trust arose in 1947 to a figure of Rs. 1,73,571.14 As. 4 Pies. For the assessment year 1962-63, which is the year under appeal, the total receipts of the trust were of the amount of Rs. 22,55,077. The main sources of these receipts were sales of newspapers and

magazines through agents, receipts on account of advertisements, receipts for job printing bills besides some other minor items. As against the receipts, the major items of expenditure were the purchase of newsprint, paper, printing types, printing and other material, the salaries and allowances of the staff, remuneration to news agencies and railway freight. There can, therefore, be no doubt that the trust has been carrying on the business of publishing newspaper and weekly and monthly magazines. The profits from the aforesaid business would also apparently account for the manifold increase in the value of the assets of the trust. The emphasis on business activity of the trust is also manifest from clauses 6, 10, 14, 16 and 18 of the trust deed reproduced above. The fact that the appellant-trust is engaged in the business of printing and publication of newspaper and journals and the further fact that the aforesaid activity yields or is one likely to yield profit and there are no restrictions on the appellant-trust earning profits in the course of its business would go to show that the purpose of the appellant-trust does not satisfy the requirement that it should be one "not involving the carrying on of any activity for profit."

9. It is true that there are some business activities like mutual insurance and co-operative stores of which profit making is not an essential ingredient, but that is so because of a self-imposed and innate restriction on making profit in the carrying on of that particular type of business. Ordinarily profit motive is a normal incidence of business activity and if the activity of a trust consists of carrying on of a business and there are no restrictions on its making profit, the court would be well justified in assuming in the absence of some indication to the contrary that the object of the trust involves the carrying on of an activity for profit. The expression "business", as observed by Shah J. speaking for the Court in the case of *State of Gujarat v. M/s. Rairpur Mfg. Co.*, (1967) 1 SCR 618 = (AIR 1967 SC 1066) though extensively used in taxing statutes, is a word of indefinite import. In taxing statutes, it is used in the sense of an oc-

cupation, or profession which occupies the time, attention and labour of a person, normally with the object of making profit. To regard an activity as business there must be a course of dealings, either actually continued or contemplated to be continued with a profit motive, and not for sport or pleasure. Whether a person carries on business in a particular commodity must depend upon the volume, frequency, continuity and regularity of transactions of purchase and sale in a class of goods and the transactions must ordinarily be entered into with a profit motive. By the use of the expression "profit motive" it is not intended that profit must in fact be earned. Nor does the expression cover a mere desire to make some monetary gain out of a transaction or even a series of transactions. It predicates a motive which pervades the whole series of transactions effected by the person in the course of his activity. In the case of *Commr. of Income-tax v. Lahore Electric Supply Co. Ltd.*, 60 ITR 1 = (AIR 1966 SC 843) Sarkar J. speaking for the majority observed that business as contemplated by Section 10 of the Indian Income-tax Act, 1922, is an activity capable of producing a profit which can be taxed. In the case of the appellant-trust the activity of the trust, as already observed earlier, has in fact been yielding profits and that apparently accounts for the increase in the value of its assets.

10. We are not impressed by the submission of the learned counsel for the appellant that profit under Section 2(15) of the Act means private profit. The word used in the definition given in the above provision is profit and not private profit and it would not be permissible to read in the above definition the word "private" as qualifying profit even though such word is not there. There is also no apparent justification or cogent reason for placing such a construction on the word "profit". The words "general public utility" contained in the definition of charitable purpose are very wide. These words, as held by the Judicial Committee in the case of *All India Spinners' Association v. Commissioner of Income-tax*, (1944) 12 ITR 482 = (AIR 1944 PC 88) ex-

clude objects of private gain. It is also difficult to subscribe to the view that the newly added words "not involving the carrying on of any activity for profit" merely qualify and affirm what was the position as it obtained under the definition given in the Act of 1922. If the legislature intended that the concept of charitable purpose should be the same under the Act of 1961 as it was in the Act of 1922, there was no necessity for it to add the new words in the definition. The earlier definition did not involve any ambiguity and the position in law was clear and admitted of no doubt after the pronouncement of the Judicial Committee in the cases of *Tribune* and *All India Spinners' Association* (supra). (1944) 12 ITR 482 = (AIR 1944 PC 88). If, despite that fact, the legislature added new words in the definition of charitable purpose, it would be contrary to all rules of construction to ignore the impact of the newly added words and to so construe the definition as if the newly added words were either not there or were intended to be otiose and redundant.

11. The appeals fail and are dismissed but in the circumstances without costs.

BEG, J.:— 12. The question, answered in the negative in this case by the Mysore High Court, which is now before us after certification of the case under Section 261 of the Income-tax Act, 1961 (hereinafter referred to as 'the Act'), was framed by the Income-tax Tribunal as follows:

"Whether, on the facts and in the circumstances of the case, the income of the Loka Shikshana Trust was entitled to exemption under Sec. 11 of the Income-tax Act, 1961 read with Sec. 2(15) of the same Act, for assessment year 1962-63."

13. The appellant is a sole trustee of the "Loka Shikshana Trust", holding properties mentioned in a schedule attached to a deed of trust executed on 19-2-1962 by himself purporting to re-declare a trust of 15-7-1935. The total assets of the earlier trust of 1935, known as the "National Literature Publications Trust", consisted of a sum of Rupees 4308.10.9 only. It appears that,

under the provisions of the earlier trust, the trustee had carried on a lucrative business of printing, under the name of "Karnatak Prakashana Mandal", at Belgaum, and, thereafter, it was shifted to Hubli where he started publishing a daily newspaper called "Samyukta Karnatak". The printing business must have been lucrative because investments of profits from it, together with some possible "donations" expanded the assets of the re-declared trust of 1962 so much that the schedule attached to the trust deed of 1962 shows their value to be Rs. 2,97,658/-. After deducting the total liabilities of the trust, shown as Rs. 1,24,086.10 annas, the net value of the assets is given as Rs. 1,73,571.14.4.

14. Even if the obvious inference from statements found in the trust deed of 1962, which is part of the statement of the case, showing the assets of the trust of 1953 as well as of the re-declared trust of 1962, that the trustee was carrying on a fairly lucrative business, the profits of which had been utilised for building up its assets, could possibly be ignored, we find, from the statement of the accounts submitted by the appellant trustee himself to the Income-tax Department for the assessment year 1962-63, with which we are concerned, that the trust had made quite considerable profits from various activities carried on as a part of its ordinary and regular business. Here, a gross income of Rs. 22,55,077.46 np. is shewn. This included Rupees 12,31,954.54 from sales of newspapers and magazines through agents, Rupees 7,29,249.27 from advertisements and notices alone, Rs. 1,27,422.53 as payments of "job printing bills". The sales of its newspapers and journals through retailers brought in Rupees 66,010.68 np. The subscribers of newspapers and journals contributed Rs. 51,803.74. "Profits" from sales of other publications are shown as Rs. 5040.05 np. Income from "sundry receipts" is given as Rs. 2964.57 np. "Profits" from the sale of a van and machinery are shown as Rs. 4829.83. Some other income is shown as Rupees 2337.95. Interest on investments is shewn as Rs. 1762.71. A glance at items of expenditure shows that nothing was spent for which a deduc-

tion could not be claimed by any private concern carrying on a profitable business. These items of expense consisted of money spent on repairs of buildings, payments of taxes, purchases of newsprint and other kinds of paper, ink, photographic materials, blocks, binding, stitching and packing materials, payments of salaries, wages, and allowances to the staff. After deducting the total expenditure of Rupees 4,92,246.81 from the gross income, the net income for the year is shown as Rs. 30,376.80 np. for which exemption from Income-tax is claimed by the appellant on the ground that it is protected from taxation by Section 11 read with Section 2 (15) of the Act.

15. The trust deed of 1962, which, as already stated is a part of the statement of the case, gives the past history of the trust, in the course of a fairly long preamble. It contains the following passage giving some idea of the activities of the trust, the composition of its present assets, as well as of utilisation of its income since 1935:

"AND WHEREAS in furtherance of the objects contained in the said deed of Trust dated 15th July, 1935, I took over on 17-7-1935 a concern called the Karnatak Prakashana Mandal, Belgaum, and conducted a printing Press for some time at Belgaum, and, thereafter, at Hubli and printed and published a daily paper "Samyukta Karnatak", and a weekly paper called "Weekly Samyukta Karnatak", which was later called "Karmaveer" and also published certain books, pamphlets, and other literature, as a result whereof the property of the trust increased from time to time, and the said property is today comprised of printing presses, building land and other property which is set out in the schedule hereunder written".

16. The trust deed also contains a reference to what necessitated a redeclaration of the trust. An amended meaning of "charitable purpose", given in Sec. 2 (15) of the Act of 1961, must have given rise to some doubts in the minds of the maker of the trust about the taxability of the income of the trust which was exempted from payment of income tax in the past. He said:

"And whereas doubts have arisen regarding the legal validity of the Trust declared in the aforesaid Deed of Trust dated 15th July 1935.

AND whereas it became necessary to take steps to remove the said doubts and to prevent similar doubts arising in future, I, Ranganath Ramachandra Diwakar, who has been the only Trustee of the National Literature publication Trust declared as aforesaid, have obtained legal opinion in the matter of the said Trust and I am desirous, with a view to carrying out public purposes of a charitable nature, of re-declaring the Trusts in accordance with the legal opinion obtained by me as aforesaid, on which I hold and shall continue to hold the original Trust amount of Rs. 4,308.10.9, and all contributions, additions, accumulations, and acquisitions to the same which are now comprised in the Schedule hereunder written and all the properties funds, assets, and any conversions or reconversions thereof and the investment in which the same may from time to time be held".

17. The objects of the trust are set out as follows:

"2. The object of the Trust shall be to educate the people of India in general and of Karnatak in particular by,

(a) establishing, conducting and helping directly or indirectly institutions calculated to educate the people by spread of knowledge on all matters of general interest and welfare;

(b) founding and running reading rooms and libraries and keeping and conducting printing houses and publishing or aiding the publication of books, booklets, leaflets, pamphlets, magazines etc. in Kannada and other languages, all these activities being started, conducted, and carried on with the object of educating the people;

(c) supplying the Kanadda speaking people with an organ or organs of educated public opinion and conducting journals in Kannada and other languages for the dissemination of useful news and information and for the ventilation of public opinion on matters of general public utility; and

(d) helping directly or indirectly societies and institutions which have

all or any of the aforesaid objects in view”.

18. In addition to the power which the sole trustee had to collect donations and subscriptions for the trust, he had all the powers which the sole manager of a business may have in order to carry it on profitably. He had the power of transferring trust properties and funds if he thought “it expedient in the interest of the objects of the Trust, to transfer the assets and liabilities of this Trust to any other Charitable Trust or institution conducted by such Trust, which, in the opinion of the original Trustee or the Board of Trustees, has objects similar to the objects of this Trust and is capable of carrying out the objects and purposes of this Trust either fully or partially”. (Paragraph 17 of the Trust deed). Although, the “original trustee” was not “to take any remuneration” for discharging his duties as a trustee, yet, he was not precluded “from being paid out of the Trust fund such remuneration as may be deemed proper for carrying out any work and duty in connection with the conduct or management of institutions of the Trust, or with the business of printing, publishing or other activities carried on by the Trust”. He was to be paid expenses incurred in travelling or otherwise in connection with his duties as a trustee (paragraph 16 of the Trust deed).

19. The “original trustee” could invest trust monies and profits “in any investment authorised by law for the investment of Trust funds or in shares, or securities or debentures of Limited Companies in India or outside” (para 4 of the Trust deed). He had the “power to mortgage, sell, transfer and give on lease or to otherwise deal with the Trust property or any portion thereof for the purpose of the Trust and to borrow monies or raise loans for the purpose of the Trust whenever he may deem it necessary to do so” (para 8 of the Trust deed). Furthermore, the Trustee had the “power and authority to spend and utilise the money and the property of the Trust for any of the purposes of this Trust in such manner as to him may appear proper”.

20. It appears to us that, with this profit making background of the trust, its loosely stated objects the wide powers of the sole trustee, and the apparently profitable mode of conducting business, just like any commercial concern, disclosed not only by the terms of the trust but by the statement of total expenditure and income by the trustee, it is very difficult to see what educational or other charitable purpose the trust was serving unless the dissemination of information and expression of opinions through the publications of the trust was in itself treated as the really educational and charitable purpose.

21. The principal arguments advanced on behalf of the appellant-trustee are: firstly, paragraph 2 (c) of the Trust deed only enables the trustee to supply the Kannada speaking people with organs or means for expressing educated public opinion as a mode of serving the real and expressly mentioned purpose of “education” which must control and determine the true nature of the activities of the trust so that profit making, as an incidental consequence of these activities, was quite immaterial; and, secondly, even if the activities of the trust did not fall within the separate category of “education” as such, in which case profit yielding became quite irrelevant, but fell under the more general or the 4th and last category of purposes of general public utility specified in Sec. 2 (15) of the Act, the mere fact that the conduct of the printing business was profitable sometimes or even constantly was not enough to make it an activity carried on “for profit”. The first contention rests on the assumption that an express mention of a dominant though general purpose of “education” will enable the Courts to supervise the execution of such a trust as one intended solely for educational purposes. The second submission, accepted by the Income-tax Tribunal but rejected by the High Court, implies that the profit-making motive must be specifically and expressly made the object of an activity which is of obvious utility to the public before exemption from taxation can be denied to such an activity. In other words, the added qualification or con-

dition imposed upon a work of "general public utility", before it could pass the test of a charitable purpose, made no difference to the law. According to learned Counsel for the appellant, the amendment was meant to make explicit what was previously only implicit in the law as it stood. The argument thus is that the amendment only clarified without actually changing the law on the subject.

22. The last paragraph of cl. (3) of Section 4 of the Indian Income-tax Act of 1922 (hereinafter referred to as 'the Act of 1922') laid down:

"'charitable purpose' includes relief of the poor, education, medical relief and the advancement of any other object to general public utility but nothing contained in clause (i) or clause (ii) shall operate to exempt from the provisions of this Act that part of the income from property held under a trust or other legal obligation for private religious purposes which does not enure for the benefit of the public."

23. It will be noticed that the provision set out above did not really define a "charitable purpose" but purports only to indicate a concept of charity which include the four categories of objects mentioned there. The fourfold classification of charitable purposes has a history in English law. A statute of Elizabeth I, which "was not directed so much to the definition of charity as to the correction of abuses which has grown up in the administration of trusts of a charitable nature" (See: Tudor on "Charities" sixth Edn. p. 2), had a preamble containing an illustrative list of charitable objects which was never treated as exhaustive. It, however, became the practice of Courts "to refer to the preamble as a sort of index or chart in order to determine whether or not a given purpose was charitable". Thus, a purpose was considered, in the eye of law, to be charitable only if it came within the letter or the spirit and intendment of the preamble of the statute of Elizabeth.

To give a semblance of order to the rather confusing mass of case law which had accumulated on the subject, attempts were made to classify purposes which had obtained recogni-

tion by Courts as charitable. Lord Macnaghten, in *Income-tax Commissioner v. Pemsel*, 1891 AC 531 at p. 583 adopted a four-fold classification of charitable purposes which had been first put forward in the course of an argument by Sir Samuel Romilly in *Morice v. Bishop of Durham*, (1805) 10 Ves 522. These were: (1) Relief of poverty, (2) advancement of education; (3) advancement of religion; (4) other purposes beneficial to the community not falling under any of the preceding heads.

24. The last or the residuary category seemed very wide and general. Properly speaking, such a wide category would be interpreted, if it were found in a statute, *ejusdem generis* with the previous three categories which were less wide and more specific. The framers of our Act of 1922 must have been attracted by this classification which they adopted with some modifications. "Medical relief" was apparently substituted for "advancement of religion". In *All India Spinners' Associations v. Commissioner of Income-tax, Bombay*, 12 ITR 482 = (AIR 1944 PC 38) Lord Wright, while considering the meaning of Section 4(3) of the 1922 Act, observed (at p. 486) (of ITR) = (at p. 91 of AIR)

"The Act of 43 Elizabeth (1601) contained in a preamble a list of charitable objects which fell within the Act, and this was taken as a sort of chart or scheme which the Courts adopted as a groundwork for developing the law. In doing so they made liberal use of analogies so that the modern English law can only be ascertained by considering a mass of particular decisions often difficult to reconcile. It is true that Section 4(3) of the Act has largely been influenced by Lord Macnaghten's definition of charity in *Pemsel v. Commissioners for Special Purposes of Income-tax* ((1891) AC 531 at p. 583), but that definition has no statutory authority and is not precisely followed in the most material particular; the words of the section are 'for the advancement of any other object of general public utility', whereas Lord Macnaghten's words were 'other purposes beneficial to the community'. The difference in language, particularly

the inclusion in the Indian Act of the word 'public' is of importance".

25. The trend of judicial pronouncements was to construe the words "general public utility", in Section 4(3) of the Act of 1922, very widely. The only serious limitation put on the character of a "general public utility" seems to have been that it clearly excluded the object of private profit making. Thus, in the *All India Spinners' Association* case (AIR 1944 PC 88) (supra) the Privy Council, while holding that the "primary object" of the Association appeared to be "the relief of the poor", said (at p. 488):

"That would be enough *prima facie* to satisfy the statute. But there is good ground for holding that the purposes of the Association included the advancement of other purposes of general public utility. These last are very wide words. Their exact scope may require on other occasions very careful consideration. They were applied in the *Tribune Press* case (1939) 66 I. A. 241 = 7 ITR 415 = (AIR 1939 PC 208) without any very precise definition to the production of the newspaper in question under the conditions fixed by the testator's will. The Board stated (at p. 256) that;

'the object of the paper might be described as the object of supplying the province with an organ of educated public opinion', and that it should *prima facie* be held to be an object of general public utility. These words, their Lordships think, would exclude the object of private gain, such as an undertaking for commercial profit though all the same it would subserve general public utility. But private profit was eliminated in this case".

26. In *Commr. of Income-tax, Madras v. Andhra Chamber of Commerce*, (1965) 55 ITR 722 at p. 732 = (AIR 1965 SC 1281 at p. 1286) this Court interpreting Sec. 4(3) of the 1922 Act, held (at p. 732):

"The expression 'object of general public utility, in Section 4(3) would *prima facie* include all objects which promote the welfare of the general public".

Decision of some cases seems to have revolved round the question whether the body of beneficiaries was large

enough to constitute the purpose one of "public utility".

27. Some of the decisions on income for which exemption was claimed on the ground that it was meant for a charitable purpose falling within the wide residuary class perhaps travelled even beyond the "bursting point" to which, according to Lord Russell of Killowen, English Courts had stretched the concept of charity (See: *In re Grove-Grady*, (1929) 1 Ch 557, 582). At any rate, the reason which induced our Government to make an amendment by Section 2(15) of the Act of 1961 was thus stated by the Finance Minister, Shri Morarji Desai, in the course of his speech in Parliament explaining the proposed amendment (see: Lok Sabha Debate dated 18-8-1961) Lok Sabha Debates, IIInd Ser. Vol. LVI D/- 18-8-61 p. 2819 at p. 3074:

"The other objective of the Select Committee, limiting the exemption only to trusts and institutions whose object is a genuine charitable purpose has been achieved by amending the definition in clause 2(15). The definition of 'charitable purpose' in that clause is at present so widely worded that it can be taken advantage of even by commercial concerns which, while ostensibly serving a public purpose, get fully paid for the benefits provided by them, namely, the newspaper industry which while running its concern on commercial lines can claim that by circulating newspapers it was improving the general knowledge of the public. In order to prevent the misuse of this definition in such cases, the Select Committee felt that the words 'not involving the carrying on of any activity for profit' should be added to the definition". (p. 3074).

28. Mr. Palkhivala objected strongly to any reference to the speech of the Finance Minister, who proposed the amendment, for the purpose of finding out the object of the amendment. He contended that speeches made by Members of Parliament in the course of debates on provisions enacted were not to be looked at for interpreting the language of the enactment to which we should confine ourselves. He relied on the well known dictum of Rowlatt J., in *Cape*

Brandy Syndicate v. I. R. C., (1921) 1 KB 64 when that learned Judge said: "In a taxing Act one has to look at what is clearly said One can only look fairly at the language used."

29. It was contended that, as the meaning of words used in Section 2 (15) was very clear we need go no further. I am not able to accept this over-simplification of the problem before us. To say that the concept of a charitable purpose, either before or after the amendment we are considering, was at all clear or free from considerable ambiguity and difficulty would be to ignore the plethora of not always consistent case-law which one can find on the subject and to minimize the difficulties of Courts. "Charitable purpose" has never been at all clearly defined or exhaustively illustrated. We have, therefore, to discover the mischief aimed at by the amendment.

30. It is true that it is dangerous and may be misleading to gather the meaning of the words used in an enactment merely from what was said by any speaker in the course of a debate in Parliament on the subject. Such a speech cannot be used to defeat or detract from a meaning which clearly emerges from a consideration of the enacting words actually used. But, in the case before us, the real meaning and purpose of the words used cannot be understood at all satisfactorily without referring to the past history of legislation on the subject and the speech of the mover of the amendment who was, undoubtedly, in the best position to explain what defect in the law the amendment had sought to remove. It was not just the speech of any member in Parliament. It was the considered statement of the Finance Minister who was proposing the amendment for a particular reason which he clearly indicated. If the reason given by him only elucidates what is also deducible from the words used in the amended provision, we do not see why we should refuse to take it into consideration as an aid to a correct interpretation. It harmonises with and clarifies the real intent of the words used. Must we, in such circumstances, ignore it?

31. We find that Section 57, sub-section (4) of the Evidence Act

not only enables but enjoins Courts to take judicial notice of the course of proceedings in Parliament assuming, of course, that it is relevant. It is true that the correctness of what is stated, on a question of fact, in the course of Parliamentary proceedings, can only be proved by somebody who had direct knowledge of the fact stated. There is, however, a distinction between the fact that a particular statement giving the purpose of an enactment was made in Parliament, of which judicial notice can be taken as part of the proceedings, and the truth of a disputable matter of fact stated in the course of proceedings, which has to be proved aliunde, that is to say, apart from the fact that a statement about it was made in the course of proceedings in Parliament (See: Rt. Hon'ble Jerald Lord Strickland v. Carmelo, AIR 1935 PC 34 Mifud Bonnici; The Englishman Ltd. v. Lajpat Rai, ILR (1910) 37 Cal 760.)

32. In the case before us, a reference was made merely to the fact that a certain reason was given by the Finance Minister, who proposed an amendment, for making the amendment. What we can take judicial notice of is the fact that such a statement of the reason was given in the course of such a speech. The question whether the object stated was properly expressed by the language of Sec. 2 (15) of the Act is a matter which we have to decide for ourselves as a question of law. Interpretation of a statutory provision is always a question of law on which the reasons stated by the mover of the amendment can only be used as an aid in interpretation if we think, as I do in the instant case, that it helps us considerably in understanding the meaning of the amended law. We find no bar against such a use of the speech.

33. In Anandji Haridas & Co. Pvt. Ltd. v. Engineering Mazdoor Sangh, AIR 1975 SC 946 at p. 949 a Division Bench of this Court observed (at p. 949):

"As a general principle of interpretation, where the words of a statute are plain, precise, and unambiguous, the intention of the Legislature is to be gathered from the language

of the statute itself and no external evidence such as Parliamentary Debates, Reports of the Committees of the Legislature or even the statement made by the Minister on the introduction of a measure or by the framers of the Act is admissible to construe those words. It is only where a statute is not exhaustive or where its language is ambiguous, uncertain, clouded or susceptible of more than one meaning or shades of meaning, that external evidence as to the evils, if any, which the statute was intended to remedy, or of the circumstances which led to the passing of the statute may be looked into for the purpose of ascertaining the object which the legislature had in view in using the words in question".

34. The Finance Minister's speech tells us that the Government was accepting the recommendations of the Select Committee to which the Bill which became the Act of 1961 had been referred. One of the recommendations was:

"The Committee is of the opinion that the advancement of an object of general public utility which involves the carrying on of any activity for profit should not come within the ambit of a charitable purpose".

(See Gazette of India Extraordinary — Part II, Sec. 2, p. 677 (4)).

35. In Commr. of Income-tax, Gujarat v. Vadilal Lallubhai, (1972) 86 ITR 2 = (AIR 1973 SC 1016) this Court, following its earlier decision in Commr. of Income-tax v. Sadora Devi, (1957) 32 ITR 615 at p. 627 = (1958) 1 SCR 1 = (AIR 1957 SC 832 at p. 838) did not consider it at all inappropriate to refer to a Select Committee's Report for finding out the reason behind an ambiguous provision so as to be able to apply the Mischief Rule. It is too late in the day for Mr. Palkhivala to object to the adoption of such a course in an attempt to apply the Mischief Rule to find out the reason behind an amendment of the law.

36. The case on which Mr. Palkhivala, the learned counsel for the appellant, relies most strongly for support to his client's case on merits is: In Re the 'Tribune', (1939) 7 ITR 415 = (AIR 1939 PC 208) where the Privy Council allowing an appeal

from a Full Bench decision of the Lahore High Court held that the income a Trust, the object of which was described as "supplying the province with an organ of an educated public opinion", was entitled to exemption on the ground that it was a trust for a purpose of "General public utility" and not just for propagating any political views. It was also held there that such a trust would not fall within the category of Trusts for education in the sense in which that term appears in Section 4 of the Act of 1922. The Privy Council, after observing that the Chief Justice and Addison, J., of the Lahore High Court, had laid some stress on the fact "that the Tribune newspaper charges its readers and advertisers at ordinary commercial rates for the advantages which it affords", said (at p. 422):

"As against this the evidence or finding do not disclose that any profit was made by the newspaper or press before 1918 and it is at least certain that neither was founded for private profit whether to the testator or any other person. By the terms of the trust it is not to be carried on for profit to any individual. It cannot, in their Lordships' opinion, be regarded as an element necessarily present in any purpose of general public utility, that it should provide something for nothing or for less than it costs or for less than the ordinary price. An eleemosynary element is not essential even in the strict English view of charitable uses (Commissioners v. University College of North Wales, (1909) 5 Tax Cas 408, 414)".

37. It seems clear to us that, the amended provision, Sec. 2(15) in the Act of 1961, was directed at a change of law as it was declared by the Privy Council in the Tribune case (supra). The amended provision reads as follows:

"Section 2(15) 'charitable purpose' includes relief of the poor, education, medical relief, and the advancement of any other object of general public utility not involving the carrying on of any activity for profit."

38. It is apparent that, even now, charitable purpose has not been

defined. The four-fold classification, which was there in the Act of 1922, is there even in the amended provision, but the last or general category of objects of "general public utility" is now qualified by the need to show that it did not involve profit making. The question before us, therefore is: What is the meaning or purpose of introducing the limitation "not involving the carrying on of any activity for profit"? The contention of Mr. Palkhivala is that it merely indicates that, as was held in the Tribune case (AIR 1939 PC 208) (*supra*) and other cases, the purpose must not be private profit making, or, in other words, the benefit must be to an object of "general public utility". This involves reading of the word "private" before "profit" which is quite unjustifiable. Furthermore, if that was the sole purpose of the amendment, we think that the amendment was not necessary at all. It had been declared repeatedly by the Courts even before the amendment that activities motivated by private profit making fell outside the concept of charity altogether. We think that it is more reasonable to infer that the words used clearly imposed a new qualification on public utilities entitled to exemption. It was obvious that, unless such a limitation was introduced, the fourth and last category would become too wide to prevent its abuse. Wide words so used could have been limited in scope by judicial interpretations *eiusdem generis* so as to confine the last category to objects similar to those in the previous categories and also subject to a dominant concept of charity which must govern all the four categories. But, the declaration of law by the Privy Council, in the Tribune case (AIR 1939 PC 208) (*supra*) had barred this method of limiting an obviously wide category of profitable activities of general public utility found entitled to exemption. Hence, the only other way of cutting down the wide sweep of objects of "general public utility" entitled to exemption was by legislation. This, therefore, was the method Parliament adopted as is clear from the speech of the Finance Minister who introduced the amendment in Parliament.

39. The word "involve" does not, it seems to me, necessitate the bringing out of the profit motive of an activity expressly in the deed of trust as was suggested by the learned Counsel for the appellant. The dictionary meaning of the word 'involve' is: "to envelop; to entangle; to include; to contain; to imply" (see: The Shorter Oxford English Dictionary III Edn. p. 1042). All profit making, even as a mere by-product, would have been covered by the word "involving," which is of wide import. If this word had stood alone and by itself without further qualifications by the context. The use of the words "for profit," however, shows that the involvement of profit making should be of such a degree or to such an extent as to enable us to infer it to be the real object. As a rule, if the terms of the trust permit its operation "for profit," they become *prima facie* evidence of a purpose falling outside charity. They would indicate the object of profit-making unless and until it is shown that terms of the trust compel the trustee to utilise the profits of business also for charity. This means that the test introduced by the amendment is: Does the purpose of a trust restrict spending the income of a profitable activity exclusively or primarily upon what is "charity" in law? If the profits must necessarily feed a charitable purpose, under the terms of the trust, the mere fact that the activities of the trust yield profit will not alter the charitable character of the trust. The test now is, more clearly than in the past, the genuineness of the purpose tested by the obligation created to spend the money exclusively or essentially on "charity". If that obligation is there, the income becomes entitled to exemption. That, in our opinion, is the most reliable test.

40. The difficult question, however, still remains: What is the meaning of "charitable purpose" which is only indicated but not defined by Sec. 2(15) of the Act? It seems to me that a common concept or element of "charity" is shared by each of the four different categories of charity. It is true that charity does not necessarily exclude carrying on an activity which yields profit, pro-

vided that profit has to be used up for what is recognised as charity. The very concept of charity denotes altruistic thought and action. Its object must necessarily be to benefit others rather than one's self. Its essence is selflessness. In a truly charitable activity any possible benefit to the person who does the charitable act is merely incidental or even accidental and immaterial. The action which flows from charitable thinking is not directed towards benefitting one's self. It is always directed at benefitting others. It is this direction of thought and effort and not the result of what is done, in terms of financially measurable gain, which determines that it is charitable. This direction must be evident and obligatory upon the trustee from the terms of a deed of trust before it can be held to be really charitable.

41. We think that this governing idea of charity must qualify purpose of every category enumerated in Section 2 (15) of the Act of 1961. We think that the words introduced by the Act of 1961 to qualify the last and widest category of objects of public utility were really intended to bring out what has to be the dominant characteristic of each and every category of charity. They were intended to bring the last and most general category in line with the nature of activities considered truly charitable and mentioned in the earlier categories.

42. Coming now to the deed of trust before us, we find that the word "education" is mentioned by the maker of the trust in a rather ceremonial or ritualistic fashion as a label for what he considers to be charitable objects. The third set of objects, in clause 2 of the deed does not appear to be stated there merely as a means of serving the general purpose of "education" separable from these objects in clause (c). On the other hand, there are strong grounds for believing, in the light of other provisions and profit making activities and background of the trust, that education was mentioned as the object in the deed only as a convenient cloak to conceal and serve the real and dominant purpose of clause 2 (c) which was to run a profitable newspaper and publishing business without paying

the tax on it. Just as mere making of profit as a consequence or incident of altruistic activity is not decisive of the real purpose or object of the activity, so also the carrying on of a business for profit does not cease to be so merely because losses are actually incurred in certain years or because those who carry it on call it "education". It would be difficult to find any commercial activity which makes profits always or which expressly gives out that its existence depends upon profit making although, in practice, and, ultimately, its continuance may depend on profit-making. A newly started business may, initially, have to run at a loss; but, at a later stage, it may earn magnificent profits. Therefore, the test of the real character or purpose of an activity cannot be whether its continuance is made to depend upon profits resulting from it or not. Such a test would be artificial and specious. I do not think that the qualification introduced by Section 2 (15) of the Act of 1961 was intended to compel Courts to look for the conditions on which continuance of activities of public utility is made to depend. If profit making results from them and these profits can be utilised for non-charitable purposes the trust which makes this possible would not be exempt from paying income-tax.

43. In the trust deed before us, as we have already indicated, the trustee had not only wide powers of utilisation of trust funds for purposes of the trust but could divert its assets as well as any of the funds of the Trust to other institutions whose objects are "similar to the objects" of the trust and of "carrying out the objects and purposes of this trust either fully or partially". The whole deed appears to me to be cleverly drafted so as to make the purpose of clause 2 (c) resemble the one which was held to be protected from income-tax in the Tribune case (supra). Indeed, the very language used by the Privy Council in the Tribune case (supra), AIR 1939 PC 208 for describing the objects of the Trust in that case, seems to have been kept in view by the draftsman of the trust deed before us. And, we find that the power of diverting the assets and income of

the Trust, although couched in language which seems designed to conceal their real effect, is decisive on the question whether the trust is either wholly or predominantly for a charitable purpose or not. The trustee is given the power of deciding what purpose is allied to or like an object covered by the trust and how it is to be served by a diversion of trust properties and funds. If the trustee is given the power to determine the proportion of such diversion, as he is given here, the trust could not be said to be wholly charitable. He could divert so much as to make the charitable part or aspect, if any, purely illusory. Indeed, this was the law even before the qualifying words introduced by the 1961 Act. (See: *East India Industries (Madras) Pvt. Ltd. v. Commr. of Income-tax, Madras*; (1967) 65 ITR 611 = (AIR 1967 SC 1554; *Commr. of Income-tax, Madras v. Andhra Chamber of Commerce*; (1965) 55 ITR 722 = (AIR 1965 SC 1281); *Md. Ibrahim Riza v. Commr. of Income-tax, Nagpur*, (1930) 57 Ind App 260 = (AIR 1930 PC 226). Such a "trust" would be of doubtful validity, but I refrain from further comment or any pronouncement upon the validity of such a trust as that was neither a question referred to the High Court in this case nor argued anywhere.

44. The amendment of the 1961 Act considered by us compels closer scrutiny of deeds of ostensibly charitable trusts with a view to discovering their real purposes by analysing the effects of their terms and what they permit. It narrows the scope of exemption from income-tax granted at least under the last and widest category of charitable trusts mentioned in Sec. 2(15) of the Act as was held in *Commr. of Income-tax, West Bengal II v. Indian Chamber of Commerce*, (1971) 81 ITR 147 (Cal).

45. We are in agreement with the view expressed in the *Tribune* case (supra) AIR 1939 PC 208 to the extent that we think that a trust such as the one considered there does not, just like the trust before us, fall within the category of education, as such, mentioned in the statutory elucidation of charity, which was repeated in the 1961 Act, with an added qualification

of the last and widest category. Although the term "education" as used in Section 2(15) of the Act, seems wider and more comprehensive than education through educational institutions, such as Universities, whose income is given an exemption from income-tax separately under Section 10(22) provided the educational institution concerned does not exist "for purposes of profit", yet, it seems to me that the educational effects of a newspaper or publishing business are only indirect, problematical, and quite incidental so that, without imposing any condition or qualification upon the nature of information to be disseminated or material to be published, the mere publication of news or views cannot be said to serve a purely or even a predominantly educational purpose in its ordinary and usual sense.

46. The purposes with which we are concerned no doubt parade under the guise or caption of "education." They are found stated in clause 2(c) of the deed. This clause speaks of a supply of "organs of educated public opinion" to Kanada speaking people and of a presumed need for "useful" information and "ventilation" of views on "matters of public utility". It is left to the Trustee to decide which class of people is "educated" so as to be permitted to voice its views through these organs. He is also to decide what is "useful" and what is harmful and what is a matter of "general public utility." If, as it seems to us to be the position here, the Trustee is the sole judge of how these presumed needs are to be satisfied, he could certainly cater for them in a manner which would be considered debased or offensive by people of good taste with a proper sense of values. I do not mean to cast the slightest reflection on the manner in which the appellant trustee conducts his business or on the quality or value of materials found in his newspapers or other publications. We have no evidence and no finding on these aspects of the case before us. All I would like to point out here is that the trust deed leaves it entirely to the sweet will of the sole trustee to decide all questions relating to policy or the way in which

the needs mentioned in clause 2 (c) are to be met. Provision for their satisfaction could be made in a manner which could be very lucrative. This is the most relevant consideration in ascertaining the purpose of the trust from the point of view of profit-making.

47. Judging from the facts set out in the trust deed itself, the sole trustee had managed to make the satisfaction of the needs mentioned above a highly profitable business. The deed puts no condition upon the conduct of the newspaper and publishing business from which we could infer that it was to be on "no profit and no loss" basis. I mention this as the learned counsel for the appellant repeatedly asserted that this was the really basic purpose and principle for the conduct of the business of the trust before us. This assertion seems to be based on nothing more substantial than that the trust deed itself does not expressly make profit making the object of the trust. But, as I have already indicated, the absence of such a condition from the trust deed could not determine its true character. That character is determined far more certainly and convincingly by the absence of terms which could eliminate or prevent profit making from becoming the real or dominant purpose of the trust. It is what the provisions of the trust make possible or permit coupled with what had been actually done without any illegality in the way of profit making, in the case before us under the cover of the provisions of the deed, which enable us to decipher the meaning and determine the predominantly profit making character of the trust.

48. For the reasons given above, I think that judgment of the Mysore High Court must be and is affirmed, but, in the circumstances of the case, the parties will bear their own costs.

Appeal dismissed.

AIR 1976 SUPREME COURT 27

(From: Punjab and Haryana)*

**A. ALAGIRISWAMI, P. K. GOSWAMI
AND N. L. UNTWALIA JJ.**

Iqbal Singh, Appellant v. Gurdas Singh and others, Respondents.

Civil Appeal No. 1172 of 1973,
D/- 19-9-1975.

(A) Conduct of Election Rules (1961), R. 56 (as amended in 1972) — Ballot paper not containing both signature and stamp — Not sufficient to establish that ballot paper was not valid.

Rule 56 was amended in 1972 providing that only a ballot paper which did not contain both the mark and signature would be deemed invalid, but even then it is not as though it automatically became invalid. The Returning Officer had to scrutinise it in order to see whether the ballot paper was genuine ballot paper. This provision was apparently put in because under pressure of work, the Polling Officer might have failed either to affix the stamp or his signature. If the Returning Officer was satisfied that the failure to affix the stamp or the signature was due to the fault of the Polling Officer but the ballot paper was itself genuine he could include it among the valid ballot papers. Therefore, merely by giving evidence that the ballot papers did not contain both the signature and the stamp it would not be established that the ballot paper concerned was not a valid ballot paper.

(Para 5)

(B) Conduct of Election Rules (1961), R. 82 — Jurisdiction for ordering recount.

There can never be any hard and fast rule as to the circumstances when an order of recount would be permissible and it should always be dependent upon the circumstances of the case. [The facts of the instant case held did not leave even the slightest jurisdiction for ordering a recount.]

(Para 9)

(C) Representation of the People Act (1951), Section 123 (1) — Bribery and gratification — Promise of cons-

*(Ele. Petn. No. 1 of 1971, D/- 10-4-1973—Punj. & Har.)

truction of Dharamshalas at election time — Does not amount to bribery or bargaining for votes.

The election time is the time when people in power as well as ordinary politicians are active in trying to show that they are out to help the people. They address meetings and hold out all sorts of promises. Where a large section of the people are concerned, who only got an amenity which they ought in any case to get (in this case, grant for construction of Dharamshalas) and which they get probably a little more easily because it happens to be election time, it cannot be said that the person in authority (who was contesting the election) making that promise and holding out that he would carry out many remedial measures to benefit the people was resorting to bribery or bargaining for votes. It may not amount to setting up a very high standard and it may be very desirable that whatever is done for the people should be done by persons in authority throughout the period of their office. But they naturally are more active at election time than other times. That cannot be said to amount to corruption. (Para 10)

(D) Representation of the People Act (1951), Section 123 (1) — Bribery and gratification — What amounts to — Promise during election period of gun licences to people who vote for certain candidate — Does not amount to bribery — Bargaining for votes — What amounts to. (Penal Code (1860), S. 171-B.)

When Parliament enacted the provision regarding bribery in the Representation of the People Act it should have had before it the comparable provisions in the Penal Code. It is to be noticed that the giving of any gratification with the object of inducing the receiver or any other person to vote is an offence while acceptance of gratification by a person either for himself or for any other person or for inducing any other person to vote is an offence. In other words, giving is an offence if paid to the voter or such giving induces another person to vote. It is not giving a gratification in order that he may induce another person to vote that is an offence whereas receipt of a gratifica-

tion in order to induce another person to vote is an offence. The reason for the distinction between the provision in Ss. 123 (1) (A) and 123 (1) (B) is this: In the former case, a person standing for election has necessarily to have a number of people to work for him and he may have to bear their expenses. That by itself should not be deemed to be bribery. In the latter case, when a person takes money offering to induce other people, of course, induce by wrong means, to vote for the person who pays him the money he is really poking his nose into something which is no business of his and that practice should be discouraged. AIR 1975 SC 1634 and C. A. No. 90 of 1973, D/- 19-9-1975 (SC), Ref. (Para 12)

The word 'gratification' should be deemed to refer only to cases where a gift is made of something which gives a material advantage to the recipient. There is hardly any need to say that giving of anything whose value is estimable in money is bribery. A gun licence gives no material advantage to its recipient. Arms licence is a licence for regulatory purposes. It is only where a licence gives a material advantage to the licensee that the grant of such licences amounts to a gratification. (Para 12)

Hence, the promise of grant of gun licences by persons in authority for people who vote for certain candidate and granting of unusually large number of such licences during the election period but only after following the proper procedure, does not amount to bribery. (Para 12)

A bargain for the purposes of this section does not mean that the candidate or his agent makes an offer and the voter accepts it in the sense that he promises to vote. It is enough if the candidate or his agent makes the gift or promise on that condition. If a candidate or his agent pays money to a voter saying that he wants him to vote it is a bargain for the purposes of this section. It is not necessary that the voter should say that he would vote and thereafter the candidate or his agent should pay the money. Even in such a case the voter after receiving the money might or might not vote. (Para 13)

The promise to grant gun licences would really amount to a redressal of the grievances of a class of the public or rendering them any help. AIR 1960 Madh Pra 362, AIR 1955 SC 775, AIR 1968 SC 1191, (1956) 12 Ele LR 378 (Ele. Tri. Luck), (1954) 10 Ele LR 57, (Ele. Tri. Nag.), Eef.

(Para 14)

Held there was no evidence in the instant case of obtaining a promise from the voters in return for a promise to grant gun licences.

(Para 14)

Cases Referred: Chronological Paras

AIR 1975 SC 1634 12
(1975) C. A. No. 90 of 1973, D/- 19-9-1975 (SC) 12
AIR 1971 SC 2025 = (1971) 3 SCR 522 14
AIR 1968 SC 1083 = (1968) 3 SCR 111 14
AIR 1968 SC 1191 = (1968) 3 SCR 102 14
AIR 1960 Madh Pra 362 = 15 Ele LR 205 14
(1956) 12 Ele LR 378 (Ele. Tri. Lucknow) 14
AIR 1955 SC 775 = (1955) 2 SCR 469 14
(1954) 10 Ele LR 57 (Ele. Tri. Nag.) 14

Mr. Hardayal Hardy, Sr. Advocate, (Mr. Bishamber Lal, Mrs. Indira Sahai, Advocates with him), for Appellant; Mr. H. L. Sibal, Sr. Advocate, (Mr. Kapil Sibal, Advocate, Mr. P. H. Parekh and Mrs. S. Bhardare, Advocates of M/s. Bhandare Parekh & Co., Miss. Manju Jaitley and S. B. Keng, Advocates with him), for Respondent No. 1.

Judgment of the Court was delivered by

ALAGIRISWAMI, J.:— This appeal relates to the election to the Parliament from the Fazilka constituency in Punjab held on 5th March, 1971. The Parliamentary constituency consisted of eight assembly constituencies of Malout, Muktsar, Gidderbha, Fazilka, Jalalabad, Abohar, Lambi and Faridkot. The votes were counted on 10th and 11th of March at five different places. The counting of the votes of the Malout Assembly constituency was held on 10th March by Mr. Aggarwal, Assistant Returning Officer, of Muktsar and Gidderbha on 10th

and 11th by Mr. Sayal, of Fazilka and Jalalabad on the 10th and 11th by Mr. Mahajan, of Lambi and Abohar on the 10th and 11th by Mr. Ram Lal and of Faridkot on the 11th by Mr. Garg. 6409 votes were declared invalid and the 1st respondent was declared elected having secured 1,52,677 votes. The appellant obtained 1,47,354 votes. There were six other candidates about whom it is not necessary to refer.

2. A number of allegations were made in the election petition about many irregularities that took place on the date of the polling. It is not necessary to refer to them as the issues concerned with them were not pressed even before the High Court. Only two issues, issues 1 and 4 were considered by the High Court and those are the issues urged before us also they are:

"1. Whether the respondent No. 1 is guilty of corrupt practices specified in paras 10, 20, 22 and 23 and 26 to 29 of the election petition as amended? If so, what is the effect?

4. Whether 15000 ballot-papers were invalid and were wrongly polled and counted? If so, with what effect?"

It is also necessary to refer to issues 3 and 6 for they have some relevance in discussing issues 1 and 4:

"3. Whether the petitioner is entitled to the scrutiny of the ballot-papers alleged to have been illegally rejected and those of the respondent alleged to have been illegally accepted and on that account is entitled to a recount?

6. Whether the allegations made in para 7 of the petition are correct, and if so, what is the effect?"

As issue 6 was not pressed the various allegations of irregularities at the time of polling including collusion by Polling Officers and consequent false voting and stuffing of ballot boxes could not be considered. As issue 3 was not pressed recount cannot be asked for on the allegation of wrong counting of votes that is that the appellant's votes were wrongly rejected and the 1st respondent's votes were wrongly accepted.

3. With regard to issue 1 the allegation was that corrupt prac-

tice of bribery was committed in the interest of the 1st respondent by his brother Shri Parkash Singh Badal, who was at that time the Chief Minister of Punjab. One of the items of bribery alleged was that large sums of money were distributed to Harijans in the form of contributions towards construction of Dharamshalas for the purpose of inducing them to vote in favour of the 1st respondent. The second allegation was that Shri Parkash Singh Badal directed Mr. Sayal, one of the Assistant Returning Officers, to issue 3,304 gun licences for furthering the prospects of the 1st respondent's election and that this was a gratification for inducing the electors to vote for the 1st respondent. Similarly, Mr. O. P. Garg, another Assistant Returning Officer was alleged to have issued 485 gun licences in the months of February and March 1971. Shri Parkash Singh Badal was alleged to have arranged and addressed a number of meetings in various villages promising to help the voters in many ways if they would vote for his brother. There were certain other allegations of corrupt practices but the only ones canvassed before us were those relating to gun licences and grants in respect of construction of Dharamshalas to Harijans.

4. The allegations which relate to issue 4, as found in the petition, were that at least 15,000 invalid and void votes had been included and counted in favour of the returned candidate, which should have been rejected and not counted at all and that in addition at least 3,000 invalid ballot papers which should have been rejected under rule 56 had been wrongly counted as valid votes in favour of the returned candidate. The distinction between 15,000 and 3,000 votes was this: The 15,000 ballot papers were said to consist of (i) spurious ballot papers, (ii) ballot papers not bearing serial number or design authorised for use at the particular polling stations, and (iii) ballot papers not bearing booth marks and the full signatures of the presiding officer. The 3,000 ballot papers were said to have been so marked as to render it doubtful to which candidate the vote is given, or the ballot papers bore marks with instrument other than the one

supplied for the purpose, or ballot papers marked in favour of more than one candidate had been wrongly counted in favour of the returned candidate. No evidence in fact was let in in respect of the 3,000 votes. The attack was concentrated on the 15,000 invalid and void votes. In view of issues 3 and 6 having been given up, the effect of which we have earlier referred to, the only question that arises is whether these 15,000 votes have not been counted at all, whether for the appellant or for the 1st respondent on the basis that they bore neither the stamp nor the signature of the Polling Officer.

5. The whole of the evidence let in was of a uniform type that a number of ballot papers did not bear the signature of the Polling Officer or the stamp of the booth. Indeed the allegation in the petition on this point is "ballot papers not bearing booth marks and full signatures of the Presiding Officer were wrongly counted as valid votes". It is not said that the ballot papers bore neither the mark nor the signature of the Presiding Officer. The rule in question, rule No. 56, was amended in 1972, providing that only a ballot paper which did not contain both the mark and signature would be deemed invalid but even then it is not as though it automatically became invalid. The Returning Officer had to scrutinise it in order to see whether the ballot papers were genuine ballot papers. This provision was apparently put in because under pressure of work the Polling Officer might have failed either to affix the stamp or his signature. If the Returning Officer was satisfied that the failure to affix the stamp or the signature was due to the fault of the Polling Officer but the ballot paper was itself genuine he could include it among the valid ballot papers. Therefore, merely by giving evidence that the ballot papers did not contain both the signature and the stamp it would not be established that the ballot paper concerned was not a valid ballot paper. But that is the only type of evidence which has been let in.

6. Apart from this the number 15,000 seems to be a case of wild guess. The appellant's voting agents

were alleged to have kept a note of number of invalid ballot papers that they had noticed but none was produced. Some of the counting agents gave evidence that they brought it to the notice of the chief counting agent who sat on the dais along with the Assist. Returning Officer at the time of the counting. Neither the counting agents nor the chief counting agent had complained in writing to the Assistant Returning Officer. It is impossible to believe that if there were as many as 15,000 invalid ballot papers which amount to about two thousand from every assembly constituency they would have kept quiet without raising hell. On both the days of counting an observer deputed by the Election Commissioner had gone round all the places where the votes were counted. No serious infirmities were pointed out to him. One or two ballot papers which did not bear either the signature of the Polling Officer or the stamp were shown to him only in the Lambi constituency and he scrutinised them and found that the serial numbers tallied and he was satisfied about their genuineness. He as well as the various Assistant Returning Officers had offered that if there were any complaints candidates could ask for a recheck. No such recheck was asked for. It was argued on behalf of the appellant that the recheck offer meant only a check on whether the number of votes had been correctly added. We find it impossible to accept this suggestion. The reference to the checking in the observer's report shows that the checking meant also scrutiny as to whether the ballot paper was signed by the Presiding Officer. The Returning Officer has also mentioned in his order on the application made by the appellant for a recount that he was asked to specify as to whether in any assembly segment he or any of his agents had asked for the recheck or pointed out any discrepancy in the figures and that the appellant had failed to cite any such specific instance, and that he was also asked as to whether he wanted the recounting of any specific assembly segment but he reiterated that he wanted a total recount.

7. Four of the Assistant Returning Officers, Mr. Sayal, Mr. Ram Lal, Mr. Garg and Mr. Aggarwal have been examined and they did not support the appellant's case that there were such a large number of invalid ballot papers or that it was brought to their notice even orally. Mr. Ram Lal said that at the most there might be 200 such votes which were objected to; that is in respect of the two constituencies in which he was the Assistant Returning Officer. This would mean that there might have been about one thousand invalid ballot papers at the most and we have already mentioned that 6,409 votes had been declared invalid. We do not know how many of them were ballot papers which did not contain either the signature or the stamp.

8. The way the appellant's case has been developed is also very interesting. We have pointed out that votes of four constituencies were counted on the 10th and of four other constituencies on the 11th. The first move of the appellant was to send a telegram on the 11th. By that time half the number of votes had been counted and probably more than half because we do not know at what time on the 11th the telegram, Ex. B-2 was sent. Even assuming that nearly half the number of votes had been counted the appellant probably had an inkling of the possibility of his being defeated. In this telegram he referred to about fifteen thousand ballot papers which did not contain either the signature of the Presiding Officer or the Polling Officer of the Polling Station and booth numbers. He also mentioned that about six thousand three hundred votes had been wrongly rejected. Apparently he wanted to imply that they would otherwise have gone in his favour. But his case of six thousand votes which ought to have gone to him, but had been wrongly rejected, had been completely given up later. Another telegram sent on the 13th March 1971 was similar to the telegram sent on the 11th. A similar telegram was sent by the appellant to the General Secretary of the Congress Party as also the Prime Minister. But in the petition given to the Returning Officer asking for a recount on the same day the

complaint was that some of the ballot papers did not bear the official stamp on their back as provided by rules and they seem to have been smuggled illegally and the number given is "thousands". Another complaint was that some of the ballot papers did not bear the signatures of the Presiding Officers on the back, which were also "in thousands" and even more than five thousand. So here we do not find the allegation that the ballot papers contained neither the signature nor the stamp. In his petition before the Election Commission asking for recount he mentioned fifteen thousand ballot papers as having been found which bore no distinction mark or signature of the Presiding Officer. He also mentioned the rejection of more than 6,000 votes. As we have already pointed out, there is absolutely nothing on record to show how the figure 15,000 was arrived at. We are, therefore, satisfied that the mention about 15,000 votes, 3,000 votes and 6,000 votes are only steps in the attempt to secure a recount at any cost and to fish for evidence. As we have already pointed out, the allegation in the petition was that 15,000 invalid votes were counted in favour of the returned candidate but in the evidence as well as the arguments it was only claimed that there were 15,000 invalid ballot papers which were counted. There is nothing to show how many of these 15,000 went to the appellant and how many to the 1st respondent. Indeed as we have earlier explained what was asked for was elimination of the 15,000 votes altogether from the counting. The whole thing is mere kite flying. We are, therefore, in agreement with the learned Judge of the High Court that the appellant has not succeeded in establishing the allegations covered by issue No. 4.

9. There are a large number of decisions of this Court on the question regarding the circumstances under which a recount can be ordered. It has been recognised in all those decisions that there can never be any hard and fast rule as to the circumstances when an order of recount would be permissible and should always be dependent upon the circumstances of the case. We do not there-

fore consider it necessary to refer to any of those decisions. Suffice it to say that the facts of this case do not leave even the slightest justification for ordering a recount.

10. Now we come to the question of corrupt practice. We shall first of all deal with the grant for construction of Dharamshalas for Harijans. The Punjab Government appears to have set apart a sum of Rs. 50,00,000 for this very purpose. All that is established is that a sum of Rs. 3,00,000 was spent towards the end of the official financial year 1970-71 in the district in which this Fazilka Parliamentary constituency is situate. Punjab has 11 districts and it cannot therefore be said that this sum is disproportionately large. The anxiety to spend the money towards the end of the financial year is also natural. If the end of the financial year also happens to be the period when an election is going on parties in power naturally bestir this to show that they are active in trying to show that they are out to help the people. They address meetings and hold out all sorts of promises. Where a large section of the people are concerned, who only get an amenity which they ought in any case to get and which they get probably a little more easily because it happens to be election time, it cannot be said that the person in authority making that promise and holding out that he would carry out many remedial measures to benefit the people was resorting to bribery or bargaining for votes. It may not amount to setting up a very high standard and it may be very desirable that whatever is done for the people should be done by persons in authority throughout the period of their office. But they naturally are more active at election time than other times. That cannot be said to amount to corruption.

11. We then come to the question of gun licences. It has been pointed out that during the months of January, February and March 1971. Mr. Sayal had issued 3,304 gun licences and Mr. Garg 485 gun licences, the usual number in an ordinary year being about 300. When every explanation offered on behalf of the

officials is taken into consideration. the fact remains that an unusually large number of gun licences had been issued during that period. We are satisfied that to some extent at least this amounts to improper use of power. We do not say that this is an abuse or misuse. In fact there is evidence that the proper procedure has been followed in these cases. In one case, for instance, a man who had applied for a gun licence long time back approached the Chief Minister when he had come to the village and he at once told the District Magistrate and the man got his licence. We can see nothing improper in that instance. But the gun licences themselves are issued by the officials and not by the Chief Minister. It also appears that a large number of relatives of the Chief Minister as well as his Mukhtiar-e-Aam, his maternal uncle, and even the returned candidate had taken interest in the issue of gun licences. It was sought to be proved that the Chief Minister had addressed a number of meetings promising to issue gun licences if they would vote for his brother. But there was no allegation in the election petition relating to the meetings he addressed or his having held out the promise in those meetings that he would issue gun licences if the people voted for his brother. The 1st respondent himself not having had noticed of the specific allegation of meetings at which such promises were held out we have left out of consideration the evidence regarding the meetings and the promises held out by the Chief Minister in those meetings as inadmissible.

12. Assuming that it was the returned candidate or his agent that had held out an inducement to get gun licences issued for people who vote for the returned candidate, does it amount to bribery under Section 123(1) of the Representation of the People Act? Bribery is defined thus:

"123 (1) 'Bribery' that is to say,—

(a) any gift, offer or promise by a candidate or his agent or by any other person with the consent of a candidate or his election agent of any gratification, to any person whomsoever, with the object, directly or indirectly of inducing—

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(a)

(b) an elector to vote or refrain from voting at an election, or as a reward to—

(i)

(ii) an elector for having voted or refrained from voting

(B) the receipt of, or agreement to receive, any gratification, whether as a motive or a reward—

(a)

(b) by any person whomsoever for himself or any other person for voting or refraining from voting, or inducing or attempting to induce any elector to vote or refrain from voting, or any candidate to withdraw or not to withdraw his candidature.

Explanation.— For the purposes of this clause the term 'gratification' is not restricted to pecuniary gratifications or gratifications estimable in money and it includes all forms of entertainment and all forms of employment for reward but it does not include the payment of any expenses bona fide incurred at, or for the purpose of any election and duly entered in the account of election expenses referred to in Section 78."

In order to understand the exact implication of the word 'gratification' it may be useful to refer to another statute which has been in force for over a century, that is, the Indian Penal Code as most legislations tend to follow established precedents. In Sec. 161 of the Code, which deals with bribery, one of the explanations is as follows:

"Gratification". The word "gratification" is not restricted to pecuniary gratification, or to gratification estimable in money."

Illustration (a) to the section is as follows:

"(a) A, a munsif, obtains from Z, a banker, a situation in Z's bank for A's brother, as a reward to A for deciding a cause in favour of Z. A has committed the offence defined in this section."

We may also quote Sec. 171-B of the Code and S. 171-E which find a place in the Chapter of Offences Relating to Elections, which was inserted in the Code in the year 1920:

"171-B. (1) whoever—

(i) gives a gratification to any person with the object of inducing

him or any other person to exercise any electoral right or of rewarding any person for having exercised any such right; or

(ii) accepts either for himself or for any other person any gratification as a reward to exercising any such right or for inducing or attempting to induce any other person to exercise any such right, commits the offence of bribery:

Provided that a declaration of public policy or a promise of public action shall not be an offence under this section.

(2) A person who offers, or agrees to give or offers, or attempts to procure, a gratification shall be deemed to give a gratification.

(3) A person who obtains or agrees to accept or attempts to obtain a gratification shall be deemed to accept a gratification and a person who accepts a gratification as a motive for doing what he does not intend to do, or as a reward for doing what he has not done, shall be deemed to have accepted the gratification as a reward."

"171-E. Whoever commits the offence of bribery shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both:

Provided that bribery by treating shall be punished with fine only.

Explanation.— "Treating" means that form of bribery where the gratification consists in food, drink, entertainment, or provision."

It would be noticed that the Explanation to Sec. 123 (1) of the Representation of the People Act and the Explanation to Sec. 161 of the Indian Penal Code relating to gratification are similar. In addition, the Representation of the People Act refers to all forms of entertainment and all forms of employment for reward. The employment for reward is covered by illustration (a) to Section 161 of the Indian Penal Code. The words "all forms of entertainment" in the Explanation to Section 123 (1) of the Representation of the People Act apparently refer to offence of treating found in Section 171-E of the Indian Penal Code. When Parliament enacted the provision regarding bribery in the

Representation of the People Act it should have had before it the comparable provisions in the Penal Code. It is to be noticed that the giving of any gratification with the object of inducing the receiver or any other person to vote is an offence while acceptance of gratification by a person either for himself or for any other person or for inducing any other person to vote is an offence. In other words giving is an offence if paid to the voter or such giving induces another person to vote. It is not giving a gratification in order that he may induce another person to vote that is an offence whereas receipt of a gratification in order to induce another person to vote is an offence. The reason for the distinction between the provision in Section 123 (1) (a) and 123 (1) (B) seems to be this: In the former case a person standing for election has necessarily to have a number of people to work for him and he may have to bear their expenses. That by itself should not be deemed to be bribery. In the latter case when a person takes money offering to induce other people, of course, induce by wrong means, to vote for the person who, pays him the money he is really poking his nose into something which is no business of his and that practice should be discouraged. See Kalya Singh's case C. A. No. 16 of 1973 decided on 28-2-1975 = (reported in AIR 1975 SC 1634) and our judgment in Harisingh Pratapsingh v. Popatlal Mulshankar Joshi, C. A. No. 90 of 1973 Decided on 19-9-1975 (SC). So far as we are aware it has never been held that the issue of a gun licence amounts to bribery under Sec. 171-B. We are of opinion that the word 'gratification' should be deemed to refer only to cases where a gift is made of something which gives a material advantage to the recipient. There is hardly any need to say that giving of anything whose value is estimable in money is bribery. A gun licence gives no material advantage to its recipient. It might gratify his sense of importance if he has a gun licence in a village where nobody else has a gun licence. So might the conferment of an honour like Padma Bhushan. A praise from a high quarter

might gratify the sense of vanity of a person. But the word 'gratification' as used in Sec. 123(1) does not refer to such gratification any more than in Section 171-B of the Indian Penal Code. Taking the case of licences: Possibly the grant of a licence which enables a man to do some business and thus make money may confer a material advantage to him. We are not here speaking of licences which are insisted upon merely for regulatory purpose like municipal licences. But a licence given to a person to deal in fertilizers might confer a financial advantage to that person; so might an import licence or an export licence. Such licences differ from licences for regulatory purposes. Arms licence is a licence for regulatory purposes. Its possession gives no material advantage to its possessor. A licence in a prohibition area to deal in liqueur might confer a material advantage to the licensee. But a licence enabling a person to imbibe liqueur in such area gives the licensee no material advantage. Such a licence is only regulatory. We must therefore distinguish between various kinds of licences and hold that where a licence gives a material advantage to the licensee the grant of such licences amounts to a gratification. In that sense the grant of gun licences to voters in the Fazilka Constituency would not amount to bribery. We have discussed this question on the basis that the authority to grant a licence is the returned candidate or his brother the Chief Minister.

13. We have already pointed out that there is no evidence regarding bargaining for votes by promise of gun licences. A bargain for the purposes of this section does not mean that the candidate or his agent makes an offer and the voter accepts it in the sense that he promises to vote. It is enough if the candidate or his agent makes the gift or promise on that condition. If a candidate or his agent pays money to a voter saying that he wants him to vote it is a bargain for the purposes of this section. It is not necessary that the voter should say that he would vote and thereafter the candidate or his agent should pay the money. Even in such

a case the voter after receiving the money might or might not vote.

14. The law regarding bribery in elections in our country has been discussed in various decisions of this Court. In *Manganlal v. Hari Vishnu*, (15 Ele LR 205) = (AIR 1960 Madh Pra 362) the candidate offered to construct a well in a village if the voters voted for him and not for the rival candidate and money was actually deposited for this purpose and was to await the result of the election. It was held that there was a clear bargain for votes. In *Bhadar Shariff v. Munnuswami Gounder*, (AIR 1955 SC 775) it was observed by this Court that it may be meritorious to make a donation for a charitable purpose but on the eve of an election such a gift may be open to construction that it was made with the intention of buying votes. In *Ghasi Ram v. Dal Singh* (1968 (3) SCR 102) = (AIR 1968 SC 1191) it was held that the gift must be proved to have a direct or indirect connection with votes and this must admit of no other reasonable excuse. In *Radha Krishna Shukla v. Tara Chand Maheshwar*, ((1956) 12 Ele LR 378 Ele. Tri. Luck.) general promises by Ministers to redress certain public grievances or to erect certain public amenities like hospitals, if elected, were held not to amount to corrupt practice. They were treated as promises of general public action. In *Amirchand v. Surendra Lal Jha*, ((1954) 10 Ele LR 57 Ele. Tri. Nag.) it was laid down that if a Minister redresses the grievances of a class of the public or people of a locality or renders them any help, on the eve of an election, it was not corrupt practice unless he had obtained promises from the voters in return, as a condition for their help. The promise to grant gun licences would really amount to a redressal of the grievances of a class of the public or rendering them any help. There is no evidence here of obtaining a promise from the voters in return. The observations made in *Ghasi Ram's* case (supra) regarding the action taken by a Minister which helps a class of the public may be noticed in this connection:

"The position of a Minister is difficult. It is obvious that he cannot cease to function when his election is

due. He must of necessity attend to the grievances, otherwise he must fail. He must improve the image of his administration before the public. If everyone of his official acts done bona fide is to be construed against him and an ulterior motive is spelled out of them, the administration must necessarily come to a stand-still. The State of Haryana came into existence on November 1, 1966. With an election in the near future, the political party had to do acts of a public nature. The grant of discretionary grants were part of the general scheme to better community development projects and to remove the immediate grievances of the public. The money was required to be spent in about 3 months' time. The action of the Minister had often the concurrence and recommendation of his subordinate staff. It is for this reason that the orders about the improvement of the supply of waters were not pressed. They were incapable of being construed against the first respondent. Therefore, emphasis was placed upon the distribution of money. The money was not distributed among the voters directly but was given to Panchayats and the public at large. It was to be used for the good of those for and those against the candidate. No doubt they had the effect of pushing forward his claims but that was inevitable even if no money was spent, but good administration changed the people's condition. We cannot, therefore, hold that there was any corrupt practice. If there was good evidence that the Minister bargained directly or indirectly for votes the result might have been different but there was no such evidence."

The issue for decision in *Om Prabha v. Abnash Chand*, (1968 (3) SCR 111) = (AIR 1968 SC 1083) was similar to the case here in respect of the grants for Dharamshalas for Harijans. It was held that the action of the Minister could not be construed against her and that it was done in the ordinary course of her duties as Minister and there was no evidence that it was, directly or indirectly, part of a bargain with the voters. In *Bhanu Kumar v. Mohan Lal*, (1971 (3) SCR 522) = (AIR 1971 SC 2025) it was alleged that the Chief Minister by ordering

the covering of a nallah, the construction of a road, the installation of water taps and the grant of pattas to the inhabitants of a colony for construction of houses had made a bargain with the people for votes and thus committed corrupt practice as defined in Sec. 123(1) of the Representation of the People Act. This court pointed out that ordinarily amelioration of grievances of the public is innocuous and cannot be construed against a candidate who is a Minister but that if there is evidence to indicate that any candidate at the election abused his power and position as a Minister in the Government by utilising public revenues for conferring advantage or benefit on a particular group of people for the purpose of obtaining their votes, different considerations will arise and it may be held to be a corrupt practice within the meaning of Section 123(1). In that case it was held that in all the instances relied upon by the appellant the evidence showed that there were long standing public grievances and the Government had from time to time made suggestions and recommendations for redress of the grievances and amelioration of the condition of the people and that it could not be said that on the eve of election there was any sudden or spontaneous outburst of public activity in the shape of diverting money to win electors to the side of the Chief Minister by throwing baits or giving them any particular and specially favoured treatment. These observations apply to the case of grants for Harijan Dharamshalas.

15. We are therefore satisfied that in the case of both the allegations of corrupt practice there was no gratification offered, that there was no bargaining for votes in the sense we have explained earlier and these issues must also be found against the appellant.

16. The appeal is, therefore, dismissed with costs.

Appeal dismissed.

AIR 1976 SUPREME COURT 37

(From: Assam and Nagaland)

R. S. SARKARIA AND A. C. GUPTA JJ.

The State of Assam and others, Appellants v. Akshaya Kumar Deb, Respondent.

Civil Appeal No. 59 of 1968, D/- 2-5-1975.

(A) Assam Fundamental and Subsidiary Rules F.R. 18 — Termination of services in terms of FR 18 — Opportunity to show cause, not given — Termination, held illegal — Termination under F.R. 18, if 'removal' within Art. 311 (2) of Constitution. (Constitution of India, Articles 226, 311 (2) — Natural Justice.)

Where the services of a permanent Government servant (an Upper Division Assistant in Veterinary Department) were terminated under F.R. 18 of Assam Fundamental and Subsidiary Rules on account of his continuous absence from duty for more than five years and no opportunity was given to him to show cause why the Rule was inapplicable.

Held (Per Sarkaria and Gupta JJ.) that the termination was illegal particularly when he was persistently contending that his failure to join duty or absence was involuntary and due to circumstances beyond his control. (Paras 23, 26)

Per R. S. Sarkaria, J.:

The "cessation" of service pursuant to this Rule would, in substance and effect, stand on the same footing as "his removal" from service within the contemplation of Art. 311 (2) of the Constitution, particularly when it is against the will of the employee who is willing to serve, or who had never lost the animus to rejoin duty on the expiry of his leave. (Para 13)

It cannot be said that the 'removal' under F.R. 18 does not visit the employee with any evil consequences. AIR 1954 SC 369, Followed (Para 15)

Assuming that termination under F.R. 18 does not cause forfeiture of benefits already earned such as pension etc., then also that will not by itself, take it out of the category of "removal" as envisaged by Art. 311

(2), merely because it is described or declared in the phraseology of F.R. 18 as a 'cessation' of service. AIR 1958 SC 36 and AIR 1966 SC 492 and AIR 1971 SC 1409, Followed.

(Para 17)

(Per A. C. Gupta, J. agreeing with the final order proposed by Sarkaria, J. but differing as to the ground on which such order was to be based):— It was doubtful whether termination of service in terms of F.R. 18 amounts to 'removal' within the meaning of Art. 311 (2) of the Constitution. But the Government servant should have been given an opportunity to show cause against the termination of his service by the application of F.R. 18. That was a requirement of natural justice. In the absence of such opportunity, the termination was illegal. (Para 26)

Cases Referred: Chronological Paras
AIR 1971 SC 1409 = 1971 Lab IC 881

22
(1968) 2 Mys LJ 426 = 1969 Lab IC 117

10
AIR 1966 SC 492 = (1966) 1 SCR 825

10, 18, 21
AIR 1958 SC 36 = 1958 SCR 828

17
AIR 1954 SC 369 = (1955) 1 SCR 26

16
Judgments of the Court were delivered by

R. S. SARKARIA, J.:— This appeal is directed against the judgment of the High Court of Assam and Nagaland declaring that the termination of the services of the respondent, being violative of Art. 311 (2) of the Constitution, was illegal.

2. The Respondent, A. K. Deb, joined service as a Lower Division Assistant in the Office of the Superintendent of Veterinary Department, Assam, on 1-4-1937. He was confirmed in that post on 28-8-1937. He was promoted as Upper Division Assistant and confirmed as such on 26-8-1943. He got further promotion as Head Assistant and was confirmed in that post with effect from 20-6-1946. Thereafter on 26-4-1947, he was appointed as Personal Assistant against a newly created temporary post in higher scale. He continued to work in that post till 18-8-1949 when he was reverted to the post of Head Assistant. On 8-11-1951, the Director of Veterinary Department drew up pro-

ceedings against the Respondent on certain charges. As a result, the Respondent was reverted to the post of Upper Division Assistant on 15-12-1952. The Respondent on 21-1-1953 filed an appeal against the order of his reversion to the State Government. The appeal was dismissed on 19-2-1954, and by order dated 28-8-1956, the Respondent was allowed to join as Head Assistant subject to the production of a medical certificate of fitness. It was further stated in the order that the Respondent would be entitled to such leave as admissible under the rules from the date he proceeded on leave until joining the post of Head Assistant. On 1-9-1956, the Respondent reported for duty and produced a medical certificate of fitness from the Civil Surgeon, Kamrup. Despite this, he was not assigned any duty. He continued to attend his office till 13-9-1956 when he was informed that the operation of the order D/- 28-8-1956 of the Government had been suspended. Subsequently, by a letter dated 30-10-1956, the Government informed him that the earlier order had been revised and he should join the post of Upper Division Assistant to which he had been reverted. Against this order of reversion, the Respondent unsuccessfully appealed to the State Government. The appeal simply drifted till on 20-2-1961, he was informed that the appeal did not lie.

3. In the meantime on 12-9-1956, the Director called for the explanation of the Respondent for the latter's absence without leave since 5-9-1956. The Director drew up disciplinary proceedings against the Respondent for his disobedience of the Government's order requiring him to join his post and for remaining absent from duty without information. Another show cause notice was issued on 26-11-1957 as to why he be not dismissed from service. The Respondent submitted a written statement and prayed for a personal hearing. He also filed an appeal to the Governor on 20-5-1961. By a letter No. AGV 7/52/280 dated 15-2-1963, the Respondent was informed that he had ceased to be a Government servant under F. R. 18 of the Assam Fundamental and Subsidiary Rules

with effect from 5-9-1961 on account of his continuous absence from duty for more than five years.

4. To challenge the order dated 30-10-1956, of his reversion to the post of Upper Division Assistant, and the order, dated 15-2-1963, by which it was held that he had ceased to be in Government service, the Respondent filed a writ petition under Art. 226 of the Constitution in the High Court. Later, he did not press his challenge to the order, dated 30-10-1956, and confined it only to the order, dated February 15, 1963.

5. After observing that the termination of service under F. R. 18 means that the employee is blameworthy, and operates as punishment amounting to "dismissal" from service, the High Court concluded:

"that F. R. 18 which permits termination of the service of a permanent Government employee without observance of the requirement of Article 311 (2) of the Constitution on a ground other than ordinary or compulsory superannuation, must be held to be invalid because such a rule contravenes the constitutional safeguard provided by that Article."

Towards the end of its judgment the High Court said:

"We, however, make it clear that we do not declare the petitioner to have continued in the post of Head Assistant as we had not interfered with the order reverting the petitioner to the post of an Upper Division Assistant. We hold that F. R. 18 is void being hit by Article 311 (2) of the Constitution and the termination of the service of the petitioner under this Rule is invalid."

In the result, the High Court allowed the writ petition and directed the Government not to give effect to the impugned order, dated 15-2-1963.

6. Hence this appeal by the State on a certificate granted under Article 133 (1) (c) of the Constitution.

7. The only question that falls for determination is whether the services of the Respondent could be terminated under the Rule 18 of the Assam Fundamental and Subsidiary Rules, without complying with the

procedure prescribed in Article 311 (2) of the Constitution?

8. It is a common ground that no charge was framed against the Respondent, no inquiry was instituted nor was he given an opportunity to show cause against the impugned action.

9. Mr. Naunit Lal, learned Counsel appearing for the appellant contends that the termination in question does not amount to "dismissal" or "removal" but is a "cessation" of service which results automatically without any action on the part of the Government from the unilateral conduct of the employee in remaining absent from duty for a period of five years or more. In such a situation, it is maintained Article 311 (2) of the Constitution is not attracted. Another reason advanced in support of this contention is that cessation of service under F. R. 18 does not entail forfeiture of the benefits already earned, nor does it debar the servant from re-employment under the Government. In the alternative, it is half-heartedly submitted that show-cause notices were issued to the Respondent on 12-9-1956 and 26-11-57 to enable him to explain his prolonged absence, and the issuance of those notices should be deemed to be a substantial compliance with the basic rule of natural justice which underlies Art. 311 (2).

10. As against the above, it is urged by Shri D. N. Mukherjee, the learned counsel for the Respondent that the High Court has rightly struck down F. R. 18 as unconstitutional because the so called "cessation" of service under that Rule is nothing but "dismissal" or "removal" from service within the purview of Art. 311 (2). It is contended that the termination in question does visit the employee with serious penal consequences. It is pointed out that according to the appellant State, itself, the five years' period of absence from duty which attracted F. R. 18, under which the impugned action has been taken, ended only on 5-9-1961, and no notice whatever after the completion of the alleged period was issued to the Respondent. In these circumstances, says the Counsel, any notices

issued to the Respondent many years before 5-9-1961, could not by any stretch of imagination be said to be an observance of the fundamental principle of natural justice enshrined in Art. 311 (2). In support of his contentions, the learned Counsel has referred to *Jai Shankar v. State of Rajasthan*, (1966) 1 SCR 825 = (AIR 1966 SC 492) and *N. Krishna Madiwala v. Inspector of Post Offices*, (1968) 2 Mys LJ 426 = (1969 Lab LC 117).

11. The impugned order, dated February 15, 1963, is in these terms:

"Whereas Shri A. K. Deb, Office Assistant, Office of the Director of Animal Husbandry and Veterinary, Assam, Gauhati, has been absent continuously for more than 5 (five) years from duty without leave:

Now, therefore pursuant to F. R. 18 of F. R. and S. R. it is hereby ordered and declared that said Shri A. K. Deb has ceased to be in Government employ with effect from 5th September 1961."

12. The material part of F. R. 18, runs thus:

"Unless the Provincial Government, in view of the special circumstances of the case shall otherwise determine, after five years' continuous absence from duty, elsewhere than on foreign service, in India, whether with or without leave a Government servant ceases to be in government employ."

13. From a reading of F. R. 18, it is discernible that it regards continuous absence of an employee, whether with or without leave, for a period of five years or more, as conduct which must normally entail "cessation" or termination of his service. Although not in so many words, but by necessary intendment, the Rule regards such conduct of the employee, as a fault or blameworthy behaviour which renders him unfit to be continued in service. In this context, the "cessation" of service pursuant to this Rule would, in substance and effect, stand on the same footing as 'his removal' from service within the contemplation of Article 311 (2) of the Constitution, particularly when it is against the will of the employee who is willing to serve, or who had never lost the animus to re-join duty on the expiry of his leave.

Another reason for equating 'cessation' of service under this Rule with 'removal' within the meaning of Article 311 (2), is that it proceeds on a ground personal to the employee involving an imputation which may conceivably be explained by him in the circumstances of a particular case. Cases are not unknown where the absence of a Government servant, even for prolonged periods, has been due to circumstances beyond his control. The case of the Japanese soldier who remained cut off and stranded in the jungles of a remote Pacific island for three decades after the termination of World War II, is a recent instance of this kind.

14 Now in the case in hand, the impugned order was made against the consent of the Respondent who has throughout been willing to continue in service. His case is that after the expiry of his leave he reported for duty and produced a medical certificate of his fitness, but he was arbitrarily and maliciously not allowed to work after September 13, 1956. Indeed, his contention is that in these circumstances, F. R. 18, would not be attracted. Apart from the constitutional requirement of Art. 311 (2) natural justice and fair-play required that he should have been given a chance to substantiate his contention. The fact remains that given an opportunity, he would have controverted seriously the circumstances of his absence from duty on the basis of which the impugned action has been taken.

15. It is difficult to accept the contention that the 'removal' under F. R. 18 does not visit the employee with any evil consequences. True, that 'removal' unlike 'dismissal', may not under the Service Rules disqualify the person 'removed' from re-employment under the Government. Further, from the standpoint of the Service Rules there may be a difference between 'removal' and 'dismissal' as to the extent of consequences that respectively flow therefrom. But for the purpose of Art. 311 (2) both stand on an equal footing, as major penalties. Both entail penal consequences. Nor is it correct to say that the removal under F. R. 18 is analogous to compulsory or premature retire-

ment. Our attention has not been drawn to any service rule or provision to support the contention that the impugned order will not result in forfeiture of the benefits already earned by the employee. On the other hand, according to most Service Rules, 'removal' or 'dismissal' does cause forfeiture of the right to pay, allowances and pension already acquired for past services.

16. The distinction between 'removal' and 'compulsory retirement' was pointed out by this Court in *Shyam Lal v. The State of U. P.*, (1955) 1 SCR 26 = (AIR 1954 SC 369) thus:

".....There can be no doubt that removal..... generally implies that the officer is regarded as in some manner blameworthy or deficient, that is to say, that he has been guilty of some misconduct or is lacking in ability or capacity or the will to discharge his duties as he should do. The action of removal taken against him in such circumstances is thus founded and justified on some ground personal to the officer. Such grounds, therefore, involve the levelling of some imputation or charge against the officer which may conceivably be controverted or explained by the officer. There is no such element of charge or imputation in the case of compulsory retirement... compulsory retirement has no stigma or implication of misbehaviour or incapacity.

x x x x x

".....dismissal or removal is a punishment. This is imposed on an officer as a penalty. It involves loss of benefit already earned.

x x x x x

".....an officer who is compulsory retired does not lose any part of the benefit that he has earned."

17. Even if it is assumed that termination under F. R. 18 does not cause forfeiture of benefits already earned such as pension etc., then also that will not by itself, take it out of the category of 'removal' as envisaged by Art. 311 (2). The Respondent was a permanent Government servant. He had a right to his substantive rank. According to the test laid

down by this Court in Purshottam Lal Dhingra's case, 1958 SCR 858 = (AIR 1958 SC 36) the mere termination of service, without more, of such an employee would constitute his 'removal' or 'dismissal' from service, attracting Art. 311 (2). From the Constitutional standpoint, therefore, the impugned termination of service will not cease to be 'removal' from service merely because it is described or declared in the phraseology of F. R. 18 as a 'cessation' of service. The Constitutional protection guaranteed by Art. 311 (2) cannot be taken away "in this manner by a side wind."

18. The above view is fortified by the ratio of this Court's decision in Jai Shanker v. State of Rajasthan, (AIR 1966 SC 492) (supra). The appellant therein was Head Warder in the permanent service of Rajasthan State. On April 14, 1950, he proceeded on two months' leave. He later asked for extensions of the leave on medical grounds. He was due to join on August 13, 1950; his request beyond that date was refused. Thereafter he made further applications for leave, the last of them supported by a medical certificate. To his last and some of the earlier applications he received no reply, but on November 8, 1950, he received a communication from the Deputy Inspector General of Prisons that he was discharged from service from August 13, 1950. Departmental remedies having failed, he filed a suit challenging his removal from service. The trial court dismissed his suit. The first appellate court accepted his appeal. In second appeal by the State the High Court restored the trial court's order. The employee came to this Court in appeal by special leave. The State relied on Regulation 13 of the Jodhpur Service Regulations which provided:

"An individual who absents himself without permission or who remains absent without permission for one month or longer after the end of his leave should be considered to have sacrificed his appointment and may only be reinstated with the sanction of the competent authority. Note: The submission of an application for extension of leave al-

ready granted does not entitle an individual to absent himself without permission."

19. It was contended by the State that this Regulation operated automatically and no question of removal from service could arise because the servant must be considered to have sacrificed his appointment. It was maintained that under the Regulation, the employee could only be reinstated with the sanction of the competent authority.

20. As before us in the instant case, the question that fell there for consideration was, whether the Regulation was sufficient to enable the Government to remove a person from service without giving him an opportunity of showing cause against that punishment, if any. Answering this question in the negative, the Court, speaking through Hidayatullah J. (as he then was) illuminated the position thus:

"The Regulation, no doubt, speaks of reinstatement if (the employee) is to be discharged or removed from service. The question of reinstatement can only be considered if it is first considered whether the person should be removed or discharged from service. Whichever way one looks at the matter the order of the Government involves a termination of the service when the incumbent is willing to serve. The Regulation involves a punishment for overstaying one's leave and the burden is thrown on the incumbent to secure reinstatement by showing cause. It is true that the Government may visit the punishment of discharge or removal from service on a person who has absented himself by overstaying his leave, but we do not think that Government can order a person to be discharged from service without at least telling him that they propose to remove him and giving him an opportunity of showing cause why he should not be removed. If this is done the incumbent will be entitled to move against the punishment for, if his plea succeeds, he will not be removed and no question of reinstatement will arise. It may be

convenient to describe him as seeking reinstatement but this is not tantamount to saying that because the person will only be reinstated by an appropriate authority, that the removal is automatic and outside the protection of Art. 311. A removal is removal and if it is punishment for over-staying one's leave an opportunity must be given to the person against whom such an order is proposed, no matter how the Regulation describes it. To give no opportunity is to go against Art. 311 and this is what has happened here."

21. The above enunciation applies to the facts of the present case. Excepting the length of the period of absence, the basic features of Regulation 13 in Jai Shankar's case (AIR 1966 SC 492) were very similar to those of F. R. 18 now under consideration. The words "should be considered to have sacrificed his appointment" in Regulation 13, substantially correspond to the words "servant ceases to be in Government employ" in F. R. 18. Further, the import and effect of the phrase "may only be reinstated with the sanction of the competent authority" in the Regulation, is largely the same as that of the opening clause "unless the Provincial Government, in view of the special circumstances of the case shall otherwise determine" in F. R. 18. The difference between the Regulation and F. R. 18 as to the length of absence from duty prescribed as a condition precedent for the attraction of the respective provision, is a distinction without a difference in principle. The consequence of absence, though for different periods, envisaged by both the provisions, is the same viz., "sacrifice" or "cessation" of the absentee's service. The present case will thus be governed by the ratio of Jai Shankar's case (supra).

22. Recently, in Deokinandan Prasad v. State of Bihar, AIR 1971 SC 1409 = (1971 Lab IC 881) a Bench of five learned Judges of this Court held that an order of termination of service passed under Rule 76, Bihar Service Code (which is identical in all respects with F. R. 18 in the present case) on account of the servant's continuous absence for 5 years without giving an opportunity

to the servant under Art. 311 (2) would be invalid.

23. In the light of the above decisions, there can be no escape from the conclusion, that the impugned order, dated February 13, 1963 was violative of Art. 311 (2) of the Constitution and as such, illegal. It was imperatively necessary to give the servant an opportunity to show cause against the proposed action, particularly when he was persistently contending that his failure to join duty or absence was involuntary and due to circumstances beyond his control.

24. In view the above approach, it is not thought necessary to express any final opinion as to the Constitutional validity of Rule 18 of Assam Fundamental and Subsidiary Rules. Although couched in ambiguous and unhappy language, the Rule is capable of being interpreted and worked consistently with the requirement of Art. 311 (2) of the Constitution. This, however, should not lull the Government into a sense of complacency and belief that all is well with the Rule. The sooner it is suitably amended, the better will it be in the interest of all concerned.

25. For the foregoing reasons, the appeal fails and is dismissed with costs.

A. C. GUPTA, J.:— 26. I agree that the respondent should have been given an opportunity to show cause against the termination of his service by the application of Rule 18 of the Assam Fundamental and Subsidiary Rules. This rule, so far as it is relevant for the present purpose, provides that after five years' continuous absence from duty, whether with or without leave, a Government servant ceases to be in Government employ, unless in the special circumstances of a case the State Government determines otherwise. The impugned order declares that the respondent had ceased to be in Government employ with effect from September 5, 1961. One of the allegations made by the respondent is that he did not absent himself from duty, but "was not allowed to work in the office after September 13, 1956." The respondent claims, inter alia, that on

the facts of his case Fundamental Rule 18 was not attracted. It is not suggested by the appellants that the respondent should be deemed to have been absent from duty even for the period he was prevented from joining his office, assuming his allegation was true. It was necessary therefore to give him a chance to prove the facts alleged by him which made Fundamental Rule 18 inapplicable to his case. This is a requirement of natural justice, and this was not complied with. I prefer resting my decision on this ground only. On the arguments advanced before us, I find it difficult to express a definite opinion that termination of service in terms of Fundamental Rule 18 amounts to removal. That rule embodies a condition of service and I do not see how the termination of service of a Government employee in terms of a rule regulating his conditions of service is removal within the meaning of Article 311 of the Constitution unless the termination is by way of penalty. It was not claimed that termination of service under Rule 18 entails loss of benefit already accrued or any other penal consequences. I do not find it possible to assume such penal consequences to construe a notice of termination under this rule as removal.

27. In *Jai Shankar v. State of Raj.*, (1966) 1 SCR 825 = (AIR 1966 SC 492) this Court construing Regulation 13 of Jodhpur Service Regulations which is somewhat similar to and also different in some respects from Rule 18 of Assam Fundamental Rules held that the Regulation involved a punishment for overstaying one's leave, no matter how the Regulation described it, that an opportunity must therefore be given to the person against whom an order under the Regulation was proposed and that to give no opportunity was to go against Art. 311. I do not however read *Jai Shankar's* case as laying down any general principle as to how service rules are to be interpreted. Rule 76 of Bihar Service Code which is word for word almost the same as Rule 18 of Assam Fundamental Rules came to be considered by this Court in *Deokinandan Prasad v. State of Bihar*; AIR 1971 SC

1409 = (1971 Lab IC 881) in that case it appears to have been admitted on behalf of the State of Bihar that continuous absence from duty for over five years, apart from resulting in the forfeiture of the office also amounts to misconduct under Rule 46 of Bihar Pension Rules. In the case before us, we were not addressed on this aspect by counsel on either side, and in the absence of relevant material, I do not feel inclined to express any opinion on this point.

28. I agree with my learned brother that the appeal should be dismissed with costs.

Appeal dismissed.

AIR 1976 SUPREME COURT 43

(From: AIR 1969 Madh Pra 100)

V. R. KRISHNA IYER AND S. MURTAZA FAZL ALI JJ.

The Income Tax Officer, "A" Ward, Indore, Appellant v. Gwalior Rayon Silk Manufacturing (Weaving) Co. Ltd. Birlagram, Nagda, Respondent.

Civil Appeals Nos. 76 to 80 of 1971, D/- 18-9-1975.

(A) Income Tax Act (1961), Section 220 (2) & (3) — Interpretation — Extension of time granted at the request of assessee to pay arrears of tax by instalment — Offer to pay 5 per cent interest on arrears instead of statutory rate of 4 per cent also accepted — Rate of interest enhanced from 4 per cent to 6 per cent p.a. by amendment of Section 220 (2) by Finance Act, 1965 — Assessee held was liable to pay higher rate of interest (at 6 per cent) on unpaid tax arrears from date of amendment — AIR 1969 Madh Pra 100, Reversed.

The request of the assessee was accepted by the Income-tax Officer when there was no amendment in Section 220 (2) of the Act and the order passed by the Income-tax Officer must be construed as one made under Section 220 (3). (Para 4)

There was no question of an agreement or settlement because Section 220 (3) does not empower the Income-tax Officer to enter into

IS/JS/D550/75/VBB

agreement or settlement in order to bind the Revenue. (Para 5)

Although sub-section (3) is an independent provision the power under this sub-section has to be exercised subject to the terms and conditions mentioned in sub-section (2) so far as they apply to the facts mentioned in sub-section (3). Thus, if sub-section (2) of Section 220 provided that the rate of interest chargeable would be four per cent per annum any order passed under sub-section (3) could not vary that rate, and if it did, then the order to that extent would stand superseded. (Para 5)

Any order which is passed under sub-section (3) would be subject to the rate of interest mentioned in sub-section (2) and as soon as the rate mentioned in sub-section (2) is varied or enhanced by the Legislature, it would have to be read into sub-section (2) from the date of the amendment and any order passed under sub-section (3) would be subject to the rate so fixed. (Para 7)

In the instant case, the Finance Act of 1965 became effective from April 1, 1965 and the Income-tax Officer had merely given effect to the legal provisions of the Finance Act by insisting that in view of the variation in the rate of interest under sub-section (2) of Section 220 the assessee would have to pay interest at the rate of 6 per cent per annum only from April 1, 1965. There was absolutely no question of the Finance Act operating retrospectively, nor there was any question of the Finance Act taking away a vested right which had accrued to the assessee because the order of the Income-tax Officer under sub-section (3) of Section 220 did not amount to any final settlement or agreement. (Para 3)

As the order of the Income-tax Officer accepting the offer of the assessee to pay interest at the rate of 5 per cent per annum was legally invalid the only relief which the assessee could get was that it was liable to pay interest at the rate of 4 per cent and not 5 per cent per annum for the period prior to amendment. But from the date of amendment it was bound to pay interest at the

rate of 6 per cent per annum. AIR 1966 SC 1285 Rel. on., 1974 Tax LR 326 (Orissa), Approved; AIR 1969 Madh Pra 100, Reversed. (Para 9)

Cases Referred: Chronological Paras

1974 Tax LR 326 = 95 ITR 372 (Orissa) 10

AIR 1966 SC 1285 = 60 ITR 411 6

AIR 1964 SC 1903 = 53 ITR 466 2

Mr. G. C. Sharma Sr. Advocate (M/s. P. L. Juneja and S. P. Nayar Advocates with him) for Appellant; Mr. S. Chowdhury Sr. Advocate, (Mrs. Leila Seth and Mr. U. K. Khaitan Advocate for Mr. O. P. Khaitan Advocates with him), for Respondent.

Judgment of the Court was delivered by

FAZL ALI, J.— These appeals are by Income-tax Officer, 'A' Ward, Indore, against the judgment of the Madhya Pradesh High Court and involve a question of law regarding the interpretation of Section 220 sub-sections (2) and (3) of the Income-tax Act, 1961. In order to understand the scope and ambit of the question involved, it may be necessary to mention a few facts leading to these appeals.

2. The respondent firm carries on the business of manufacturing cloth. In 1947 the then Maharaja of Gwalior granted to the firm exemption from tax for a period of twelve years from the date when the firm started its factories. Under the Part B States (Taxation Concession) Order, 1950 the Commissioner of Income-tax of the region concerned approved of the exemption only to the weaving division of the respondent for ten years, but deferred decision regarding the staple fibre division until the factory started functioning in 1954. The Commissioner was approached again for granting exemption but he refused to do so. The respondent thereafter moved the High Court of Madhya Pradesh for cancelling the order of the Commissioner refusing exemption. The writ petition before the High Court succeeded and the respondent's right to exemption was upheld by the High Court. Thereafter the Revenue filed an appeal to this Court which was allowed and by its order dated April 28, 1964 (reported in (1964) 53

ITR 466 = (AIR 1964 SC 1903) this Court reversed the decision of the High Court and maintained the order of the Commissioner refusing exemption. As a result of the cancellation of the exemption, a huge amount of income-tax became due from the respondent, and the provisional assessments made for the years 1959-60 to 1964-65 reached the aggregate amount of over Rs. 6.60 crores which was payable by the firm was actually demanded from the respondent. In fact the effect of the order of this Court was that the amount exempted became payable at once and was accordingly demanded from the respondent but the respondent instead of paying the amount tried to negotiate with the Revenue for certain concessions. In this connection a series of correspondence followed between the respondent and the Income-tax Department including a letter which was written by the assessee on December 26, 1964 by which the assessee paid a sum of Rs. 3 crores and wanted the balance of Rs. 3.60 crores to be paid in instalments. The assessee further undertook to pay interest on the arrears at the rate of 5 per cent per annum, even though under sub-section (2) of Section 220 of the Income-tax Act, 1961 — hereinafter referred to as 'the Act' — he was required to pay interest at the rate of 4 per cent only. In view of these favourable terms offered by the assessee, the Income-tax Officer acceded to its request by his letter dated January 16, 1965. The assessee had agreed to pay the arrears in the following manner:

Rs. 1,00,00,000 by March 15, 1966

Rs. 1,20,00,000 by March 15, 1967

Rs. 1,34,76,000 by March 15, 1968,

Soon after the request of the assessee was granted by the Income-tax Officer, sub-section (2) of Section 220 of the the Act was amended by the Finance Act, 1965 by which the rate of interest was increased from 4% to 6% per annum. In view of this amendment, the I-T. Officer by his letter dated Jan 10, 1966 informed the assessee that on the unpaid balance of tax arrears the respondent would be liable to pay interest at the rate of 6 per cent per annum

with effect from April 1, 1965 instead of 5 per cent as agreed to by the Income-tax Officer in his previous letter. The Income-tax Officer pointed out that this course was necessitated in view of the amendment made by the Finance Act, 1965. Consequently a notice of demand under Section 156 of the Act was served on the respondent which resulted in his filing writ petitions before the High Court with the result mentioned above.

3. The main point urged in the petitions before the High Court by the respondent was that the Income-tax Officer, having acceded to the request of the assessee a settlement between the parties was arrived at to pay the balance of arrears at the rate of interest at 5 per cent per annum and it was not open to the Income-tax Officer to vary that rate to the prejudice of the assessee even in spite of a change in the rate of interest by the Finance Act, 1965, because a vested right could not be taken away by a statute which in terms did not apply retrospectively. This plea appears to have found favour with the High Court though not on the ground expressly taken by the respondent. The High Court found that in view of the notice of demand the liability of the assessee to pay the arrears arose only after the expiry of 35 days and this period had expired before the Finance Act, 1965 amending Section 220 (2) of the Act and therefore the Revenue had no jurisdiction to demand payment of the arrears at the rate of 6 per cent interest. Thus it would appear that the High Court actually decided the case on a point which was not raised by the respondent in his petition but after making out a new case made out at the time of arguments and without giving any opportunity to the Revenue to rebut the same. The High Court has written a detailed judgment regarding the time as to when the liability of the assessee where a notice of demand under Section 156 of the Act is issued would arise. It is, however, not necessary for us to consider the reasons given by the High Court in detail, because in the view that we take we find

that the basis on which the High Court has decided this case is wholly irrelevant and is not at all germane to the issue that was involved. It was not a case of a notice of demand under Section 156 of the Act simpliciter, but the admitted position was that in view of the decision of the Supreme Court the respondent was in arrears of tax and had to pay heavy amounts of over Rupees 6.6 crores. The respondent voluntarily paid the amount of Rs. 3 crores and requested the Income-tax Officer to allow it to pay the balance in instalments and persuaded the Income-tax Officer to accept the request even by agreeing to pay a higher rate of interest of 5 per cent than the rate prescribed under Section 220 (2) of the Act. The liability to pay the arrears was never disputed and the only dispute between the parties was as to rate of interest that was payable.

4. Section 220 sub-sections (2) and (3) run thus:

"(2) If the amount specified in any notice of demand under Section 156 is not paid within the period limited under sub-section (1), the assessee shall be liable to pay simple interest at four per cent per annum from the day commencing after the end of the period mentioned in sub-section (1).

Provided that, where as a result of an order under Section 154, or Section 155, or Section 250, or Section 254, or Section 260, or Section 262, or Section 264, the amount on which interest was payable under this section had been reduced, the interest shall be reduced accordingly and the excess interest paid, if any, shall be refunded

(3) Without prejudice to the provisions contained in sub-section (2), on an application made by the assessee before the expiry of the due date under sub-section (1), the Income-tax Officer may extend the time for payment or allow payment by instalments, subject to such conditions as he may think fit to impose in the circumstances of the case."

The fact that the arrears were demanded from the assessee is

not disputed as would appear from the statement made by the respondent in paragraph 2 of the writ petition filed before the High Court where it was averred thus:

"Subsequently when assessments for the assessment years 1959-60 to 1964-65 were provisionally made, a huge amount aggregating to over Rupees six and a half crores became payable and was demanded from the petitioner."

In these circumstances, therefore, the conditions precedent to the application of sub-section (2) of Section 220 of the Act were undoubtedly fulfilled, in this case. It would be seen that before the assessee entered into correspondence with the Revenue, the rate of interest prescribed under sub-section (2) of Section 220 was only four per cent and yet the assessee offered to pay a higher rate namely 5 per cent per annum if he was allowed to pay the arrears in instalments. This request of the assessee was accepted by the Income-tax Officer on January 16, 1965 when there was no amendment in the provisions contained in Section 220 (2) of the Act and the order passed by the Income-tax Officer must be construed as one made under sub-section (3) of Section 220 of the Act.

5. It was suggested before the High Court that the order of the Income-tax Officer amounted to an irrevocable agreement which could not be varied merely because the rate of interest contained in sub-section (2) of Section 220 of the Act was enhanced. Mr. S. C. Choudhry learned counsel for the respondent, however, has fairly conceded that there was no question of an agreement or settlement because Section 220 (3) does not empower the Income-tax Officer to enter into agreement or settlement in order to bind the Revenue. We find ourselves in complete agreement with this view. Section 220 (3) merely empowers the Income-tax Officer to extend the time for payment or allow payment by instalments on such conditions as he may impose. In the instant case the Income-tax Officer merely exercised his powers under sub-section (3) of Section 220 by imposing the condition that the

assessee shall be allowed to pay the arrears by instalments if he paid interest at the rate of 5 per cent per annum offered by him. What is important, however, is that sub-section (3) is not independent of sub-section (2) but is inter-connected with it. The words 'without prejudice to the provisions contained in sub-section (2)' clearly show that any order passed by the Income-tax Officer under sub-section (3) must neither be inconsistent with nor prejudicial to the provisions contained in sub-section (2). In other words, the position is that although sub-section (3) is an independent provision the power under this sub-section has to be exercised subject to the terms and conditions mentioned in sub-section (2) so far as they apply to the facts mentioned in sub-section (3). Thus if sub-section (2) of Section 220 provided that the rate of interest chargeable would be four per cent per annum any order passed under sub-section (3) could not vary that rate, and if it did, then the order to that extent would stand superseded. The argument of the assessee is that sub-sections (2) and (3) of Section 220 were independent provisions which operated in fields of their own. We are, however, unable to accept this somewhat broad proposition of law. Sub-sections (2) and (3) form part of the same section, namely Section 220, and are therefore closely allied to each other. It is no doubt true that the two sub-sections deal with separate issues but the non obstante clause of sub-section (3) clearly restricts the order passed under sub-section (3) to the conditions mentioned in sub-section (2) of Section 220 of the Act.

6. Furthermore, it is the Finance Act which fixes the rate of interest payable under sub-section (2) of Section 220 and it is common knowledge that every year the Finance Act makes important amendments in the rates payable under the various provisions of the Income-tax Act. In these circumstances, therefore, it is not within the competence of the Income-tax Officer to vary the rate of interest fixed by the Finance Act under sub-section (2) of Section 220 from time to time. We are fortified in this view by a decision of this

Court in *Esthuri Aswathaiah v. Commr. of Income-tax, Mysore*, 60 ITR 411 at p. 416 = (AIR 1966 SC 1285 at p. 1288) where this Court observed thus:

"The Income-tax Officer has no power to vary the rate on which the income of the previous year is to be assessed. The rate of tax is fixed by the Finance Act every year. By S. 3, the tax is levied at that rate for an assessment year in respect of the income of the previous year. Once the length of the previous year is fixed and the income of the previous year is determined, that income must be charged at the rate specified in the Finance Act and at no other rate."

7. As we have already pointed out sub-section (3) of Section 220 of the Act does not empower the Income-tax Officer to enter into any indefeasible settlement with the assessee or to clothe the Income-tax Officer with any such power so as to vary the statutory inhibition contained in sub-section (2). Any order which is passed under sub-section (3) would be subject to the rate of interest mentioned in sub-section (2) and as soon as the rate mentioned in sub-section (2) is varied or enhanced by the legislature it would have to be read into sub-section (2) from the date of the amendment and any order passed under sub-section (3) would be subject to the rate so fixed. In fact if this is not the position then the order passed under sub-section (3) being prejudicial to sub-section (2) becomes, illegal and invalid and the Income-tax Officer exceeds the limits of his jurisdiction in passing such an order.

8. In the instant case the Finance Act of 1965 became effective from April 1, 1965 and the Income-tax Officer in his letter dated January 10, 1966, to the assessee had merely given effect to the legal provisions of the Finance Act by insisting that in view of the variation in the rate of interest under sub-section (2) of Section 220 the assessee would have to pay interest at the rate of 6 per cent per annum only from April 1, 1965. There was absolutely no question of the Finance Act operating retrospectively, nor there was any question of the Finance Act taking

away a vested right which had accrued to the assessee because we have already held that the order of the Income-tax Officer under sub-section (3) of Section 220 does not amount to any final settlement or agreement.

9. There is yet another view of the matter. In the present case the assessee himself wanted extension of time for being allowed to pay the arrears by instalments. The assessee could be permitted to seek this indulgence under sub-section (3) of Section 220 only within the four corners of the law and not outside the same. The moment the Finance Act, 1965, came into operation and the rate of interest in sub-section (2) of Section 220 was increased from 4 per cent to 6 per cent per annum, any order passed by the Income-tax Officer would automatically operate in accordance with the Finance Act with effect from April 1, 1965. This is what has happened in the present case. Thus it is manifest that the Income-tax Officer could not have passed any order against the statutory provisions of sub-section (2) of Section 220 either with or without the consent of the assessee. Even the order of the Income-tax Officer dated January 16, 1965, accepting the offer of the assessee to pay interest at the rate of 5 per cent per annum was legally invalid, because if the rate of interest fixed by the statute was 4 per cent the parties could not be allowed to contract out of the statute. The only relief, therefore, which the assessee could get is that it was liable to pay interest at the rate of 4 per cent and not 5 per cent per annum for the period January to March 1965. But from April 1, 1965 it was bound to pay interest at the rate of 6 per cent per annum as found by the Income-tax Officer.

10. Reliance was placed by Mr. G. C. Sharma appearing for the Revenue on a decision of the Orissa High Court in *Biswanath Ghosh v. Income-tax Officer, Ward, B, 95 ITR 372 at p. 374 = (1974 Tax LR 326 at p. 327) (Orissa)* where a Division Bench of that Court observed as follows:

"As we find, the Income-tax Officer has charged interest at 6 per

cent, until the provision was amended to enhance the rate of interest at 9 per cent. In fact in the counter affidavit given by the Income-tax Officer in O. J. C. No. 195 of 1972 that position has been clarified. Mr. Pasayat for the petitioner claims that the rate of interest must be only at 6 per cent, in view of the fact that default in this case had occurred prior to the amendment. It is only here that he relies upon the decision of the Madhya Pradesh High Court in *Gwalior Rayon Silk Manufacturing (Weaving) Co. v. Income-tax Officer (1969) 73 ITR 95**. That was a case in respect of penalty under Section 220 (2) of the Act and the court took the view that the rate of interest as provided on the date when default occurred would apply to the facts of the case. We do not agree with the view expressed in the said decision. It is true that Central Act 27 of 1967 has no retrospective effect, but in respect of continuing default after the amendment, in our view, the rate of interest as provided thereunder would apply."

The Orissa High Court expressly dissented from the view taken by the Madhya Pradesh High Court in the present judgment under appeal and we find ourselves in complete agreement with the view taken by the Orissa High Court.

11. We have already pointed out, the Madhya Pradesh High Court did not at all go into the question which really arose in this case with respect to the payment of interest at the rate of 6 per cent, in accordance with the Finance Act, 1965.

12. For these reasons, therefore, the appeals are allowed and the order of the High Court is set aside with slight modification, namely, that the assessee shall pay interest on the entire amount of arrears at the rate of 4 per cent, per annum only during the period January to March 1965. So far as rest of the period is concerned, the order of the Income-tax Officer directing the assessee to pay interest at the rate of 6 per cent, per annum is restored. In view of the peculiar circumstances of the

*Reported in AIR 1969 Madh Pra 100

case, however, we leave the parties to bear their own costs throughout.

Appeals allowed.

AIR 1976 SUPREME COURT 19

(From Punjab and Haryana: 1956
Cur LJ 767)*

V. R. KRISHNA IYER AND S. MUR-
TAZA FAZL ALI JJ.

Rameshwar and others, Appellants
v. Jot Ram and others, Respondents.

Civil Appeals Nos. 817 to 819 of
1968 and 1456 to 1458 of 1969, D/-
18-9-1975.

(A) Punjab Security of Land
Tenures Act (10 of 1953), Section 18
— Purchase of proprietary right by
tenant from big landowner — Right
vested in tenant by virtue of Section
18 (4) not divested by subsequent
death of Landowner and devolution
of his rights on his heirs.

Where each of the tenants under
a large landowner applied for pur-
chase of ownership under Section 18
(1) of the Act and the primary au-
thority found them eligible, fixed the
price and instalments of payment and
they duly deposited the first instal-
ment as required by Section 18 (4),
the tenants shall be deemed to have
become the owners of the land by
virtue of Cl. (b) of Section 18 (4), and
the subsequent death of the land-
owner during the pendency of appeal
by him against the order for pur-
chase and the devolution of the right
of the landowner on his heirs will
not affect the rights of ownership al-
ready acquired by the tenants under
Section 18 (4). 1966 Cur LJ 767, Af-
firmed. (Paras 5, 10)

The right of the tenants is fixed
under Section 18 (1) and (4) and hat
cannot be uprooted by supervening
circumstances. To deny relief to the
tenants on the ground that heirs of
the deceased would become small
landowners on division would be to

*(Civil Writ Nos. 2205, 2206 and 2215
of 1965, D/- 19-5-1966 reported in
1966 Cur LJ 767 and Civil R-vn.
Nos. 771 to 773 of 1967, D/- 7-11-
1968—Punj.)

defeat the scheme and object of the
statute intended for agrarian reform.
(Para 11)

(B) Civil P. C. (1908), Order 7,
Rule 7 — Right to relief — To be de-
termined as on date of institution of
proceedings — Court's procedural de-
lays cannot affect rights crystallised in
initial cause of action — Power of
Court to take note of subsequent
events.

It is basic to our processual juris-
prudence that the right to relief must
be judged to exist as on the date a suit-
or institutes the legal proceedings.
This is an emphatic statement that
the right of a party is determined by
the facts as they exist on the date
the action is instituted. Granting the
presence of such facts, then he is en-
titled to its enforcement. Later de-
velopments cannot defeat his right.
The Court's procedural delays cannot
deprive him of legal justice or rights
crystallised in the initial cause of ac-
tion (Para 8)

Courts can, however, take note
of subsequent events and mould the
relief accordingly, but this can be
done only in exceptional circumstan-
ces. Rights vested by statute cannot
be divested by this equitable doc-
trine. AIR 1927 PC 252 and AIR 1966
Punj 374 (FB), Approved. Case law
discussed. (Para 9)

(C) Constitution of India Art. 136
— Appeal by special leave — New
Point—Point of law demanding in-
quiry into facts not raised in Courts
below will not be allowed. (Para 13)

Cases Referred: Chronological Paras

AIR 1975 SC 1409 = 1975 UJ (SC)
327 8, 9

(1971) 1 SCC 34 = (1971) 1 SCJ 405
8

AIR 1966 Punj 374 = ILR (1966) 2
Punj 125 (FB) 9

AIR 1941 FC 5 = 1940 FCR 84 9
(1934) 294 US 600 = 79 Law Ed 1082
9

AIR 1927 PC 252 = 54 Mad LJ 88 9
(1885) 16 QBD 178 9

M/s. Rameshwar Dial and A. D.
Mathur, Advocates, for Appellants (in
all the Appeals); Mr. K. L. Gosain, Sr.
Advocate (Mr. E. C. Aggarwala, Ad-
vocate, with him), for Respondent
No. 1 (in C. A. Nos. 817 of 1968,

1456-1457 of 1969) Respondents Nos. 1 and 3 (in Civil Appeals Nos. 818 of 1968 and 1458 of 1969) and Respondent No. 1 (in Civil Appeal No. 819 of 1968)

Judgment of the Court was delivered by

KRISHNA IYER, J.— These two batches of appeals stem from the same judgment but raise two different questions of law under the Punjab Security of Land Tenures Act, 1953 (Punjab Act X of 1953) (for short, the Act), the forensic focus being turned on two different facets of Section 18 of the Act. The first set of appeals relates to the right of the tenants to purchase the ownership of the common landlord, Teja, while the second set of appeals turns on principles of compensation awardable to the landlord pursuant to the vesting of ownership in the tenant.

2. Teja, the landlord, was admittedly a large land-owner under whom there were three tenants. Each of them applied for purchase of ownership under Section 18 (1) of the Act. The Assistant Collector, who is the primary authority, found them eligible, fixed the price and the instalments of payment, and they duly deposited the first instalment. The statutory consequence of such deposit was that title to the property vested in the tenants on that date. All these events took place in the early '60s. Had the scheme of agrarian reform in the Punjab been simple and had the virtue of early finality so necessary in such a measure been present, the law would have operated with speed and changed the rural landscape radically, instead of provoking a heavy run of never-ending litigation. Section 24 of the Act has had this unwitting effect. Too many tiers of quasi-judicial review, too long at each deck and in a system which is slow-moving, tempt disappointed parties to litigate to the disastrous end. Such a statutory creation, calculated to give ultimate justice, is like a Frankenstein's monster, the very prolonged over-judicialised litigative engine, bleeding justice to death. A legislature, with care and concern for the agrarian community, should be vigilant enough to design a

quick and competent legal engineering project — absent by contrast in most land-reform laws blessing the rural poor. And it is noteworthy that legal battles are fought largely before Collectors, Commissioners and Financial Commissioners and then the writ chapter begins. This litigation, it is worthy of note, began before the Collector in 1961/62. A fundamental assessment of the comparative economic and social costs of multi-decked determination procedure would have induced the legislature to reduce institutional levels of adjudication. This is by the way, although we strongly recommend that the legislatures do pay serious attention to producing an early termination to land-reform re-ordering by a mammoth and immediate decision-making instrumentality.

3. Shortly put, and shorn of details, the simple contention of the appellants in these appeals is that although their propositus Teja was a large landowner, on his death his heirs, the present appellants, became entitled to shares and, in this process of fragmentation, they became 'small landowners' within the meaning of S. 2(2) of the Act. This event occurred after the tenants had been found entitled to purchase from the landowner the lands held by them and after they had deposited the first instalment as set down in S. 18(4). The plea is that an appeal is a continuation of the original proceeding and, therefore, if there is a change of circumstances in the landlord's ownership during the pendency of the appeal, resulting in his legal representatives becoming 'small landowners', the tenants will be disentitled to purchase the land. Of course, a tenant of a 'small landowner' has no right to purchase the land. But, in the present case, the landowner admittedly was a large landowner at the time the tenants applied for purchase. Section 18 (1) reads, dropping the irrelevant portions, thus:

"18. Right of certain tenants to purchase land:—

(1) Notwithstanding anything to the contrary contained in any law, use or contract, a tenant of a landowner other than a small landowner

(i).....

(ii).....

(iii).....

shall be entitled to purchase from the land-owner the land so held by him..... in the case of a tenant falling within cl. (i) or cl. (ii) at any time, and in the case of a tenant falling within cl. (iii) within a period of one year from the date of commencement of this Act."

It is common case that the application has been made in time and that at the time such application was made, the tenants were competent to buy the land. Section 18 (4) (a) and (b) may, at this stage, be read:

"18 (4) (a) The tenant shall be competent to pay the purchase price either in a lump sum or in six-monthly instalments not exceeding ten in the manner prescribed.

(b) On the purchase price or the first instalment thereof, as the case may be, being deposited, the tenant shall be deemed to have become the owner of the land, and the Assistant Collector shall, where the tenant is not already in possession, and subject to the provisions of the Punjab Tenancy Act (XVI of 1887), put him in possession thereof."

It is absolutely plain that on the deposit of the first instalment of the purchase price, the tenant shall be deemed to have become the owner of the land. In the present case, all these happenings had resulted in the respondents becoming the owners.

4. The death of the large landowner occurred pending the appeal. The argument of counsel for the appellant, which found favour with the Financial Commissioner, but failed before the High Court, is that an appeal being a re-hearing of the suit, relief must be given to the legal representatives of the original landowner who, by devolution, became small landholders. If this contention be sound, the tenants would have to be denied relief since they would be holding under small landowners.

5. The solitary point which thus falls for determination is as to whether the subsequent event of the landowner's death at the appellate stage unsettles the right acquired by

the tenants or whether the tribunal must uphold rights which have crystallized as on the date the applications were made and, in any event, the deposits of the first instalment were made by each of the tenants. We see no difficulty in answering this question against the appellant, but, in view of the persistent submission based upon a few rulings of this Court, the Federal Court and the High Courts, made by counsel for the appellant, we may as well consider the question of law, adopting an interpretative attitude which will further and not frustrate the legislative will in case there are alternative choices for the Court. Of course, a construction which will promote predictability of results, maintenance of reasonable orderliness, simplification of the judicial task, advancement by the Court of the purpose of the legislation and the judicial preference for what it regards as the sounder rule of law as between competing ones, must find favour with us. A plain reading of Section 18, without reference to consideration of subsequent events at the appellate level, yields the easy and only conclusion that the rights of parties are determined on the date they come to Court and what is an insurmountable obstacle to any other construction is that once the deposit is made the title to the land vests in the tenant. Agrarian reform law affects a considerable number of people and to keep rights uncertain over a long stretch of time till appeals and reviews and revisions and other processes are exhausted, is to inject unpredictability of results, for it is quite on the cards that a landlord may die in the long course of litigation, or other events may happen at later stages beyond the trial Court. Can rights of parties fluctuate with such uncertain contingencies? If so, stabilization of land-ownerships, so vital to the new pattern of agrarian relations, will be postponed for a long time. Is not the judicial task simplified by adopting the golden rule that the rights of parties must be determined when they seek justice and not when the last Court has had its last say, long years after the litigation was initiated? A system of

orderliness about rights in land will result from this approach. More than all, the sounder rule of law as between rival claims to consideration of, or indifference to, subsequent events is surely that which excludes the later event factually or legally. Such a reading of the statutory scheme rhymes well with rapid agrarian reform contemplated by the framers.

6. The philosophy of the approach which commends itself to us is that a litigant who seeks justice in a perfect legal system gets it when he asks for it. But because human institutions of legal justice function slowly, and in quest of perfection, appeals and reviews at higher levels are provided for, the end product comes considerably late. But these higher Courts pronounce upon the rights of parties as the facts stood when the first Court was first approached. The delay of years flows from the infirmity of the judicial institution and this protraction of the Court machinery shall prejudice no one. *Actus curiae neminem gravabit**. Precedential support invoked by the appellant's counsel also lets him down provided we scan the fact situation in each of those cases and the legal propositions therein laid down.

7. The realism of our processual justice bends our jurisprudence to mould, negate or regulate reliefs in the light of exceptional developments having a material and equitable import, occurring during the pendency of the litigation so that the Court may not stultify itself by granting what has become meaningless or does not, by a myopic view, miss decisive alterations in fact-situations or legal positions and drive parties to fresh litigation whereas relief can be given right here. The broad principle, so stated, strikes a chord of sympathy in a court of good conscience. But a seeming virtue may prove a treacherous vice unless judicial perspicacity, founded on well-grounded rules, studies the plan of the statute, its provisions regarding subsequent changes and the possible

*"An act of the Court shall prejudice no one" — Latin for lawyers — Sweet & Maxwell.

damage to the social programme of the measure if later events are allowed to unsettle speedy accomplishment of a re-structuring of the land system which is the soul of the whole enactment. No processual equity can be permitted to sabotage a cherished reform, nor individual hardship thwart social justice. This wider perspective explains the rulings cited on both sides and the law of subsequent events on pending actions.

8. In *P. Venkateswarlu v. Motor & General Traders*, AIR 1975 SC 1409, 1410 this Court dealt with the adjectival activism relating to post-institution circumstances. Two propositions were laid down. Firstly, it was held that 'it is basic to our processual jurisprudence that the right to relief must be judged to exist as on the date a suitor institutes the legal proceeding.' This is an emphatic statement that the right of a party is determined by the facts as they exist on the date the action is instituted. Granting the presence of such facts, then he is entitled to its enforcement. Later developments cannot defeat his right because, as explained earlier, had the court found his facts to be true the day he sued he would have got his decree. The Court's procedural delays cannot deprive him of legal justice or rights crystallised in the initial cause of action. This position finds support in *Bhajan Lal v. State of Punjab*, (1971) 1 SCC 34.

9. The impact of subsequent happenings may now be spelt out. First, its bearing on the right of action, second, on the nature of the relief and third, on its impotence to create or destroy substantive rights. Where the nature of the relief, as originally sought, has become obsolete or unserviceable or a new form of relief will be more efficacious on account of developments subsequent to the suit or even during the appellate stage, it is but fair that the relief is moulded, varied or reshaped in the light of updated facts. *Patterson v. State of Alabama*, (1934) 294 U.S. 600, 607, illustrates this position. It is important that the party claiming the relief or change of relief must have the same right from which ei-

ther the first or the modified remedy may flow. Subsequent events in the course of the case cannot be constitutive of substantive rights enforceable in that very litigation except in a narrow category (later spelt out) but may influence the equitable jurisdiction to mould reliefs. Conversely, where rights have already vested in a party, they cannot be nullified or negated by subsequent events save where there is a change in the law and it is made applicable at any stage. *Lachmeshwar Prasad v. Keshwar Lal*, 1940 FCR 84 = AIR 1941 FC 5 falls in this category. Courts of justice may, when the compelling equities of a case oblige them, shape reliefs — cannot deny rights — to make them justly relevant in the updated circumstances. Where the relief is discretionary, courts may exercise this jurisdiction to avoid injustice. Likewise, where the right to the remedy depends, under the statute itself, on the presence or absence of certain basic facts at the time the relief is to be ultimately granted, the Court, even in appeal, can take note of such supervening facts with fundamental impact. *Venkateswarlu*, AIR 1975 SC 1409 read in its statutory setting, falls in this category. Where a cause of action is deficient but later events have made up the deficiency the Court may, in order to avoid multiplicity of litigation, permit amendment and continue the proceeding, provided no prejudice is caused to the other side. All these are done only in exceptional situations and just cannot be done if the statute, on which the legal proceeding is based, inhibits, by its scheme or otherwise, such change in cause of action or relief. The primary concern of the court is to implement the justice of the legislation. Rights vested by virtue of a statute cannot be divested by this equitable doctrine (See *Chokalingam Chetty*: 54 Mad LJ 83 = (AIR 1927 PC 252)). The law stated in *Ramji Lal v. State of Punjab*, ILR (1966) 2 Punj 125 = (AIR 1966 Punj 374 FB) is sound:

"Courts do very often take notice of events that happen subsequent to the filing of suits and at times even those that have occurred during

the appellate stage and permit pleadings to be amended for including a prayer for relief on the basis of such events but this is ordinarily done to avoid multiplicity of proceedings or when the original relief claimed has, by reason of change in the circumstances, become inappropriate and not when the plaintiff's suit would be wholly displaced by the proposed amendment (see *Steward v. The North Metropolitan Tramways Company*, (1885) 16 QBD 178) and a fresh suit by him would be so barred by limitation."

One may as well add that while taking cautious judicial cognisance of 'post-natal' events, even for the limited and exceptional purposes explained earlier, no court will countenance a party altering, by his own manipulation, a change in situation and plead for relief on the altered basis.

10. The apparently divergent strains of the several decisions has persuaded us to dilate on this branch of processual jurisprudence. Let us now apply the law to the circumstances here. The legislation we are interpreting relates to agrarian reform, regarded as the vital base to build a new social order. The Constitution has stressed not merely the supreme significance of this rural transformation but the fleet-footed implementation thereof, even going to the extreme extent of walling off litigative assaults on constitutionality by creation of the Ninth Schedule and the like. Moreover, the Act itself takes care to prevent future accumulation of lands or motivated slimming process by transfers, interfering with the scheme of surplus pool and settlement of ejected tenants and the like. Peasant proprietorship is a cherished goal of the statute and so it provides that even on the payment of the first instalment of the price the tenant gets the title of the landlord. To hold that, if the landlord dies at some distant date after the title has vested in the tenant, the statutory process would be reversed if by such death, his many children, on division, will be converted into small landholders, is to upset the day of reckoning visualized by the Act and to make the vesting provision 'a teasing illusion', a formal Festschrift to agrarian re-

form, not a flaming programme of 'now and here'. These surrounding facts drive home the need not to allow futurism, in a dawdling litigative scene, to foul the quick legislative goals.

11. Moreover, the right of the respondents is fixed under Section 18 (1) and (4) and that cannot be uprooted by supervening circumstances. We are not called upon to mould the relief but to reject the right. We are not asked to avoid multiplicity of suits but to non-suit and thus stultify the agrarian law. We are not required to permit the appellate authority to re-assess the facts as they stood when the action was brought (that is part of appellate power) but to project the landholder's subsequent death backwards to refuse a right already acquired. A flash-back camera in this context, frustrates forensic objectives. Individual misfortune may be real but larger social changes will claim martyrs in law and in fact. How can we miss the sublime impact of the Passion of Christ for the Redemption of Mankind? The great fact is that, if uniformly, relentlessly and swiftly enforced, neither landlord nor tenant can keep more than the 'permissible area'. That is the equity and equality of this agrarian law.

12. We see no merit in the appeals and dismiss them, leaving parties to bear their respective costs throughout.

13. These appeals raise an interesting question of law bearing on compensation payable to landholders whose lands are vested in tenants and this turns on the connotation of 'similar land' in Section 18 (2) of the Act in the context of averaging the price for ten years before the filing of the application for purchase. The primary fact which projects this point of law is as to whether the purchased land is irrigated or non-irrigated for purposes of valuation. We are relieved from the need to investigate the implications of the issue because the factual foundation about the nature of the land in question was never put in issue nor considered in the High Court. Thus the appellants have missed the bus and we

cannot hear them on a question raised de novo and demanding enquiry into facts not raised at the next-below level.

14. We dismiss these appeals, without costs.

Appeals dismissed.

AIR 1976 SUPREME COURT 54

(From: Rajasthan)*

A. ALAGIRISWAMI, P. K. GOSWAMI
AND N. L. UNTWALIA JJ.

M/s. Ramlal & Sons, Appellant v.
The State of Rajasthan, Respondent.

Civil Appeal No. 1562 of 1970,
D/- 9-10-1975.

(A) Mines and Minerals (Regulation and Development) Act (1948), S. 5 — Mineral Concession Rules (1949), R. 41 — Grant of mining lease by State Government on realisation of premium without prior approval of Central Government under R. 41 (3) is illegal — Lessee is entitled to a refund of the amount illegally realised. Civil Spl. Appeal No. 172 of 1970, D/- 29-7-1970 (Raj) partly Reversed.

Rule 41 of the Mineral Concession Rules, 1949, provides for conditions of lease but the rules nowhere provided for the realisation of premium for the lease. Under R. 41 (3) a mining lease may contain any other special conditions subject to the prior approval of the Central Government. On granting mining leases under S. 5 of the Act the State Government is under legal obligation to act in accordance with the definite statutory rules and cannot exercise a power unknown to the rules. Therefore, the grant of a mining lease by the State Government on realisation of a premium without the prior approval of the Central Government is illegal and the lessee is entitled to a refund of the amount. Civil Spl. Appeal No. 172 of 1970, D/- 29-7-1970 (Raj) Partly Reversed. (Paras 11, 12)

Mr. D. V. Patel Sr. Advocate,
(Mr. S. M. Jain, Advocate with him),
for Appellant; Miss Maya Rao, Advocate,
for Respondent.

*(Civil Spl. Appeal No. 172 of 1970,
D/- 29-7-1970—Raj.)

JS/KS/D876/75/KSB

Judgment of the Court was delivered by

GOSWAMI, J.— This appeal by special leave is against the judgment of the Division Bench of the Rajasthan High Court by which an appeal against the judgment of a single Bench was summarily rejected.

2. In answer to a notification of March 29, 1950, issued by the State of Rajasthan inviting tenders for mining rights for mica on certain terms and conditions, the appellant submitted its tender which was accepted on December 30, 1950 and a notification in that behalf was made by the State Government on Feb. 6, 1951, granting the mining lease for mica for block No. 6 (except sidries mine) in Bhilwara District on payment of the tendered amount of Rs. 1,55,000/-. The lease was for a period of 20 years with an option of renewal of the lease for another 20 years as per conditions prescribed in the Mineral Concession Rules, 1949 (briefly the Rules). A premium of Rs. 1,55,000/- was deposited by the appellant and possession was also handed over to it on March 15, 1951. The area originally was 6021 acres but later on a dam, by the name of Meza Dam, was constructed over some parts of the original area and the appellant was left to work on 2924 acres. It is stated that the appellant spent Rs. 5,65,000/- between 1951 and 1955. It is also common case that no lease was executed within six months of the acceptance of the tender as required. On June 19, 1955, the Director of Mines and Geology, Rajasthan, sent a notice to the appellant intimating that the orders sanctioning the lease stood revoked with effect from June 6, 1955. The appellant was asked by this notice to show cause why further action to take immediate possession of the area should not be taken. It may be noted that in this notice exception was taken for the appellant not executing the lease within the requisite period of six months which, it was mentioned, expired on August 27, 1953. The appellant submitted a review application against the order of the State Government cancelling the mine lease on February 23, 1957. It appears, meanwhile, the State Government proposed to grant a lease to the ap-

pellant and the latter did not press the review application. Thereafter some correspondence took place between the appellant and the State Government regarding execution of the lease, its terms and conditions and the like. A reference was also made by the appellant to the Central Government on March 12, 1963, to direct the State Government to sanction the lease. On May 15, 1965, the Mining Engineer, Rajasthan, sent a notice to the appellant to deposit the dead rent amounting to Rs. 1,27,616.36 for the period 1-4-1960 to 14-9-1965 on pain of legal action. The appellant preferred a revision application to the Government of India against this order. The Government of India by its order of March 19, 1966, set aside the order of May 15, 1965, demanding Rs. 1,27,616.36 as dead rent for block No. 6. This order is significant in more than one way. It is clearly stated in the order that the conditions under the Mineral Concession Rules 1949 under which mining or prospecting operation is allowed to be undertaken do not provide for payment of premium by the lessee except with the prior approval of the Central Government. It was also pointed out in the order that no such approval was secured by the State Government before accepting the premium of Rs. 1,55,000/- from the appellant. It was, therefore, pointed out that the acceptance of the premium was illegal. It was further held that the State Government was entitled to charge only royalty in the present case and it could charge dead rent or royalty, whichever was higher, only after execution of a formal lease.

3. Then came the State Government's impugned order of November 9, 1967, addressed to the appellant. There was reference in the above order to the fact that the appellant—

"approached the Central Government in revision. The Central Government have held that the permissive permission of this block to you is not even as a licensee under the Mineral Concession Rules 1949. Government, therefore, do not want that the possession of this area should remain with you any longer. Government is, there-

fore, pleased to order that you should vacate the aforesaid block No. 6 within a month from the date of the receipt of this note, failing which such action shall be taken as may be deemed proper."

It may be mentioned that the Central Government in the order referred to above in the extract also observed "this licence was not within the meaning of Mineral Concession Rules 1949 but was governed by the General law, e.g. the Easements Act". (See Central Government's letter dated March 19, 1966.)

4. The appellant after receipt of the order of November 9, 1967 instituted an application under Art. 226 of the Constitution in the High Court of Rajasthan (being Writ Petition No. 691 of 1967) praying for a writ of certiorari to quash the aforesaid order, to restrain the State from revoking the licence and dispossessing the appellant from the mining area absolutely or in the alternative, till compensation along with refund of the premium of Rs. 1,55,000/- and the dead rent realised in excess of royalty were paid by the State. As a last alternative it prayed for a direction to the State to grant the lease of the balance area of 3628 acres or such other area to which the appellant was entitled in law.

5. The learned single Judge of the High Court dismissed the writ application as infructuous in view of the offer made by the State in its application of April 20, 1970, repeated through the learned Advocate General. The learned Advocate General submitted before the High Court that the State Government "was still prepared to pay them compensation in order to revoke the licence granted in favour of the petitioner".

6. In the aforesaid application of April 20, 1970, the State Government was prepared to pay compensation to the appellant at the rate of Rs. 7750/- per annum for the unexpired period of 20 years ending on March 14, 1971.

7. The learned single Judge while dismissing the application observed that if the petitioner thought that the compensation was inadequate he could agitate the matter in court.

8. The appellant's appeal thereafter to the Division Bench was summarily dismissed and leave to appeal to this Court was also rejected. Hence this appeal by special leave.

9. We have heard the learned counsel for both the parties.

10. In view of the fact that the period of the purported lease already expired on March 14, 1971, there is no question of a writ for granting the lease. Since a proper lease had not been executed, for whatever reasons, there was no question also of exercise of an option of renewal of lease. The only question that survives is whether the State Government could realise premium in a lawful manner under the Mineral Concession Rules.

11. We do not find any provision in the Rules authorising realisation of premium as done in this case. Section 41 of the Rules of 1949 applicable at the relevant time provides for conditions of the lease. These conditions specifically mention royalty, dead rent and surface rent, but not premium. Again proviso to Section 41 (1) (iii) states that the lessee shall be liable to pay the dead rent or royalty in respect of each mineral whichever be higher in amount, but not both. Under sub-section (3) of Section 41, a mining lease may contain any other special conditions, subject to the prior approval of the Central Government. The Central Government is, therefore, right in holding that the realisation of the premium of Rs. 1,55,000/- was illegal particularly because there was no prior approval under sub-section (3) of Section 41 of the Rules.

12. When in this case grant of the mining lease was envisaged under definite statutory rules made in exercise of power conferred under Section 5 of the Mines & Minerals (Regulation and Development) Act, 1948, the State Government was under legal obligation to act in accordance with these rules. It could not exercise a power in the matter of grant of mining lease unknown to these Rules. The State Government could not impose terms and conditions according to its own whims ignoring or disregarding the statutory rules which are binding on it. The appellant is, therefore, entitled to a refund

of Rs. 1,21,930.71 which is due to the appellant out of the illegally realised premium of Rs. 1,55,000/- allowing the sum of Rs. 33,069.29 already received by the appellant from the Government on account of compensation.

13. The appellant's counsel made a statement in court that since the appellant had already vacated the area it will not of its own make any further claim for compensation or under any other heads but reserves its right to raise all possible defences against any action that may be instituted by the State against the appellant in the matter of the grant of mining for mica in the area. Subject to the reservation of the above right, the appeal is partly allowed to the extent that the State Government is directed to refund Rs. 1,21,930.71 as mentioned above.

14. The appellant is entitled to its costs in this Court.

Appeal partly allowed.

AIR 1976 SUPREME COURT 57

(From: Punjab and Haryana)*

A. ALAGIRISWAMI, P. K. GO-SWAMI AND N. L. UNTWALIA JJ.

M/s. New Samundri Transport Co. (P) Ltd., Appellant v. The State of Punjab and others, Respondents.

Civil Appeal No. 879 of 1975, D/- 9-10-1975.

(A) Motor Vehicles Act (1939), S. 60 — Suspension or cancellation of Stage Carriage permits — Show cause notice — Person holding 33 permits — Action to suspend or cancel all permits on basis of general allegations without particularising, breach of conditions of each permit — Procedure is violative of principles of natural justice. C. W. No. 4346 of 1974, D/- 4-11-1974 (Punj & Har), Reversed.

Sub-section (3) of Section 60 provides for composition of breach of certain conditions. Section 59 (3) contains the conditions laid down for every permit. The target of Section 60 is the permit that has been issued

*(Civil Writ No. 4346 of 1974, D/- 4-11-1974—Punj. & Har.)

JS/KS/D875/75/MVJ

breach of conditions of which is the subject-matter of section under it except in cases covered by Section 60 (1) (d) and (f). It is true that for each permit the permit-holder is responsible and he is the person who has to submit the explanation. The proposed penal action has to be particularised with reference to each permit detailing the particular conditions for breach of which action is sought to be taken in connection with a particular permit. This is the minimum requirement of Section 60. (Para 5)

What is important in a departmental action of this type for violation of conditions of permit is that it must relate to the particular permits appertaining to concerned vehicles. It is of utmost importance that charges are made with reference to each permit in clear terms in order to enable the permit-holder to furnish his explanation. Proviso to Section 60 (1) which requires mandatory compliance is nothing short of a reasonable opportunity to the permit-holder to furnish his explanation. Unless, therefore, the breaches of conditions or other allegations are particularised with reference to each permit in the show cause notice, such notice is clearly invalid and no action can be taken under such a notice. (Para 7)

Held, that in the case in question it was only a bald notice making no reference to any particular permit for cancellation or suspension of which action had been taken. It was as if all the 33 permits were going to be suspended or cancelled. It was clear that after receipt of the various reports the Commissioner did not apply his mind to scrutinise the same for the purpose of taking appropriate legal action against any specific permit under Section 60 of the Act. On the other hand taking the reports as they were, which may as well have been general allegations against the permit-holder, immediately action was taken for suspension or cancellation of all the permits. Such a procedure was violative of the principles of natural justice. C. W. No. 4346 of 1974, D/- 4-11-1974 (Punj & Har), Reversed. (Para 6)

Mr. Hardyal Hardy, Sr. Advocate, (M/s. S. K. Mehta, K. B. Nagaraja, P. N. Puri, M. Qamaruddin and R. K.

Khanna, Advocates with him), for Appellant; Mr. O. P. Sharma, Advocate, (for No. 1), Mr. Luxmi Grover and Mr. S. S. Jauhar, Advocates (for No. 3), for Respondents.

Judgment of the Court was delivered by

GOSWAMI, J.:— This appeal by special leave is against the judgment of the Punjab and Haryana High Court summarily dismissing a writ application under Article 226 of the Constitution against the order of the State Transport Appellate Tribunal, Punjab.

2. The appellant is a private limited company carrying on transport business over a long period. The company was granted 33 stage carriage permits for various routes. It had a sanctioned fleet of 35 transport vehicles. On receipt of several reports and complaints from various sources, the State Transport Commissioner issued the following show cause notice to the appellant on March 28, 1974:—

"Regd. A. D. from:

S. Balinder Singh, IAS.,
State Transport Commissioner,
Punjab.

To

The Managing Director, New
Samundri Transport Company
(P) Ltd.,
Ferozepur.

No. 455/JFI (2) dated Chandigarh the 28th March, 1974. Subject: Departmental Action.
Memorandum

A list of prosecutions launched against your company by the operational staff is forwarded herewith. The offences committed are of a very serious nature. Your company is also short of fleet of fit vehicles. A copy of the joint report of the Secretary, Regional Transport Authority, Jullundur and Motor Vehicles Inspector, Jullundur relating to the condition of buses of your company is also enclosed. Due to the shortage of fit vehicles against the sanctioned fleet of 35 buses, number of services are being missed whereby the public is being put to a great inconvenience. You are, therefore, required to show cause as to why departmental action by way of suspension/cancellation of stage car-

riage permits under S. 60 of the Motor Vehicles Act, 1939, should not be taken against your company. Reply should be sent to this office within 10 days of the receipt of this notice failing which it will be presumed that you have nothing to say.

State Transport Commissioner
Punjab".

3. The appellant says that an explanation was posted to the Commissioner within time under certificate of posting. According to the Commissioner it was not received. The District Judge, who is the State Transport Appellate Tribunal, observed in his order that—

"some mischief appears to have been committed in the office of the respondent with regard to the reply which was sent under postal certificate".

4. We will, however, proceed on the assumption that no explanation was sent by the appellant to the Commissioner. Even so a manifestly wrong procedure in a departmental action of this nature is obvious on the face of the above notice resulting in violation of the principles of natural justice.

5. The notice was issued under Section 60 of the Motor Vehicles Act, 1939 (briefly the Act) which may be quoted:

60 (1). "The transport authority which granted a permit may cancel the permit or may suspend it for such period as it thinks fit:

(a) on the breach of any condition specified in sub-section (3) of Section 59, or of any condition contained in the permit, or

(b) if the holder of the permit uses or causes or allows a vehicle to be used in any manner not authorised by the permit, or

(c) if the holder of the permit ceases to own the vehicle or vehicles covered by the permit, or

(d) if the holder of the permit has obtained the permit by fraud or misrepresentation, or

(e) if the holder of the permit, not being a private carrier's permit, fails without reasonable cause to use the vehicle or vehicles for the purposes for which the permit was granted; or

(f) if the holder of the permit acquires the citizenship of any foreign country:

Provided that no permit shall be cancelled unless an opportunity has been given to the holder of the permit to furnish his explanation".

Sub-section (3) of Section 60 provides for composition of breach of certain conditions. Section 59(3) contains the conditions laid down for every permit. The target of Section 60 is the permit that has been issued breach of conditions of which is the subject-matter of action under it except in cases covered by Section 60(1) (d) and (f). It is true that for each permit the permit-holder is responsible and he is the person who has to submit the explanation. The proposed penal action has to be particularised with reference to each permit detailing the particular conditions for breach of which action is sought to be taken in connection with a particular permit. This is the minimum requirement of S. 60.

6. What we find in this case is a kind of bald notice making no reference to any particular permit for cancellation or suspension of which action has been taken. It is as if all the 33 permits were going to be suspended or cancelled. It is clear that after receipt of the various reports the Commissioner did not apply his mind to scrutinise the same for the purpose of taking appropriate legal action against any specific permit under Section 60 of the Act. On the other hand taking the reports as they were, which may as well have been general allegations against the permit-holder, immediately action was taken for suspension or cancellation of all the permits. From the list of prosecutions we find only 15 vehicles are involved and most of the cases are of overloading. Some of the cases relate to non-accompaniment with the vehicles of registration certificates and other documents. In some cases, against certain vehicles, the time schedule was not kept and certain trips were missed. We are not at all on the merits of these prosecutions.

7. What is important in a departmental action of this type for violation of conditions of permit is

that it must relate to the particular permits appertaining to concerned vehicles. It is of utmost importance that charges are made with reference to each permit in clear terms in order to enable the permit-holder to furnish his explanation. Proviso to Section 60(1) which requires mandatory compliance is nothing short of a reasonable opportunity to the permit-holder to furnish his explanation. Unless, therefore, the breaches of conditions or other allegations are particularised with reference to each permit in the show cause notice such notice is clearly invalid and no action can be taken under such a notice. This is exactly what has happened in this case resulting in violation of the principles of natural justice ingrained in the proviso to S. 60(1) of the Act. The High Court, therefore, was not right in not interfering with the order of the authorities cancelling the permits.

8. In the result the appeal is allowed. The order of the High Court as well as the orders of the State Transport Appellate Tribunal and the Commissioner are set aside. We will, however, make no order as to costs.

Appeal allowed.

AIR 1976 SUPREME COURT 59

(From: Allahabad)*

P. N. BHAGWATI AND R. S. SARKARIA JJ.

Tameshwar Sahi and others, Appellants v. State of Uttar Pradesh, Respondent.

Criminal Appeal No. 125 of 1971.
D/- 1-10-1975.

(A) Evidence Act (1872), Sec. 3 — Appreciation of evidence — Partisan witness — Credibility — Necessity of corroboration — Conviction based on testimony.

There is no hard and fast rule that the evidence of a partisan witness cannot be acted upon, without corroboration. If his presence at the scene of occurrence cannot be doubted and his evidence is consistent with

*(Criminal Appeal No. 2659 of 1967
D/- 17-11-1970—All.)

JS/JS/D812/75/GGM

the surrounding circumstances and the probabilities of the case and strikes the court as true, it can be a good foundation for conviction, more so if some assurance for it is available from medical evidence. (Para 25)

Mr. Frank Anthony, Sr. Advocate, (Mr. E. C. Agarwala, Advocate with him), for Appellants; Mr. O. P. Rana, Advocate, for Respondent.

Judgment of the Court was delivered by

SARKARIA, J.:— Tameshwar Sahi (55), Ram Naresh (60), Harihar alias Harendra Nath Sahi (23), Jagdish Sahi (45), Dudhai alias Dudhnath Sahi (70), Garib alias Lal Bahadur Sahi (22), Jagat Sahi (40) Arjun Sahi (25) and Bhandari Ahir (45), Sita Ram Sahi (40), were tried by the Additional Sessions Judge, Gorakhpur for the murders of Chandrabali and Ram Adhar, and for allied offences. All the ten were convicted under Sec. 302 read with S. 149, Penal Code on two counts, and sentenced to imprisonment for life, each. They were further convicted for the attempted murder of Raj Ballabh (P. W. 3) — Harihar under Sec. 307 and the rest under Ss. 307/149 — and each sentenced to 5 years rigorous imprisonment. A sentence of 3 years rigorous imprisonment was also imposed on each of them under Sec. 148, Penal Code. The sentences were directed to run concurrently.

2. On appeal, the High Court of Allahabad altered the conviction of Tameshwar Sahi and Ram Naresh to one under S. 302 read with S. 34, Penal Code but maintained their sentences of life imprisonment. Their convictions on the other counts were set aside. The conviction of the other eight under Ss. 148, 302/149, Penal Code was also set aside. The conviction of Harihar under Section 307, Penal Code was upheld.

3. Tameshwar, Ram Naresh and Harihar have come in appeal to this Court by special leave

4. The prosecution case as unfolded at the trial by P. W. 3, Raj Ballabh, is as follows:

5. One Janki owned a house in village Bairia-Dih. He executed an unregistered sale deed (Kha 10) in the year 1954 in favour of Sita Saran,

the acquitted co-accused. After Janki's death, his son, Kedar, (P. W. 17) sold the same house to Chandrabali deceased by a registered deed (Ka 22) in the year 1964.

6. On October 6, 1964, at about 9-30 a.m., the deceased persons, Chandrabali and his son, Ram Adhar, started removing tiles from the roof of the said house. Sita Saran accompanied by the nine co-accused, all armed with spears, came there. Sita Saran asked the deceased to stop the demolition of the house, asserting that he was its owner by virtue of the purchase from Janki. A heated altercation ensued between the deceased and the accused. The deceased came down from the roof. A sharp exchange of abuse between the parties followed. Exhorting his companions to deal with the deceased, Tameshwar hit Chandrabali with the spear, while Ram Naresh struck his spear on Ram Adhar. Ram Naresh dealt a spear blow to Chandrabali, also. Raj Ballabh, PW, interceded and asked the assailants to desist from the assault. Thereupon, Harihar alias Harendar appellant gave a spear blow to Raj Ballabh, followed by another blow by one of the accused. While the appellants were striking blows on the victim, their companions continued to instigate them saying "Maro, Maro". On receiving these injuries, all the three victims fell to the ground. The assailants then ran away taking their weapons with them.

7. Apart from PW 3, the occurrence was witnessed by Hargovind (CW 1), Chaturgun, Sardar Sahi, Sheoshankar, Sheo Mangal Yadav, Uppu and others who had come to the spot on hearing the altercation.

8. Chandrabali and Ram Adhar died at the spot. Raj Ballabh injured was removed to Barhalganj Hospital where he was examined by Dr. Paresh Chandra Chaudhury (PW 5) on the same day at 2-30 P.M. The Doctor found one punctured wound on the left side of his chest and another punctured wound on the outer-side of his right thigh. The chest wound was grievous while the other was simple.

The First Information Report of this case was laid by Sheo Shankar (P. W. 12) son of Raj Ballabh

(P. W. 3), at the Police Station Barhalganj, 7 miles away, at 1.45 p.m. the same day. It was recorded by Head-Constable Girjesh Dutt as the Sub-Inspector was away.

9. At 2.45 P.M., Jagdish, the acquitted co-accused, also, lodged a report (Ex. Kha 18) in the Police Station, complaining that Chandrabali and Ram Adhar deceased along with P. Ws. Raj Ballabh, Sheo Shankar, Mangal, Laxmi Shankar, Mahatam Sahi and others were dismantling the tiles of the informant's house which had been purchased by the informant's brother, Sita Saran. The informant and his brother stopped them, whereupon the deceased and their associates, all began plying ballams. One of the blows given by Ram Adhar hit the informant on the thigh. The informant and his brother wielded their ballams in self-defence. On account of the hue and cry raised, the villagers collected and intervened.

10. A copy of the F. I. R. made by P. W. 12 was received by Sub-Inspector Parsu Ram Singh in the village Purey at 3 P.M. The Sub-Inspector then proceeded to the place of occurrence and reached there at about 3.45 P.M. He arrested Sita Saran and Dudhai accused, and seized blood-stained shirts from their persons, vide Memo. Kha 21. The Investigating Officer recorded the statements of Hargovind, Budhu, Parduman, Mst. Dhanpati, Mst. Attarwali and others, at the spot. After inspecting the spot and removing the blood-soaked earth, he recorded the statements of P.Ws. Mangal, Chaturgun, Sheo Shankar and others.

11. On receiving a copy of the report given by Jagdish, accused the Investigating Officer rushed to the Police Station, and on reaching there at 9 P.M., arrested Jagdish and interrogated him.

12. Tameshwar, Ram Naresh, Harihar, Garib, Arjun, Jagat and Bhandari could not be found despite search. Therefore proceedings under Ss. 87 and 88, Cr. P. C. against them were set afoot. These seven accused surrendered in court on 11-11-64.

13. The inquest reports (Ka 9 and 1p) regarding the deaths of Chandrabali and Ram Adhar were prepar-

ed by Head-Constable Girjesh Dutt. The post-mortem examination of the dead bodies was conducted by Dr. P. N. Mehrotra (PW 6) on 27-(??)-10-1964, at 11.30 onwards.

14. The Doctor found three wounds on the body of Ram Adhar which, in his opinion, had been caused with a sharp-edged pointed weapon, like a spear, and the death was due to shock and syncope as a result of the chest injury (No. 1) and haemorrhage.

15. On the body of Chandrabali, the Doctor found two penetrating wounds on the chest, and an abrasion on the left shoulder. The penetrating wounds in the Doctor's opinion, had been caused with a sharp-edged pointed weapon like a spear and the death was due to shock and syncope as a result of injury to both the lungs and haemorrhage.

16. The plea of the accused was one of denial of the prosecution case. Sita Saran pleaded alibi. Sita Saran however owned the shirt, Ex. 7, and alleged that he had been beaten by the Sub-Inspector and the blood, if any on this shirt, was of the accused. Jagdish disowned the F. I. R., Ex. Ka 18, although he repeated the allegation that he had been assaulted by the deceased and others when he prevented them from dismantling the tiles from the roof of the house.

17-18. At the trial, the prosecution had examined seven eye-witnesses, namely, Chaturgun P. W. 1, Mahatam P. W. 2, Raj Ballabh P. W. 3, Sardar P. W. 4, Budhu P. W. 11, Sheo Shankar P. W. 12 and Laxmi Narain, P. W. 13.

19. The trial court found that the presence of P. Ws. 1, 2, 3, 12 and 13 at the time and place of occurrence could not be doubted. It did not rely on the testimony of Budhu who, in its opinion, had colluded with the accused, and had been allowed to be cross-examined by the Public Prosecutor. It further held that Sardar P. W. 4, was a "got up" witness and no reliance could safely be placed upon his statement. In its opinion, the ocular account of the aforesaid witnesses, corroborated by the medical evidence, had fully brought home the charges to the accused. It therefore convicted them as aforesaid.

20. The learned Judges of the High Court, however, in disagreement with the trial court, found that the evidence of P. W. 4, also, was creditworthy. Although it found that all the 10 accused may have been present at the spot, yet it doubted whether all of them had spears or had intended participating in the occurrence. It held that the fatal assault on the deceased persons was made by Tameshwar and Ramnaresh on the exhortation of Tameshwar, that Harihar had intervened only to attack Rajballabh and that in these circumstances, each accused was responsible for his own individual act. On this reasoning all the accused, excepting the appellants, were acquitted.

21. Mr. Frank Anthony, learned counsel for the appellants, contends that all the eye-witnesses examined by the prosecution were partisans of the deceased, and, even according to the High Court, it was not safe to act upon their testimony without seeking independent corroboration. Such corroboration, according to counsel, was sought by the High Court from the testimony of P. W. 4. The point pressed into service is, that the evidence of P. W. 4, as found by the trial Court, was unreliable and it could not impart any assurance to the other evidence, which it, itself did not have. It is pointed out that P. W. 4's statement was recorded by the investigating officer about two months after the occurrence although this witness was available at the time of recording the First Information and was also present at the time of the inquest and signed the inquest reports. It is emphasised that his name does not find mention in the F. I. R. Further infirmities in his evidence pointed out by the Counsel are: that he had the audacity to deny that Jagdish accused had received any injury at or about the time of the occurrence; that he had seen the incident from a distance when all the 10 accused persons were allegedly surrounding the deceased and brandishing their weapons. In sum, it is maintained that if the evidence of P. W. 4 is knocked out, there will be no independent evidence to corroborate the partisan witnesses.

22. Doubtless, the evidence of P. W. 4 suffers from several infirmities, and could not, as rightly held by the trial court, be safely relied upon. But that does not mean, that the prosecution case would collapse on that score. Even if his evidence were to be ruled out, the evidence of PW 3, corroborated by the medical evidence, would, in our opinion, be sufficient to sustain the conviction of the appellants. The testimony of P. W. 3, who is the chosen Sabhapati of the village Panchayat strikes us as true. Although he is a partisan witness and in proceedings under Section 107. Cr. P. C. he was arrayed along with P. Ws. 1, 2, 11, 13 against the party of the accused, yet that is no ground, in the circumstances of the case, to disbelieve him. He gave his evidence with due restraint and responsibility. The very tenor of his testimony bears the impress of truth. He physically interceded to stop the assault of the deceased persons and in the process himself received two injuries. He was closest to the deceased and had the best opportunity to see as to who out of the several accused dealt blows to the deceased persons, and to him. He did not, as his son PW 12 did, (who had probably seen the incident from a distance), irresponsibly and recklessly say that all the ten accused assaulted the deceased persons. He ascribes the injuries of Chandrabali and Ram Adhar to Tameshwar and Ram Naresh appellants only, although he had the opportunity to ascribe the six injuries found on the deceased persons to six different persons out of the ten accused. He himself had received two spear injuries. He could — if he had been actuated by untruthful and vindictive motive — attribute his two injuries to two different persons. But he did nothing of this kind. Even with regard to his own injuries, he did not give up that restraint. He attributed only one of the injuries to Harinder appellant. In regard to his second injury, all that he said was that one of the accused inflicted that injury. The medical testimony furnished by PWs 5 and 6 confirms that all the injuries for the deceased (excepting one on Chandrabali which was an abrasion) and both the inju-

ries of Raj Ballabh had been caused with sharp-edged pointed weapons like spears. The corroboration furnished by the medical evidence, in the circumstances of the case, was sufficient to make Raj Ballabh's testimony safe for basing a conviction thereon.

23. Nor does the acquittal of the seven accused who according to Raj Ballabh were instigating the appellants, necessarily show that he had falsely implicated them. The High Court did not find it so; it acquitted those accused only as a matter of abundant caution. In their case, the medical evidence could not furnish any corroboration as it has done against the appellants.

24. Nor do we find any substance in the contention that the story at the trial was materially changed from that narrated in the F. I. R. lodged by P. W. 12. In the F. I. R., the parts played by each of the accused were not particularised. It was not stated with specificity as to who belaboured whom. It was stated in a somewhat consolidated manner that all the ten accused surrounded the deceased and were seen plying their spears at them. The informant was the son of Raj Ballabh. Obviously he had seen the occurrence, if at all, from a distance. Had he ventured to go to the rescue of the victim, he could not have escaped unscathed. Moreover, when a crowd of assailants closes on a victim then the witnesses who see the incident from varying distances are not expected to give more than a general account of the incident. Only, Raj Ballabh PW, who had actually interceded to stop the assault on the deceased persons, and while so doing himself received injuries, could give such details with specificity, and he has done so in a natural, unexaggerated and forthright manner.

25. There is no hard and fast rule that the evidence of a partisan witness cannot be acted upon, without corroboration. If his presence at the scene of occurrence cannot be doubted and his evidence is consistent with the surrounding circumstances and the probabilities of the case and strikes the court as true, it can be a good foundation for a conviction,

more so if some assurance for it is available from the medical evidence.

26. In the light of what has been said above, we have no hesitation in holding that Tameshwar and Ram Naresh were rightly convicted for the murders of Chandrabali and Ram Adhar.

27. As against Harihar, we think, the offence made out was one under Sec. 324, Penal Code and not under Section 307, Penal Code for which he has been convicted. Out of the two injuries found on the person of Raj Ballabh, one, that is, injury No. 1 only, located on the chest, was grievous, while the other on the thigh was simple. Raj Ballabh did not specify as to which of these injuries was inflicted by Harihar. Therefore, as a matter of caution, he should have been convicted for causing simple hurt only with a sharp weapon. Accordingly, we alter his conviction from one under Sec. 307, Penal Code to that under Sec. 324, Penal Code, and reduce his sentence to 3 years rigorous imprisonment.

28. Excepting this modification qua Harihar-appellant, the appeal is dismissed.

Order accordingly.

AIR 1976 SUPREME COURT 63

(From: Punjab H. C.)*

V. R. KRISHNA IYER AND A. C. GUPTA JJ.

The State of Haryana and another, Appellants v. Jiwan Singh, Respondent.

Civil Appeal No. 852 of 1968, D/- 8-10-1975.

(A) Punjab Security of Land Tenures Act (10 of 1953), Section 2 (3) Proviso (ii) (a) — 'Permissible area' of displaced person — Determination — No discretion given to Collector or any authority in its determination either in standard acres or in ordinary acres — Nature of original allotment whether in standard acres or

*(L. P. A. No. 199 of 1967, D/- 9-8-1967—Punjab & Har.)

JS/JS/D829/75/VSS

in ordinary acres is determining factor.

Proviso (i) to Sec. 2 (3) appears to group displaced persons into two categories, those who were allotted land in standard acres and those whose allotment was in ordinary acres. Clause (a) deals with both these categories and limits—the permissible area of those who were allotted land in standard acres at 50 standard acres and those who were allotted land in ordinary acres at 100 ordinary acres; cls. (b) and (c) deal only with those who were allotted land in standard acres. Those whose allotment was in ordinary acres, their permissible area is fixed at 100 such acres, but in the case of those who were allotted land in standard acres, the permissible area varies as provided in clauses (a) (b) and (c) though the measure in each case would be in standard acres. This appears to be the scheme.

Thus, where the land allotted to displaced person is 55.80 standard acres, the permissible area for him will be 50 standard acres and the rest of 5.80 standard acres will be surplus area. AIR 1966 Punj 423 (FB) Approved; L. P. A. No. 199 of 1967, D/- 9-8-1967 (Punj. & Har.), Affirmed.

(Para 3).

Cases Referred: Chronological Paras
AIR 1966 Punj 423 = 68 Pun LR 543
(FB) 2, 3

Mr. Naunit Lal and Mr. R. N. Sachthey, Advocates for Appellants; Mr. Madan Bhatia, Advocate, for Respondent.

Judgment of the Court was delivered by

GUPTA, J.:— The respondent Jiwan Singh who is a displaced person from Pakistan was allotted 55.80 standard acres of land in village Neza Dali Kalan in Sirsa Tehsil of Hissar District in lieu of the land left by him in Pakistan. The second appellant, Collector Surplus Area, Sirsa, in determining the surplus area under the Punjab Security of Land Tenures Act, 1953 (hereinafter referred to as the Act) left only 100 ordinary acres with the respondent as his permissible area and declared the rest of the land measuring 73.57 ordinary acres, equivalent to 25.99 standard acres, as

surplus. Permissible Area as defined in Sec. 2 (3) of the Act is as follows:

“Permissible area” in relation to a land owner or a tenant, means thirty standard acres and where such thirty standard acres on being converted into ordinary acres exceed sixty acres, such sixty acres:

Provided that—

(i) no area under an orchard at the commencement of this Act, shall be taken into account in computing the permissible area;

(ii) for a displaced person—

(a) who has been allotted land in excess of fifty standard acres, the permissible area shall be fifty standard acres or one hundred ordinary acres, as the case may be,

(b) who has been allotted land in excess of thirty standard acres, but less than fifty standard acres, the permissible area shall be equal to his allotted area.

(c) who has been allotted land less than thirty standard acres, the permissible area shall be thirty standard acres, including any other land or part thereof, if any, that he owns in addition.”

There is an explanation to this definition which is not relevant for the present purpose. Surplus Area would be the area in excess of the permissible area.

2. According to the respondent the surplus area in his case cannot exceed 5.80 standard acres in view of the proviso (ii) (a) to Sec. 2 (3), and being aggrieved by the order of the Collector preferred an appeal to the Commissioner. The Commissioner remanded the case to the Collector for a fresh determination of the respondent's surplus area observing that in the case of a displaced person if the allotment was in standard acres, 50 standard acres would be the permissible area and if the allotment was in ordinary acres the permissible area would be 100 ordinary acres. On remand the Collector upheld his own previous order and the appeal taken by the respondent from this order was dismissed by the Commissioner. The respondent filed a revision petition before the Financial Commissioner, Punjab, who also upheld the order of the Collector and dismiss-

ed the petition. The respondent thereafter filed a writ petition in Punjab and Haryana High Court which was allowed. The learned Judge who heard the writ petition held following a Full Bench decision of the same High Court, *Khan Chand v. State of Punjab*, AIR 1966 Punj 423 that it was "not legitimate for the authority to treat as surplus area anything more than 5.80 standard acres of the petitioner's land". The Letters Patent Appeal preferred against the decision of the learned single Judge by the State of Haryana and the Collector Surplus Area, Sirsa, was dismissed. The correctness of the High Court's decision is challenged before us in this appeal by special leave.

3. The case turns on the true meaning of proviso (ii) (a) to Section 2(3). Counsel for the appellants submits that this provision means that the permissible area in the case of displaced persons who were allotted land in excess of 50 standard acres can be determined either in terms of standard acres or in terms of ordinary acres, as the authority concerned chooses. Counsel contends that the words "as the case may be" refer to the discretion of the authority in this matter. We do not find it possible to accept this contention. There is no specific provision in the Act giving a discretion to the Collector or any other authority under the Act to determine the permissible area for a displaced person either in standard acres or in ordinary acres. On a plain reading proviso (ii) (a) seems to indicate that where the land allotted to a displaced person was in standard acres and its area exceeded 50 standard acres, the permissible area would be 50 standard acres, and where the land was allotted not in standard acres the permissible area would be 100 ordinary acres. The nature of the original allotment — whether it was in standard acres or in ordinary acres — seems to be the determining factor. The Full Bench decision of the Punjab and Haryana High Court, *Khan Chand v. State of Punjab*, (AIR 1966 Punj 423) (supra), on which the judgment under appeal relies, reads proviso (ii) (a) to mean:

"For a displaced person who has been allotted land in excess of 50 standard acres or in excess of 100 ordinary acres the permissible area shall be 50 standard acres or 100 ordinary acres, as the case may be."

We agree that this is the correct meaning to be given to this provision, it is only construed this way that the words "as the case may be" acquire a significance, otherwise they would be mere surplusage. Clauses (b) and (c) of proviso (ii) lend assurance to this construction. Clause (b) deals with the case of a displaced person who has been allotted land in excess of thirty standard acres but less than fifty standard acres and provides that the permissible area in his case shall be equal to his allotted area. Clause (c) fixes the permissible area for a displaced person who has been allotted land less than thirty standard acres providing that it shall be thirty standard acres including any other land or part thereof, if any, that he owns in addition. Clauses (b) and (c) both deal with cases where the original allotment was in standard acres, and there is nothing in either of them sanctioning the conversion of the permissible area in standard acres into ordinary acres, though perhaps any other land which a displaced person whose case is covered by clause (c) might own in addition to the 30 standard acres allotted to him may be in ordinary acres requiring conversion of such land into standard acres to determine the permissible area in standard acres in his case as provided in clause (c). But this does not mean that the permissible area in cases covered by clauses (b) and (c) can also be fixed in ordinary acres. Proviso (ii) to Sec. 2(3) appears to group displaced persons into two categories, those who were allotted land in standard acres and those whose allotment was in ordinary acres. Clause (a) deals with both these categories and limits the permissible area of those who were allotted land in standard acres at 50 standard acres and those who were allotted land in ordinary acres at 100 ordinary acres; clauses (b) and (c) deal only with those who were allotted land in standard acres. Those whose allotment was in ordinary acres, their permissi-

ble area is fixed at 100 such acres, but those who were allotted land in standard acres, in their case the permissible area varies as provided in clauses (a), (b) and (c) though the measure in each case would be in standard acres. This appears to be the scheme. In defining "Permissible area" Sec. 2(3) of the Act provides differently for land owners and tenants covered by the substantive part of the definition, and displaced persons mentioned in proviso (ii), and also makes a distinction between displaced persons inter se as provided in the different clauses of the proviso. In the course of argument questions were raised about the logical basis for such differentiation, but the policy of the Act being clear we have to interpret the provision as we find it; if there is any anomaly in the policy itself, it is for the legislature to remove that defect. In this case the land allotted to the respondent being admittedly 55.80 standard acres, the permissible area for him would be 50 standard acres under clause (a) and, that being so, the High Court was right in holding that it was not legitimate for the authority to treat as surplus area anything more than 5.80 standard acres.

4. The appeal is accordingly dismissed but in the circumstances of the case without any order as to costs.

Appeal dismissed.

AIR 1976 SUPREME COURT 66

(From: AIR 1966 Pat 445)

A. ALAGIRISWAMI, P. K. GOSWAMI
AND N. L. UNTWALIA JJ.

The Employees' State Insurance Corporation and another, Appellants v. The Tata Engineering & Co., Locomotive Co. Ltd. and another, Respondents.

Civil Appeal No. 2113 of 1969,
D/- 8-10-1975.

(A) Employees' State Insurance Act (1948), Section 2 (9) — Apprentice — Not an employee within Section 2 (9) — Apprentices Act (1961), Section 2 (a).

JS/JS/D811/75/SSG

When under the terms and conditions of agreement under which apprentices are engaged by a company, they are mere trainees for a particular period for a distinct purpose and the company is not bound to employ them in their work after the training period is over, such apprentices cannot be said to be employed in the work of the company or in connection with the work of the company more so when they are not given wages within the meaning of that term as defined in Sec. 2(22). Thus, an apprentice is not an employee within Sec. 2(9) of the Act. AIR 1966 Pat 445, Affirmed. (Paras 11, 13)

The heart of the matter in apprenticeship is the dominant object and intent to impart on the part of the employer and to accept on the part of the other person learning under certain agreed terms. That certain payment is made during the apprenticeship, by whatever name called, and that the apprentice has to be under certain rules of the discipline do not convert the apprentice to a regular employee under the employer. Such a person remains a learner and is not an employee. It is inherent in the word "apprentice" that there is no element of employment as such in a trade or industry. (Paras 6, 7)

Mr. G. L. Sanghi, Sr. Advocate, (M/s. S. P. Nayar and Girish Chandra, Advocates with him), for Appellants; Mr. M. C. Bhandare, Sr. Advocate, (M/s. O. C. Mathur and D. N. Misra, Advocates of M/s. J. B. Dadachanji Co., Advocates with him), for Respondents.

Judgment of the Court was delivered by

P. K. GOSWAMI, J.:— Is an apprentice an "employee" under the Employees' State Insurance Act, 1948? That is the question raised in this appeal by certificate under Article 133 (1) (a) and (b) of the Constitution from the judgment of the Patna High Court by which it refused to interfere with the order of the Industrial Tribunal passed under Section 73B of the Employees' State Insurance Act, 1948 (briefly the Act).

2. The respondent is a public limited company having its registered office at Bombay and its factory at

Jamshedpur in the State of Bihar. The Act is applicable to the company's factory. Besides regular employees in the company, there are two sets of apprentices, namely, graduate apprentices for a period of two years and trade apprentices for the duration of three years. The graduate apprentices receive stipend of Rs. 250.00 per month in the first year and Rs. 300.00 per month during the second year. The trade apprentices receive stipend at the rate of Rupees 2.00, Rs. 2.50 and Rs. 3.00 per diem during the first, second and third year of the apprenticeship respectively. No other emoluments except the daily allowance or the monthly stipends are paid by the company to the apprentices. A deed of apprenticeship is signed by three parties, namely, the apprentice, his surety and the company and it contains the terms and conditions of apprenticeship. From the said terms and conditions which are common for both sets of apprentices except for the quantum of stipends and the duration, it appears that the company agree to provide the apprentice a combined theoretical and practical training in its factory for the respective period above mentioned and the apprentice also binds himself to serve the company for the purpose of the said training for the said period. Clause (7) of the agreement provides that if the apprentice successfully passes the examination after training he will be considered for absorption as skilled worker although the company is under no legal obligation to offer him employment. There are other conditions in the agreement with regard to matters of discipline during the apprenticeship.

3. Our attention was particularly drawn to the following provisions in the agreement:

"12. In consideration of the company having agreed to give the Apprentice training in its works (Automobile Division) and to pay the apprentice the aforesaid daily allowance or stipend, the apprentice and the surety as the father or guardian of the apprentice jointly and severally covenant with the company as follows:—

(i) That the apprentice will during the whole of the said term of

three years of training diligently and faithfully serve the company and to the utmost power and skill attend to the company's business at such places and times as the company or its representatives shall direct.

x x x x x

(v) The apprentice shall immediately on the satisfactory completion of his training for the full term of three years serve the company for a period of five years, if so required, by the company on such conditions as the company may offer having regard to his personal qualifications or requirements and complying with the Rules and Regulations as are contained in the Works Standing Orders of the company."

Without citing all the terms and conditions of the agreement, it is apparent that an apprentice is not in the regular employment of the company.

4. It is, however, submitted on behalf of the appellants that the words "serve the company" in clause 12 (i), which are repeated in clause (v), introduce a relationship of master and servant thus constituting apprentice an employee as ordinarily understood. We attach no special significance to the use of the words "serve the company" in the above clauses.

5. The word 'apprentice' is not defined in the Act, nor is it specifically referred to in the definition of 'employee' by either inclusion or exclusion. We are unable to hold that in ordinary acceptance of the term apprentice a relationship of master and servant is established under the law. Even etymologically, as a matter of pure English, "to serve apprenticeship means to undergo the training of an apprentice" (Chambers's Dictionary). According to the Shorter Oxford English Dictionary apprentice is "a learner of a craft; one who is bound by legal agreement to serve an employer for a period of years, with a view to learn some handicraft, trade, etc. in which the employer is reciprocally bound to instruct him". Stroud's Judicial Dictionary puts it thus:

"In legal acceptance, an apprentice is a person bound to another for

the purpose of learning his Trade, or calling; the contract being of that nature that the master teaches and the other serves the master with the intention of learning".

While dealing with the nature of the relationship of master and servant in comparison with other relationships in Halsbury's Laws of England, Third edition, Volume 25, the following passage appears at para 877, pages 451-452:

"By a contract of apprenticeship a person is bound to another for the purpose of learning a trade or calling, the apprentice undertaking to serve the master for the purpose of being taught, and the master undertaking to teach the apprentice. Where teaching on the part of the master or learning on the part of the other person is not the primary but only an incidental object, the contract is one of service rather than of apprenticeship; but, if the right of receiving instruction exists, a contract does not become one of service because, to some extent, the person to whom it refers does the kind of work, that is done by a servant, or because he receives pecuniary remuneration for his work."

6. The heart of the matter in apprenticeship is, therefore, the dominant object and intent to impart on the part of the employer and to accept on the part of the other person learning under certain agreed terms. That certain payment is made during the apprenticeship, by whatever name called, and that the apprentice has to be under certain rules of discipline do not convert the apprentice to a regular employee under the employer. Such a person remains a learner and is not an employee. An examination of the provisions of the entire agreement leads us to the conclusion that the principal object with which the parties enter into an agreement of apprenticeship was offering by the employer an opportunity to learn the trade or craft and the other person to acquire such theoretical or practical knowledge that may be obtained in the course of the training. This is the primary feature that is obvious in the agreement.

7. Now coming to the legislative history of our country on the subject, it is interesting to note that

more than hundred years back we had the Apprentices Act, 1850 and its preamble says "For better enabling children, and especially orphans and poor children brought up by public charity, to learn trades, crafts and employments, by which, when they come to full age, they may gain a livelihood". Learning of craft or trade was the essence of the said legislation. This Act was repealed by Sec. 38 of the Apprentices Act, 1961. The object of 1961 Act is to provide for the regulation and control of training of apprentices in trades and for matters connected therewith. By the definition clause under this Act, namely, Sec. 2 (a) "'apprentice' means a person who is undergoing apprenticeship training in a designated trade in pursuance of a contract of apprenticeship". It is, therefore, inherent in the word 'apprentice' that there is no element of employment as such in a trade or industry but only on adequate well-guarded provision for training to enable the trainee after completion of his course to be suitably absorbed in earning employment as a regular worker. The fact that a trainee may have been absorbed in the company where he is undergoing the training, is not relevant for the purpose of comprehending the content of the term.

8. Again we find that where the legislature intends to include apprentice in the definition of a worker it has expressly done so. For example, the Industrial Disputes Act, 1947, which is a piece of beneficial labour welfare legislation of considerable amplitude defines 'workmen' under Sec. 2 (s) of that Act and includes apprentice in express terms. It is significant that although the legislature was aware of this definition under Sec. 2 (s) under the Industrial Disputes Act, 1947, the very following year while passing the Employees' State Insurance Act, 1948, it did not choose to include apprentice while defining the word 'employee' under Sec. 2 (9) of the Employees' State Insurance Act, 1948. Such a deliberate omission on the part of the legislature can be only attributed to the well-known concept of apprenticeship which the legislature assumed and took note of for the purpose of the

Act. This is not to say that if the legislature intended it could not have enlarged the definition of the word 'employee' even to include the 'apprentice' but the legislature did not choose to do so.

9. Even then the question is whether such an apprentice is an employee within the meaning of the term under Sec. 2(9) of the Act. If the answer is yes, he will be governed by the Act and the appellants' claim for charging the company with liability for payment of special contribution under Chapter VA of the Act in respect of the apprentices will be justified.

10. We may, therefore, turn to the definition of 'employee' under Sec. 2(9) of the Act. So far as it is material, Sec. 2(9) reads as follows:—

"'employee' means any person employed for wages in or in connection with the work of a factory or establishment to which this Act applies and—

(i) who is directly employed by the principal employer on any work of, or incidental or preliminary to or connected with the work of, the factory or establishment, whether such work is done by the employee in the factory or establishment or elsewhere....."

It is clear that in order to be an employee a person must be employed for wages in the work of a factory or establishment or in connection with the work of a factory or establishment. Wages is defined under Section 2(22) and

"means all remuneration paid or payable in cash to an employee, if the terms of the contract of employment, express or implied, were fulfilled and includes any payment to an employee in respect of any period of authorised leave, lockout, strike which is not illegal or layoff and other additional remuneration, if any, paid at intervals not exceeding two months, but does not include....."

11. From the terms of the agreement it is clear that apprentices are mere trainees for a particular period for a distinct purpose and the employer is not bound to employ them in their works after the period of training is over. During the appren-

ticeship they cannot be said to be employed in the work of the company or in connection with the work of the company. That would have been so if they were employed in a regular way by the company. On the other hand the purpose of the engagement under the particular scheme is only to offer training under certain terms and conditions. Besides, the apprentices are not given wages within the meaning of that term under the Act. If they were regular employees under the Act, they would have been entitled to additional remuneration such as daily allowance and other allowances which are available to the regular employees. We are, therefore, unable to hold that the apprentice is an employee within the meaning of Section 2(9) of the Act.

12. Incidentally we may note that Section 18 of the Apprentices Act, 1961, provides that—

"save as otherwise provided in this Act, every apprentice undergoing apprenticeship training in a designated trade in an establishment shall be a trainee and not a worker....."

13. The concept of apprenticeship is, therefore, fairly known and has now been clearly recognised in the Apprentices Act. Apart from that, as we have noticed earlier, the terms and conditions under which those apprentices are engaged do not give any scope for holding that they are employed in the work of the company or in connection with its work for wages within the meaning of Section 2(9) of the Act. The appeal, therefore, fails and is dismissed. There will be, however, no order as to costs. Appeal dismissed.

AIR 1976 SUPREME COURT 69

(From: Allahabad)*

R. S. SARKARIA AND A. C. GUPTA
JJ.

Mahmood, Appellant v. State of
Uttar Pradesh, Respondent.

Criminal Appeal No. 178 of 1971,
D/- 1-10-1975.

*(Criminal Appeal No. 699 of 1968,
D/- 9-4-1971—All.)

JS/KS/D815/75/LGC

(A) Penal Code (1860), Section 300 — Murder — Circumstantial evidence — Appreciation of — Expert opinion — Value of — On review the circumstantial evidence was found too shaky, suspicious and fragile to furnish a sound foundation for conviction—Cri. Appeal No. 699 of 1968, D/- 9-4-1971 (All), Reversed. (Evidence Act (1872), Ss. 3 and 45).

In a case dependent wholly on circumstantial evidence, the Court before recording a conviction on the basis therefor must be firmly satisfied—

(a) that the circumstances from which the inference of guilt is to be drawn, have been fully established by unimpeachable evidence beyond a shadow of doubt;

(b) that the circumstances are of a determinative tendency unerringly pointing towards the guilt of the accused; and

(c) that the circumstances, taken collectively, are incapable of explanation on any reasonable hypothesis save that of the guilt sought to be proved against him. (Para 9)

In the instant case these conditions have not been satisfied. The solitary piece of circumstantial evidence on which the prosecution have staked their case, was too shaky, suspicious and fragile to furnish a sound foundation for conviction. The conviction for the murder rested on the solitary circumstances, viz., that the finger prints of the accused were found on the handle of the gandasa which was found lying near the dead-body at the scene of the occurrence. But it was found that the investigator did not take all the necessary precautions which could be taken to eliminate the possibility of fabrication of this evidence, or to dispel suspicion as to its genuineness. Admittedly, he sealed the box with his seal which thereafter remained with him throughout. (Paras 10, 15, 20)

Furthermore, the specimen finger-prints of the accused were not taken before or under the order of a Magistrate in accordance with Section 5 of the Identification of Prisoners Act. (Para 16)

Even if it is assumed that the handle of the gandasa bore the finger-

prints of the accused, then also it would not inexorably and unmistakably lead to the conclusion that the accused, and none-else was the murderer, unless it was firmly proved further that the fatal injury to the deceased was caused with this weapon. Definite proof of this link was lacking in this case. The missing link could be best supplied by showing that there was blood on this gandasa, and that blood was of human origin. But this was not done. (Para 18)

Further, the Inspector of the Scientific Laboratory has not given any reasons in support of his opinion. Nor has it been shown that he has acquired special skill, knowledge and experience in the science of identification of finger-prints. It would be highly unsafe to convict one on a capital charge without any independent corroboration, solely on the bald and dogmatic opinion of such a person, even if such opinion is assumed to be admissible under Sec. 45, Evidence Act. Cri. Appeal No. 699 of 1968, D/- 9-4-1971 (All), Reversed. (Para 19)

M/s. R. K. Garg, S. C. Agarwal, V. J. Francis and T. M. Ansari, Advocates of M/s. Ramamurthi & Co., for Appellant; Mr. D. P. Uniyar Sr. Advocate, (Mr. O. P. Rana, Advocate with him), for Respondent.

Judgment of the Court was delivered by

SARKARIA, J.:— This appeal by special leave is directed against a judgment of the High Court of Allahabad upholding the conviction of the appellant for offences under Sections 452 and 302/34, Penal Code in respect of the murder of a villager, Dwarka.

2. The deceased lived all alone in his house in village Gurgawn, Police Station Nigohi. The deceased used to lend money to one Ram Sarup, a distant relation. Over this loan, a dispute arose between Ramsarup and the deceased. Their relations became strained, and Ramsarup started nursing a grudge against the deceased. According to the prosecution story, this Ramsarup, in collaboration with the appellant, murdered Dwarka on the night between the 4th and 5th of January, 1967.

3. On January 4, 1967 at about 6.30 p.m., Ramchander, P. W. 2, Sheodass, P. W. 3, Govind and others were sitting by the side of Alowa (fire place) to warm themselves in front of the house of Ramchander at a distance of about 50 paces from the entrance to the house of the deceased. Ramsarup and the appellant came there. They stayed at the fireplace for a few minutes and then went to the entrance of Dwarka's house and called. Dwarka opened the door, and Ramsarup and the appellant (who was a stranger to the witnesses) went into the house.

4. On the following morning, one Mithulal, P. W. 4, went to the house of the deceased for purchasing gram. On going inside, he found Dwarka lying dead with injuries. Mithu came out and informed P. W. Ramchander and Karan about what he had seen. Karan further communicated that information to Bhagwandeem, P. W. 10, a cousin and neighbour of the deceased. Bhagwandeem then went inside the house of the deceased and saw the scene. P. Ws. 2, 3, 4 and 5 were present near the dead-body of Dwarka. These persons apprised Bhagwandeem about what they had seen the preceding evening. Bhagwandeem then scribed a report and thereafter delivered it in Police Station Nigohi, 6 miles away, at 11.00 a.m.

5. After registering the case, Sub-Inspector K. C. Bhandari, P. W. 11, reached the scene of occurrence. He found the blood-stained Gandasa, Ex. 1, lying near the dead-body. He noticed finger prints on its wooden handle. He, therefore, put this Gandasa in a box which was made into a parcel and sealed with his own seal in the present of Gajadhar, P. W. 5 and prepared the memorandum Ex. Ka-3. He then prepared the inquest report and recorded the statements of the witnesses.

6. The Sub-Inspector arrested Mahmood appellant on 24-3-1965 at 8.15 a.m. Mahmood was directed to conceal his face and he did likewise. Mahmood was taken to the Police Station. At 12.10 P.M. on the same date he was taken out of the police lock-up and sent in the custody of constable to the District Jail, Shah-

jahanpur, 20 miles away by bus. A test identification was held on 5-4-1967 before a Magistrate at which P. Ws. 2 and 3 identified the appellant. On 15-4-1967, at the request of the Investigating Officer, Proficient Mohd. Sarvar Hussain took the specimen finger impression of the appellant. These impressions along with the sealed parcel containing the blood-stained Gandasa, were sent to the CID Scientific Laboratory, Lucknow, on 21-4-1967, through Constable Munish Dikshit, P. W. 18. Inspector Dariao Singh (P. W. 15) of the Laboratory examined these impressions. In his opinion the finger-impressions found on the handle of the Gandasa, Ex. 1, tallied with the specimen finger impressions of the appellant.

7. At the trial the prosecution examined P. Ws. Ramchander and Sheodass to show how on the preceding evening they had seen Ramsarup and the appellant going into the house of the deceased. The trial court disbelieved the evidence of these witnesses, but found that the presence of the finger prints of the appellant on the handle of the Gandasa, Ex. P-1, was a circumstance which by itself was sufficient to show that the murder had been committed by the appellant and convicted him. Mahmood appealed to the High Court. The High Court affirmed the findings of the trial court and dismissed his appeal.

8. Thus the conviction rests on the solitary circumstance, viz., that the finger prints of the appellant were found on the handle of the Gandasa, P-1, which was found lying near the dead-body at the scene of occurrence.

9. It is well settled that in a case dependent wholly on circumstantial evidence, the Court before recording a conviction on the basis thereof must be firmly satisfied—

(a) that the circumstances from which the inference of guilt is to be drawn, have been fully established by unimpeachable evidence beyond a shadow of doubt;

(b) that the circumstances are of a determinative tendency unerringly pointing towards the guilt of the accused; and

(c) that the circumstances, taken collectively, are incapable of explanation on any reasonable hypothesis save that of the guilt sought to be proved against him.

10. After hearing the learned counsel on both sides, we are of opinion that in the instant case these conditions have not been satisfied.

11. There are some suspicious circumstances in this case which cast a grave doubt as to the genuineness of this lone piece of evidence. Firstly, no less a person than the complainant Bhagwandeem, P. W. 1 admitted in cross-examination that when he first saw the gandasa, Ex. 1, lying near the dead-body at the scene of occurrence, its wooden handle was dirty, but on 29-1-1968, (when this weapon was shown to the witness in court) the wooden part of its handle was clean and the rest dirty. The inference is that somebody might have cleaned the wooden-handle and thereafter got the finger prints of the appellant on it. Cleaning would be necessary to obtain distinct and decipherable finger-impressions. Secondly, the investigation in this case was not as fair and cautious as it should have been. The version of the appellant was that he had been arrested by the police on the 23rd March, 1967 at about 5 or 5.30 p.m. from a bus and was then kept in the lock-up of the Police Station for the night and on the following day at about Noon, the Sub-Inspector bandaged the appellant's eyes, applied some fluid on his fingers, then made him hold some object and forcibly obtained his finger-prints on it. Then on 26-4-1967, that is, long before the start of the proceedings in the court of the Committing Magistrate, the appellant sent two petitions through the Jailor addressed to the District Magistrate and Superintendent of Police, Saharanpur, (Shahjahanpur) complaining how his finger-prints were forcibly taken by the Police on some round object.

12. Constable Hardwari Lal, PW 9, falsified the version of the Investigating Officer, PW 11, and confirmed that of the accused about the date of the latter's arrest. In cross-examination, PW 9 admitted that Mahmood accused was arrested on 23-3-1967 and thereafter was kept in

the Police Station till 12.10 Noon of 24-3-1967, when the witness took him out of the Police Station for escorting him to the District Jail, Shahjahanpur.

13. Further, at the test identification parade held before the Magistrate, and again at the trial, the appellant had complained that he had been shown at the Police Station after his arrest, to Pws Ram Chandra and Sheo Dass. After noticing this consistent complaint of the accused, though without accepting its truth in clear terms, the learned trial Judge found that "there appears to be something fishy in the matter". It was inter alia on this ground that the evidence of Pws 2 and 3 was discarded as unreliable. The High Court upheld that finding.

14. The purpose of mentioning all this is that the Investigating Officer in the mistaken zeal for the success of his case was prone to resort to "padding" and suppression or distortion of facts. It is in this background of suspicion that this piece of circumstantial evidence collected by him had to be evaluated.

15. Further, the investigator did not take all the necessary precautions which could be taken to eliminate the possibility of fabrication of this evidence, or to dispel suspicion as to its genuineness. Admittedly, he sealed the box with his own seal which thereafter remained with him throughout. He did not take the signatures of the witnesses on the parcel containing the gandasa. He did not after sealing the parcel entrust his seal to the Sarpanch or any other respectable person of the village. According to the prosecution the finger-prints found on the gandasa could possibly be blood-prints and that the blade of the gandasa was all smeared with human blood. But this gandasa was never sent to the Chemical Examiner or the Serologist. No explanation of the same is forthcoming. This being the case, the contention of Mr. R. K. Garg at the bar, that the gandasa, Ex. 1, or smear of the alleged blood on it was not sent to the Chemical Examiner for fear of the fabrication being detected and exposed, cannot be rejected outright.

16. Furthermore, the specimen finger-prints of the appellant were not taken before or under the order of a Magistrate in accordance with Sec. 5 of the Identification of Prisoners Act. This is another suspicious feature of the conduct of investigation. It has not been explained why this Magistrate was kept out of the picture.

17. It is to be noted further that the same Constable (Muneswar Dixit, P. W. 18) collected the specimen finger-prints, presumably from the Investigating Officer, and the parcel containing the gandasas, Ex. 1 from the Sadar Malkhana, on the 21st April and delivered it at the Scientific Section, Lucknow on the 22nd April. There was thus a possibility of the Investigating Officer, having an access to the parcel containing the gandasas on the 21st April. Such a possibility has not been positively excluded by the prosecution.

18. Secondly, even if it is assumed that the handle of this gandasas bore the finger-prints of the appellant, then also it would not inexorably and unmistakably lead to the conclusion that the appellant, and none else was the murderer of Dwarka, unless it was firmly proved further that the fatal injury to the deceased was caused with this weapon. Definite proof of this link was lacking in this case. The missing link could be best supplied by showing that there was blood on this gandasas, and that blood was of human origin. But this was not done.

19. Lastly, it may be observed that Inspector Daryac Singh, P. W. 15, has not given any reasons in support of his opinion. Nor has it been shown that he has acquired special skill, knowledge and experience in the science of identification of finger-prints. It would be highly unsafe to convict one on a capital charge without any independent corroboration, solely on the bald and dogmatic opinion of such a person, even if such opinion is assumed to be admissible under Sec. 45, Evidence Act.

20. In the light of the above discussion, we are of the view that the solitary piece of circumstantial

evidence on which the prosecution have staked their case, is too shaky, suspicious and fragile to furnish a sound foundation for conviction.

21. These, then, are the reasons which we now give in support of our order dated 22-9-1975 whereby we accepted this appeal, set aside the conviction of the appellant and acquitted him.

Appeal allowed.

AIR 1976 SUPREME COURT 73 =

1975 TAX. L. R. 2108

(From Madras: (1974) 88 Mad WR 288)

A. ALAGIRISWAMI, P. K. GOSWAMI AND N. L. UNTWALIA, JJ.

R. Rangachari, Appellant v. S. Suppiah and others. Respondents.

Civil Appeal No. 1136 of 1975, D/- 15-9-1975.

(A) Companies Act (1956), S. 186

(1) (a) — Power of Court under —
Ambit of — Application for mere appointment of Chairman of meeting (already called) — Not maintainable — (1974) 88 Mad LW 288, Reversed.

The use of the word 'and' between the words 'held' and 'conduct' in Section 186 (1) (a) clearly shows that the Court has no power to make any order regarding the holding and conducting of any meeting which has already been called without ordering a meeting of the Company to be called in place of the meeting already called. The use of the word 'or' in the first part of Section 186 (1) may be disjunctive or conjunctive. But undoubtedly the order under Section 186 (1) (a) has got to be for all the three purposes and not merely for holding or conducting of the meeting. Thus an application for mere appointment of an Advocate/Commissioner as Chairman of a meeting (already called) without there being any prayer to the Court for an order for the calling of a meeting is not maintainable. (1974) 88 Mad LW 288, Reversed.

(Paras 6, 7)

Mr. S. V. Gupte, Sr. Advocate,
(Mrs. S. Bhandare, Advocate of M/s.
JS/JS/D563/75/SSG)

Bhandare Parekh & Co. with him), for Appellant; Mr. S. Govinda Swaminathan, Sr. Advocate, (M/s. T. Raghavan, R. Chandrasekhar and K. Jayaram, Advocates with him) for Respondents Nos. 1 and 2. Mr. M. C. Bhandare, Sr. Advocate, (M/s. A. T. M. Sampath and M. M. L. Srivastava, Advocates with him), for Respondent No. 3.

Judgment of the Court was delivered by

N. L. UNTWALIA, J.:— The question which falls for our determination in this appeal by special leave is as to what is the meaning and scope of Section 186 of the Companies Act, 1956 hereinafter called the Act. For the determination of the said question it will suffice to state only a few facts from the judgments of the Madras High Court. There were two Managing Directors of Century Flour Mills Ltd. — respondent No. 3. Their names are Shri P. S. Govindaswamy and S. P. Sithambaram. Both of them had been duly appointed as such in the year 1972. They subsequently fell out. In August, 1974 certain shareholders of the company including respondents 1 and 2 lodged a requisition under Section 169 of the Act for the calling of an extraordinary general meeting of the company for removal of Govindaswamy. Certain other shareholders lodged a similar requisition for removal of Sithambaram from the post of Managing Director. Both the requisitions were considered by the Board of Directors in their meeting held on 19-8-1974. As per the requisitions, they called an extraordinary general meeting of the company to be held on 14-9-1974. The meeting was directed to be held at the residence of one of the shareholders of the company instead of its registered office. The shareholders were divided into two factions belonging to the two groups of the Managing Directors. Apprehending very many difficulties and troubles in the holding and the conduct of the meeting on 14-9-1974, respondents 1 and 2 filed an application under Section 186 of the Act, Company Petition No. 85/1974, in the Madras High Court. They prayed to the Court to appoint an Advocate-Commissioner as Chairman of the

meeting to be held on 14-9-1974 so that the proceedings may be conducted in a regular manner. The only respondent impleaded in the said petition was the company which filed a counter-affidavit to resist the prayer of respondents 1 and 2. A learned single Judge of the High Court took the view that power under Section 186 of the Act could be exercised even where a meeting had already been called, but it was impracticable to hold or conduct the meeting. In other words, the learned Judge was of the opinion that the Court even without ordering a meeting of the company to be called could appoint a person to be the Chairman of the meeting. But on appreciation of the facts of the case in the light of certain decisions of the High Courts, he came to the conclusion that it was not impracticable to hold or conduct the meeting and hence dismissed the application filed by respondents 1 and 2.

2. O. S. Appeal No. 64/1974 was filed in the High Court under clause 15 of the Letters Patent against the order dated 11-9-1974 of the learned single Judge. By an order made on September 12, 1974 a Bench of the High Court stayed the convening of the meeting called to be held on 14-9-1974. It appears that in spite of the service of the order dated 12-9-1974 on September 13, the meeting was held on 14-9-1974. CMP No. 10935/1974 was taken out in the form of a Judges' summons under Rule 9 of the Company Code Rules, 1959 to declare the meeting held on 14-9-1974 as void and the resolutions passed therein as illegal and inoperative. The said appeal and the CMP along with other CMPs which are not necessary to be referred to in this judgment were heard by a Bench of the High Court presided over by the learned Chief Justice. The Bench allowed CMP No. 10935/1974, put back the parties in the same position as they stood immediately prior to the service of the order dated 12-9-1974 and declared that the meeting held on September 14, 1974 and the resolutions passed thereunder would have no effect whatsoever. By a separate judgment, Appeal No. 54/1974 was also allowed by the Division Bench. It

agreed with the single Judge as regards the meaning and scope of Section 186 of the Act but differed from him on the merits of the case. They appointed an Advocate of the Court as the Advocate-Chairman to hold and conduct the meeting and directed that the meeting would take place at the premises of the registered office of the Company.

3. The sole appellant in this appeal is a shareholder of the company. Feeling aggrieved by the orders of the Division Bench of the High Court in CMP No. 10935/74 and in OS Appeal No. 64/1974 he filed special leave applications in this Court seeking leave to file appeals in both the matters. By order dated 29-8-1975 a Bench of this Court dismissed as withdrawn SLP No. 1156/1975 arising from the judgment and order D/- 11-3-1975 of the High Court in CMP No. 10935/1974. Special leave was granted from the judgment and order D/- 17-3-1975 of the High Court passed in OS Appeal No. 64/ 1974.

4. Mr. S. P. Gupte, learned counsel for the appellant urged the following three points in support of the appeal.

- (1) That power under Section 186 of the Act could not be exercised until it was found that it was impracticable to call a meeting of the Company other than an annual general meeting and to hold and conduct the meeting in the manner prescribed by the Act or the Articles of the company. The Court had no jurisdiction merely to appoint a Chairman of the meeting without an order for the calling of the meeting.
- (2) That the High Court was wrong in holding that it was impracticable to hold or conduct the meeting of the company which had already been called.
- (3) That during the pendency of the appeal in the High Court, Company Law Amendment Act of 1974 came into force on 1-2-1975. The powers and jurisdiction of court under Section 186 stood transferred to Company Law Board by the said amendment. The court, there-

fore had no power to make an order under S. 186 on 17-3-1975.

5. Since in our opinion the first point urged on behalf of the appellant is well founded and has to be accepted as correct, neither of the other two points need any determination or answer and we express no opinion in respect of them.

6. Section 186 of the Act as it stood at the relevant time reads as follows:

"Power of Court to order meeting to be called.—

- (1) If for any reason it is impracticable to call a meeting of a company, other than an annual general meeting, in any manner in which meetings of the company may be called, or to hold or conduct the meeting of the company in the manner prescribed by this Act or the articles, the Court may, either of its own motion or on the application of any director of the company, or of any member of the company who would be entitled to vote at the meeting.—
 - (a) order a meeting of the company to be called, held and conducted in such manner as the Court thinks fit; and
 - (b) give such ancillary or consequential directions as the Court thinks expedient, including directions modifying or supplementing in relation to the calling, holding and conducting of the meeting, the operation of the provisions of this Act and of the company's articles.

Explanation— The directions that may be given under this sub-section may include a direction that one member of the company present in person or by proxy shall be deemed to constitute a meeting.

- (2) Any meeting called, held and conducted in accordance with any such order shall, for all purposes, be deemed to be a meeting of the company duly called, held and conducted."

It corresponds with slight variation to Section 79(3) of the Companies Act, 1913 and Section 135 of the English Companies Act, 1948. The plain

meaning of Section 186 is that the court may order a meeting of the company to be called, held and conducted in such manner as the court thinks fit in any or more of the following contingencies.

- (i) If for any reason it is impracticable to call a meeting of the company other than an annual general meeting.
- (ii) If for any reason it is impracticable to hold the meeting of the company in the manner prescribed by the Act or the Articles.
- (iii) If for any reason it is impracticable to conduct the meeting of the company in the same manner.

On the occurring of any or more of the said contingencies the court has to order the calling of a meeting of the company and its holding and conducting in such manner as the court thinks fit. The use of the word 'and' between the words 'held' and 'conducted' in cl. (a) of sub-section (1) clearly shows that the court has no power to make any order regarding the holding and conducting of any meeting which has already been called without ordering a meeting of the company to be called in place of the meeting already called. If an order under Cl. (a) has been made such ancillary or consequential directions as the court thinks expedient could be given under Cl. (b), including a direction within the meaning of the Explanation appended thereto. The language of sub-sec. (2) further fortifies the above interpretation of sub-section (1) and makes any meeting called, held and conducted in accordance with an order under sub-section (1) to be a meeting of the company duly called, held and conducted. The use of the word 'or' in the first part of sub-section (1) may be disjunctive or conjunctive in the manner we have interpreted above. But undoubtedly the order under clause (a) has got to be for all the three purposes and not merely for holding or conducting of the meeting.

7. In Company Petition No. 85/1974 no prayer was made to the Court for an order for the calling of a meeting of the Company nor has any such order been made by the

High Court in appeal. In our opinion, therefore, the application as presented in the Court under Section 186 of the Act was not maintainable. No prayer was ever made to the Court for an order that a meeting of the company be called. A fresh application, it goes without saying, if necessary, can be made under Section 186 of the Act. But then it will have to be made to the authority mentioned in the amended section.

8. For the reasons stated above, we allow this appeal, set aside the judgment and order of the High Court passed in OS Appeal No. 64/1974 and dismiss Company Petition No. 85/1974 as being not maintainable. We shall direct the parties to bear their own costs throughout.

Appeal allowed.

AIR 1976 SUPREME COURT 76

(From: Allahabad)*

P. N. BHAGWATI AND R. S. SARKARIA JJ.

Kartarey and others, Appellants v. State of U. P., Respondent.

Criminal Appeal No. 153 of 1973, D/- 25-9-1975.

(A) Constitution of India, Art. 136 — Concurrent findings of fact — Interference by Supreme Court — Rule of practice.

As a rule of practice, in appeal against conviction for offence of murder Supreme Court is loath to disturb a concurrent finding of fact unless it is shown that the finding is manifestly erroneous, clearly unreasonable, unjust or illegal or violative of some fundamental rule of procedure or natural justice. (Original Appeal No. 319 of 1970 D/- 27-7-1970 (All) Affirmed on facts) (Para 14)

(B) Criminal P. C. (1898), Section 509 — Medical witness — Whether injuries could be caused by particular weapon — Opinion of such witness — Necessity — Duty of prosecution and Court.

Where injuries found are forensically of the same species, e. g. stab

*(Original Appeal No. 319 of 1970, D/- 27-7-1970--All.)

JS/KS/D970/75/SSG

wounds, and the problem before the Court is whether all or any of those injuries could be caused with one or more than one weapon, it is the duty of the prosecution, and no less of the Court, to see that the alleged weapon of the offence, if available, is shown to the medical witness and his opinion invited as to whether all or any of the injuries on the victim could be caused with that weapon. Failure to do so may, sometimes, cause aberration in course of justice.

(Para 25)

(C) Criminal P. C. (1898), Section 374 — Proceedings upon reference under Section 374 — Nature of — Duty of High Court — Appeal by special leave — Lapse on part of High Court in not considering defence evidence — Remand — Necessity—(Constitution of India, Art. 136).

Proceedings upon reference under S. 374, before the High Court in fact are a continuation of the trial on the same evidence or additional evidence. Therefore, it is the duty of the High Court to reappraise the entire evidence and consider the proceedings in all their aspects and then come to an independent conclusion on the merits of the case. The High Court's approach inasmuch as it does not itself consider the defence evidence, is not in conformity with this settled rule of practice.

(Para 31)

Where in appeal by special leave under Art. 136 against conviction for offence of murder it was found that there was lapse on part of High Court in not considering defence evidence on a reference under S. 374, Cr. P. C., and the remittance of the case to High Court for rededecision would entail unnecessary hardship to appellants (accused), the case being already six years old, the Supreme Court instead of remitting the case to High Court, examined the defence version itself.

(Para 31)

(D) Evidence Act (1872), Section 8 — Absconder — Who is.

To be an 'absconder, in the eye of law, it is not necessary that a person should have run away from his home, it is sufficient if he hides himself to evade the process of law, even if the hiding place be his own home.

(Para 42)

Mr. E. C. Agarwala, Advocate for Appellants; Mr. O. P. Rana, for Respondent.

Judgment of the Court was delivered by

R. S. SARKARIA, J.:— This appeal by special leave is directed against a judgment of the High Court of Allahabad. Six persons viz., Kartarey (30), Sita Ram (45), Baljeet (45), Smt. Kaila (27), Benarsi and Ram Karan all residents of Giaspur, were tried by the First Temporary Sessions Judge, Meerut for rioting and committing the murder of their co-villager, Tejpal. He convicted all the six under S. 302/149, Penal Code. Each of the first three was sentenced to death and the rest to imprisonment for life. They were also convicted under Sec. 148, Penal Code. The convicts appealed, while a reference under S. 374, Cr. P. C. was made by the Sessions Judge for confirmation of the death sentences. The High Court set aside the conviction of Mst. Kaila, Benarsi and Ram Karan and acquitted them on all the counts. It set aside the conviction of Kartarey, Sitaram and Baljeet in respect of an offence under S. 148, Penal Code. It, however, maintained the conviction of Kartarey, Sitaram and Baljeet but altered it from that under Sec. 302/149 to one under Sec. 302 read with Sec. 34, Penal Code. Their death sentences were also commuted to imprisonments for life.

2. Kartarey, Sita Ram and Baljeet have now come to this Court in appeal after obtaining Special Leave under Art. 136 of the Constitution. The facts of the prosecution case are as follows:

Tejpal deceased was a Thakur. He owned considerable landed property in village Giaspur. The accused are Harijans of the village. In the last week of April 1961, the deceased found Mst. Kaila and another woman cutting sugarcane and scraping grass in his field. The deceased rebuked them and snatched away the Khurpi from Mst. Kaila. She resented this behaviour of the deceased and threatened to wreak vengeance upon him.

3. On 1-5-1969, at about noon, the deceased was returning home from his fields. When he reached in

the lane in front of the house of Kartarey, all the six accused caught hold of him and pulled him into Kartarey's house. On seeing this, Khacheru P. W. and Sripal, P. W. 2 who were sitting under a tree in the same lane, sensed mischief. So they ran to the house of Kartarey raising shouts for help. By the time they reached the house, the accused had taken the deceased inside and bolted the entrance door from within. The alarm raised by these witnesses attracted Nain Singh, P. W. 1, father of the deceased; Subrati, P. W. 3, Prah-lad Singh P. W. 4, Attar Singh and one Kantu Singh. These persons heard the shrieks of the deceased emanating from inside the house. They tried to force open the door but were unsuccessful. Leaving Kha-cheru at the entrance door, the other witnesses climbed the eastern wall of Kartarey's house and saw, in the courtyard, Mst. Kaila, Banarsi and Ram Karam holding the de-ceased while Kartarey was assault-ing him with a chhura and Baljeet and Sitaram with Katars. The wit-nesses jumped into the courtyard whereupon the assailants dragged the deceased into the Kotha. The wit-nesses succeeded in apprehending Kar-tarey and in seizing the blood-stained chhura from him. They also se-cured Mst. Kaila and Banarsi. The remaining three assailants, however, escaped through the adjoining house of Sita Ram. The witnesses found Tejpal lying dead in the Kotha.

4. Nain Singh, P. W. 1, ac-companied by Charan Singh and the Sarpanch went to the Police Station, Civil Lines Meerut, 5 miles away, and handed over the written report, Ex. Ka-2, at 2 p. m. the same day. After registering the case, Sub-inspec-tor Murari Lal, P. W. 7, reached the scene of occurrence. He found Kar-tarey, Banarsi and Mst. Kaila in the custody of the villagers. The clothes on the persons of Kartarey and Mst. Kaila were found blood-stained. The Investigator seized the same. The Investigator took over the custody of the three accused and of the blood-stained churra that had been seized from the Kartarey. The sealed par-cel containing this chhura was sent to Chemical Examiner and Serolo-

gist who reported that there was hu-man blood on this weapon.

5. Baljeet was arrested the same day, Sitaram three days later. Ram Karan surrendered in Court on 6-5-69.

6. Kartarey, Banarsi and Mst. Kaila had injuries. The Investigator sent them for medical examination. He also held the inquest. The post mortem examination of the dead body of Tejpal was performed by Dr. Radha Mohan who found 16 stab wounds on the chest, abdomen, back and left middle finger of the deceased. Both the lungs were found punctured. The heart was found punctured at the base of the left auricle and so was the diaphragm. The other inter-nal organs also were found injured. In the opinion of the Doctor, the death of the deceased was due to in-jury to the vital organs, inflicted with a sharp-edged weapon like a knife or a katar.

7. All the accused denied the prosecution case. Before the Committ-ing Magistrate, in answer to the last question, Smt. Kaila said:

"Tejpal went to my house and entered the house forcibly. He struck kirpan on my hands and face. He forcibly loosened my petticoat. He started outraging my modesty. When I kicked him, he fell down. I got his kirpan and saved myself."

8. In that court, Kartarey said: "They entered into my house and beat me. I did not beat. They are big men. They go me challaned by colluding with the police."

9. Banarsi also alleged false implication. He is a blind person. Sitaram, Ram Karan and Baljeet pleaded alibi.

10. At the trial, also, Smt. Kaila stated:

"I was all alone in my house. Tejpal came and started beating me badly. He wanted to outrage my mo-desty. I finished him in self-defence."

11. In answer to question No. 5, at the trial, Kartarey said:

"The house of Sitaram adjoins my house, but there is no opening in the middle wall. Neither Ram Karan, Sitaram and Baljeet were present there, nor they ran away. As soon as I came inside my house after tak-

ing the bath the Chauhans started beating me with lathis and I having fallen down became unconscious."

12. In reply to the last question he said:

"I did not beat Tejpal, nor do I know anything about his death. I and my brother and my wife were beaten by having entered my house. Chauhans are Zamindars. They are big people."

13. We have reproduced the statements of Kartarey, appellant and Mst. Kaila as some argument was built thereon.

14. The evidence against the appellant has been concurrently believed by the courts below. As a rule of practice, this Court is loath to disturb a concurrent finding of fact unless it is shown that the finding is manifestly erroneous, clearly unreasonable, unjust or illegal or violative of some fundamental rule of procedure or natural justice. We have therefore to see whether such exceptional circumstances exist in the case which would warrant an interference by this Court.

15. The learned Counsel for the appellants contends that this was a case in which the injuries to the deceased were caused, if at all, by Kartarey and Mst. Kaila in the exercise of their right of private defence. In support of this contention, Counsel has drawn our attention to these observations of the High Court:

"Coming to the appeal of Mst. Kaila, as already indicated we find it difficult to believe that merely because a few days earlier she and another woman had been found by Tejpal cutting sugarcane plants from his chak whereupon Tejpal had snatched the khurpi from her, the six appellants made common cause to commit murder. The injuries found on the person of Tejpal are indicative that some stronger motive must have existed for such a ferocious attack to be made upon the victim. We are unable to ignore the possibility that Tejpal might have entered Kartarey's house that noon in the expectation that Kaila would be alone in the house and men-folk would be away but contrary to his expectation, Kartarey and Baljeet turned up shortly

afterwards and found Tejpal inside the house. Kartarey appears to have jumped to the conclusion that Tejpal had come there to have illicit connection with his wife and got enraged. This explains the ferocious nature of the attack made upon Tejpal."

16. With great respect, the observations appear to us to have no foundation in the evidence on the record. They are exceedingly speculative. The defence story was extremely unnatural and improbable. Mst. Kaila wants to have it believed that the deceased was so bold that in broad day light he entered her house and simultaneously attempted to ravish and belabour her with a weapon, in the presence of her husband and husband's brother (Benarsi). This is too fantastic a story which cannot be swallowed even by the most credulous man. Moreover, against the background of the incident which took place four or five days earlier in the field, the deceased would be the least disposed to venture into the house of Kartarey. The fact that there was blood in the courtyard, apart from the blood inside the Kotha, corroborates the ocular account of the eye-witnesses that the deceased had been forcibly taken into the hind courtyard and assaulted and thereafter taken into the kotha and finished there.

17. Kartarey, in his statement which we have reproduced above, rather took up the position that he had come to his house after the occurrence, when he was assaulted and captured by the Chauhans who were already there. His stand militates against the story that he had assaulted the deceased as the latter was found attempting to rape Mst. Kaila.

18. We have, therefore, no hesitation in rejecting this contention canvassed by the Counsel. The charge against Kartarey had been proved to the hilt. He was arrested red-handed at the spot near the dead-body in his house and the blood-stained chhura Ex. 1, was seized from him. We would therefore, uphold his sentence and conviction.

19. Counsel next contends that the charge against Sita Ram and Baljeet appellants had not been brought

home beyond a reasonable doubt. It is submitted that if these two persons had participated in the assault on the deceased, they could not have escaped arrest by the witnesses. It is maintained that the wall which separates the house of Sita Ram from that of Kartarey is 7 ft. high and there is no ghati (opening or passage) through which these appellants could have escaped. In this connection, it is stressed that the Investigating Officer, in his deposition or in the site-plan, Ex. Ka-14, does not say about any such ghati in this wall.

20. All the witnesses have stated that there is a ghati in this wall through which Sita Ram and Baljeet went from the house of Kartarey into the house of Sita Ram and escaped. The version of the witnesses in regard to the existence of this ghati was not challenged in cross-examination. Although in the site-plan, the Investigating Officer has not specifically shown this ghati, he has indicated the escape route of these appellants by an arrow mark. No question or suggestion was put to the Investigating Officer as to whether he had seen any such ghati in the wall. His silence on this point was therefore not a ground to hold that no such ghati existed. Its existence had been cogently established by the unquestioned testimony of the eye-witnesses.

21. Nor could the circumstance of these appellants' successful escape be a ground to disbelieve the eye-witnesses and to doubt the appellants' participation in the commission of the crime. This only shows that the crime was committed after proper planning and the route and the manner of escape were thought out in advance. Further, the escape route lay in the direction in which they could not have been intercepted by the witnesses. A glance at the site-plan would show that the entrance door of the house of Kartarey faces the North. The witnesses are supposed to have come from the North to this entrance door, while Sitaram and Baljeet, according to the eye-witnesses escaped through the adjoining house of Sitaram towards the South. In this situation therefore, it was comparatively easy for these two appellants to elude arrest by these witnesses.

22. Counsel further submits that no marks caused by dragging were found on the deceased, that all the stab wounds found on his body might have been inflicted with a chhura by one person. The medical testimony, it is contended, does not definitely exclude that possibility. He placed particular stress on the point that the chhura Ex. 1, was not shown to the medical witness, nor was his opinion specifically invited as to whether all or any of the injuries of the deceased could be caused with this weapon.

23. It is true that neither the parties nor the trial Court asked the Medical witness Dr. Radha Mohan as to whether the injuries found on the deceased could be caused with this particular chhura Ex. 1. It seems that this weapon was not shown to the Doctor at all. The prosecution remained content with the general answer given by the Doctor that the injuries to the deceased appear to have been caused with "sharp-edged weapon such as chhuri and katar."

24. The learned Judges of the High Court also did not care to measure the breadth and length of the chhuri Ex. 1 and relate it to the dimensions of the wounds noted by the medical witness. All that they say is that this knife was "one span long, the blade was of 7 fingers' breadth", and as such it was a formidable weapon. We are unable to appreciate this crude way of measuring the weapon. It hardly furnishes any guide for relating it to the injuries of the deceased.

25. We take this opportunity of emphasising the importance of eliciting the opinion of the medical witness, who had examined the injuries of the victim, more specifically on this point, for the proper administration of justice, particularly in a case where injuries found are forersically of the same species, e.g. stab wounds, and the problem before the Court is whether all or any of those injuries could be caused with one or more than one weapon. It is the duty of the prosecution, and no less of the Court, to see that the alleged weapon of the offence, if available, is shown to the medical witness and his opinion invited as to whether all or any

of the injuries on the victim could be caused with that weapon. Failure to do so may sometimes, cause aberration in the course of justice. Fortunately, in the instant case, the number, nature and dimensions of the injuries of the deceased, as deposed to by Dr. Sohan Lal, afford a sure indication that they were caused with three different weapons. There were sixteen stab-wounds which fall into three groups, the wounds in each group being of almost identical length and breadth. Thus, the length of each of the wounds 1, 3, 4, 5 and 15 was 3 cm. The breadth of each of these wounds (excepting that of Nos. 1 and 15 which was slightly less) was 1.5 cms. Wound No. 2 was 3.5 cm. x 1.5 cms. The length and breadth of wound No. 15 was 2.5 x 1 cm. The length of wounds 6, 8, 11, 12, 13 and 16 was 4 cms. each. Giving allowance for slight variations, it can be said that the breadth of these six injuries was very nearly the same.

26. The length and breadth of wounds 9 and 10 was 6 cm. x 2 cm. each, while those of wound No. 7 were 6.5 cm. x 2.5. This dimension-wise classification of the injuries into three groups points with reasonable certainty to the conclusion that stabs 1, 2, 3, 4, 5 and 15 were caused with one weapon, stabs 6, 8, 11, 12, 13 and 16 with another and stabs 7, 9 and 10 with a third. Thus the medical evidence lends valuable corroboration to the ocular account of the eye-witnesses inasmuch as they say that these injuries on the deceased were inflicted by three persons, one with a chhura, Ex. P-1, and by the other two with katars.

27. The absence of any marks caused by dragging on the body of Tejpal does not in any way undermine the veracity of the ocular account of eye-witnesses. It all depends on the manner in which the deceased was taken from the courtyard into the kotha. If he was carried into the kotha, no such marks or injuries would be caused in the process. Then, it is not known whether the ground was soft or hard. The presence of blood in the courtyard on the door-frame of the kotha and inside the kotha coupled with the marks of dragging noticed by the

Sub-Inspector, PW 22, were more than sufficient to lend credence to the prosecution story that the deceased was first assaulted in the courtyard and then taken into the kotha and killed there.

28. Learned Counsel has urged that Sita Ram and Baljeet appellants had led evidence to show that at the time of occurrence, they were not present in the village. The High Court, it is pointed out, simply ignored the defence evidence as if it did not exist.

29. It may be recalled that Sita Ram and Baljeet while denying the prosecution allegations against them, had pleaded alibi. Sitaram's case was that from April 28 to May 3, 1969, for six days he was in village Kishanpur Birana to assist his sister's husband for threshing his crop. On the 3rd May, Sita Ram's brother came and informed him that Tejpal had been murdered and that the appellant had been named as one of the culprits. Thereupon the appellant went to the Police Station and was arrested there. He examined Rumal D. W. 4 and Sukhey D. W. 5 to substantiate his story.

30. Baljeet's plea was that at the time of occurrence, he was in the paith (market) at Maidpur for selling baan (cord). He examined Jagram (D. W. 1) to prove his alibi.

31. The High Court has not dealt with this defence evidence at all. Time and again this Court has pointed out that proceedings upon reference under Sec. 374, before the High Court in fact are a continuation of the trial on the same evidence or additional evidence. Therefore, it is the duty of the High Court to reappraise the entire evidence and consider the proceedings in all their aspects and then come to an independent conclusion on the merits of the case. The High Court's approach inasmuch as it did not itself consider the defence evidence, was not in conformity with this settled rule of practice. On account of this lapse, we would have remitted the case to the High Court for rededecision but for the fact that such a course would entail unnecessary hardship to the appellants, the case being already six

years old. In this situation, it has become necessary for us to examine the defence version.

32. We will first take up the defence evidence of Sita Ram. His first witness is Rumal, D. W. 4. He is a Harijan resident of village Kishanpur Birana. He stated that Sita Ram's sister is married to Bhondu of his village. Bhondu suffers from asthma and is sonless. Consequently Sita Ram used to come to his assistance for threshing the harvest. For that purpose Sitaram came to his village on the 28th April. Witness saw him there in Bhondu's threshing floor till the evening of the 3rd May when Sita Ram's brother came and informed him about Tej Pal's murder and Sita Ram's implication in it.

33. Rumal's evidence does not inspire confidence. It is inherently flimsy. In cross-examination he admits that his field is situate at a distance of 5 or 6 chaks — which would be a considerable distance — from the land of Bhondu in which the latter's threshing floor was located. He further swears that he has not been on visiting terms with Bhondu or Sitaram. Still he wants to have it believed — which is impossible — that he had made his threshing floor also in Bhondu's field just close to the latter's threshing floor. Although he claimed that Sita Ram used to visit his village frequently, yet he could not when asked in cross-examination, give the date of any of the visits of Sita Ram, excepting the one he deposed to in examination-in-chief. He belongs to the caste of the appellants. He admitted that he had been brought to Court for evidence by Salanga, brother of Sita Ram.

34. Sukhey D. W. 5 is also a resident of Kishanpur Birana. His evidence is more or less on the same lines as of D. W. 4. He is a nephew of Rumal, "by village relationship". He also belongs to the brotherhood of Bhondu. His memory about dates was also shaken in cross-examination. His land is situated at a far off place from the land and threshing floor of Bhondu. Still he claims that he had made his threshing floor not in his own land but in that of Bhondu. He also did not mention about Sita Ram's presence in his village at the

material time to any officer before his appearance in Court. His evidence also is no better — if not worse — than that of Rumal.

35. Sita Ram did not examine his brother Salanga who is supposed to have gone to village Kishanpur Birana on the 3rd May, and informed the appellant about his implication in Tejpal's murder. Evidently he was the best informed person regarding the whereabouts of Sitaram on the day of occurrence and for four days thereafter. It is not claimed that Salanga or any of three defence witnesses appeared before the Investigating Officer.

36. In this state of the evidence, we have no hesitation to hold in agreement with the trial Court that Sita Ram had miserably failed to establish his alibi. In fact, he intentionally remained absent from his village for four days after the occurrence.

37. This takes us to the defence evidence of Baljeet. His witness, Jagram, D. W. 1, is a barber of village Nagla. His evidence-in-chief is as under:

"I know Baljit accused. He does the work of preparing baan. I attend the paith (market) of Maidpur. This paith is held on Thursday. Baljit also sells baan in the market. Baljit had also gone there. Baljit sells at a distance of 4-5 paces from the spot where I cut hair in the market. That day I was in the paith from 9 a. m. to 4 p. m. Baljit had left a little earlier at about 3.30 p. m. Baljit did not go anywhere from the paith from 9.30 a. m. to 3.30 p. m."

38. Cross-examined, the witness admitted that he had never been to village Giasupur, although it is hardly 1 or 1 1/2 Kos. (1 1/4 or 1-3/4 miles) from the paith. He could not name any of the 25 persons which he claims to have shaved in the paith on May 1. He could not tell the date on which he last time attended the Paith before his examination in court. He admits that at times he fails to attend the Paith; that Baljit also fails to attend the Paith occasionally. Witness could not say on which particular dates Baljit attended the Paith, and on which dates he

did not. He was then asked as to how he remembered that Baljit attended the Paith on the first May. He replied because of the murder committed on that day at Giasupur.

39. Jagram's evidence is far from being cogent and convincing. It is as vague as his memory. He does not remember any other date, excepting May 1, on which he or Baljit attended or not attended the Paith. He says he has never been to village Giasupur, yet he knew that the murder in question had been committed at Giasupur on May 1. Village Giasupur is less than two miles from the Paith. Even on foot, it was not difficult for the appellant to come to the Paith within 20 to 25 minutes of the occurrence which took place at about Noon. With regard to dates and times, as revealed by cross-examination, Jagram was not a dependable witness at all. The trial Judge was therefore, right in holding that the witness had no particular reason to remember the date of occurrence. The inference is that this date was put into his mouth by the defence. In any case, Jagram's statement was hardly the kind of evidence that could establish even a reasonable probability in favour of the alibi set up by Baljit.

40. The last submission of the learned counsel for the appellant is that the prosecution case against Baljit stands on a different footing. According to the Counsel, two circumstances entitled Baljit, at least to the benefit of doubt. Firstly, he had no conceivable motive to join in the fatal assault on the deceased. He was not related to Kartarey or even to Sita Ram through whose house the culprits are alleged to have escaped. Secondly, unlike Sita Ram, he never absconded and was admittedly arrested from the village in the evening of the day of occurrence.

41. At first flush we were somewhat impressed by this argument. But on a close examination we find that this contention does not rest on sound premises and must be rejected. While the prosecution did not allege that Baljit had a motive to join Kartarey in the commission of the crime, the appellants, strangely enough, brought out in the testimony

of the defence witness, Shambhoo, DW 3—who is none else but Baljit's wife's brother — that Nain Singh who is the father of Tejpal deceased, and is Sarpanch of the village, had imposed a fine on Baljit's father-in-law. If that is true, Baljit had a conceivable ground of grudge against the deceased and his father.

42. Further it is wrong to say that Baljeet never absconded. Contrary to what Baljeet has said in his examination under Sec. 342, Cr. P.C. the Investigating Officer, P. W. 7, testified that Baljeet was found hiding in a chhappar in the village from where he was arrested. This account of Baljeet's arrest was not challenged in cross-examination. To be an 'absconder' in the eye of law, it is not necessary that a person should have run away from his home, it is sufficient if he hides himself to evade the process of law, even if the hiding place be his own home. We therefore, do not find any ground to distinguish the case of Baljeet from that of Sita Ram and to treat him differently.

43. All said and done, no good reason has been shown why we should disturb the concurrent findings of the courts below against the appellants.

44. Accordingly, we dismiss this appeal and maintain the convictions of the appellants.

Appeal dismissed.

AIR 1976 SUPREME COURT 83

(From: Punjab and Haryana)*

R. S. SARKARIA AND A. C. GUPTA
JJ.

Labh Singh and others, Appellants v. State of Punjab, Respondent.

Criminal Appeal No. 176 of 1971,
D/- 10-10-1975.

(A) Criminal P. C. (1898), Sections 417, 418 and 423 — Appeal against acquittal — Appreciation of evidence by Appellate Court — Matters regarding which due regard and consideration to be paid.

*(Cri. Appeal No. 230 of 1970, D/- 25-5-1971—Punjab & Har.)

JS/KS/D873/75/VSS

It is now well-settled that the powers of the High Court under Sections 417, 418 and 423 of the Code of Criminal Procedure 1898 (or for that matter under the corresponding provisions of the new Code of 1973) while hearing an appeal against an acquittal are as wide and comprehensive as in an appeal against a conviction. It has full power to reappraise the entire evidence upon which the order of acquittal was based and to reach its own conclusion. But before reversing an order of acquittal it should endeavour to displace or dispel in a general or specific way the primary reasoning of the trial court upon which the acquittal is founded, paying due regard and consideration to such matters as (1) the views of the trial Judge as to the credibility of the witnesses and the value of their evidence; (2) the initial presumption of innocence in favour of the accused, a presumption certainly not weakened by his acquittal at the trial; (3) the right of the accused to the benefit of any doubt and (4) the slowness of an appellate court in disturbing a finding of fact arrived at by a Judge who had the advantage of seeing the witnesses. It follows as a corollary from the above, that if two views of the evidence are reasonably possible, one supporting acquittal and the other indicating conviction, the High Court should not interfere merely because it feels, that it would, sitting as a trial Court, have taken the other view. AIR 1975 SC 77 and AIR 1974 SC 286, Rel. on. (Para 12)

(B) Evidence Act (1872), Sec. 3 —Relationship — Mere fact that witness is a collateral of deceased in some degree is no ground to hold that he is not a disinterested and independent witness. (Para 18)

Cases Referred: Chronological Paras
AIR 1975 SC 77 = 1975 Cri LJ 37
12
AIR 1974 SC 286 = 1974 Cri LJ 337
13

M/s. Hardev Singh and R. S. Sodhi, Advocates, for Appellants; Mr. O. P. Sharma and Mr. Balak Ram, Advocates for Respondent.

Judgment of the Court was delivered by

SARKARIA J.:— Labh Singh, Jamiat Singh, Banta Singh, Surjit Singh

and Harbans Kaur of village Manauli were tried for the murders of Nasib Singh and Sadhu Singh by the learned Additional Sessions Judge, Patiala. All of them were acquitted. The State carried an appeal against that acquittal to the High Court of Punjab and Haryana. The High Court set aside the acquittal of Labh Singh, Jamiat Singh and Banta Singh and convicted them under Sec. 302 read with S. 34, Penal Code on two counts and sentenced them to imprisonment for life, each. In addition, a fine of Rs. 200/- was imposed on each of the convicts.

2. Aggrieved by that order, Labh Singh, Jamiat Singh and Banta Singh have come in appeal to this Court.

3. The prosecution story as adumbrated in the F.I.R., Ex. P. A., lodged by Gurdev Singh, PW 5, at the Police Station Mubarakpur, on October 13, 1968 at 3.50 P. M. was as follows:

"I am a resident of village Manauli. Today, at 8/9 A. M. I along with my father, Nasib Singh and my sister's husband, Sadhu Singh son of Assa Singh, Jat, by caste, resident of Bandey Mahla Khurd, were scraping Khal (channel) to bring water from the tubewell of Teja Singh of Kailria, now residing at Manauli. Labh Singh and his companions came running from his maize field; and Labh Singh son of Ram Dass resident of aforesaid village, gave a gandasi blow from its sharp side on the head of Sadhu Singh, who ran away. Jamiat Singh son of Ram Dass gave a bircha blow from the back, on his shoulder blades. Banta Singh, brother-in-law (wife's brother) of Labh Singh, resident of Sahoran, gave a kohala blow from its sharp side on the right leg of Sadhu Singh, who fell down in the maize field of Gurdev Singh, resident of Manauli. Thereon, Harbans Kaur wife of Labh Singh hurled a kirpan blow towards my father which he warded off with his hands, and the hands were injured. Sital, resident of Sahoran, gave a Safaiaing blow from the right side on the head of my father who also fell down. Both the aforesaid accused inflicted

injuries with their respective weapons upon Sadhu Singh and my father when they were lying on the ground. Ram Dass father of Labh Singh kept on raising lalkaras that Sadhu Singh and Nasib should not be left alive. My mother, Mihaan Singh jat of village Sahoran and Nasib Singh jat resident of Khuda, had also reached the spot. On the alarm raised by all of us, the accused ran away. Thereafter I collected Panchayat of the village and showed them the spot. The cause of fight is that about one and a half months back, Labh Singh had damaged our gowara crop by letting in bullocks. An altercation had also taken place with Sadhu Singh who had come to Manuali on duty. So abuses were also exchanged many times but the Panchayat used to pacify the matter in the village. They have belaboured my father and Sadhu the latter due to the grudge that he has been helping my father. All the accused have inflicted injuries with their common intention. My maternal uncle, Nasib Singh, and Gurdev Singh, resident of Manuali have taken Sadhu Singh and my father to the Hospital at Chandigarh, for treatment. I along with Mihaan Singh aforesaid have come to lodge the report. Action may be taken."

4. On this report, Station Officer Gurnam Singh (P. W. 22) registered a case under Secs. 307/326/149, Penal Code. Accompanied by Head Constable Santokh, 4 constables, Gurdev Singh P.W. 5 and Mihaan Singh, PW 9, he then reached the Bus Stand at Chandigarh. From there, he sent the Head Constable to the scene of occurrence, while he along with the PWs, reached the Hospital in Sector 16 at 6.30 P.M. He found Sadhu Singh dead, and Nasib Singh unfit to make a statement. He then recorded the statement of Mihaan Singh there in the Hospital. Nasib Singh also died in the Hospital the same night. He prepared the inquest reports regarding the deaths of Sadhu Singh and Nasib Singh. On the following day, the 14th October, he visited the scene of occurrence in the presence of PWs Sardari Lal Sarparch and Madan Lal Panch. Sardari Lal handed over the documents

Ex. U/1, and Ex. PW said to be the dying declarations made by Nasib Singh and Sadhu Singh deceased, recorded by PWs. Madan Lal and Harnam Singh respectively. The investigator took these documents into possession and prepared the memo Ex. PY.

Labh Singh, Jamiat Singh and Harbans Kaur accused were arrested on October 17, 1968 when they were produced before the Station Officer by Madan Lal Panch. The blood-stained shirts (P-3 and P-4) which they were then wearing, were seized by the Police Officer and the Memos Ex. PAA and Ex. PZ were prepared. After making statements on the 25th October Jamiat Singh and Labh Singh led the Police Sub-Inspector to a sugarcane field and produced a blood-stained barcha and a gandasi, respectively. These weapons were sealed into parcels which in due course were sent for chemical examination.

5. Surjeet alias Sital Singh accused surrendered before the Magistrate at Jullundur where a test identification parade was held. Prosecution witnesses, Gurdev Singh, Nasib Singh and Mihaan Singh identified Surjeet Singh correctly at that parade.

6. At the trial, the prosecution demanded conviction of the accused on the basis of evidence which may be catalogued as under:

(1) Direct testimony of the eye-witnesses, Gurdev Singh (P. W. 5), Nasib Singh (PW 8) and Mihaan Singh (PW 9).

(2) The dying declarations (Ex. PU/1 and Ex. PW) of Nasib Singh and Sadhu Singh deceased recorded by Madan Lal Panch (PW 14) and Harnam Singh Lamberdar (PW) respectively.

(3) Discovery of the barcha Ex. P-1 and the gandasi Ex. P-2 at the instance of Jamiat Singh and Labh Singh appellants respectively, on 25-10-1968.

(4) The seizure of the blood-stained shirts (P3 and P-4) from the persons of Labh Singh and Jamiat Singh at the time of their arrest on 17-10-1968.

7. The trial court found that the evidence of all the four catego-

ries produced by the prosecution was wholly unworthy of credit. It, therefore, rejected it and in the result acquitted all the accused.

8. Against that order of acquittal, the State preferred an appeal to the High Court. The learned Judges of the High Court agreed with the trial court to this extent that the evidence of the two eye-witnesses, Nasib Singh and Mihaan Singh was wholly unreliable. But in their opinion the same could not be said about the testimony of Gurdev Singh P. W. 5. According to the learned Judges, the testimony of Teja Singh P.W. 13 assured the presence of Gurudev Singh at the time and place of occurrence and "if once the presence of Gurudev Singh is accepted..... it will naturally be inferred that he had seen the occurrence and having done that he would not have given up the real assailant and falsely name the appellants as the person who had injured his father and brother-in-law." Even on "careful scrutiny" they were of the view that the story given by him is substantially true.

9. Reversing the finding of the trial Judge, the learned Judges found that the dying declarations of the deceased persons, were genuine, spontaneous and made without any tutoring and "it will be safe to rely on these pieces of evidence". The High Court further held, in reversal of the trial court's finding, that the seizure of the bloodstained shirts (P-3 and P-4) from the persons of Labh Singh and Jamiat Singh at the time of their arrest on the 17th October, was also a valuable piece of circumstantial evidence, supporting the prosecution case as against these two appellants. The High Court, however, upheld the finding of the trial court that the evidence of the discovery of the Barcha, P-1, and the gandasi, P-2, at the instance of Jamiat Singh and Labh Singh was not worthy of reliance.

10. Mr. Hardev Singh, the learned counsel for the appellant has in the course of his arguments sought to make out two points: First, the reasons given by the trial court for rejecting the evidence of P. W. 5 and that of the dying declarations,

Ex. PU/1 and Ex. PW, were weightier and have not been completely displaced by the High Court. Secondly, in any case, the view of the evidence taken by the trial court was also reasonably possible. In such a situation, it is urged, the High Court should not have reversed the order of acquittal and ignored the principles settled by the pronouncements of this Court. Learned Counsel has taken us through the evidence on record and the judgments of the courts below.

11. As against this, Mr. O. P. Sharma, learned Counsel for the State submits that the reasons given by the trial court for discarding the entire prosecution evidence were manifestly untenable and had been effectively dispelled by the High Court. The powers of the High Court, it is maintained, to review the evidence and reach its own findings in an appeal against acquittal are as wide as those of the trial Court. Counsel has adopted the reasoning of the High Court, with particular stress on the brutal nature of the murders.

12. In some earlier judgments of this Court, it was said that the High Court should not reverse an order of acquittal unless there are "substantial and compelling" reasons to do so. In order to dispel doubts, it was clarified in subsequent decisions that the use of such phrases was neither intended to lay down a formula to be rigidly applied in every case, nor to curtail the powers of the High Court in appeal over an order of acquittal. It is now well settled that the powers of the High Court under Sections 417, 418 and 423 of the Code of Criminal Procedure 1898 (or for that matter under the corresponding provisions of the new Code of 1973) while hearing an appeal against an acquittal are as wide and comprehensive as in an appeal against a conviction. It has full power to re-appraise the entire evidence upon which the order of acquittal was based and to reach its own conclusion. But before reversing an order of acquittal it should endeavour to displace or dispel in a general or specific way the primary reasoning of the trial court upon which the acquittal

is founded, paying due regard and consideration to such matters as (1) the views of the trial Judge as to the credibility of the witnesses and the value of their evidence; (2) the initial presumption of innocence in favour of the accused, a presumption certainly not weakened by his acquittal at the trial; (3) the right of the accused to the benefit of any doubt; and (4) the slowness of an appellate court in disturbing a finding of fact arrived at by a Judge who had the advantage of seeing the witnesses — (see *Sita Ram v. State of Madhya Pradesh*, AIR 1975 SC 77 = (1975 Cri LJ 37)).

13. It follows as a corollary from the above, that if two views of the evidence are reasonably possible, one supporting acquittal and the other indicating conviction, the High Court should not interfere merely because it feels, that it would, sitting as a trial court, have taken the other view (see *Bhim Singh Rup Singh v. State of Maharashtra*, AIR 1974 SC 286 = (1974) Cri LJ 337)).

14. The Judgment of the High Court reversing the acquittal, is to be tested in the light of the above principles.

15. First we take up the evidence of Gurdev Singh, PW 5. The trial court rejected his evidence for these reasons:

(1) As deposed to by Teja Singh, PW 13, the water from his tube-well had run for about half an hour till it was stopped at about 7.30 A.M., that during this period the water must have run much more than a distance of 4 or 5 killas (260 to 330 yds.) which according to Teja Singh was the distance between the tube-well and the field of the deceased; consequently "the story of Gurdev Singh P-W 5, regarding he and the deceased (being there?) only (for?) scraping khal at the time of occurrence would appear to be palpably false.

(2) In the F.I.R., Gurdev Singh mentioned all the members of the family, including Ram Dass, the father of Labh Singh and Jamiat Singh, and attributed lalkaras to him, though in Court he did not say a word regarding the presence of Ram Dass or any instigation proceeding from him.

(3) Implication by Gurdev Singh of Smt. Harbans Kaur wife of Labh Singh, as one of the assailants of Nasib Singh, was false because—

(a) She was in an advanced stage of pregnancy, and it was not possible to imagine that she would in that condition join in the assault;

(b) On this point his evidence was inconsistent with the medical evidence.

(4) In the F.I.R. and in his statement before the Committal Court the witness suppressed the injury caused by Sadhu Singh deceased with a takwa to Jamiat Singh though at the trial he deposed to that fact. This "improvement" upon his former statements throws a "grave doubt" on his truthfulness.

(5) Gurdev Singh while lodging the F.I.R., suppressed the fact of the death of Sadhu Singh. Gurdev Singh's explanation that at the time of making the F.I.R., he did not know of Sadhu Singh's death in the Hospital, was contradicted by Nasib Singh PW who stated that he had informed Gurdev Singh of this death, at the time of the latter's departure from the Hospital for the Police Station.

(6) At the trial, the witness has contradicted his statement in the Committal Court in regard to the dying declarations made by Sadhu Singh and Nasib Singh. In the Committal Court, he had stated that the victims Sadhu Singh and Nasib Singh had told PWs Sardari Lal, Madan Lal and Harnam Singh all about the incident and those statements of the victims were recorded on the spot in Punjabi and Urdu. At the trial, PW 5, took up the position that these dying declarations were not recorded in his presence, and he omitted this part of the story, perhaps "with a view to rule out the possibility of his having influenced the deceased in making the declarations".

(7) The story given by PW 5 was unnatural. If the deceased persons and the witness were scraping the khal with kahies, they should have used them in self-defence. Gurdev Singh should have gone to the rescue of the deceased persons and used his kahi against the assailants. But he did not do so.

(8) If PW 5 had been present at the time and place of occurrence he could not escape uninjured. The fact that there was no injury on Gurdev Singh makes his presence at the scene of occurrence doubtful.

16. The learned Judges of the High Court have fully and specifically considered every one of these reasons given by the trial court and, in our opinion, effectively dispelled them.

17. The mere fact that water had flown in the khal for about half an hour up to 7.30 or so, was no ground to hold that there was no necessity to scrap, mend or construct the water channels further. It is a matter of common knowledge that most of the work of scraping, repairing, and levelling irrigation channels is done during the flow of water. Moist or wet soil, after the flow of some water, can be scraped and moulded more easily and with less effort. Nasib Singh deceased had on the previous evening settled with Teja Singh, PW 13, to take the water from the latter's tubewell on the following morning for irrigating the field which was at a distance of about 300 yards from the tubewell. The supply of water was to be paid for at the rate of Rs. 5/- per hour. The longer the tubewell worked, the more would be the charges. There must have been an anxiety on the part of Nasib Singh to irrigate his field within the shortest time possible. Only a properly aligned well-embanked and flow-commanding channel could cut short the irrigation time and the supply charges. There was, therefore, necessity for the deceased to mobilize his family strength for this purpose. In such a compelling situation, Gurdev Singh's collaboration with his father and brother-in-law would be indispensable. Nor does the switching off of the tube-well at about 7-30, lead to the inference that no more work on the water-channels or in the field remained to be done. Rather, it would be otherwise. Probably, sometime after the water started flowing into the field, Nasib Singh deceased and his companions felt the necessity of scraping the khal further or to set right its alignment to avoid wastage of water or facilitate its flow. The

learned Judges of the High Court, therefore, were right in concluding that "far from casting any doubt on the evidence of Gurdev Singh, the statement of Teja Singh establishes his presence at the spot at the time of occurrence and makes this part of the prosecution story highly probable."

18. It may be recalled that Teja Singh's version that Gurdev Singh (PW 5) came to him at about 7.30 A.M. or so and asked the witness to stop the tube-well engine, was not challenged by the defence in cross-examination. He however, admitted in cross-examination that Nasib Singh deceased was his collateral. Homogeneity of descent among all or most of the proprietors in a Punjab village is not unusual. The mere fact that Teja Singh was a collateral of Nasib Singh, in some degree, is no ground to hold that he is not a disinterested, independent witness. He is a respectable person, the veracity of whose testimony was not doubted even by the trial court. Thus, Teja Singh's unimpeached testimony had indubitably fixed the presence of Gurdev Singh, PW 5 in connection with the irrigation of the field of his father Nasib Singh, at about 7.30 A.M., that is, shortly before the occurrence which took place at 8 A.M. The tubewell is about 260 or 330 yards — though according to the other witnesses this distance is much less — from the field of Nasib Singh. This much distance could be covered in about 10 or 15 minutes. Gurdev Singh therefore, must have returned to his field well before the commencement of the assault on the deceased persons.

19. Once Gurdev Singh's presence about the scene of occurrence is accepted as a reasonably certain fact, there is no escape from the conclusion that he was an eye-witness of the fatal assault on Sadhu Singh and Nasib Singh. The only question remaining to be considered would be, how far his evidence could be safely acted upon.

20. It is true that in the F. I. R. Gurdev Singh attributed relatively minor, though an incriminating part to Ram Dass, the father of the appellant. But he did not re-

peat this allegation in Court. That only shows that the witness had jettisoned the exaggerations or embellishments which he had made in the F. I. R. and returned to the path of restraint and truth. This omission of Ram Dass by the witness in court was not put to him. He had no opportunity to explain the same. Possibly he might have given some plausible explanation as to why in the F. I. R. he had mentioned Ram Dass also as an instigator of the actual assailants. In any case, the evidence of Gurdev Singh PW 5, could not be thrown over-board on this account although it will be necessary to scrutinise his evidence with care.

21. As regards the implication of Smt. Harbans Kaur, the High Court has found and in our opinion for good reasons that it could not be positively said that the part ascribed to her in the assault was necessarily false. Only a minor part was attributed to Harbans Kaur that she had attempted a kirpan blow on Masib Singh which the latter tried to ward off with his hand and in the process received an injury. The trial court gave two reasons for holding that PW 5 had falsely implicated her. These reasons we have already set out earlier in this judgment. Undoubtedly she was in an advanced stage of pregnancy but it must be remembered that she was a rustic woman who would be used to manual work in the fields. It could not therefore be said that in that stage of pregnancy, she was physically incapable of wielding a kirpan. The medical evidence did not contradict Gurdev Singh. There was an injury on the hand of Nasib Singh caused with a sharp-edged weapon. Kirpan is also a sharp-edged weapon. Thus the two reasons advanced by the trial court for stigmatising Gurdev Singh's version implicating Harbans Kaur as false were not sound and had been effectively off-set by the High Court. In maintaining the acquittal of Mst. Harbans Kaur, the High Court only accorded her the benefit of doubt only. Her acquittal was not based on the ground that she had been falsely implicated.

22. Reasons (4) and (5) given by the trial court were manifestly perile

and we do not think it necessary to elaborate the point further. It would suffice to say that we agree with the reasoning of the High Court that the mere fact that in his earlier statement Gurdev Singh did not state that Sadhu Singh deceased had also caused an injury to Jumiat Singh in self-defence to which fact he deposed at the trial or that in the F. I. R. he had not said that Sadhu Singh had succumbed to his injuries in the Hospital — a fact of which according to him, he was not aware — was not a ground to brush aside the testimony of the witness.

23. Similarly with regard to the dying declarations, the so called discrepancies in his statement were of no consequence. His statement to the effect that Sadhu Singh and Nasib Singh deceased had narrated all about the incident to the village dignitaries was obviously based on hearsay or on derivative information.

24. Lastly the presence of Gurdev Singh at the scene of occurrence could not be disbelieved merely because he had not received any injury at the hands of the assailants of his father. Nor his conduct in not going to the rescue of his father and in not using his kahi against the assailants who were armed with superior weapons, was in any way inconsistent with his being an eye-witness. Gurdev Singh was a lad of only 16 or 17 years. He had only a kahi with him which was no match for the superior weapons and strength of the assailants. No wonder that Gurdev Singh in such a situation realising that discretion was the better part of valour did not intervene. Different persons react differently some are bold; some are timid and some get panicky. Thus no inference can be drawn against the presence or veracity of Gurdev Singh merely because he had been left unhurt.

25. Gurdev Singh no doubt was an interested witness but there is reliable independent evidence on the record which lends sufficient assurance to his testimony qua the appellants. Firstly, there was valuable evidence furnished by the dying declarations Ex. PU/I and PW made by the deceased persons before Sardari

Lal (PW 16) Sarpanch, Madan Lal (PW 14) Panch and Harnam Singh (PW 15) Lambardar who were brought to the spot soon after the occurrence by Gurdev Singh PW 5.

26. The trial court had discarded the evidence furnished by Exhts. PU/I and PW for three reasons. Firstly, that they do not bear the thumb impressions or signatures of the deponents and the explanation given by these village dignitaries in regard to the absence of thumb-marks/signatures was not satisfactory. Secondly, Madan Lal PW had admitted in cross-examination that at the time of making the statement Exhibit PU/I Nasib Singh was not fully conscious although he was conscious enough to make that statement. Thirdly, there was no explanation why these dying declarations were not handed over to the informant Gurdev Singh for transmission to the Police Station at the time of lodging the First Information Report. The learned Judges of the High Court found, and we think correctly, that these reasons were quite hollow. Dr. Manmohan Goyal, who conducted the post-mortem examination of the body of Nasib Singh found no less than six injuries including two lacerated wounds on the left hand; one incised wound on the web of left thumb and index finger and one wound on left forearm with fracture of radius. He further found another lacerated wound on the right thumb. It was manifest that not only both the right hand and left thumbs of Nasib Singh were injured but practically the whole of his left arm was badly mangled and fractured. The explanation given by P. Ws. 14, 15 and 16 as to why the thumb-impression or the signature of the deceased, (Nasib Singh) was not taken on the dying declaration. Ex. PU/I was that his thumbs and hands were so injured that he could not affix his thumb-impressions. This was a very satisfactory explanation and there was absolutely no good reason for the trial court to disbelieve these village dignitaries on this point. Same was their explanation for not getting the statement, Ex. PW, thumb-marked or signed by Sadhu Singh. He too had a punctured wound and multiple

abrasions on his left arm. His right elbow and right fore-arm near the wrist were badly injured. Both the bones, that is, the radius and the ulna of the arm, were found fractured. The medical evidence thus confirmed the correctness of the explanation given by these witnesses for not getting these dying declarations thumb-marked by the deponents.

27. It is true that Madan Lal in cross-examination did opine that Sadhu Singh was semi-conscious but he qualified this with the addition, that he was fit to make the statement he did. In this connection it may be noted that the statement Ex. P. W. of Sadhu Singh was not recorded by Madan Lal Panch but by his colleague, Harnam Singh Lambardar, P. W. 15., who stated in categorical terms that Sadhu Singh was in his senses and on being questioned by the Sarpanch (P. W. 16) made the statement PW without interruption. The statement Ex. PW represents the answer given by Sadhu Singh to a single question put by the Sarpanch. It was only after making this statement, according to the witness, Sadhu Singh started becoming unconscious.

28. The High Court has correctly interpreted that by saying that Sadhu Singh was semi-conscious but at the same time he was conscious enough to make the statement he did, what these unsophisticated villagers meant was that Sadhu Singh was not fit enough to make an elaborate statement. There is nothing in the statements of these witnesses to show that Nasib Singh at the time of making statement PU/I, was not fully conscious.

29. The very brevity and rugged simplicity of these statements is a guarantee of their genuineness. Had these documents been prepared after the arrival of the Police Officer, they would not have been so cryptic. Nor could they have been written in this form. It may be noted that in Ex. PU/I, Nasib Singh stated that he had been assaulted by five persons viz., Labh Singh, Jamiat Singh, Banta Singh, brother-in-law of Labh Singh, Harbans Kaur and an unknown person. Similarly in Ex. PW, Sadhu Singh stated that one of

his assailants was an 'unknown' person. In the First Information, Gurdev Singh has named this 'unknown' person as Sital Singh alias Surjit Singh of Saheran.

30. This circumstance indicates two things: First, that these statements were made without prompting or tutoring by Gurdev Singh, P.W. 5, or anybody else, and possibly they were made after P.W. 5 had gone to arrange for conveyance to remove the injured to the Hospital. Secondly, they were not written after the registration of the case in the Police Station or during investigation.

31. These dying declarations were handed over by the Sarpanch to the Investigating Officer when he reached the spot on the following morning. Up to that time, he kept these documents in his safe custody. These village dignitaries were wholly disinterested persons. They were not related to the victims or the appellants. They had no axe of their own to grind against the appellants. There was absolutely no ground to disbelieve their sworn word.

32. The dying declarations, PU/1 and PW, fully support and confirm the testimony of Gurdev Singh, PW 5 qua the appellants.

33. These village dignitaries have testified that it was Gurdev Singh, PW 5, who had taken them to the scene of occurrence. They thus assure the presence of Gurdev Singh about the time of the occurrence on the spot.

34. The medical evidence also corroborates the ocular account given by Gurdev Singh in regard to the nature of the weapons used by the appellants in inflicting injuries on the deceased persons.

35. The injuries found on Labh Singh by the Doctor, also, corroborate Gurdev Singh, PW 5, inasmuch as the latter stated that Sadhu Singh had also wielded his takua in self-defence, and in the process, caused an injury to Labh Singh.

36. Lastly, a relatively minor circumstance which further supports the testimony of Gurdev Singh against the appellants, is that stains of human blood were found on the shirts of Jamiat Singh and Labh

Singh appellants when they were arrested by the police.

37. For the foregoing reasons, we are of opinion that the High Court had rightly reversed the order of acquittal in the case of the appellants. The appeal accordingly fails and is dismissed.

Appeal dismissed.

AIR 1976 SUPREME COURT 91

(From: Punjab and Haryana)*

P. N. BHAGWATI AND R. S. SARKARIA, JJ.

Raghubir Singh, Appellant v. State of Punjab, Respondent.

Criminal Appeal No. 142 of 1971, D/- 10-10-1975.

(A) Penal Code (1860), Section 161 — Bribery case — Evidence — Appreciation of — Duty of officers in anti-corruption department to secure independent and respectable witnesses of raid — (Evidence Act (1872), Ss. 3 and 133) (Criminal P. C. (1974), Section 51). Cri. Appeal No. 1027 of 1969, D/- 25-2-1971 (Punj & Har), Reversed.

The Officers functioning in the anti-corruption department must seriously endeavour to secure really independent and respectable witnesses so that the evidence in regard to raid inspires confidence in the mind of the court and the Court is not left in any doubt as to whether or not any money was paid to the public servant by way of bribe. They should insist on observing this safeguard for the protection of public servants against whom a trap may have been laid. In the present case the search witnesses were interested witnesses and, therefore, their evidence with regard to the giving of bribe and the recovery of the amount from the person of the accused was not relied upon. Cri. Appeal No. 1027 of 1969, D/- 25-2-1971 (Punj. & Har.), Reversed. (Paras 8, 9)

(B) Penal Code (1860), Section 161 — Bribery case — Laying of trap for public servant — Duty of Police Officer pointed out.

*(Cri. Appeal No. 1027 of 1969, D/- 25-2-1971—Punj. & Har.)

JS/KS/D870/75/KSB

Where a trap is laid for a public servant, it is desirable that the marked currency notes, which are used for the purpose of trap, are treated with phenolphthalein powder so that the handling of such marked currency notes by the public servant can be detected by chemical process and the Court does not have to depend on oral evidence which is sometimes of a dubious character for the purpose of deciding the fate of the public servant. AIR 1974 SC 989, Rel. on. (Para 11)

Cases Referred: Chronological Paras
AIR 1974 SC 289 = (1974) 3 SCR 200
= 1974 Cri LJ 784 11

Mr. S. C. Manchanda, Sr. Advocate, (M/s. J. M. Khanna, Ujjal Singh and R. N. Kapoor, Advocates with him), for Appellant; Mr. O. P. Sharma, Advocate, for Respondent.

Judgment of the Court was delivered by

BHAGWATI J.:— This appeal, by special leave, is directed against an order of conviction and sentence recorded against the appellant under Sec. 161 of the Indian Penal Code and Sec. 5(1) (d) read with Sec. 5(2) of the Prevention of Corruption Act, 1947. The appellant was tried by the special Judge, Amritsar and for each of the two offences he was convicted and sentenced to undergo rigorous imprisonment for one and a half years and to pay a fine of Rs. 100/- or in default to undergo rigorous imprisonment for a further period of three months. This conviction of the appellant was maintained by the High Court in appeal, but the sentence of substantive imprisonment for each of the two offences was reduced from one and half years to one year. The question which arises for consideration in this appeal is: whether, on the evidence on record, the conviction and sentence recorded against the appellant are justified, or they require to be set aside?

2. The appellant was, at the material time, a Passenger and Goods Tax Clerk II in the office of the Excise and Taxation Officer, Amritsar. There was also another Passenger and Goods Tax Clerk I in the office at that time and his name was Har Mohan Singh. One Jagdish Raj,

along with his brothers, jointly owned a truck bearing No. PNA 4228 which stood in his name. Since the truck was old and needed extensive repairs, Jagdish Raj stopped plying it for hire and it remained idle in the workshop of Ajit Singh in the village Bhikhiwind since 1st July, 1965. The certificate of registration of the truck was deposited by Jagdish Raj with the Licensing Officer, Amritsar since he was not plying the truck. It appears that by an order dated 12th May, 1967 exemption had already been granted to Jagdish Raj from payment of goods tax in respect of the truck for the period of seven quarters from 1st July, 1965 to 31st March, 1967. But the goods tax for the subsequent quarters from 1st April, 1967 remained to be paid by Jagdish Raj. One Brar, who was the Excise and Taxation Inspector at the relevant time insisted on payment of these arrears of goods tax, but on the request of Jagdish Raj, granted him one and a half months' time to produce a certificate from the Licensing Officer, Amritsar certifying that the truck had not been plied and that the certificate of registration remained deposited with the Licensing Officer during the quarters from 1st April, 1967. The case of the prosecution was that this time was granted by Brar on receipt of illegal gratification to the tune of about Rs. 20/-. However, some twenty days thereafter, Brar came to Bhikhiwind and impounded the truck for non-payment of arrears of goods tax and handed it over at the police station for safe custody. On learning about this event, Jagdish Raj once again contacted Brar and on further demand being made by him, Jagdish Raj paid for the benefit of Brar a sum of Rs. 10/- to the keeper of the hotel where Brar had stayed. Jagdish Raj entreated Brar to release the truck but the latter was adamant and insisted that he would not release the truck until the exemption certificate from the Licensing Officer, Amritsar was produced and ultimately told Jagdish Raj that he should contact the appellant on 29th July, 1968 as he would be on leave on that day. Jagdish Raj accordingly contacted the appellant in his office on 29th

July, 1968 when the appellant confronted him with the demand of a bribe of Rupees 400/- for Brar and Rs. 50/- for himself if Jagdish Raj wanted his work in connection with the release of the truck to be carried out expeditiously. Jagdish Raj entreated the appellant that he was not in a position to pay the large amount demanded by the appellant, but the latter remained firm and refused to reduce the amount of the bribe. On the next day, that is 30th July, 1968, Jagdish Raj again contacted the appellant and repeated his request for reduction in the amount of the bribe but the appellant declined to accept a lesser amount.

3. Jagdish Raj then decided to go to the Office of the Special Inquiry Agency in Amritsar for the purpose of entrapping the appellant. On his way to the office of the Special Inquiry Agency, he met Arjun Das, who was well known to him and was going on a cycle to see his sister. He persuaded Arjun Das to accompany him and both of them proceeded to the office of the Special Inquiry Agency and met Inspector Hardas Singh there. Jagdish Raj disclosed all the facts to Inspector Hardas Singh and his statement was duly recorded by Sub-Inspector Baldev Singh on the dictation of Inspector Hardas Singh and it was subsequently despatched for the registration of the case. Jagdish Raj then produced five currency notes of the denomination of rupees ten each which were duly taken into possession after having been initialled and their serial numbers having been noted in the relevant memo and were then returned to him. The necessary instructions were thereafter given to Jagdish Raj and Arjun Das. The memo was signed by Jagdish Raj, Arjun Das and one other witness named Mohan Lal. The raiding party then proceeded to the office of the Excise and Taxation Officer at about 1.30 p.m. after picking up one more witness named Makhan on the way. When they reached the office of the Excise and Taxation Officer, Jagdish Raj and Arjun Das went to the first floor where the appellant used to sit while the rest of the members of the raiding party waited below in the com-

pound. Jagdish Raj and Arjun Das met the appellant in the room where he was sitting and the appellant told Jagdish Raj that he was waiting for him to come as it was otherwise time for him to go home. Jagdish Raj told the appellant that he would himself settle the amount with Brar, but so far as the appellant was concerned, he had brought the sum of Rs. 50/- demanded by the appellant and he handed over the five marked currency notes to the appellant in the presence of Arjun Das. The appellant received the five marked currency notes and put them in his right hand pocket of his trousers and thereafter he proceeded down stairs followed by Jagdish Raj and Arjun Das as the office time was over. As soon as he came within the sight of the raiding party which was waiting in the compound, Jagdish Raj gave the agreed signal. Thereupon the appellant was apprehended by Inspector Hardas Singh in the verandah of the ground floor. The appellant was searched and the five marked currency notes were recovered from the right hand pocket of his trousers and these were taken possession of by Inspector Hardas Singh under a memo. Whilst the search was in progress, Gurdev Singh, Excise and Taxation Officer also arrived there and Inspector Hardas Singh requested him to attest the memo of recovery of the five marked currency notes, but Gurdev Singh declined to do so and observed that whosoever has committed the sin would suffer the consequences. Inspector Hardas Singh thereafter carried out the investigation and after the investigation was complete, he filed a charge-sheet against the appellant charging him for offences under S. 161 of the Indian Penal Code and Sec. 5(1)(d) read with Sec. 5(2) of the Prevention of Corruption Act, 1947. The appellant was, as pointed out above, convicted and sentenced by the learned Special Judge and his conviction was confirmed in appeal by the High Court, though the substantive sentence of imprisonment was slightly reduced. The appellant challenges his conviction and sentence in this appeal brought by him with special leave.

4. The conviction of the appellant rests on the oral evidence of Jagdish Raj, Arjun Das, Sub-Inspector Baldev Singh and Inspector Haridas Singh. This evidence has been accepted both by the learned Sessions Judge as well as the High Court, but if we scrutinise this evidence closely in the light of the other evidence on record, it will be apparent that this evidence is not of such a character as to inspire confidence in the mind of the Court, and moreover, there are various other circumstances which clearly militate against the veracity of the prosecution case. We will first examine the broad circumstances of the case as appearing from the evidence on record and show how they throw grave doubt on the story as put forward by the prosecution and then proceed to consider the infirmities in the evidence of the witnesses relied upon by the prosecution.

5. In the first place, it appears clearly from the evidence that the appellant had nothing to do with the grant of exemption from payment of passenger or goods tax. The appellant was, at the material time, Passenger and Goods Tax Clerk II and, according to the evidence of Harmohan Singh, who was Passenger and Goods Tax Clerk I, the order of allocation of work made by the Excise and Taxation Officer assigned various duties to Passenger and Goods Tax Clerk II, but these did not include processing of application for exemption from payment of passenger or goods tax. The detection and recovery of passenger and goods tax was undoubtedly one of the duties entrusted to Passenger & Goods Tax Clerk II, but not the handling of applications for exemption. This was also made clear by Kashmir Singh who was an Establishment Clerk in the Excise and Taxation Office. Kashmir Singh stated that "the Passenger & Goods Tax Clerk has no concern with the exemption cases and the same are dealt with by the Taxation Inspector" and he added that the release of attached property is also effected on the basis of the report of the Taxation Inspector and "the Passenger & Goods Tax Clerk has nothing to do with it." It would, therefore, be seen that the appellant was

not incharge of applications for exemption which were dealt with by the Taxation Inspector. It is true that so far as the detection and recovery of goods tax was concerned, it was within the charge of the appellant, but nothing remained to be done on that count at the material time when the bribe was demanded and paid, since the truck was already attached by Taxation Inspector Brar on 12th July, 1968. The only issue which was then being pressed by Jagdish Raj was that relating to exemption from payment of goods tax and so far as that issue was concerned, the appellant had nothing to do with it. There was, therefore, clearly no motivation for Jagdish Raj to give bribe to the appellant for obtaining grant of exemption. This circumstance weakens the foundation on which the edifice of the prosecution story rests and introduces an element of infirmity in it.

6. But more than anything else, the evidence of Taxation Inspector Sharma makes a serious inroad in the prosecution case. The evidence of Sharma shows that it was only on 1st August, 1968 that Jagdish Raj made an application for exemption from payment of goods tax supported by an affidavit and a certificate of exemption of token tax granted by the Licensing Officer. Now, obviously no exemption from payment of goods tax could be granted to Jagdish Raj until he made an application supported by a certificate of exemption of token tax obtained from the Licensing Officer. The certificate of exemption of token tax issued by the Licensing Officer would show that the truck was not plied during the period for which the certificate was granted and the registration certificate of the truck was lying deposited in the office of the Registration Authority. That would be prima facie proof that the truck did not carry any goods for hire and was, therefore, not liable to payment of goods tax for the period for which the certificate of exemption of token tax was granted. It appears from the record that an order for issue of certificate of exemption of token tax was made by the Licensing Officer on 25th July 1968, and, pursuant to

the order, the certificate must have been issued to Jagdish Raj a few days later and it was on 1st August, 1968 that Jagdish Raj made the application for exemption from payment of goods tax, supported by this certificate. It is difficult to see how in these circumstances, when the application for exemption supported by the certificate of exemption of token tax was not made until 1st August, 1968, any question of demanding or giving bribe could arise on 29th or 30th July, 1968. If an application for exemption were already made supported by the certificate, one can understand, deplorable though it may be, that the clerk incharge of dealing with such application may demand bribe for expediting the disposal of the application or making a favourable noting on it. But one fails to see how there could be any question of demand or payment of bribe before such application was made, when, manifestly, nothing could be done in the matter of granting exemption without such application. It may be noted that even according to the evidence of Jagdish Raj, Taxation Inspector Brar stated to him on 27th July, 1968 that it would not be possible for him to do anything for Jagdish Raj until Jagdish Raj produced the certificate of exemption of token tax from the Licensing Officer and that was done by Jagdish Raj only on 1st August, 1968. The incident of demand of bribe by the appellant alleged to have taken place on 29th and 30th July, 1968 was, therefore, clearly premature and improbable.

7. Then again the evidence of Sharma shows that there was redistribution of work between the two taxation inspectors, namely, Brar and Sharma on 15th or 16th July 1968 and under this redistribution of work, the case of Jagdish Raj came to be assigned to Sharma. It is, therefore, quite improbable that on 29th and 30th July, 1968, the appellant would demand a bribe of Rs. 400/- for Brar who had no longer anything to do with the file of Jagdish Raj. In fact, Sharma stated in his evidence that at about 10 a.m. on 31st July, 1968 when he went to the room of the Excise and Taxation Officer on being summoned by him, he had to

pass through the room in which the appellant was sitting and at that time he saw Jagdish Raj in that room with the appellant. Sharma heard the appellant telling Jagdish Raj that Brar would no longer be attending to the work of Jagdish Raj as the file had been entrusted to Sharma. Sharma then inquired from the appellant as to what was the total amount of arrears of tax due from Jagdish Raj and the appellant gave the figure to Sharma after looking into the file. The appellant inquired from Sharma as to what should be done, whereupon, Sharma stated that half the amount of arrears should be realised from Jagdish Raj and so far as the other half was concerned, orders of the Excise and Taxation Officer should be obtained for realising the same in instalments. Sharma also stated in his evidence that when he again passed through the room occupied by the appellant on his way back from the room of the Excise and Taxation Officer to his own room, he saw Jagdish Raj still sitting with the appellant. Jagdish Raj was entreating the appellant to get an order passed regarding the payment of arrears of tax by instalments, but the appellant told him that he could not do anything in the matter and that he should approach the Excise and Taxation Officer or Sharma. Presumably, on this date, Jagdish Raj was not aware that an order had already been made on 25th July, 1968 for issue of certificate of exemption of token tax and he was, therefore, anxious that until he succeeded in obtaining such certificate, he should not be pressed into making immediate payment of arrears of tax. This evidence clearly shows that the file of Jagdish Raj had been transferred to Sharma and the appellant was aware of it and he informed Jagdish Raj accordingly in so many terms. The importance of this evidence cannot be over-exaggerated, particularly since Sharma was a witness examined on behalf of the prosecution and this incident was narrated by him in his examination-in-chief. It cannot lie in the mouth of the prosecution to disown this evidence given by Sharma. If this evidence is true, as it must be taken to be — and it

must be said in fairness to the counsel on behalf of the State that nothing was urged against it — it is impossible to accept the prosecution story that the appellant demanded bribe of Rs 400/- for Brar or Rs. 50 for himself or that Jagdish Raj agreed to pay the same. This evidence, in our opinion, completely destroys the foundation of the prosecution case and knocks the bottom out of it. This evidence also falsifies the statement of Jagdish Raj that he did not see the appellant in the morning of 31st July 1968 and it was only at 1.30 p.m. that with the raiding party he went for the first time on that day to the office of the appellant. Jagdish Raj is completely belied by this evidence on an important part of the prosecution case.

8. The prosecution case also suffers from another serious infirmity and it is that it rests entirely on the evidence of witnesses who are either interested witnesses or police witnesses. Jagdish Raj was clearly an interested witness because he was concerned in laying the trap for the appellant. Arjun Das was also an interested witness as he was a relative of Jagdish Raj. Jagdish Raj admitted in his evidence that Arjun Das was his relative and so did Arjun Das. It is a little interesting to know that Arjun Das was not secured as a witness to the raid by Inspector Hardas Singh. He was picked up by Jagdish Raj when he was going to meet his sister in Putlighar and taken to the Special Enquiry Agency. His evidence was that he had taken leave on that day from his work as he wanted to meet his sister. But curiously enough, he allowed himself to be persuaded to go as a witness of the raid and even after the raid was over at about 3 p.m. he did not go to meet his sister in Putlighar. It appears to us extremely improbable that Arjun Das was really going to meet his sister when he was diverted by Jagdish Raj and taken as a member of the raiding party. If that was the mission for which he had taken leave, he would not have gone with Jagdish Raj and even if he did, he would have gone to meet his sister after the raid was over. It seems to us that Arjun Das had taken leave

for the purpose of assisting Jagdish Raj in arranging the raid and he was clearly and indubitably an interested witness. Now it is significant that the only two persons who witnessed the actual passing of bribe were Jagdish Raj and Arjun Das. Inspector Hardas Singh knew very well that Arjun Das was brought by Jagdish Raj and presumably, he was connected with Jagdish Raj and could not, therefore, be regarded as an independent person, even so he did not care to secure an independent person to act as a witness of the raid. In fact, one Mohan Lal had acted as a witness when Jagdish Raj gave information to Inspector Hardas Singh in regard to the demand for bribe made by the appellant and though he was an independent person he was not taken as a witness by Inspector Hardas Singh when the latter went for the purpose of the raid. Instead, one Makhan, who was a sweeper in the whole time employment of the police, was taken as a witness. But, even he was not sent along with Jagdish Raj to witness the passing of the bribe. It is indeed difficult to see how Makhan could possibly be regarded as an independent witness. It is indeed a sad commentary on the functioning of the anti-corruption department in this case that the only safeguard against false implication in the offence of bribery which is provided by the presence of independent and respectable witnesses, was completely ignored and two witnesses were taken, one of whom was a relative of Jagdish Raj and the other, a sweeper in the whole time employment of the police. We must take this opportunity of impressing on the officers functioning in the anti-corruption department to insist on observing this safeguard as zealously and scrupulously as possible for the protection of public servants against whom a trap may have to be laid. They must seriously endeavour to secure really independent and respectable witnesses so that the evidence in regard to raid inspires confidence in the mind of the court and the court is not left in any doubt as to whether or not any money was paid to the public servant by way of bribe. We cannot, in the present case, rely on

the evidence of Jagdish Raj and Arjun Das for the purpose of holding that a sum of Rs. 50/- was paid by Jagdish Raj to the appellant by way of bribe.

9. Even when the appellant came down to the ground floor from his room after allegedly taking the bribe of Rs. 50/- and a search was made of his person, the persons who witnessed this search were not independent and respectable witnesses. Inspector Hardas Singh and Sub-Inspector Baldev Singh were police witnesses. The other three were Jagdish Raj, Arjun Das and Makhan who were all interested witnesses. Makhan, in fact, was not even called to give evidence on behalf of the prosecution. He was dropped on the ground that he was not a man of status. Now this is also a distressing feature of the present case. We are aiming to build a just and egalitarian social order where there will be equality of status and opportunity and it is indeed difficult to see how in such social order a sweeper who is earning his livelihood by doing honest labour can be regarded as a man of no status. Be that as it may, the fact remains that there was no independent person to witness the search of the person of the appellant and the seizure of five marked currency notes of Rs. 10/- each from his person. It is a matter of regret that the prosecution did not choose to examine Gurdev Singh, Excise & Taxation Officer, though, according to the evidence of Jagdish Raj, Arjun Das, Inspector Hardas Singh and Sub-Inspector Baldev Singh, Gurdev Singh happened to come there before the person of the appellant was searched and he was a witness to the search. The only reason given by the prosecution for not examining Gurdev Singh was that he declined to attest the search memo. But that is hardly an explanation which can carry conviction. Gurdev Singh was a highly placed officer and even though he was the Head of the Department in which the appellant was working, we can safely assume that, if summoned, he would have told the truth, even if it hurt the appellant. We do not think it was fair on the part of the High Court to observe

that Gurdev Singh's reluctance to support the case of the appellant, or his declining to become a prosecution witness against the appellant, who was his subordinate or a member of his staff, was neither exceptional nor unusual. Gurdev Singh was the only independent person who could have deposed to what happened at the time when the search of the person of the appellant was taken and it is unfortunate that the prosecution did not summon him to give evidence. There were also fifteen to twenty other persons who were assembled there at the time of the search and any one of them could have been asked to be a witness to the search. But this opportunity was also not availed of by the police. There is also one other small circumstance which is rather significant and it tends to show that the appellant did not accept any monies from Jagdish Raj as alleged by the prosecution. When Inspector Hardas Singh arrested the appellant for the purpose of searching his person, the appellant enquired from him as to why he was being arrested. That is hardly a question the appellant would have asked if he had accepted bribe from Jagdish Raj because then he would have known that he had been trapped. The evidence in regard to the search of the person of the appellant and the seizure of five marked currency notes from him is, in the context of the other facts and circumstances of the case, not such as to inspire confidence and cannot be implicitly accepted.

10. Then, there is the evidence of two defence witnesses, namely, Sohan Lal (D. W. 6) and Achhar Singh (D. W. 7). These two witnesses have clearly stated that at the time when the appellant came down from his office at about 1.45 p. m., Jagdish Raj, who was following him, caught hold of him and thereafter they grappled with each other and in the meantime the officer of the anti-corruption department and two constables arrived there and surrounded the appellant. About this time, said these two witnesses, Gurdev Singh, Excise and Taxation Officer, also came out of his office and when the police officer asked Gurdev

Singh to attest a document which had been prepared by him, Gurdev Singh refused to do so on the ground that no currency notes were recovered from the appellant in his presence. Sohan Lal added that five currency notes of rupees ten each were lying on the ground and the police officer took them in his possession. This evidence given by Sohan Lal and Achhar Singh clearly supports the defence of the appellant that he had not taken five marked currency notes from Jagdish Raj and that the same were not recovered from his pocket when his person was searched. The High Court, however, failed to take this important evidence into consideration and ignored it.

11. It is clear from the aforesaid discussion that the evidence led on behalf of the prosecution is not such as to inspire confidence in the mind of the court and we must say that we are not at all satisfied that the appellant either demanded bribe of Rs. 50/- from Jagdish Raj or that Jagdish Raj paid bribe of Rs. 50/- to the appellant by handing over five marked currency notes to him or that five marked currency notes of Rs. 10/- each were recovered from the pocket of the appellant when his person was searched by the raiding party. We may take this opportunity of pointing out that it would be desirable if in cases of this kind where a trap is laid for a public servant, the marked currency notes, which are used for the purpose of trap, are treated with phenolphthalein powder so that the handling of such marked currency notes by the public servant can be detected by chemical process and the court does not have to depend on oral evidence which is sometimes of a dubious character for the purpose of deciding the fate of the public servant. It is but meet that science-oriented detection of crime is made a massive programme of police, for in our technological age nothing more primitive can be conceived of than denying the discoveries of the sciences as aids to crime suppression and nothing cruder can retard forensic efficiency than swearing by traditional oral evidence only, thereby discouraging liberal use of scientific research to prove guilt. Vide *Som Prakash v. State of Delhi*,

(1974) 3 SCR 200 = (AIR 1974 SC 989 = 1974 Cri LJ 784).

12. We are, therefore, of the view that the prosecution has failed to establish the guilt of the appellant and we must accordingly set aside the conviction and sentence recorded against the appellant and acquit him of the offences charged against him. The bail bonds executed by the appellant will stand discharged.

Appellant acquitted.

AIR 1976 SUPREME COURT 98

(From: Gujarat)*

A. ALAGIRISWAMI, P. K. GO-SWAMI AND N. L. UNTWALIA JJ.

M/s. Bharat Iron Works, Appellant v. Bhagubhai Balubhai Patel and others, Respondents.

Civil Appeal No. 835 of 1975, D/- 10-10-1975.

(A) Industrial Disputes Act (1947), Sec. 33 — Power of Tribunal to interfere with order of dismissal as passed in domestic enquiry — Victimisation — What is — Pleading and proof — Manifest error of law on part of Tribunal in concluding that management was guilty of victimisation — Dismissal of writ application by Company in limine — Held, to be not correct — S. C. A. No. 1404 of 1974, D/- 25-11-1974 (Guj.), Reversed. (Constitution of India, Art. 226).

Where there is no defect in procedure in a domestic enquiry against an employee, the Tribunal, while granting or withholding permission under Section 33 does not sit as a court of appeal, weighing or reappreciating the evidence for itself but only examines the finding of the enquiry officer on the evidence in the domestic enquiry as it is, in order to find out either whether there is a prima facie case or if the findings are perverse. Extent of Power of Tribunal to interfere with order of dismissal as passed in domestic enquiry indicated. (Paras 3, 2, 1)

In the same case i.e. where there is no failure of the principles of na-

*(Spl. Civil Appeal No. 1404 of 1974, D/- 25-11-1974—Guj.)

JS/KS/D863/75/SSG

tural justice in the course of domestic enquiry, if the tribunal finds that dismissal of an employee is by way of victimisation or unfair labour practice, it will then have complete jurisdiction to interfere with the order of dismissal passed in the domestic enquiry. In that event the fact that there is no violation of the principles of natural justice in the course of the domestic enquiry will absolutely lose its importance or efficacy.

(Para 4)

Ordinarily a person is victimised, if he is made a victim or a scapegoat and is subjected to persecution, prosecution or punishment for no real fault or guilt of his own, in the manner, as it were, of a sacrificial victim. Types of victimisation indicated.

(Paras 7, 8)

Victimisation is a serious charge by an employee against an employer, and, therefore, it must be properly and adequately pleaded giving all particulars upon which the charge is based to enable the employer to fully meet them. The fact that there is a union espousing the cause of the employees in legitimate trade union activity and an employee is a member or active office-bearer thereof, is, per se, no crucial instance.

(Para 9)

The onus of establishing a plea of victimisation will be upon the person pleading it. Mere allegations, vague suggestions and insinuations are not enough. All particulars of the charge brought out, if believed, must be weighed by the Tribunal and a conclusion should be reached on a totality of the evidence produced. A proved misconduct is antithesis of victimisation as understood in industrial relations. This is not to say that the Tribunal has no jurisdiction to interfere with an order of dismissal on proof of victimisation. (Paras 10, 11)

Certain employees of a company were charged for misconduct in that they along with other outsiders, assaulted three temporary workers of the company, on 11-10-1972, as they were coming out of a public Hotel, where they went to take their mid-day meal with coupons from the company. The assault followed by prior threats was of some significance, as

those who were assaulted were new workers employed by the company after its decision to discharge the temporary employees and to lay off the permanent workers. It was not as if the incident was absolutely unconnected with work or service in the company. A domestic enquiry was held on December 24, 1972. Orders of dismissal were passed on March 12, 1973 and as certain industrial dispute was apparently pending the management made the requisite applications under Ss. 33 (2) and 33 (3), Industrial Disputes Act. The Tribunal after examining the evidence of the domestic enquiry held that no prima facie case was made out against the workmen concerned and that the findings of the enquiry officer were perverse and not bona fide. The Tribunal further held on the evidence produced before it that it was a case of victimisation for trade union activity. The Tribunal therefore, refused to grant approval and permission prayed for by the management.

Held (1) that even though there was no defect in the domestic enquiry the Tribunal was entitled to examine the evidence in the domestic enquiry in order to find out whether a prima facie case was made out or if the findings were perverse. The Tribunal was not, however, competent to re-appreciate or reappraise the evidence.

(Para 15)

(2) that it was manifestly a perverse finding on the part of the Tribunal to hold that there was not even a prima facie case made out against the workmen or worse than it, that the findings of the enquiry officer were not bona fide. The Tribunal had no jurisdiction in this case to act as a court of appeal as if in a criminal case and to interfere with the findings of the domestic enquiry; and

(Para 17)

(3) that there was a manifest error of law on the part of the Tribunal in coming to the conclusion that the management was guilty of victimisation. The Tribunal made two serious errors, firstly by holding that the offence was not established, prima facie, and secondly, by allowing it to be influenced by an extraneous finding with regard to the lay off. Since it was a jurisdictional fact and the

Tribunal's correct finding about victimisation would entitle it to interfere with the order of the management a wrong decision regarding victimisation resulted in an error of jurisdiction on the part of Tribunal in not allowing the applications under Sec. 33. The High Court was therefore, not correct in dismissing the writ application of the company in limine. S. C. A. No. 1404 of 1974, D/- 25-11-1974 (Gui.), Reversed. (Para 19)

Mr. M. C. Bhandare, Sr. Advocate, (Mrs. S. Bhandare, Advocate of M/s. Bhandare Parekh & Co., Advocate with him), for Appellant; M/s. B. C. Shah, M. V. Goswami and Ambrish Kumar, Advocates for Respondents No. 4, 5 and 9.

Judgment of the Court was delivered by

P. K. GOSWAMI, J.:— In a long line of decisions of this Court the ambit of Section 33, Industrial Disputes Act, 1947, is now well established. There is also no difference in principle of the law applicable to a case under Section 10, Industrial Disputes Act and that under Section 33. To put it clearly, it is this:

When an application under Section 33 whether for approval or for permission is made to a Tribunal it has initially a limited jurisdiction only to see whether a prima facie case is made out in respect of the misconduct charged. This is, however, the position only when the domestic enquiry preceding the order of dismissal is free from any defect, that is to say, free from the vice of violation of the principles of natural justice. If on the other hand, there is violation of the principles of natural justice, the Tribunal will then give opportunity to the employer to produce evidence, if any, and also to the workman to rebut it if he so chooses. In the latter event the Tribunal will be entitled to arrive at its own conclusion on merits on the evidence produced before it with regard to the proof of the misconduct charged, and the Tribunal, then, will not be confined merely to consider whether a prima facie case is established against the employee. In other words, in such an event, the employer's findings in the domestic enquiry will lapse and

these will be substituted by the independent conclusions of the Tribunal on merits.

2. There is a two-fold approach to the problem and if lost sight of, it may result in some confusion. Firstly, in a case where there is no defect in procedure in the course of a domestic enquiry into the charges for misconduct against an employee, the Tribunal can interfere with an order of dismissal on one or other of the following conditions:—

(1) If there is no legal evidence at all recorded in the domestic enquiry against the concerned employee with reference to the charge or if no reasonable person can arrive at a conclusion of guilt on the charge levelled against the employee on the evidence recorded against him in the domestic enquiry. This is what is known as a perverse finding.

(2) Even if there is some legal evidence in the domestic enquiry but there is no prima facie case of guilt made out against the person charged for the offence even on the basis that the evidence so recorded is reliable. Such a case may overlap to some extent with the second part of the condition No. 1 above. A prima facie case is not, as in a criminal case, a case proved to the hilt.

3. It must be made clear in following the above principles, one or the other, as may be applicable in a particular case, the Tribunal does not sit as a court of appeal, weighing or reappreciating the evidence for itself but only examines the finding of the enquiry officer on the evidence in the domestic enquiry as it is in order to find out either whether there is a prima facie case or if the findings are perverse.

4. Secondly, in the same case i.e. where there is no failure of the principles of natural justice in the course of domestic enquiry, if the Tribunal finds that dismissal of an employee is by way of victimisation or unfair labour practice, it will then have complete jurisdiction to interfere with the order of dismissal passed in the domestic enquiry. In that event the fact that there is no violation of the principles of natural jus-

tice in the course of the domestic enquiry will absolutely lose its importance or efficacy.

5. Whether and under what facts and circumstances a Tribunal will accept the plea of victimisation against the employer will depend upon its judicial discretion.

6. What is victimisation is again a multi-headed monster to tackle with. The word 'victimisation' is not defined in the Industrial Disputes Act. An attempt to describe 'unfair practices by employers' by a deeming definition was made under Section 28K in Chapter III B of the Indian Trade Unions (Amendment) Act 1947 (Act XLV of 1947) but we understand, it has not yet been brought into force. The concept of victimisation is to a large extent brought out under Section 28K of that unenforced law and it may be worthwhile to quote the same as it throws sufficient light on the topic and will offer guidance to Tribunals in adjudicating a ticklish issue of this nature:

Section 28K. "Unfair practices by employers—

The following shall be deemed to be unfair practices on the part of an employer, namely—

(a) to interfere with, restrain or coerce his workmen in the exercise of their rights to organize, form, join or assist a Trade Union and to engage in concerted activities for the purpose of mutual aid or protection;

(b) to interfere with the formation or administration of any Trade Union or to contribute financial or other support to it;

(c) to discharge, or otherwise discriminate against, any officer of a recognised Trade Union because of his being such officer;

(d) to discharge or otherwise discriminate against any workman because he has made allegations or given evidence in any enquiry or proceeding relating to any matter such as is referred to in sub-section (1) of Section 28-F;

(e) to fail to comply with the provisions of Sec. 28-F:

Provided that the refusal of an employer to permit his workmen to engage in Trade Union activities during their hours of work shall not be

deemed to be an unfair practice on his part".

Section 28-F provides for rights of recognized Trade Unions.

7. Ordinarily a person is victimised, if he is made a victim or a scapegoat and is subjected to persecution, prosecution or punishment for no real fault or guilt of his own, in the manner, as it were, of a sacrificial victim. It is, therefore, manifest that if actual fault or guilt meriting the punishment is established, such action will be rid of the taint of victimisation.

8. It is apparent that victimisation may partake of various types, to cite one or two only, for example, pressurising an employee to leave the union or union activities; treating an employee unequally or in an obviously discriminatory manner for the sole reason of his connection with union or his particular union activity; inflicting a grossly monstrous punishment which no rational person would impose upon an employee and the like.

9. A word of caution is necessary. Victimisation is a serious charge by an employee against an employer, and, therefore, it must be properly and adequately pleaded giving all particulars upon which the charge is based to enable the employer to fully meet them. The charge must not be vague or indefinite being as it is an amalgam of facts as well as inferences and attitudes. The fact that there is a union espousing the cause of the employees in legitimate trade union activity and an employee is a member or active office-bearer thereof, is, per se, no crucial instance. Collective bargaining being the order of the day in a democratic social welfare State, legitimate trade union activity which must shun all kinds of physical threats, coercion or violence, must march with a spirit of tolerance, understanding and grace in dealings on the part of the employer. Such activity can flow in healthy channel only on mutual co-operation between employer and employee and cannot be considered as irksome by the management in the best interest of the concern. Dialogues with representatives of a union help striking a delicate balance in adjustment and

settlement of various contentious claims and issues.

10. The onus of establishing a plea of victimisation will be upon the person pleading it. Since a charge of victimisation is a serious matter reflecting, to a degree, upon the subjective attitude of the employer evidenced by acts and conduct, these have to be established by safe and sure evidence. Mere allegations, vague suggestions and insinuations are not enough. All particulars of the charge brought out, if believed, must be weighed by the Tribunal and a conclusion should be reached on a totality of the evidence produced.

11. Again victimisation must be directly connected with the activities of the concerned employee inevitably leading to the penal action without the necessary proof of a valid charge against him. The question to be asked: Is the reason for the punishment attributable to a gross misconduct about which there is no doubt or to his particular trade union activity which is frowned upon by the employer? To take an example, suppose there is a tense atmosphere prevailing in a company because of a strike consequent upon raising of certain demands by the union, each party calling the other highly unreasonable or even provocative, the Tribunal will not readily accept a plea of victimisation as answer to a gross misconduct even when an employee, be he an active office-bearer of the union, commits assault, let us say, upon the Manager, and there is reliable legal evidence to that effect. In such a case the employee, found guilty, cannot be equated with a victim or a scapegoat and the plea of victimisation as a defence will fall flat. This is why once, in the opinion of the Tribunal a gross misconduct is established, as required, on legal evidence either in a fairly conducted domestic enquiry or before the Tribunal on merits, the plea of victimisation will not carry the case of the employee any further. A proved misconduct is antithesis of victimisation as understood in industrial relations. This is not to say that the Tribunal has no jurisdiction to interfere with an order of dismissal on proof of victimisation.

12. After clearing the grounds on principles, coming to the facts of the present case the eight respondents were charged for misconduct in that they along with other outsiders, in all numbering about twentyfive persons, assaulted three temporary workers of the company, namely, Ratilal Nathubhai Chowdhari, Vasant Babulal Patil and Jivanbhai Eddas Patel, on October 11, 1972, as they were coming out of Hotel Manisha, a public Hotel, where they went to take their midday meal with coupons from the company. The Hotel was about one or two furlongs away from the factory. The assault was of some significance, as those who were assaulted were new workers employed by the company after its decision to discharge the temporary employees and to lay off the permanent workers. It was not as if the incident was absolutely unconnected with work or service in the company. It is stated in course of the evidence in the domestic enquiry that two persons threatened the assaulted workers saying "why we were going on work, go away from here immediately leaving the work or else you would be beaten". Assault followed this threat.

13. The respondents were charged by the management on October 28, 1972, and they denied the charges as false and pleaded victimisation on account of trade union activity. A domestic enquiry was held on December 24, 1972. Orders of dismissal were passed on March 12, 1973 and as certain industrial dispute was apparently pending the management made the eight requisite applications under Ss. 33 (2) and 33 (3). Industrial Disputes Act. Three of the workmen were protected workmen.

14. The Tribunal did not find any defect in the domestic enquiry. Since the workmen repeated the plea of victimisation before the Tribunal, evidence of both parties was recorded only with regard to that plea. Evidence was not given before the Tribunal with regard to the actual incident. A large number of documents were filed by the union. The management filed the proceedings of the domestic enquiry and also certain other documents. The Tribunal after

examining the evidence of the domestic enquiry held that no prima facie case was made out against the workmen concerned and that the findings of the enquiry officer were perverse and not bona fide. The Tribunal further held on the evidence produced before it that it was a case of victimisation for trade union activity. The Tribunal, therefore, refused to grant approval and permission prayed for by the management. The management filed an application under Article 226 of the Constitution in the High Court of Gujarat which was summarily dismissed. Leave to appeal to this Court was refused by the High Court and hence this appeal by special leave.

15. On the principles of law laid down by this Court even though there was no defect in the domestic enquiry the Tribunal was entitled to examine the evidence in the domestic enquiry in order to find out whether a prima facie case was made out or if the findings are perverse. The Tribunal was not, however, competent to reappreciate or reappraise the evidence. The Tribunal referred to the evidence of the three witnesses recorded in the enquiry with regard to the incident. Two of the three persons, viz., Ratilal Nathubhai Chowdhari and Vasant Babulal Patil, were the assaulted workmen and the third witness, Gokulkumar Devidas, was a permanent worker of the company. The Tribunal extracted the material part of the evidence from the domestic enquiry and we may now refer to the same. The case appears to be that two unnamed persons, who are not chargesheeted, first threatened the assaulted workers and a little later about 25 persons came and gave them fist blows. The assaulted workers were newly employed after a lay off of the permanent workers had been raised. Ratilal Nathubhai Chowdhari joined the company in October, 1972 i.e. only a few days before the assault when the workmen concerned were admittedly not working in the company. Ratilal Nathubhai Chowdhari's evidence recorded in the domestic enquiry is as follows:—

"That he does not know these workers That when he came out at that time workers from

Bharat Iron Works assaulted him and other workers with him and were beaten by fist blows."

Vasant Babulal Patil, who was working in the company from October 6, 1972 "deposed that he does not know if the workers present at the enquiry are company's workers that on 11-10-1972 at noon in the recess they five persons were going to Manisha Hotel for lunch, that they were sitting in the hotel. That persons of the Union were present there. These chargesheeted workers were present there in the crowd. That two persons came and threatened us as to 'why we were going on work, go away from here immediately leaving the work or else you would be beaten.' That when he came out after lunch the persons of the Union beat him and other persons with him were also beaten, that the persons who were beaten with him were Ratilal Nathu, Jivan Iddas, Eknath Ramesh. They were also beaten by the workers who are here at present, that then they came to the company and informed the clerk." He also stated "that 20 to 25 persons had come to beat him but he did not know all". He further "deposed that he complained against the persons of the Union, who are not present here (at the enquiry) but from those 25 persons of crowd these persons present at enquiry were there....."

16. Gokulkumar Devidas Pandey is a permanent worker who is expected to recognise the workers charged. His evidence in the enquiry as recorded in the report is as follows:—

"That after while when we came out the workers of LMP and Bharat Iron Works were beaten. That at that time he (sic) was at a little distance. That these persons who are present now were there among the persons who had assaulted workers. That other persons were also there whom he did not know."

The third assaulted person was not examined. On the above State of the evidence the enquiry officer held "both of them (meaning the witnesses assaulted) have identified them (meaning the chargesheeted workmen)

that they were among the assailants... "I, therefore, hold that the incident has occurred. The point to be decided is whether any one of the workers facing this inquiry was among the assailants.....". "I also hold that it is proved that these workers have beaten the workers of the factory".

17. On the above state of the one way evidence against the respondents with regard to the incident and in the absence of any denial by them by examining themselves before the enquiry officer and offering themselves for cross-examination by the management, it is manifestly a perverse finding on the part of the Tribunal to hold that there is not even a prima facie case made out against the workmen or, worse than it, that the findings of the enquiry officer are not bona fide. The Tribunal had no jurisdiction in this case to act as a court of appeal as if in a criminal case and to interfere with the findings of the domestic enquiry. Lastly, the Tribunal's interference with the findings of the domestic enquiry could have been justified if it was right in its conclusion that a case of victimisation has been made out.

18. We may, therefore, refer to that part of the Tribunal's order where it is found that the plea of victimisation was justified. Ordinarily we would not go into such a question of fact in an application under Article 136 and that again when there is no direct appeal from the order of the Tribunal.

19. If the finding of the Tribunal that it was a case of victimisation is correct, the Tribunal could interfere with the orders of dismissal. On the test laid down above with regard to victimisation, it is found that the Tribunal by wrongly holding that no prima facie case was established naturally fell into an error. If the Tribunal held, as it should have rightly held, that the offence was established, no question of victimisation could arise. Such an incident may be an unholy spark and aberration out of certain prevailing confrontation but cannot have the protective umbrella of legitimate trade

union activity. Besides, the Tribunal in accepting the plea of victimisation took into consideration an extraneous factor, namely, about the justifiability or otherwise of the lay off. Lay off was beyond the scope of the enquiry under Section 33 and the Tribunal went wrong by unnecessarily arriving at a conclusion against the management that lay off was unjustified. This conclusion of the Tribunal largely influenced it to hold the management guilty of victimisation. We are, therefore, clearly of opinion that in this case there is a manifest error of law on the part of the Tribunal in coming to the conclusion that the management was guilty of victimisation. The Tribunal made two serious errors, firstly by holding that the offence was not established, prima facie, and secondly, by allowing it to be influenced by an extraneous finding with regard to the lay off. Since it is a jurisdictional fact and the Tribunal's correct finding about victimisation would entitle it to interfere with the order of the management a wrong decision regarding victimisation resulted in an error of jurisdiction on the part of the Tribunal in not allowing the applications under Section 33. The High Court was, therefore, not correct in dismissing the writ application in limine.

20. In the result the appeal is allowed and the order of the High Court as well as the orders of the Tribunal are set aside. The Tribunal committed an error of jurisdiction in not allowing the applications. The Tribunal is, therefore, directed to record appropriate orders allowing the applications under Section 33. The appellant will, however, pay the costs of the Respondent as already ordered.

21. CMP No. 5579 of 1975 of the appellant praying for condonation of delay in filing additional documents is rejected.

Appeal allowed.

AIR 1976 SUPREME COURT 105

(From: Delhi (1975) 2 F.A.C. 16)

P. N. BHAGWATI AND R. S. SARKARIA JJ.

1. Mangu Ram (In S. L. P. No. 918 of 1975)

2. M/s. Ram Parshad Gondamal through Ram Pershad and Jaideyal (In S. L. P. No. 919 of 1975), Petitioners v. Municipal Corporation of Delhi, Respondent.

Petns. for Spl. Leave to Appeal (CRL) Nos. 918-919 of 1975, D/- 10-10-1975.

(A) Limitation Act (1963), Sec. 5, 29 — Applicability of S. 5 to application for special leave under Section 417 (3) Criminal P. C. (1898) — (Criminal P. C. (1898), Section 417).

There is an important departure made by the Limitation Act, 1963 in so far as the provision contained in Section 29, sub-section (2) is concerned. Since under the Limitation Act, 1963, Sec. 5 is specifically made applicable by Section 29, sub-section (2), it can be availed of for the purpose of extending the period of limitation prescribed by a special or local law if the applicant can show that he had sufficient cause for not presenting the application within the period of limitation. It is only if the special or local law expressly excludes the applicability of Section 5, that it would stand displaced. The time limit of sixty days laid down in sub-s. (3) of Section 417, Criminal P. C. (1898), is a special law of limitation and there is nothing in this special law which expressly excludes the applicability of Sec. 5, Limitation Act. Mere provision of a period of limitation in Sec. 417 (4) in howsoever peremptory or imperative language is not sufficient to displace the applicability of Sec. 5. The conclusion is, therefore, irresistible that in a case where an application for special leave to appeal from an order of acquittal is filed after the coming into force of the Limitation Act, 1963, Sec. 5 would be available to the applicant and if he can show that he had sufficient cause for not preferring the application within the limit of sixty days prescribed in sub-s. (4) of Sec. 417, the

JS/KS/D871/75/DHZ.

application would not be barred and despite the expiration of the time limit of sixty days, the High Court would have the power to entertain it. AIR 1964 SC 260, Distinguished. (Para 7)

Cases Referred: Chronological Paras
AIR 1964 SC 260 = 1964 (1) Cri LJ 152 5, 6, 7

Mr. Frank Anthony Sr. Advocate, (Mr. K. C. Dua, Advocate with him), (In SLP No. 918 of 1975); Mr. C. L. Sahu Advocate, (In SLP No. 919 of 1975) for Petitioners; M/s. B. P. Maheshwari and Suresh Sethi, Advocates, for Respondent (In both the Petitions.)

Judgment of the Court was delivered by

BHAGWATI, J.:— These are two special leave petitions which are being disposed of by us by judgment after hearing both sides. There is only one question of law which arises for determination and since it lies in a very narrow compass and is concluded against the petitioner by the language of the new statutory enactment in Sec. 29 (2) of the Limitation Act, 1963, we thought that it would be a futile exercise to grant special leave and then hear the appeals and hence we decided to hear these two special leave petitions after issuing notice to the respondents so that the question of law arising for consideration can be finally determined by a pronouncement of this Court.

2. The petitioner in Special Leave Petition No. 918 of 1975, hereinafter referred to as Mangu Ram, was at all material times a partner in the firm of M/s. Ram Parshad Gondamal, which is the petitioner in Special Leave Petition No. 919 of 1975. The firm of M/s. Ram Parshad Gondamal owned a shop in Kharibaoli, Delhi where it sold inter alia Phool Gulab. On 8th August, 1969, the Food Inspector of the Municipal Corporation of Delhi purchased two samples of Phool Gulab from the shop of the firm of M/s. Ram Parshad Gondamal for analysis after complying with the procedure prescribed by law and each sample was divided into three parts, out of which one part was sent to the Public Analyst for analysis, the other was retained by

the Food Inspector and the third was handed over to Mangu Ram who sold the samples on behalf of the firm of M/s. Ram Parshad Gondamal. The first sample was marked O. P. K. 169 and the second was marked O. P. K. 170. It was found from the report of the analysis made by the Public Analyst that both samples O. P. K. 169 and O. P. K. 170 were adulterated and hence the Municipal Corporation of Delhi filed two complaints, one in respect of each sample, against Mangu Ram and the firm of M/s. Ram Parshad Gondamal in the Court of the Judicial Magistrate, 1st Class, Delhi for an offence under Section 7 read with Section 16 of the Prevention of Food Adulteration Act, 1954. These two complaints were consolidated and tried together by the learned Judicial Magistrate. During the course of the trial, on an application made by the Mangu Ram and the firm of M/s. Ram Parshad Gondamal, one part of each of the two samples lying with them was sent by the learned Judicial Magistrate to the Director, Central Food Laboratory for analysis as required by Section 13, sub-section (2) of the Act. The Director, Central Food Laboratory, analysed the two samples sent to him, and issued a certificate in respect of each of them showing the result of the analysis. The certificate in respect of sample O. P. K. 169 showed the presence of Tartrazine indigo Carmine which was then a non-permitted Coal Tar dye, but subsequently permitted by reason of amendment of rule 29 of the Prevention of Food Adulteration Rules, 1955, while the certificate in respect of sample O. P. K. 170 revealed the presence of Rhodamine B, which was at all times a non-permitted coal tar dye. The learned Judicial Magistrate, in view of these certificates of the Director, Central Food Laboratory, came to the conclusion that both the samples sold by Mangu Ram on behalf of the firm of M/s. Ram Parshad Gondamal were adulterated, but since Phool Gulab of these two samples was purchased by the firm of M/s. Ram Parshad Gondamal from M/s. Venkateshwara & Co. which was a large manufacturing concern and hence presumably a licensed manu-

facturer, the learned Judicial Magistrate held that Mangu Ram and the firm of M/s. Ram Parshad Gondamal were entitled to the benefit of Section 19, sub-s. (2) of the Act and accordingly acquitted them by an order dated 18th March, 1971.

3. The Municipal Corporation of Delhi, being aggrieved by the order of acquittal, made an application to the High Court of Delhi under Section 417 sub-section (3) of the Code of Criminal Procedure, 1898 for special leave to appeal from the order of acquittal. Sub-section (4) of Section 417 required that the application for special leave should be made before the expiry of sixty days from the date of the order of acquittal and, therefore, after excluding the time taken in obtaining certified copy of the order of acquittal, the application for special leave should have been filed on 25th August, 1971, but it came to be filed two days late, namely, on 27th August, 1971. The Municipal Corpn. of Delhi, therefore, made an application for condonation of delay by invoking Sec. 5 of the Limitation Act, 1963 and pleaded that there was sufficient cause which prevented it from making the application for special leave within time. The High Court, by an order dated 3rd November, 1971 condoned the delay as there was in its opinion sufficient cause for not making the application for special leave within the time prescribed by sub-section (4) of Section 417 and, taking the view that this was a fit case which deserved the exercise of discretion under sub-section (3) of Section 417, the High Court granted special leave to the Municipal Corporation of Delhi to appeal against the order of acquittal.

4. The appeal was thereafter heard by a Division Bench of the High Court. The High Court took the view that there was no evidence on record to show that M/s. Venkateshwara & Co. from whom Phool Gulab was purchased by the firm of M/s. Ram Parshad Gondamal was a licensed manufacturer, nor was there any written warranty in the prescribed form obtained by the firm of M/s. Ram Parshad Gondamal from M/s. Venkateshwara & Co. and hence the

defence under S. 19 sub-s. (2) was not available to Mangu Ram and the firm of M/s. Ram Pershad Gondamal. Since the certificates issued by the Director, Central Food Laboratory showed unmistakably the presence of non-permitted coal tar dye in both the samples, there was no doubt, said the High Court that the two samples were adulterated and in this view the High Court set aside the acquittal of Mangu Ram and the firm of M/s. Ram Pershad Gondamal and convicted them of the offence under Section 7 read with Sec. 16 of the Act for selling adulterated samples of Phool Gulab to the food Inspector. The sentence imposed for the offence in respect of sample O. P. K. 169 was only a sentence of fine since coal tar dye found in that sample subsequently came to be permitted by the amendment of Rule 29, but so far as the offence in respect of sample O. P. K. 170 was concerned, Mangu Ram was sentenced to suffer six months rigorous imprisonment and to pay a fine of Rs. 1,000/- or in default to suffer rigorous imprisonment for a further period of three months, while the firm of M/s. Ram Pershad Gondamal was sentenced to pay a fine of Rs. 1000/-. Mangu Ram and the firm of M/s. Ram Pershad Gondamal thereupon filed the present petitions for special leave to appeal against the order of conviction and sentence passed against them.

5. There was nothing that could be said on behalf of Mangu Ram and the firm of M/s. Ram Pershad Gondamal on the merits of the conviction and sentence since the certificates of the Director, Central Food Laboratory clearly showed the presence of non-permitted coal tar dye in both the samples, and it was impossible to contend that the two samples were not adulterated. The only argument which could be advanced on their behalf was — and that was the only argument pressed before us — that the time limit of sixty days prescribed in sub-s. (4) of Section 417 for the making of an application for special leave under sub-section (5) of that section was a mandatory and inexorable time limit which could not be relieved against or relaxed and it excluded the applicability of Section

5 of the Limitation Act, 1963. It was urged that having regard to the clear and specific language of sub-s. (4) of Section 417 which left no scope for doubt or ambiguity, the High Court was statutorily obliged to reject an application for special leave made after the expiry of sixty days from the date of the order of acquittal and it had no jurisdiction to extend this time limit of sixty days by resort to Section 5 of the Limitation Act, 1963. This contention was sought to be supported by reference to a decision of this Court in Kaushalya Rani v. Gopal Singh, AIR 1964 SC 260 = (1964 (1) Cri LJ 152). Now, prima facie, it might seem at first blush that the decision in Kaushalya Rani's case is directly applicable in the present case and clinches the decision of the issue in favour of Mangu Ram and the firm of M/s. Ram Pershad Gondamal. But a closer scrutiny will reveal that it is not so. The decision in Kaushalya Rani's case is clearly distinguishable from the present case.

6. The question which arose for consideration in Kaushalya Rani's case AIR 1964 SC 260 = (1964 (1) Cri LJ 152) was apparently the same as in the present case, namely, whether the time limit of sixty days prescribed in sub-s. (4) of Sec. 417 for making an application for special leave under sub-s. (3) of that section could be extended by invoking Section 5 of the Indian Limitation Act, 1908. This Court held that sub-section (4) of Section 417 laid down a special period of limitation for an application by a complainant for special leave to appeal against an order of acquittal and "in that sense, this rule of sixty days bar is a special law, that is to say, a rule of limitation which is specially provided for in the Code itself, which does not ordinarily provide for a period of limitation for appeals or applications."

This Court pointed out that since "the special rule of limitation laid down in sub-section (4) of S. 417 of the Code is a special law of limitation governing appeals by private prosecutors, there is no difficulty in coming to the conclusion that Section 5 of the Limitation Act is wholly out of the way, in view of Section 29 (2) (b) of the Limitation Act."

The applicability of Section 5 of the Indian Limitation Act, 1908 was thus held to be excluded in determining the period of limitation of sixty days prescribed in sub-section (4) of Section 417 by reason of Section 29 (2) (b) of that Act which provided in so many terms that "for the purpose of determining any period of limitation prescribed for any suit, appeal or application by any special or local law, the remaining provisions of this Act" that is sections other than Secs. 4, 9 to 18 and 22 "shall not apply". Now, there can be no doubt that if the present case were governed by the Indian Limitation Act, 1908, this decision would wholly apply and the Municipal Corporation of Delhi would not be entitled to invoke the aid of Section 5 of that Act for the purpose of extending the period of limitation of sixty days prescribed in sub-s. (4) of Section 417 for an application by a complainant for special leave to appeal against an order of acquittal. But the Indian Limitation Act, 1908 has clearly no application in the present case, since that Act is repealed by the Limitation Act, 1963 which came into force with effect from 1st January, 1964 and the present case must, therefore, be decided by reference to the provisions of the Limitation Act, 1963.

7. There is an important departure made by the Limitation Act, 1963 in so far as the provision contained in Section 29, sub-section (2) is concerned. Whereas under the Indian Limitation Act, 1908 Section 29, sub-section (2), cl. (b) provided that for the purpose of determining any period of limitation prescribed for any suit, appeal or application by any special or local law the provisions of the Indian Limitation Act, 1908, other than those contained in Sections 4, 9 to 18 and 22, shall not apply and, therefore, the applicability of Section 5 was in clear and specific terms excluded. Section 29, sub-section (2) of the Limitation Act, 1963 enacts in so many terms that for the purpose of determining the period of limitation prescribed for any suit, appeal or application by any special or local law the provisions contained in Sections 4 to 24, which would include Section 5, shall apply in so far as and to the

extent to which they are not expressly excluded by such special or local law. S. 29, sub-s. (2), cl. (b) of the Indian Limitation Act, 1908 specifically excluded the applicability of Section 5, while Section 29, sub-section (2) of the Limitation Act, 1963 in clear and unambiguous terms provides for the applicability of Section 5 and the ratio of the decision in Kaushalya Rani's case can, therefore, have no application in cases governed by the Limitation Act, 1963, since that decision proceeded on the hypothesis that the applicability of Section 5 was excluded by reason of Section 29 (2) (b) of the Indian Limitation Act, 1908. Since under the Limitation Act, 1963 Section 5 is specifically made applicable by Section 29, sub-section (2), it can be availed of for the purpose of extending the period of limitation prescribed by a special or local law if the applicant can show that he had sufficient cause for not presenting the application within the period of limitation. It is only if the special or local law expressly excludes the applicability of Section 5, that it would stand displaced. Here, as pointed out by this Court in Kaushalya Rani's case AIR 1964 SC 260 = (1964) 1 Cri LJ 152 the time limit of sixty days laid down in sub-section (4) of Section 417 is a special law of limitation and we do not find anything in this special law which expressly excludes the applicability of Section 5. It is true that the language of sub-section (4) of Section 417 is mandatory and compulsive, in that it provides in no uncertain terms that no application for grant of special leave to appeal from an order of acquittal shall be entertained by the High Court after the expiry of sixty days from the date of that order of acquittal. But that would be the language of every provision prescribing a period of limitation. It is because a bar against entertainment of an application beyond the period of limitation is created by a special or local law that it becomes necessary to invoke the aid of Section 5 in order that the application may be entertained despite such bar. Mere provision of a period of limitation in howsoever peremptory or imperative language is not sufficient to displace the applica-

bility of Section 5. The conclusion is, therefore, irresistible that in a case where an application for special leave to appeal from an order of acquittal is filed after the coming into force of the Limitation Act, 1963, Section 5 would be available to the applicant and if he can show that he had sufficient cause for not preferring the application within the time limit of sixty days prescribed in sub-section (4) of Section 417, the application would not be barred and despite the expiration of the time limit of sixty days, the High Court would have the power to entertain it. The High Court, in the present case, did not, therefore, act without jurisdiction in holding that the application preferred by the Municipal Corporation of Delhi was not barred by the time limit of sixty days laid down in sub-section (4) of Section 417 since the Municipal Corporation of Delhi had sufficient cause for not preferring the application within such time limit. The order granting special leave was in the circumstances not an order outside the power of the High Court.

8. We do not, therefore, see any reason to grant special leave to Mangu Ram and the firm of M/s. Ram Pershad Gondamal to appeal against the order of the High Court and we accordingly dismiss the petitions for special leave filed by them.

Petitions for special leave dismissed.

AIR 1976 SUPREME COURT 109

(From: Bombay (1969) 2 ITJ 813 (Bom))

Y. V. CHANDRACHUD, R. S. SARKARIA AND A. C. GUPTA, JJ.

Surjit Lal Chhabda, Appellant v. Commissioner of Income-tax, Bombay, Respondent.

Civil Appeal No. 1819-1821 of 1970, D/- 6-10-1975.

(A) Income-tax Act, (1922), Section 3 — Hindu undivided family — Meaning of — Hindu joint family and Hindu coparcenary — Distinction (Hindu Law — Joint family).

Under Section 3 a Hindu undivided family is a taxable unit for

the purpose of income-tax. The expression "Hindu undivided family" must be construed in the sense in which it is understood under the Hindu Law. It is true that the assessee cannot constitute a coparcenary with his wife and unmarried daughter but under the Income Tax Act a Hindu undivided family, not a coparcenary, is a taxable unit. A Hindu coparcenary is a much narrower body than the joint family. It includes only those persons who acquire by birth an interest in the joint or coparcenary property and these are the sons, grandsons and great grandsons of the holder of the joint property for the time being. Since under the Mitakshara Law, the right to joint family property by birth is vested in the male issue only, females who come in only as heirs to obstructed heritage cannot be coparceners. Outside the limits of coparcenary, there is a fringe of persons, males and females, who constitute an undivided or joint family. There is no limit to the number of persons who can compose it nor to their remoteness from the common ancestor and to their relationship with one another. The joint Hindu family is thus a larger body consisting of group of persons who are united by the tie of sapindaship arising by birth, marriage or adoption. The fundamental principle of the Hindu joint family is the sapindaship. The absence of an antecedent history of jointness between the assessee and his ancestors is no impediment to the assessee, his wife and unmarried daughter forming a joint Hindu family. That it does not take more than one male to form a joint Hindu family with females is well established. (Paras 10, 12, 12A, 13, 14, 16)

(B) Income-tax Act (1922), Section 66A — Appeal to Supreme Court — New point.

It is not open to the Department to take before the Supreme Court a contention which in the first place does not arise out of the reference and which the Department's counsel in the High Court raised but did not press. (Para 17)

(C) Income-tax Act (1922), S. 3 — Property thrown in common hotch-

pot — Assessee having no son but only wife and daughter — Assessee whether to be taxed as individual or as member of Hindu joint family.

The property Kathoke Lodge was not an asset of a pre-existing joint family of which the assessee was a member. It became an item of joint family property for the first time when the assessee threw what was his separate property into the family hotchpot. The assessee had no son. His wife and unmarried daughter were entitled to be maintained by him from out of the income of Kathoke Lodge while it was his separate property. Their rights in that property were not enlarged for the reason that the property was thrown into the family hotchpot. Not being coparceners of the assessee, they had neither a right by birth in the property nor the right to demand its partition nor indeed the right to restrain the assessee from alienating the property for any purpose whatsoever. Their prior right to be maintained out of the income of Kathoke Lodge remained what it was even after the property was thrown into the family hotchpot. Thus, Kathoke Lodge might be usefully described as the property of the family after it was thrown into the common stock but it did not follow that in the eye of Hindu Law it belonged to the family, as it would have if the property were to devolve on the assessee as a sole surviving coparcener. The property which the assessee had put into the common stock might change its legal incidents on the birth of a son but until that event happened the property in the eye of Hindu Law, was really his. Since the personal Law of the assessee regarded him as the owner of Kathoke Lodge and the income therefore as his income even after the property was thrown into the family hotchpot, the income would be chargeable to income-tax as his individual income and not that of the family.

(Paras 41, 42, 43)

Cases Referred: Chronological Paras

AIR 1970 SC 14 = (1969) 3 SCR 882
14, 15, 33, 36
(1970) 76 ITR 467 = (1970) 1 SCWR
31 38
(1970) 75 ITR 458 (Bom) 6, 17

AIR 1966 SC 1523 = (1966) 3 SCR
224 14, 15, 33, 36, 37, 38, 39
1957 AC 540 = (1958) 34 ITR Suppl
42 35, 36, 39, 40
AIR 1937 PC 36 = 5 ITR 90 6, 7, 12,
19, 28, 31, 32, 33, 34, 35,
36, 37, 38, 39, 40
AIR 1937 PC 239 = (1937) 5 ITR 416
32, 33, 34, 35
AIR 1935 Bom 412 = (1935) 3 ITR
367 12, 32, 33, 34, 35
(1908) ILR 32 Bom 479 = 10 Bom LR
184 12A

Judgment of the Court was delivered by

CHANDRACHUD, J.— The appellant, Surjit Lal Chhabda, had three sources of income. He had a share in the profits of two partnership firms, he received interest from Bank accounts and he received rent from an immoveable property called "Kathoke Lodge". These were his self-acquired properties and until the assessment year 1956-57, he used to be assessed as an individual in respect of the income thereof. On January 26, 1956 he made a sworn declaration before a Presidency Magistrate in Bombay that he had thrown the property Kathoke Lodge into the 'family hotchpot' in order to impress that property with the character of joint family property and that he would be holding that property as the Karta of the joint Hindu family consisting of himself, his wife and one child. That child was an unmarried daughter.

2. In the assessment proceedings for 1957-58, the appellant contended that since he had abandoned all separate claims to Kathoke Lodge, the income which he received from that property should be assessed in the status of a Hindu Undivided Family. The income-tax authorities and the Income-tax Appellate Tribunal rejected that contention for varying reasons. The Income-tax Officer held that in the absence of a nucleus of joint family property, there was nothing with which the appellant could mingle his separate property and secondly, that there could not be a Hindu undivided family without there being undivided family property. The appellant carried the matter in appeal to the Appellate Assistant

Commissioner who differed from the Income-tax Officer on both the points but dismissed the appeal on two other grounds. The A. A. C. held that even after the declaration, the appellant was dealing with the income of Kathoke Lodge in the same way as before which showed that the declaration was not acted upon and secondly, that even assuming that the property was thrown into the common stock and was therefore joint family property, the income from that property could still be taxed in the appellant's hands as he was the sole male member of the family. The Tribunal accepted the declaration as genuine and differed from the A. A. C.'s finding that it was not acted upon. The appellant, according to the Tribunal, was the Karta of the joint Hindu family and it was irrelevant as to how he dealt with the joint family income. The Tribunal however held that though the appellant had invested his separate property with the character of joint family property, he being a sole surviving coparcener continued to have the same absolute and unrestricted interest in the property as before and therefore, in law, the property had to be treated as his separate property.

3. The appellant moved the Tribunal for referring five questions to the High Court while the respondent applied for the reference of one other question. The Tribunal referred the following question only for the opinion of the Bombay High Court under S. 66 (1) of the Income-tax Act, 1922:

"Whether, on the facts and in the circumstances of the case, the income from property known as 'Kathoke Lodge' was to be assessed separately as the income of the Hindu undivided family of which the assessee was the karta?"

4. In the High Court, it was contended on behalf of the appellant that it is open to a male member of a joint Hindu family to convert his self-acquired property into joint family property by throwing it into the common hotchpot; that for effectuating this purpose it is neither necessary that there should be an ancestral or joint family nucleus nor that there should be more than one male

in the joint family; and since Kathoke Lodge was impressed with the character of joint family property, its income belonged to the joint Hindu family of which the appellant was the Karta, the other members being his wife and unmarried daughter.

5. On the other hand, the Department contended that it was contrary to the basic concept of a Hindu Undivided Family that a single male along with females could form a joint Hindu family; that though a joint Hindu family could include a wife and unmarried daughters, a sole male member could not constitute a joint Hindu family along with females; and that it was necessary for the formation of a joint Hindu family that there should be more than one male capable of claiming partition of the joint family property. In the alternative, it was urged by the Department that a single male could form a joint Hindu family along with a coparcener's widow who is capable of making an adoption to her deceased husband but not with his own wife and unmarried daughter. The argument that the existence of ancestral or joint family property was an essential pre-requisite to throwing the self-acquired property into the common stock was raised but was not pressed in the High Court.

6. On these contentions, the real controversy before the High Court was whether a single male can form a joint Hindu family with his wife and unmarried daughter; if yes, whether the Karta of such a family can impress his self-acquired property with the character of joint family property by throwing it into the family hotchpot; and, lastly, whether the income of such property can be assessed as the income of the joint family. The High Court did not enter into these questions and made its task simple by saying:

"Several authorities were referred to on either side in support of their respective contentions. We do not, however, propose in deciding this reference to go into the larger question as to whether the property of the assessee, which was originally self-acquired property, assumed the character of a Hindu undivided family pro-

perty, as to what are the incidents of a Hindu undivided family property and under what circumstances can separate property become Hindu undivided family property. Some of these questions have been directly answered in the authorities which were cited before us.

"The question referred is confined to the 'income' from Kathoke Lodge. We would, therefore, without going into these larger questions, prefer to rest our decision on the short point whether the income from the property known as Kathoke Lodge after the declaration was the income of a Hindu undivided family and in this respect whether the principle laid down by the Privy Council in Kalyanji's case, AIR 1937 PC 36; was correctly applied."

The High Court assumed for the purposes of argument that there need not be more than one male member for forming a joint Hindu family as a taxable unit and that a joint Hindu family could lawfully consist of a single male member, his wife and unmarried daughter. On these assumptions the High Court concluded that Kathoke Lodge, from the date of the declaration by which it was thrown into the common stock, was the property of the Hindu undivided family. It, however, held:

"But the assessee has no son and therefore no undivided family. His ownership of the property and its income in fact remains the same as before. The fact of the existence of a wife or of a wife and daughter would make no difference to his ownership of that property..... His position as a member of the joint family after the declaration would be the same as that of a sole surviving coparcener, but it is now settled law that a person who for the time being is the sole surviving coparcener is entitled to dispose of the coparcenary property as if it were his separate property..... That is the position which the assessee held so far as this property is concerned. So far as the income is concerned, he has the complete power of disposal over the income and, even assuming that he is the karta of a joint Hindu family, there is no one who can question his spending, i.e., whether

or not it is for legal necessity or other justifiable purpose. If then, his right to the income remains under his personal law the same as it was before he made the declaration, the question arises whether under the Income-tax Act it must be held to be the income of the karta of the Hindu undivided family. That is precisely the question which the Privy Council answered against the assessee in Kalyanji's case (AIR 1937 PC 36)..... In our opinion, therefore, the assessee's case would fall squarely within the principle enunciated by their Lordships of the Privy Council in Kalyanji's case (AIR 1937 PC 36) and upon that view the income in the hands of the assessee would be liable to be assessed as his individual income."

The Privy Council decision on which the High Court relies is Kalyanji Vithaldas v. Commr. of Income-tax, (1937) 5 ITR 90 = (AIR 1937 PC 36). The judgment of the High Court is reported in (1970) 75 ITR 458 (Bom).

7. Before examining the validity of the High Court's reliance on Kalyanji's case (AIR 1937 PC 36) and the correctness of its conclusion that the instant case falls within the ratio of that decision, it is necessary to have regard to the principles of Hindu Law governing joint families. The High Court did not examine those principles, calling them "larger questions", and preferred wholly to rely on, so to say, the magic touch of Kalyanji's case AIR 1937 PC 36. It assumed that a joint family may consist of a single male, a wife and daughter which means that it assumed that the appellant was a member of a joint Hindu family consisting of himself, his wife and daughter. However, in the very next breath the High Court concluded: "But the assessee has no son and therefore no undivided family." An examination of fundamentals might have saved the High Court from the inconsistency that a single male can constitute a "joint family" with his wife and daughter but if that male has no son, there can be no "undivided family". In the first place, joint family and undivided family are synonymous terms. Secondly, when one says

that a joint Hindu family consists of a single male, his wife and daughter, one implies necessarily that there is no son. If there were a son, there would be two males.

8. For our limited purpose, fundamentals do not any more require a study of Sastric texts, digests and commentaries because judicial decisions rendered over the last century and more have given a legalistic form to what was in a large measure a mingling of religious and moral edicts with rules of positive laws. Hindu law today, apart from the piecemeal codification of some of its branches like the laws of marriage, succession, minority, guardianship, adoption and maintenance is Judge-made law, though that does not detract from the juristic weight of Smritis like the Yajnavalkya Smriti nor from the profundity of Vijnaneshwara's Commentary on it, the critique bearing the humble title of 'Mitakshara'.

9. The appellant is governed by the Mitakshara school of Hindu law but that is not of any particular consequence for the purposes of this appeal. The differences between the Mitakshara and Dayabhaga schools on the birth-right of coparceners and the rules of inheritance have no bearing on the issues arising in this appeal, particularly on the question whether a single male can constitute a joint or undivided family with his wife and unmarried daughter. A joint Hindu family under the Dayabhaga is, like a Mitakshara family, normally joint in food, worship and estate. In both systems, the property of joint family may consist of ancestral property, joint acquisitions and of self-acquisitions thrown into the common stock.* In fact, whatever be the school of Hindu law by which a person is governed, the basic concept of a Hindu undivided family in the sense of who can be its members is just the same.

10. Section 2 (9) of the Income-tax Act, 1922 defines a "person" to include inter alia a "Hindu undivided

family". Under Sections 3 and 55 of that Act, a Hindu undivided family is a taxable unit for the purposes of income-tax and super-tax. The expression 'Hindu undivided family' finds reference in these and other provisions of the Act but that expression is not defined in the Act. The reason of the omission evidently is that the expression has a well-known connotation under the Hindu law and being aware of it, the legislature did not want to define the expression separately in the Act. Therefore, the expression 'Hindu undivided family' must be construed in the sense in which it is understood under the Hindu Law.**

11. There is no substance in the contention of the respondent that in the absence of an antecedent history of jointness, the appellant cannot constitute a joint Hindu family with his wife and unmarried daughter. The lack of such history was never before pleaded and not only does it find no support from the record but such an assumption ignores the plain truth that the joint and undivided family is the normal condition of Hindu society. The presumption therefore is that the members of a Hindu family are living in a state of union, unless the contrary is established.† The strength of the presumption may vary from case to case depending upon the degree of relationship of the members and the farther one goes from the founder of the family, the weaker may be the presumption. But, generally speaking, the normal state of every Hindu family is joint and in the absence of proof of division, such is the legal presumption. Thus, a man who separates from his father or brothers may, nevertheless continue to be joint with the members of his own branch. He becomes the head of a new joint family, if he has a family and if he obtains property on parti-

**Gomedalli Laxminarayan v. Commr. of Income-tax, Bom., (1933) 8 ITC 239 (See particularly the judgment of Rangnekar J. at p. 244) = 3 ITR 367 at pp. 369-370 = (AIR 1935 Bom 412 at p. 414).

†Mayne's Hindu Law and Usage, Eleventh Ed., p. 323; Mulla's Hindu Law, Fourteenth Ed., p. 284.

*Mayne's Hindu Law and Usage, Eleventh Ed., pp. 364-365, paragraph 297; Mulla's Hindu Law, Fourteenth Ed., p. 277, paragraph 227 (3).

tion with his father and brothers, that property becomes the ancestral property of his branch qua him and his male issue.

12. It is true that the appellant cannot constitute a coparcenary with his wife and unmarried daughter but under the Income-tax Act a Hindu undivided family, not a coparcenary, is a taxable unit. A Hindu coparcenary is a much narrower body than the joint family. It includes only those persons who acquire by birth an interest in the joint or coparcenary property and these are the sons, grandsons and great-grandsons of the holder of the joint property for the time being, that is to say, the three generations next to the holder in unbroken male descent. Since under the Mitakshara Law, the right to joint family property by birth is vested in the male issue only, females who come in only as heirs to obstructed heritage (sapatibandha daya), cannot be coparceners. But we are concerned under the Income-tax Act with the question whether the appellant's wife and unmarried daughter can with him be members of a Hindu undivided family and not of a coparcenary. In the words of Sir George Rankin who delivered the opinion of the Judicial Committee in Kalyanji's case: (AIR 1937 PC 36).

"The phrase 'Hindu undivided family' is used in the statute with reference, not to one school only of Hindu law, but to all schools; and their Lordships think it a mistake in method to begin by passing over the wider phrase of the Act the words 'Hindu coparcenary', all the more that it is not possible to say on the face of the Act that no female can be a member." (p. 95 of ITR) = (at p. 38 of AIR).

12A. Outside the limits of coparcenary, there is a fringe of persons, males and females, who constitute an undivided or joint family. There is no limit to the number of persons who can compose it nor to their remoteness from the common ancestor and to their relationship with one another. A joint Hindu family consists of persons lineally descended from a common ancestor and includes their wives and unmarried daughters.

The daughter, on marriage, ceases to be a member of her father's family and becomes a member of her husband's family. The joint Hindu family is thus a larger body consisting of a group of persons who are united by the tie of sapindaship arising by birth, marriage or adoption.

"The fundamental principle of the Hindu joint family is the sapindaship. Without that it is impossible to form a joint Hindu family. With it as long as a family is living together, it is almost impossible not to form a joint Hindu family. It is the family relation, the sapinda relation, which distinguishes the joint family, and is of its very essence."††

13. The joint Hindu family, with all its incidents, is thus a creature of law and cannot be created by act of parties, except to the extent to which a stranger may be affiliated to the family by adoption. But the absence of an antecedent history of jointness between the appellant and his ancestors is no impediment to the appellant, his wife and unmarried daughter forming a joint Hindu family. The appellant's wife became his sapinda on her marriage with him. The daughter too, on her birth, became a sapinda and until she leaves the family by marriage, the tie of sapindaship will bind her to the family of her birth. As said by Golapchandra Sarkar Sastri in his "Hindu Law" (Eighth Ed., p. 240), "Those that are called by nature to live together, continue to do so" and form a joint Hindu family. The appellant is not by contract seeking to introduce in his family strangers not bound to the family by the tie of sapindaship. The wife and unmarried daughter are members of his family. He is not by agreement making them so. And as a Hindu male, he himself can be the stock of a fresh descent so as to be able to constitute an undivided family with his wife and daughter.

14. That it does not take more than one male to form a joint Hindu family with females is well established. In *Gowli Buddanna v.*

††Per Beaman J. in *Karsondas v. Gangabai* (1908) ILR 32 Bom 479 at p. 493; See also *Hindu Law in British India* by S. V. Gupte, Second Ed., p. 59.

Commissioner of Income-tax, Mysore, Bangalore, (1966) 3 SCR 224 = (AIR 1966 SC 1523) one Buddappa, his wife, his two unmarried daughters and his adopted son Buddanna were members of a Hindu undivided family. On Buddappa's death a question arose whether the adopted son who was the sole surviving coparcener could form a joint Hindu family with his mother and sisters and could accordingly be assessed in the status of a manager of the Hindu undivided family. Speaking for the Court, Shah J. observed:

"The plea that there must be at least two male members to form a Hindu undivided family as a taxable entity also has no force. The expression 'Hindu undivided family' in the Income-tax Act is used in the sense in which a Hindu joint family is understood under the personal law of Hindus. Under the Hindu system of law a joint family may consist of a single male member and widows of deceased male members, and apparently the Income-tax Act does not indicate that a Hindu undivided family as an assessable entity must consist of at least two male members."

In *N. V. Narendranath v. Commr. of Wealth-tax, Andhra Pradesh Hyderabad*, (1969) 3 SCR 882 = (AIR 1970 SC 14) the appellant filed returns for Wealth Tax in the status of a Hindu undivided family which at the material time consisted of himself, his wife and two minor daughters. The claim to be assessed in the status of a Hindu undivided family rested on the circumstance that the wealth returned consisted of ancestral property received or deemed to have been received by the appellant on partition with his father and brothers. The High Court held that as the appellant's family did not have any other male coparcener, the assets must be held to belong to him as an individual and not to the Hindu undivided family. That decision was set aside by this Court on the ground that a joint Hindu family could consist under the Hindu law of a single male member, his wife and daughters and that it was not necessary that the assessable unit should consist of at least two male members.

15. In both of these cases, *Gowli Buddanna's* (AIR 1966 SC 1523)

and *Narendranath's*, (AIR 1970 SC 14) the assessee was a member of a pre-existing joint family and had, in one case on the death of his father and in the other on partition, become the sole surviving coparcener. But the decision in those cases did not rest on the consideration that there was an antecedent history of jointness. The alternative argument in *Gowli Buddanna's* case (1966) 3 SCR 224 (p. 226) = (AIR 1966 SC 1523 at p. 1525) was an independent argument uncorrelated to the pre-existence of a joint family. The passage which we have extracted from the judgment of Shah J. in that case shows that the decision of this Court did not proceed from any such consideration. The Court held in terms categorical that the Hindu undivided family as an assessable entity need not consist of at least two male members. The same is true of the decision in *Narendranath's* case (1969) 3 SCR 882 (see at p. 886) = (AIR 1970 SC 14 at p. 18).

16. Thus the contention of the Department that in the absence of a pre-existing joint family the appellant cannot constitute a Hindu undivided family with his wife and unmarried daughter must fail. The view of the High Court that the appellant has "no son and therefore no undivided family" is plainly unsound and must also be rejected. Accordingly, the question whether the income of the Kathoke Lodge can be assessed in the hands of the appellant as a Karta or manager of the joint family must be decided on the basis that the appellant, his wife and unmarried daughter or members of a Hindu undivided family.

17. By the declaration of January 26, 1956, the appellant threw Kathoke Lodge into the family hotchpot abandoning all separate claims to that property. The genuineness of that declaration was accepted by the Tribunal. The High Court too decided the reference on the footing that the appellant had thrown the property into the common hotchpot and that "after the declaration, the property... would be property of a Hindu undivided family in the hands of the assessee" (at p. 471). Learned counsel for the Department attempted to raise a new contention

before us that there is no such thing under the Hindu law as impressing separate property with the character of joint family property, that the only doctrine known in this behalf to Hindu law is the doctrine of blending and since, prior to the declaration the family hotchpot in the instant case was empty, there was nothing with which the Kathoke Lodge or its income could be blended and therefore, the declaration is ineffective to convert that property into joint family property. Learned counsel for the appellant cited several decisions of the High Courts to controvert the Department's contention. But apart from the merits of the point we ruled that the contention was not open to the Department. The statement of case framed by the Tribunal shows that such a contention was not raised before the Tribunal. The Commissioner of Income-tax himself asked for the reference of a question to the High Court for its opinion. That question concerns the point whether having regard to the conduct of the appellant his self-acquired property could be said to be impressed with the character of joint family property. The question did not cover the contention raised before us on behalf of the Department. But above all, though an argument was raised in the High Court on behalf of the Department that for the operation of the doctrine of blending it was essential that there should exist not only a coparcenary but also a coparcenary property, learned counsel who appeared for the Department in the High Court "did not, after some discussion, press that there should necessarily be coparcenary property." This was not a concession on a question of law in the sense as to what the true legal position was. What the Department's counsel stated in the High Court was that he did not want to press the particular point. In our opinion, it is not open to the Department to take before us a contention which in the first place does not arise out of the reference and which the Department's counsel in the High Court raised but did not press.

18. Having examined the true nature of an undivided family under the Hindu law and in view of the

findings of the Tribunal and the High Court on the second aspect, two points emerge clear: Firstly that the appellant constituted a Hindu undivided family with his wife and unmarried daughter and secondly that Kathoke Lodge which was the appellant's separate property was thrown by him in the family hotchpot. It remains now to consider whether the income of Kathoke Lodge must be assessed in the hands of the appellant as an individual or whether it can be assessed in his status as manager of the Hindu undivided family.

19. Since the conclusion reached by the High Court that the income of Kathoke Lodge cannot be assessed in the appellant's status as a manager of the Hindu undivided family is based wholly on the decision in Kalyanji's case (AIR 1937 PC 36) and since that decision also loomed large in the arguments before us, it is necessary to examine it closely.

20. The relevant facts of that case are these: One Sicka had two sons, Moolji and Purshottom. From his first wife, Moolji had two sons, Kanji and Sewdas both of whom were married but neither of whom had a son. From his second wife, Moolji had a son Mohan Das. Kanji had a wife and a daughter while Sewdas had a wife but no issue. Moolji, Kanji and Sewdas separated from one another in about 1919. In the same year Moolji made gifts of capital to Kanji and Sewdas. Moolji continued to live jointly with his second wife and the son Mohan Das born of her. Purshottom had a wife, a son and a daughter.

21. There was another family of which the head was one Vithaldas. He had three sons, Kalyanji, Chaturbhuj and Champsi. Kalyanji had a wife, three sons and a daughter while Chaturbhuj had a wife and daughters.

22. Moolji and Purshottom, the two sons of Sicka, who had already separated from each other started in 1912 a business called Moolji Sicka and Company in partnership with Kalyanji, the son of Vithaldas. The three partners employed their self-acquired properties for the purpose of that business. In course of time, Moolji's sons Kanji and Sewdas, and

Vithaldas's sons Chaturbhuj and Champsi were taken into the partnership with the result that by 1930 the partnership came to consist of seven partners: Moolji, his sons Kanji and Sewdas; Moolji's brother Purshottom; and Vithaldas's sons Kalyanji, Chaturbhuj and Champsi. The interest of Kanji and Sewdas in the firm was a gift from their father Moolji and that of Chaturbhuj a gift from his brother Kalyanji. Those of the partners whose interest in the firm was separate property were not shown to have thrown that property or the receipts therefrom into the common stock.

23. The Privy Council had six appeals before it which were filed by the partners of the firm except Champsi. The appeals related to the assessment year 1931-32. The controversy was whether the partners should each be assessed to super-tax upon his share of the profits as an individual or whether the six shares should each be assessed as income of a Hindu undivided family.

24. Three partners out of the six, namely, Moolji, Purshottom and Kalyanji, were each members of a Hindu undivided family. Each of these three partners had a son or sons from whom he was not divided. But the income which these partners received from the firm was their separate and self-acquired property. Since the income was not thrown into the common stock, the Privy Council held that it could not be regarded as the income of the respective joint families.

25. The fourth partner Chaturbhuj had no son. His interest in the firm was obtained from his brother Kalyanji and therefore the income which he received from his share in the profits of the firm was a self-acquired and not ancestral property. The Privy Council observed that even if Chaturbhuj were to have a son, that son would have taken by birth no interest in the income which fell to Chaturbhuj's share and therefore the income was assessable in the hands of Chaturbhuj as his separate income and not that of the joint Hindu family.

26. According to the Privy Council, in none of the cases of these

four partners was the result affected by the fact that any partner had a wife and a daughter or a wife and more than one daughter. If the mere existence of a son did not make a father's self-acquired property joint family property, it was untenable that the existence of a wife or a daughter could do so.

27. In the case of the remaining two partners, Kanji and Sewdas, their interest in the firm was obtained under a gift from their father. The Privy Council assumed, without deciding the question, that such an interest was ancestral property in the hands of the sons so that if either Kanji or Sewdas had a son, the son would have taken interest in the property by birth. But neither Kanji nor Sewdas had a son. Kanji's family consisted of himself, his wife and daughter while Sewdas's family consisted of himself and his wife. The Privy Council held that the wife and daughter may be entitled to be maintained out of a person's separate as well as joint family property but the mere existence of a wife or daughter did not make ancestral property joint.

28. The crucial facts in Kalyanji's case (AIR 1937 PC 36) on which the ultimate decision rested are these: (i) In regard to three partners, Moolji, Purshottom and Kalyanji, though each of them was the head of his joint family which included in every case a son or sons, the income which each received from the firm was his separate and self-acquired property which was not thrown into the common stock. (ii) In regard to Chaturbhuj, though he had no son, that fact was irrelevant because his interest in the firm was his self-acquired or separate property in which the son could have taken no interest by birth. (iii) And in regard to Kanji and Sewdas, even if their interest in the firm was assumed to be ancestral property, the income which they received from the firm was their separate property as neither of them had a son who could take interest in the ancestral property by birth.

29. The appeals of the six partners before the Privy Council fall into two classes. Those of Moolji, Purshottom, Kalyanji and Chaturbhuj fall in one class while those of

Kanji and Sewdas fall in another class. There is a point of distinction between the cases of the four partners falling within the first class on one hand and that of the appellant on the other. But the point of distinction is not that Moolji Purshotom and Kalyanji had a son or sons and the appellant has none, because though the three partners were heads of their respective joint families which included in every case a son or sons, the income which each received from the firm was his separate and self-acquired property which was not thrown into the common stock. The mere existence of a son or sons in a joint Hindu family does not make the father's separate or self-acquired property joint family property. Though Chaturbhuj had no son that fact would not by itself bring his case on par with the appellant's because Chaturbhuj's interest in the firm was his separate property which also was not thrown in the common stock. If the mere fact that Moolji, Purshotom and Kalyanji had each a son or sons did not make their separate property joint family property, the mere existence of a wife or daughter could not bring about that result in Chaturbhuj's case.

30. As contrasted with the cases of these four partners, Kathoke Lodge which was once the separate property of the appellant was thrown by him in the common stock, which raises the question whether that circumstance is sufficient to justify the assessment of the income from that property in the appellant's status as the manager of the joint family. On this point the cases of Kanji and Sewdas furnish a near parallel. They did not have to throw their interest in the firm in the common stock because that interest was, on assumption, their ancestral property. But even though the property was ancestral, the income which they received from it was treated as their separate property as neither of them had a son who could take interest in the ancestral property by birth. Applying that analogy, even if Kathoke Lodge were to be an ancestral asset, its income would still have to be treated as the appellant's separate property as he

has no son who could take interest in that property by birth. On this reasoning, the effect of the appellant throwing Kathoke Lodge into the family hotchpot could not be more telling than if that property was his ancestral property.

31. But then it is urged by the learned counsel for the appellant that the Privy Council was in error in its decision on the nature of income received by Kanji and Sewdas from what was assumed to be ancestral property and therefore the decision on that aspect of the matter ought not to be followed in determining the true nature of the income received by the appellant from Kathoke Lodge. This submission is founded on the disapproval by this Court of certain observations made by the Privy Council in Kalyanji's case (AIR 1937 PC 36).

32. The Privy Council, in its judgment in Kalyanji's case, (AIR 1937 PC 36) referred in passing to "Laxminarayan's case" (AIR 1935 Bom 412) and observed that:

"The Bombay High Court on the other hand, in Laxminarayan's case (AIR 1935 Bom. 412) having held that the assessee, his wife and mother were a Hindu undivided family, arrived too readily at the conclusion that the income was the income of the family."

The decision of the Bombay High Court which the Privy Council had in mind is Commr. of Income-tax, Bombay v. Gomedalli Lakshminarayan (3 ITR 367) = (AIR 1935 Bom 412). There is a fundamental distinction between Lakshminarayan's case AIR 1935 Bom 412. and Kalyanji's case (AIR 1937 PC 36) which, with respect, the Privy Council failed to notice. In Lakshminarayan's case (AIR 1935 Bom 412) the joint Hindu family consisted of a father, his wife, their son and the son's wife. The property of the joint family was ancestral in the hands of the father and the son had acquired by birth an interest therein. (See the judgment of Rangnekar J. at p. 369 of ITR = (at p. 414. of AIR).) There was a subsisting undivided family during the father's lifetime and that undivided family,

did not come to an end on the father's death. The same undivided family continued after the death of the father, with the son, his mother and his wife as its members. The effect of the father's death was merely this that the son, instead of the father, became the manager of the joint family. The income from ancestral property was the income of the joint family during the father's lifetime and after his death it continued to be the income of the self-same joint family. The only change that had come about was that one link in the chain was snapped by death. But the death of a member of a joint Hindu family does not ordinarily disrupt the joint family. The Bombay High Court therefore held that the income of the ancestral property should be assessed in the son's status as a manager of the undivided family and not in his individual capacity. When Lakshminarayan's case (AIR 1935 Bom 412) came up before the Privy Council in appeal, (1937) 5 ITR 416 = (AIR 1937 PC 239) it regarded itself as bound by the interpretation put in Kalyanji's case (AIR 1937 PC 36) on the expression "Hindu undivided family" as employed in Section 55 of the Indian Income-tax Act and observed that the facts of the case were not materially different from the facts of Kalyanji's case (AIR 1937 PC 36). The Privy Council therefore answered the question by holding that

"the income received by right of survivorship by the sole surviving male member of a Hindu undivided family can be taxed in the hands of such male members as his own individual income for the purposes of assessment to super-tax under S. 55 of the Indian Income Tax Act, 1922."

33. The decision of the Privy Council in Lakshminarayan's case (AIR 1937 PC 239) and the observations made by it in Kalyanji's case (AIR 1937 PC 36) regarding the view taken by the Bombay High Court in Lakshminarayan's case (AIR 1935 Bom 412) were expressly disapproved by this Court at least in two cases. In Gowli Buddanna's case (AIR 1966 SC 1523) after discussing the decisions in Kalyanji's case (AIR 1937 PC 36) and

Lakshminarayan's case (AIR 1935 Bom 412) this Court observed:

"It may however be recalled that in Kalyanji Vithaldas's case (AIR 1937 PC 36) income assessed to tax belonged separately to four out of six partners of the remaining two it was from an ancestral source but the fact that each such partner had a wife or daughter did not make that income from an ancestral source income of the undivided family of the partner, his wife and daughter. In Gomedalli Lakshminarayan's case (AIR 1935 Bom 412) the property from which income accrued belonged to a Hindu undivided family and the effect of the death of the father who was a manager was merely to invest the rights of a manager upon the son. The income from the property was and continued to remain the income of the undivided family. This distinction which had a vital bearing on the issue falling to be determined was not given effect to by the Judicial Committee in A. P. Swamy Gomedalli's case." (AIR 1937 PC 239).

In Narendranath's case (1969) 3 SCR 882 = (AIR 1970 SC 14) too this Court disapproved of the Privy Council decision in Lakshminarayan's case AIR 1937 PC 239 and pointed out that the Privy Council had failed to notice the distinction between the facts of Kalyanji's case (AIR 1937 PC 36) and those of Lakshminarayan's case (AIR 1935 Bom 412) in observing that the Bombay High Court "arrived too readily at the conclusion that the income was the income of the family."

34. The appellant's counsel is thus right in his submission that the observations made by the Privy Council in Kalyanji's case (AIR 1937 PC 36) as regards the correctness of the Bombay view in Lakshminarayan's case (AIR 1935 Bom 412) is not good law. In fact, the decision of the Privy Council in appeal from the judgment of the Bombay High Court in Lakshminarayan's case (AIR 1935 Bom 412) has itself been disapproved by this Court. But that does not affect the correctness of the Privy Council decision in Kalyanji's case (AIR 1937 PC 36) itself as regards the nature of the income received by the six partners from the firm. That

part of the judgment in Kalyanji's case (AIR 1937 PC 36) has never been doubted and is open to no exception. For the matter of that, the error of the Privy Council's decision in Lakshminarayan's case AIR 1937 PC 239 consisted in overlooking the factual distinction between that case and Kalyanji's case (AIR 1937 PC 36) as a result of which the ratio of Kalyanji's case (AIR 1937 PC 36) came to be wrongly applied to Lakshminarayan's case. (AIR 1935 Bom 412).

35. The ratio of Kalyanji's case (AIR 1937 PC 36) would therefore apply to the instant case, the parallel being furnished by the cases of Kanji and Sewdas. But a word of explanation is necessary in the interests of clarity. The reason why the cases of Kanji and Sewdas furnish a close parallel is the very reason for which their cases were held by this Court to be distinguishable from Lakshminarayan's case AIR 1937 PC 239. In Lakshminarayan's case (AIR 1935 Bom 412) the property was ancestral in the hands of the father, the son had acquired an interest by birth therein, there was a subsisting Hindu undivided family during the lifetime of the father and since that family did not come to an end on the death of the father, the Bombay High Court had rightly held that the income continued to be income of the joint family and was liable to super-tax as such income. In regard to Moolji, Purshotom, Kalyanji and Chaturbhuj no such question arose as their interest in the firm was their separate property which was not thrown into the common stock. As regards Kanji and Sewdas, they were divided from their father Moolji at least since 1919 in which year Moolji made gifts of capital to them. Kanji joined the firm in 1919 and Sewdas in 1930. The assessment year in reference to which the dispute arose was 1931-32. Thus the gifted property of which the income was to be charged to super-tax was not the ancestral or joint family property of a subsisting Hindu undivided family consisting of Moolji, Kanji and Sewdas. Were it so, the case would have fallen within the ratio of the judgment of the Bombay High Court in Lakshminarayan's case (AIR 1935

Bom 412). As in the cases of Kanji and Sewdas, so here, the property of which the income is to be brought to tax was not the joint family property of a subsisting Hindu undivided family which had devolved on a sole surviving coparcener. In that latter class of cases the view has been consistently taken, except for the decision of the Privy Council in Lakshminarayan's case (AIR 1937 PC 239) that property of a joint family does not cease to belong to the family merely because the family is represented by a single coparcener who possesses rights which an owner of property may possess. The decision of the Privy Council in Attorney-General of Ceylon v. A. R. Arunachalam Chettiar, (1958) 34 ITR Suppl 42 (E. Case) the decisions of this Court in the cases of Gowli Buddanna, (AIR 1966 SC 1523) and Narendranath (AIR 1970 SC 14) and the decision of the Bombay High Court in Lakshminarayan's case (AIR 1935 Bom 412) fall within that class and are not to be confused with cases like the one on hand, which fall within the rule in Kalyanji's case (AIR 1937 PC 36).

36. In Arunachalam Chettiar's case ((1958) 34 ITR Suppl 42) a father and son constituted a joint Hindu family along with females including the widow of a pre-deceased son. On the death of the son in 1934 the father became the sole surviving coparcener. By a Ceylonese Ordinance, property passing on the death of a member of a Hindu undivided family was exempt from payment of Estate Duty. On the death of the father a question arose whether, in view of the ordinance, his estate was liable to Estate Duty. The Privy Council held that the father was at his death a member of a Hindu undivided family, the same undivided family of which his son, when alive was a member, and of which the continuity was preserved after the father's death by adoptions made by the widows who were members of the family. In Gowli Buddanna's case, AIR 1966 SC 1523 there was a subsisting Hindu undivided family between a father, his wife, two unmarried daughters and an adopted son. In respect of the income from dealings of the family,

the father was assessed during his lifetime in the status of a manager of the Hindu undivided family. After the death of the father the adopted son contended that he should be assessed as an individual. This contention was rejected uniformly at all stages. After examining various authorities including Kalyanji's case (AIR 1937 PC 36); Lakshminarayan's case (AIR 1935 Bom 412) and Arunachalam's case, (1958) 34 ITR Suppl 42 this Court held that property which belongs to a Hindu undivided family does not cease to belong to it because of the temporary reduction of the coparcenary unit to a single individual, who possesses rights which an owner of property may possess. A similar view was taken by this Court in Narendranath's case AIR 1970 SC 14 which raised a question under the Wealth Tax Act. Narendranath's family consisted at the material time, of his wife and two minor daughters. Since the wealth returned consisted of ancestral property received by him on partition with his father and brothers, it was held by this court that his status was that of a Hindu undivided family and not that of an individual.

37. While dealing with the question whether the assets which came to Narendranath's share on partition ceased to bear the character of joint family properties and became his individual property, this Court observed:

"In this connection, a distinction must be drawn between two classes of cases where an assessee is sought to be assessed in respect of ancestral property held by him (1) where property not originally joint is received by the assessee and the question has to be asked whether it has acquired the character of a joint family property in the hands of the assessee and (2) where the property already impressed with the character of joint family property comes into the hands of the assessee as a single coparcener and the question required to be considered is whether it has retained the character of joint family property in the hands of the assessee or is converted into absolute property of the assessee." After referring to Kalyanji's case

(AIR 1937 PC 36) and noticing the observation of the Judicial Committee that income from an ancestral source does not necessarily become the income of the undivided family consisting of a man, his wife and daughter, this Court held:

"Different considerations would be applicable, where property already impressed with the character of joint family property comes into the hands of a single coparcener. The question to be asked in such a case is whether the property retains the character of joint family property or whether it sheds the character of joint family property and becomes the absolute property of the single coparcener." In the result the Court concluded that the case fell within the rule in Gowli Buddanna's case AIR 1966 SC 1523.

38. There are thus two classes of cases, each requiring a different approach. In cases falling within the rule in Gowli Buddanna's case (AIR 1966 SC 1523) the question to ask is whether property which belonged to a subsisting undivided family ceases to have that character merely because the family is represented by a sole surviving coparcener who possesses rights which an owner of property may possess. For the matter of that, the same question has to be asked in cases where the family, for the time being, consists of widows of deceased coparceners as in Commr. of Income-tax, Madras v. Rm. Ar. Ar. Veerappa Chettiar, (1970) 6 ITR 467 at p. 470 (SC) so long as the property which was originally of the joint Hindu family remains in the hands of the widows of the members of the family and is not divided amongst them. In cases falling within the rule in Kalyanji's case (AIR 1937 PC 36) the question to ask is whether property which did not belong to a subsisting undivided family has truly acquired the character of joint family property in the hands of the assessee. In this class of cases, the composition of the family is a matter of great relevance for, though a joint Hindu family may consist of a man, his wife and daughter, the mere existence of a wife and daughter will not justify the assessment of income from the

joint family property in the status of the head as a manager of the joint family. The appellant's case falls within the rule in Kalyanji's case (AIR 1937 PC 36) since the property, before it came into his hands, was not impressed with the character of joint family property. It is of great relevance that he has no son and his joint family consists, for the time being, of himself, his wife and daughter.

39. Once it is realised that there are two distinct classes of cases which require a different approach, there would be no difficulty in understanding the implications of the apparently conflicting tests evolved as guides for deciding the two classes of cases. In Kalyanji's case (AIR 1937 PC 36) the Privy Council observed:

"In an extra legal sense, and even for some purposes of legal theory, ancestral property may perhaps be described, and usefully described, as family property; but it does not follow that in the eye of the Hindu law it belongs save in certain circumstances, to the family as distinct from the individual. By reason of its origin a man's property may be liable to be divested wholly or in part on the happening of a particular event, or may be answerable for particular obligations, or may pass at his death in a particular way; but if, in spite of all such facts, his personal law regards him as the owner, the property as his property and the income therefrom as his income, it is chargeable to income-tax as his, i.e., as the income of an individual. In their Lordships' view it would not be in consonance with ordinary notions or with a correct interpretation of the law of the Mitakshara, to hold that property which a man has obtained from his father belongs to a Hindu undivided family by reason of having a wife and daughters."

On the other hand, in Arunachalam's case (1958) 34 ITR Suppl. 42 which falls within the rule in Gowli Buddanna's case (AIR 1966 SC 1523) the Privy Council observed:

"But though it may be correct to speak of him (the sole surviving co-

parcener) as the 'owner', yet it is still correct to describe that which he owns as the joint family property. For his ownership is such that upon the adoption of a son it assumes a different quality: it is such too, that female members of the family (whose members may increase) have a right to maintenance out of it and in some circumstances to a charge for maintenance upon it. And these are incidents which arise, notwithstanding his so-called ownership, just because the property has been and has not ceased to be joint family property... it would not appear reasonable to impart to the legislature the intention to discriminate, so long as the family itself subsists, between property in the hands of a single coparcener and that in the hands of two or more coparceners."

Holding that it was an irrelevant consideration that a single coparcener could alienate the property in a manner not open to one of several coparceners, the Privy Council said:

"Let it be assumed that his power of alienation is unassailable: that means no more than that he has in the circumstances the power to alienate joint family property. That is what it is until he alienates it, and, if he does not alienate it, that is what it remains. The fatal flaw in the argument of the appellant appeared to be that, having labelled the surviving coparcener 'owner', he then attributed to his ownership such a congeries of rights that the property could no longer be called 'joint family property'. The family, a body fluctuating in numbers and comprised of male and female members, may equally well be said to be owners of the property, but owners whose ownership is qualified by the powers of the coparceners. There is in fact nothing to be gained by the use of the word 'owner' in this connexion. It is only by analysing the nature of the rights of the members of the undivided family, both those in being and those yet to be born, that it can be determined whether the family property can properly be described as 'joint property' of the undivided family."

40. These two sets of tests, both evolved by the Privy Council, govern two distinct sets of cases and there is no inconsistency between the two tests. The test evolved in Kalyanji's case, (AIR 1937 PC 36) not in Arunachalam's ((1953) 34 ITR Suppl 42) or Gowli Buddanna's case, (AIR 1966 SC 1523) has to be applied to the instant case.

41. Kathoke Lodge was not an asset of a pre-existing joint family of which the appellant was a member. It became an item of joint family property for the first time when the appellant threw what was his separate property into the family hotchpot. The appellant has no son. His wife and unmarried daughter were entitled to be maintained by him from out of the income of Kathoke Lodge while it was his separate property. Their rights in that property are not enlarged for the reason that the property was thrown into the family hotchpot. Not being coparceners of the appellant, they have neither a right by birth in the property nor the right to demand its partition nor indeed the right to restrain the appellant from alienating the property for any purpose whatsoever. Their prior right to be maintained out of the income of Kathoke Lodge remains what it was even after the property was thrown into the family hotchpot: the right of maintenance, neither more nor less. Thus, Kathoke Lodge may be usefully described as the property of the family after it was thrown into the common stock but it does not follow that in the eye of Hindu Law it belongs to the family, as it would have, if the property were to devolve on the appellant as a sole surviving coparcener.

42. The property which the appellant has put into the common stock may change its legal incidents on the birth of a son but until that event happens the property, in the eye of Hindu Law, is really his. He can deal with it as a full owner, unrestrained by considerations of legal necessity or benefit of the estate. He may sell it, mortgage it or make a gift of it. Even a son born or adopted after the alienation shall have to take the family hotchpot as he finds it. A son born, begotten or adopted after the

alienation has no right to challenge the alienation.

43. Since the personal law of the appellant regards him as the owner of Kathoke Lodge and the income therefrom as his income even after the property was thrown into the family hotchpot, the income would be chargeable to income-tax as his individual income and not that of the family.

44. For these reasons, we dismiss the appeal but there will be no order as to costs.

Appeal dismissed.

AIR 1976 SUPREME COURT 123

(From: (1972) 2 Andh WR 18)

A. ALAGIRISWAMI, P. K. GOSWAMI
AND N. L. UNTWALIA JJ.

State of Andhra Pradesh and another, Appellants v. T. Gopalakrishnan Murthi and others, Respondents.

Civil Appeal No. 2136 of 1972,
D/- 25-9-1975.

(A) Constitution of India, Article 229 (2) Proviso — A. P. High Court Service Rules 1959, Rule 19 — Conditions of service of High Court staff — Powers of Chief Justice — Recommendations of Chief Justice to equate pay scales of High Court staff with those of equivalent posts in secretariat — Refusal by Government — High Court is not justified in issuing mandamus to Government to implement recommendations. (1972) 2 Andh W. R. 18, Reversed.

If there is a law made by the Legislature of the State then subject to that law, otherwise without it, the Chief Justice or some other Judge or officer of the Court authorised by the Chief Justice is empowered to make rules laying down the conditions of service of the High Court staff. But if the Rules made under clause (2) of Art. 229 relate to salaries, allowances, or pensions then since in them is involved the question of finance the framing of the rules requires the approval of the Governor that means the State Government. One should expect in the fitness of things and in view of

JS/KS/D969/75/MVJ

the spirit of Art. 229 that ordinarily and generally the approval should be accorded. But surely it is wrong to say that the approval is a mere formality and in no case it is open to the Government to refuse to accord their approval. On the facts and in the circumstances of this case and in the background of the conditions which are prevalent in other States Government could have been well-advised to accord approval to the suggestion of the Chief Justice. It is, however, not possible to take the view that merely because the State Government does not see its way to give the required approval it will justify the issuance of a writ of mandamus under Art. 226 of the Constitution as if the refusal of the State Government was ultra vires or mala fide and arbitrary.

(Para 6)

It could not also be contended that since the Rules of 1959 were framed with the approval of the Governor, the Chief Justice could under Rule 19 regulate the pay of the High Court staff in the manner he thought fit and proper without any further reference to the Governor. There are no such words in the Rules. (Para 9)

However, the Government should give their second thought to the matter and see whether it is possible in the State of Andhra Pradesh to obliterate the distinction in the matter of pay scales etc., between the High Court and the Secretariat staff. There does not seem to be any good and justifiable reason for maintaining the distinction. (1972) 2 Andh WR 18, Reversed.

(Para 10)

Cases Referred: Chronological Paras

AIR 1975 SC 389 = (1975) 4 SCC 1
= 1975 Lab IC 581 5, 7
AIR 1971 SC 1850 = (1971) Supp
SCR 420 5, 7

Mr. P. Rama Reddy, Sr. Advocate, (M/s. P. P. Rao and T. V. S. N. Chari Advocates with him), for Appellants; Mr. S. V. Gupte, Sr. Advocate, (Mr. A. Subbarao, Advocate with him), for Respondents.

Judgment of the Court was delivered by

UNTWALIA, J.:— This appeal is by certificate of fitness granted by the Andhra Pradesh High Court. The point concerns the scope and the

power of the Chief Justice under Art. 229(2) of the Constitution of India. The Chief Justice of the High Court wanted the High Court staff to be paid at the scales of pay of equivalent posts in the Secretariat staff of the Government of Andhra Pradesh. The Government did not agree to do so. The respondents who are members of the High Court service belonging to the categories of Bench Clerks, Lower Division Clerks, Typists and certain other categories filed a writ petition in the High Court for a writ of mandamus against the appellants directing them to implement the recommendations of the Chief Justice of the High Court made to the Government from time to time to fix the pay scales of the various categories to which the respondents belong in accordance with the scales of pay as revised by the State Government in case of corresponding categories detailed in Annexure III of the Andhra Pradesh Secretariat service. The High Court has allowed the writ petition and directed the Government to give effect to the recommendations of the Chief Justice embodied in the letters of the Registrar of the High Court, D/- 31-3-1969 and 1-7-1969 with such allowances and such benefits as are admissible to the members of the Secretariat service in the Secretariat.

2. A few facts may be stated for determination of the point at issue. In April, 1965 a Pay Commission was appointed by the Government to make recommendations in regard to the revision of pay scales of Government employees in the various services. The Pay Commission submitted its report in 1967. In respect of certain categories of the High Court staff, but not all, the Commission recommended to give them the pay scales of their counter-parts in the Secretariat.

3. The Assistant Secretary to the Government wrote a letter dated 12-2-1969 to the Registrar requesting that a comprehensive note together with the latest scales of pay obtaining in the other High Courts may kindly be sent to the Government for placing the same before the Officers Committee for consideration. A detailed letter dated 31-3-1969 was

written by the Registrar to the Government with reference to some earlier letters of the High Court and in reply to the Government's letter dated 12-2-1969. Facts and figures from other States were given to show that in most of the States the scales of pay allowed to the members of the High Court service were identical with those of the Secretariat staff and the Government was asked to agree to the proposal of the Chief Justice to bring the pay scales of the High Court staff at par with those of the Secretariat. The matter was pursued by the High Court in the Registrar's letter dated 1-7-1969 addressed to the Secretary to the Govt. Finance (Pay Commission) Department and in the D. O. letter dated 23-7-1969 written by the Chief Justice to the Chief Minister. The Government did not agree to the equation of the scales of pay of the staff of the High Court to those of the Secretariat's. The High Court was accordingly informed. Thereupon respondents filed the writ petition in January, 1970.

4. In support of the writ petition reliance was placed before the High Court on the power of the Chief Justice under Article 229 and Rule 19 of the Andhra Pradesh High Court Service Rules, 1959 (for brevity, the 1959 Rules). The High Court has taken the view that for the purposes of appointments of officers and servants of the High Court and laying down the conditions of their service the Chief Justice in the highest authority. The requirement of the approval of the Governor of the State under the proviso to clause (2) of Article 229 is a requirement of a mere formal approval. The Government could not refuse to accord their approval when the recommendation of the Chief Justice was merely for equation of the pay scales of the High Court staff with those of the Secretariat's. The High Court has not rested its judgment on Rule 19 of the 1959 Rules.

5. Mr. Ram Reddy, learned counsel for the appellants has assailed the decision of the High Court as being contrary to the two decisions of this Court in *M. Gurumoorthy v. Accountant General Assam and Nagaland*, (1971) Supp SCR 420 = [AIR

1971 SC 1850) and *State of Assam v. Bhubhan Chandra Dutta*, (1975) 4 SCC 1 = (AIR 1975 SC 889 = 1975 Lab IC 581). The High Court has noticed the first decision, but counsel submitted, it has applied it wrongly. Mr. S. V. Gupte appearing for the respondents endeavoured to support the judgment of the High Court with reference to Rule 19.

6. Leaving aside the proviso to clause (1) of Article 229 in the matter of appointments of officers and servants of a High Court the power is of the Chief Justice or of such other Judge or officer of the Court as he may direct. Under clause (3) the administrative expenses of a High Court including all salaries, allowances and pensions payable to or in respect of the officers and servants of the Court are a charge upon the Consolidated Fund of the State. Any fees or monies taken by the Court formed part of that Fund. There is no separate fund or power to raise it at the disposal of the High Court for the purposes of meeting the salaries etc. of the High Court staff. In this context clause (2) of Article 229 may now be read with the proviso appended thereto.

"Subject to the provisions of any law made by the Legislature of the State, the conditions of service of officers and servants of a High Court shall be such as may be prescribed by rules made by the Chief Justice of the Court or by some other Judge or officer of the Court authorised by the Chief Justice to make rules for the purpose:

Provided that the rules made under this clause shall, so far as they relate to salaries, allowances, leave or pensions, require the approval of the Governor of the State."

If there is a law made by the Legislature of the State then subject to that law, otherwise without it, the Chief Justice or some other Judge or officer of the Court authorised by the Chief Justice is empowered to make rules laying down the conditions of service of the High Court staff. But if the Rules made under clause (2) relate to salaries, allowances, or pensions then since in them is involved the question of finance the framing

of the rules under clause (2) requires the approval of the Governor — that means the State Government. One should expect in the fitness of things and in view of the spirit of Article 229 that ordinarily and generally the approval should be accorded. But surely it is wrong to say that the approval is a mere formality and in no case it is open to the Government to refuse to accord their approval. On the facts and in the circumstances of this case and in the background of the conditions which are prevalent in other States Government could have been well-advised to accord approval to the suggestion of the Chief Justice, as the suggestion was nothing more than to equate the pay scales of the High Court staff with those of the equivalent posts in the Secretariat. That merely because the Government is not right in (not) accepting the Chief Justice's view and refusing to accord the approval is no ground for holding that by a writ of mandamus the Government may be directed to accord the approval. The High Court staff has not always been treated at par with the Secretariat staff in the matters of scales of pay. The matter has been taken up in the Chief Justices' Conference and with several State Governments. Most of them have acceded to the request of the High Court to bring its staff at par with the Secretariat staff in the matter of pay etc. It is, however, not possible to take the view that merely because the State Government does not see its way to give the required approval it will justify the issuance of a writ of mandamus under Article 226 of the Constitution as if the refusal of the State Government was ultra vires or made mala fide and arbitrarily.

7. In Gurumoorthy's case (1971) Supp. SCR 420 = (AIR 1971 SC 1850) (supra) Grover, J. delivering the judgment on behalf of the Constitution Bench of this Court has stated at page 429 (of SCR Supp) = (at p. 1855 of AIR)

"Thus Article 229 has a distinct and different scheme and contemplates full freedom to the Chief Justice in the matter of appointments of officers and servants of the High Court and their conditions of service. These

can be prescribed by rules made by him. Apart from the special situation contemplated by the proviso to cl. (1) the only exception is that the Governor's approval must be sought to the extent the rules relate to salaries, leave or pension. This exception; it is abundantly clear has to be made because the finances have to be provided by the Government and to the extent there is any involvement of expenses the Government has to approve of it.

The more apposite and direct case on the point is the decision of this Court in Bhubhan Chandra Dutta's case (1975) 4 SCC 1 = (AIR 1975 SC 889 = 1975 Lab IC 581) (supra) where following the decision in Gurumoorthy's case, Ray, C. J. has said while delivering the judgment on behalf of the Court at page 5 (of SCC) = (at p. 891 of AIR) = (at p. 584 of Lab IC):

"Article 229 of the Constitution confers power on the Chief Justice of the High Court to appoint officers and servants of the High Court. Article 229(2) states that subject to the provisions of any law made by the legislature of the State, the conditions of service of officers and servants of a High Court shall be such as may be prescribed by rules made by the Chief Justice of the Court or by some other Judge or officer of the Court authorised by the Chief Justice to make rules for the purpose. It is also provided that the rules made under Article 229(2) shall, so far as they relate to salaries, allowances, leave or pensions, require the approval of the Governor of the State. It is not disputed that the appointment of Bhubhan Chandra Dutta by the Chief Justice of the High Court at a salary of Rs. 1,500 per month with special allowance of Rupees 250 per month was made without the approval of the Governor. If the Chief Justice of the High Court wanted to appoint the Registrar at the initial salary of Rs. 1500 with a special salary of Rs. 250 per month, special approval of the Governor should have been taken in view of the fact that the rules did not permit such salary and the higher salary involved greater financial burden on the Government (See M. Gurumoorthy

v. A. G., Assam & Nagaland, (AIR 1971 SC 1850)).

8. We share the sentiment expressed by the High Court in its judgment and yet find it difficult to allow our sentiment to cross the boundary of law engrafted in the proviso to clause (2) of Art. 229.

9. Rule 19(1) of the 1959 Rules on which reliance was placed on behalf of the respondents to sustain the judgment of the High Court has been quoted therein. After quoting the rules, the High Court has said:

"We may observe in passing that this rule has not been happily worded. There is reference to the Rules of 1932, the Rules of 1947, the Rules of 1950 relating to gratuities, provident fund etc., and the rules of 1947 relating to scales of pay. Whatever might have been the power of the Government in the matter of fixing pay or making rules in the pre-constitution days, that position has changed after the Constitution in view of Article 229 of the Constitution."

Mr. Gupte pointed out that the 1959 Rules framed by the Chief Justice under Article 229(1) and (2) of the Constitution were with the approval of the Governor of Andhra Pradesh in so far as the Rules related to salaries, allowances, leave or pensions. Rule 19(1) authorised the Chief Justice to regulate the pay of the High Court staff in the manner he thought it fit and proper to do without any further reference to the Governor. We do not find any such words in Rule 19(1) to lead to the above conclusion. The reference to "the Rules regulating the pay of the services included in the Pay Schedule and other rules for the time being in force applicable to officers under the rule-making control of the Government of Andhra Pradesh" was merely a reference to the rules and not to the pay schedules. This was further made clear by the first proviso of Rule 19(1) which reads as follows:

"Provided that except with regard to salaries, allowances, leave and pensions, the Chief Justice shall exercise the powers vested in the Governor under any of the aforesaid rules;"

10. For the reasons stated above we do not find it possible to sustain the judgment of the High Court in law. We, however, trust and hope that the Government will give their second thought to the matter and see whether it is possible in the State of Andhra Pradesh to obliterate the distinction in the matter of pay scales etc. between the High Court and the Secretariat staff. There does not seem to be any good and justifiable reason for maintaining the distinction.

11. In the result the appeal is allowed but there will be no order as to costs.

Appeal allowed.

AIR 1976 SUPREME COURT 127

(From: Orissa)*

P. K. GOSWAMI AND
N. L. UNTWALIA JJ.

1. M/s. Bisra Stone Lime Co. Ltd. (In Civil Appeal No. 106 of 1975)
2. Orissa Textile Mills Ltd. and another (In Civil Appeal No. 107 of 1975), Appellants v. Orissa State Electricity Board and another, Respondents.

Civil Appeals Nos. 106 and 107 of 1975, D/- 21-10-1975.

(A) Electricity (Supply) Act (1948), S. 49 — Surcharge — Meaning — Enhancement of rates of tariff by way of surcharge — Permissibility. (Words and Phrases — Surcharge).

The word surcharge is not defined in the Act, but etymologically, *inter alia*, surcharge stands for an additional or extra charge or payment. Surcharge is thus a superadded charge, a charge over and above the usual or current dues. It is in substance an addition to the stipulated rates of tariff. The nomenclature, therefore, does not alter the position. Enhancement of the rates by way of surcharge is well within the power of the Board to fix or revise the rates of tariff under the provisions of the Act. (Para 11)

In view of decisions of Supreme Court in AIR 1975 SC 1967, an agree-

*(O. J. C. Nos. 851 and 850 of 1972, D/- 18-10-1974—Orissa.)

ment entered in exercise of the power conferred by the statute, such as under S. 49 (3) of the Act, cannot be set at naught by unilateral exercise of power by the Board under the Act to enhance the rates agreed upon between the parties in the absence of any provision in that behalf in the agreement itself. (Para 12)

Exercise of power under S. 49 (1) and (2) as also that under S. 59 will remain suspended during the currency of the special agreements between the parties and no unilateral enhancement of rates is permissible under the law. There is only a protempore ban on revision of rates during the subsistence of statutory special agreements entered in conformity with S. 49 (3) of the Act. (Para 13)

Merely because there was special agreement between the parties it could not be said that the stipulated rates could not be increased by adding the surcharge in question. The ratio of AIR 1975 SC 1967 will be available on all fours only where there is nothing in the special agreements with regard to revision of rates during the subsistence of the agreement. O. J. C. Nos. 851 and 850 of 1972, D/- 18-10-1974 (Orissa). Affirmed. (Para 14)

(B) Constitution of India, Art. 226 — Other remedy open — Arbitration clause in agreement of 1960 between a textile manufacturing company and State Government — State Electricity Board as constituted in 1962 assuming all obligations of State Government and as such bound by agreement — Question as to whether Board has power to levy surcharge in view of certain clause and that as to interpretation of the clause, held to be covered by arbitration clause — Company should pursue remedy of arbitration instead of extraordinary jurisdiction of High Court under Art. 226. AIR 1975 SC 1967, Rel. on. (Paras 8, 23, 24)

(C) Electricity (Supply) Act (1948), S. 49 — Plea of "undue favour" under Sec. 49, if at par with that of discrimination under Art. 14 of Constitution.

A plea of discrimination which is available when Art. 14 of Constitution is in free play is not at par with the interdict of 'undue favour' under S. 49 of the Act. Apart from this, when law makes it obligatory for cer-

tain special agreements to continue in full force during their currency stultifying the power of the Board to revise the rates during the period, no ground of discrimination can be made out on the score of exempting such industries as are governed by special agreements. (Paras 22, 21)

Cases Referred: Chronological Paras AIR 1975 SC 1967 = (1975) 2 SCC 414 and 436 12, 14, 16, 17

Mr. S. V. Gupte, Sr. Advocate (In C.A. No. 107 of 1975) (Mr. Vinoo Bhagat, Advocate with him), for Appellants; Mr. G. Rath, Advocate General, (Mr. B. Parthasarathi, Advocate with him), for Respondent No. 1 In C. A. No. 106 of 1975 and Respondent in C. A. No. 107 of 1975.

Judgment of the Court was delivered by

P. K. GOSWAMI, J.:— This judgment will govern both the above mentioned appeals.

2. We may take the facts briefly from Civil Appeal No. 107 of 1975.

3. The Orissa Textile Mills Limited is a public limited company (briefly the company) and is engaged in manufacture of textile articles. It is located at Choudwar in the District of Cuttack (Orissa). On May 12, 1960, the company (described in the agreement as Consumer) entered into an agreement with the State of Orissa (described in the agreement as the Supplier) for supply of electric power. The contract was for a period of five years from the date of supply of electric power, namely, February 1, 1963 and it was thereafter to so continue unless and until the same was determined by either party giving to the other six calendar months' notice in writing of the intention to terminate the agreement. It is common ground that the agreement has not been terminated.

4. It may be appropriate at this stage to refer to a few clauses in the agreement. Clause 12 provides for charges to be paid by the consumer as well as about maximum demand. Clause 13 reads as follows:—

"The tariff and conditions of supply mentioned in this agreement shall be subject to any revision that

may be made by the supplier from time to time."

Clause 23 deals with extra charge regarding domestic lighting, fans, domestic power and street lighting, etc. in the colony of the Mills. Cl. 23 reads as follows:—

"Any dispute or difference arising between the Consumer and the Supplier or their respective Electrical Engineers as to the supply of electrical energy hereunder or the pressure thereof or as to the interpretation of this Agreement or the right of the Supplier or the consumer respectively to determine the same or any other question, matter or thing arising hereunder shall be referred to a single arbitrator who shall be mutually agreed upon by both parties. The arbitrator's decision thereon shall be final and the provisions of the Arbitration Act of 1940 (X of 1940) or of any other statutory modification thereof for the time being in force shall apply to any such reference."

5. On April 1, 1962, the Orissa State Electricity Board (briefly the Board) was constituted by the State Government under Section 5 of the Electricity (Supply) Act, 1948 (briefly the Act). Under Section 60(1) of the Act "all debts and obligations incurred, all contracts entered into and all matters and things engaged to be done by, with or for the State Government for any of the purposes of this Act before the first constitution of the Board shall be deemed to have been incurred, entered into or engaged to be done by, with or for the Board....." By this section, therefore, the Board assumed all obligations of the State Government in respect of matters to which the Act applied. It is common ground that the contract entered between the company and the State Government is binding on both.

6. The Board decided to levy a surcharge of 10 per cent on the power tariff then in force with effect from July 1, 1972, and a Press Note was issued accordingly. The material portion of the Press Note may be extracted:

"The Orissa State Electricity Board has decided to levy a general and uniform surcharge of 10 per cent

on the power tariff now in force except on the following categories of consumers who will pay the existing tariff:—

(1) Power Intensive Industries which are governed by Special Agreements.

(2) Domestic power and lighting. In respect of irrigation loads (pumping and agriculture) the power tariff will be Re. 0.16P. (sixteen paise) per unit (Kwh) with a rebate of Re. 0.01 (one paise) per unit 'Kwhp' for timely payment.....

The above levy of surcharge of 10 per cent is also applicable to the power supply to the Hindustan Steel Ltd., Rourkela and Kalinga Iron Works, Barbil.

The levy of 10 per cent surcharge will be on demand charges, unit charges, maximum and minimum charges and reservation charges.

x x x x x
The levy of surcharge and revised tariff for irrigation loads has become necessary for improving the Board's overall financial return and enabling it to undertake larger developmental programmes like rural electrification.

x x x x x
It appears that the second purpose in the above Press Note with reference to "larger developmental programmes like rural electrification" was omitted by a revised Press Note.

7. The company unsuccessfully challenged the levy of the surcharge by an application under Article 226 of the Constitution in the Orissa High Court. Several contentions were raised in the petition before the High Court. The surcharge was, inter alia, challenged as being violative of Article 14 of the Constitution. This objection was repelled by the High Court and the learned counsel appearing on behalf of the company was unable to press the same before us in view of the Presidential suspension of that article during the emergency.

8. Some other grounds, including that clause 13 is ultra vires the Act, were taken before the High Court but have not been pressed before us.

9. Mr. Gupte, the learned counsel appearing on behalf of the

appellants, submits as follows:—

(1) The Board has no power to levy a surcharge under the provisions of the Act.

(2) Clause 13 of the agreement cannot take in the levy of surcharge. It is, therefore, not a matter for reference to arbitration under clause 23 of the agreement.

(3) Assuming it has power under the Act or under clause 13 to levy a surcharge, the Board in exempting certain categories and imposing surcharge upon the appellants is guilty of discrimination which is impermissible under Section 49 of the Act and clause (2) of Schedule I to the agreement.

10. With regard to his first contention Mr. Gupte submits that surcharge is unknown to the provisions in the Act and the Board has no power under the Act to levy a surcharge. It is not possible to accede to the submission that the demand of surcharge cannot be included in the revision of rates of tariff.

11. The word surcharge is not defined in the Act, but etymologically, *inter alia*, surcharge stands for an additional or extra charge or payment (see Shorter Oxford English Dictionary). Surcharge is thus a super-added charge, a charge over and above the usual or current dues. Although, therefore, in the present case it is in the form of a surcharge, it is in substance an addition to the stipulated rates of tariff. The nomenclature, therefore, does not alter the position. Enhancement of the rates by way of surcharge is well within the power of the Board to fix or revise the rates of tariff under the provisions of the Act. The first submission of counsel is, therefore, of no avail.

12. Before we deal with the second submission of counsel, we may refer to a recent decision of this Court in *M/s. Titagarh Paper Mills Ltd. v. Orissa State Electricity Board*, (1975) 2 SCC 436 (briefly the Titagarh's case) to which one of us was a party. This Court following the decision in the *Indian Aluminium Co. v. Kerala State Electricity Board*, (1975) 2 SCC 414 = (AIR 1975 SC 1967) with regard to the scope of Ss. 49 and 59 of

the Act held in the Titagarh's case (*supra*) as follows:—

".....neither Section 49 nor Section 59 confers any authority on the Board to enhance the rates for supply of electricity where they are fixed under a stipulation made in an agreement. The Board has no authority under either of these two sections to override a contractual stipulation and enhance unilaterally the rates for the supply of electricity".

It is clear from the above decision that an agreement entered in exercise of the power conferred by the statute such as under Section 49 (3) of the Act, cannot be set at naught by unilateral exercise of power by the Board under the Act to enhance the rates agreed upon between the parties in the absence of any provision in that behalf in the agreement itself. In the *Indian Aluminium Company's case* (*supra*) there was no provision in the agreement with regard to the revision of tariff, such as we find in clause 13 of the present agreement. This Court, therefore, had not to consider in that case about the effect of a clause like clause 13. In the Titagarh's case (*supra*), however, this Court had to take into consideration clause 13 of the agreement therein which is the identical clause in the present case.

13. Sub-sections (1) and (2) of Section 49 empower the Board to fix uniform rates of tariff. Sub-section (3) of Section 49 on the other hand reserves to the Board the power of fixing different tariffs having regard to certain factors mentioned therein. Section 49 (3) contemplates what are known as 'special agreements.' Power under Section 49 (1) and (2) cannot be invoked during the subsistence of special agreements providing for stipulation of rates of tariff in absence of any reservation therein. Exercise of power under Section 49 (1) and (2) as also that under Section 59 will remain suspended during the currency of the special agreements between the parties and no unilateral enhancement of rates is permissible under the law. There is only a *pro tempore* ban on revision of rates during the subsistence of statutory special agreements entered in conformity with Section 49 (3) of the Act.

14. Mr. Gupte, however, submits that since there have been special agreements between the parties the stipulated rates could not be increased by adding the surcharge in question. This argument proceeds on a wrong assumption that surcharge is absolutely different from rates of tariff. Besides the submission fails to take account of clause 13 of the agreement with regard to revision of rates. The ratio of the Indian Aluminium Co.'s case (AIR 1975 SC 1967) (supra) will be available on all fours only where there is nothing in the special agreement with regard to revision of rates during the subsistence of the agreement.

15. With regard to the second submission, which overlaps to some extent the first, Mr. Gupte points out that revision of tariff under cl. 13 cannot include levy of surcharge which is distinct from tariff. He also draws our attention to the various clauses in the Press Note where both the expressions 'surcharge and tariff' are freely used. On the other hand, the learned Advocate General submits that the import of surcharge depends upon the nature of the original charge. If the surcharge is appended to a tariff it partakes of the character of tariff.

16. When the Press Note introduces the surcharge in addition to tariff rates, not much can be made of for use of the two words separately. We have already noted the meaning of the word 'surcharge' while dealing with the first submission of the learned counsel. We may only add that this Court in *Titagarh's case* (1975) 2 SCC 436 (supra) put the matter beyond controversy in the following words:—

"Now, the effect of the levy of coal surcharge would be to enhance the rates for the supply of electricity stipulated under the agreement."

17. Besides in the *Titagarh's case* (1975) 2 SCC 436 (supra) this Court further observed as follows:—

"Questions such as: whether the Board has power under clause (13) of the agreement to levy any coal surcharge at all when no such power was conferred on it by the Act, whether the action of the Board in levy-

ing the coal surcharge on the appellant under clause (13) of the agreement was arbitrary and unreasonable or whether it was based on extraneous and irrelevant considerations and whether, on the facts and circumstances of the case, the Board was justified under clause (13) of the agreement to levy the coal surcharge on the appellant, are plainly questions arising under the agreement and they are covered by the arbitration provision contained in clause (23) of the agreement. All the contentions raised by the appellant against the claim to justify the levy of the coal surcharge by reference to clause (13) of the agreement would, therefore, seem to be covered by the arbitration agreement and there is no reason why the appellant should not pursue the remedy of arbitration which it has solemnly accepted under clause (23) of the agreement and instead invoke the extraordinary jurisdiction of the High Court under Article 226 of the Constitution to determine questions which really form the subject-matter of the arbitration agreement."

18. Although this Court was dealing with the coal surcharge in the above decision, there is no distinction in principle between the coal surcharge or a surcharge simpliciter and the ratio of the above decision will be applicable in this case. The second submission of the learned counsel, therefore, fails and the point is squarely covered by the above decision. The matter is, therefore, covered by the arbitration clause (23) of the agreement.

19. With regard to the last submission regarding discrimination founded upon Section 49 of the Act and clause (2) of the Schedule I to the agreement, Mr. Gupte relied upon sub-section (4) of Sec. 49 which provides that in fixing the tariff and terms and conditions for the supply of electricity, the Board shall not show undue preference to any person. He also draws our attention to clause (2) of the conditions of supply in the First Schedule to the agreement to the effect that "the Department shall not be entitled to discriminate between different consumers in fixing the charges for the supply of energy." The agreement is enter-

ed under the provisions of S. 49(3) of the Act. If we read Section 49 as a whole we find that under sub-section (1) of that section, the Board in supplying electricity to any person not being a licensee "may for the purposes of such supply frame uniform tariffs". However, under sub-section (2) of that section in fixing the uniform tariffs the Board shall have regard to the various factors under four heads (a), (b), (c) and (d). Then comes sub-section (3) which preserves the power of the Board, "if it considers it necessary or expedient to fix different tariffs for the supply of electricity to any person not being a licensee having regard to the geographical position of any area, the nature of the supply and purpose for which supply is required and any other relevant factors".

20. Mr. Gupte submits that there is no reason why the power intensive industries, which are governed by special agreements, should have been exempted from the levy of surcharge in the Press Note. He further points out that there are eight industries referred to in paragraph 20 of the Special Leave Petition which have not been subjected to the aforesaid 10 per cent surcharge even though the rates of electricity charged per unit in their case are less than those of the Orissa Textile Mills.

21. It is enough to point out that the industries referred to in the Special Leave Petition were covered by special agreements and we are not even told whether these special agreements had a similar clause like clause 13 in the present case. This Court has held that special agreements entered under Section 49(3) cannot be given a go-by while exercising the power of revision of rates under Section 49 read with Section 59. That being the position, the objection on the score of discrimination loses all importance. The totality of the provisions under Section 49 does not give any scope for the plea of discrimination raised in this case and in view of clause 13 in the agreement itself.

22. We can appreciate the handicap of counsel in advancing his

arguments under the head of discrimination having lost the protective amulet of Article 14 of the Constitution under the Presidential embargo during the emergency. A plea of discrimination which is available when Article 14 is in free play is not at par with the interdict of 'undue favour' under Section 49 of the Act. Apart from this, when law makes it obligatory for certain special agreements to continue in full force during their currency stultifying the power of the Board to revise the rates during the period, no ground of discrimination can be made out on the score of exempting such industries as are governed by special agreements.

23. Although the Press Note in the instant case did not recite any provisions of the Act under which the same was issued, mere omission to do so does not disentitle the Board to rely upon clause 13 of the agreement for a claim to revision of the rates, although in the form of a surcharge in this case. We, therefore, do not give any significance to the omission in the Press Note to refer to clause 13 or to any other provision of the Act. The matter is, therefore, covered by the arbitration clause 23 of the agreement. It is not for this Court to speculate what answers the Arbitrator will enter with regard to the disputed questions that may be raised before him. We are not to be understood as expressing any opinion on the merits of the dispute or difference between the parties with regard to the surcharge.

24. It is then submitted that this Court should not use its discretion in favour of arbitration in a matter where it is a pure question of law as to the power of the Board to levy a surcharge. This submission would have great force if the sole question involved were the scope and ambit of the power of the Board under Sections 49 and 59 of the Act to levy a surcharge, as it was sought to be initially argued. The question in that event may not have been within the content of clause 23 of the agreement. But all questions of law, one of which may be interpretation of the agreement, need not necessarily be withdrawn from the domestic forum because the court has discre-

tion under Section 34 of the Arbitration Act or under Article 226 of the Constitution and that the court is better posted to decide such questions. The arbitration clause 23 is a clause of wide amplitude taking in its sweep even interpretation of the agreement and necessarily, therefore, of clause 13 therein. We are therefore, unable to accede to the submission that we should exercise our discretion to withhold the matter from arbitration and deal with it ourselves.

25. We, therefore, find no justification in interfering with the conclusion of the High Court in dismissing the writ application. In the result the appeals fail and are dismissed. We will, however, make no order as to costs.

Appeals dismissed.

AIR 1976 SUPREME COURT 133

(From: Madhya Pradesh)*

Y. V. CHANDRACHUD, P. N. BHAGWATI AND R. S. SARKARIA JJ.

Dilip Kumar Sharma and others, Appellants v. State of Madhya Pradesh, Respondent.

Criminal Appeal No. 188 of 1974, D/- 10-10-1975.

(A) Penal Code (1860), Section 303 — Scope — Expression "under sentence of imprisonment for life" — Sentence contemplated is operative executable sentence — Provisions cannot be attracted till the final judgment of conviction is passed and sentence of life imprisonment confirmed. Criminal Appeals Nos. 61 to 63 and Death Reference No. 2 of 1974, D/- 27-2-1974 (Madh Pra), Reversed.

The words "whenever ... commits murder" in Sec. 303, I.P.C. must mean "whoever is proved to have committed murder" and not "whoever is alleged to have committed murder". The proof of murder consists in the final judgment of conviction and, therefore, until such judgment is recorded it is impossible to predicate that the accused

*(Criminal Appeals Nos. 61 to 63 and Death Reference No. 2 of 1974, D/- 27-2-1974.)

KS/KS/D867/75/GGM

has committed murder. Thus when S. 303 speaks of a person "under sentence of imprisonment for life" it means a person under an operative, executable sentence of imprisonment for life. A sentence once imposed but later set aside is not executable and therefore the court convicting an accused of murder cannot take such a sentence into account for imposing the sentence of death by the application of S. 303. Criminal Appeals Nos. 61 to 63 and Death Reference No. 2 of 1974, D/- 27-2-1974 (Madh Pra), Reversed. (Paras 11 and 13)

Per Sarkaria J.

Section 303 is draconian in severity, relentless and inexorable in operation. Such a penal provision must be strictly construed; that is to say in the absence of clear, compelling language, the provision should not be given a wider interpretation. Considered in the light of these principles the connotation of the expression "sentence" in the phrase "being under sentence of imprisonment for life" must be restricted to a sentence which is final, conclusive and ultimate so far as the judicial remedies are concerned. A sentence of life imprisonment which at the time of the commission of the murder in question, is defeasible or capable of being, or liable to be voided, annulled or undone by way of appeal, revision or other judicial process known to law, is outside the purview of the phrase, "being under sentence of imprisonment for life" in Sec. 303. (Paras 21 to 23).

(B) Interpretation of Statutes — Alternative constructions.

If two constructions are possible upon the language of the statute, the Court must choose the one which is consistent with good sense and fairness, and eschew the other which makes its operation unduly oppressive, unjust or unreasonable, or which would lead to strange, inconsistent results or otherwise introduce an element of bewildering uncertainty and practical inconvenience in the working of the statute. (Para 22)

Cases Referred: Chronological Paras
AIR 1961 SC 1494 = (1961) 3 SCR
986 = 1961 (2) Cri LJ 696 22

Mr. A. N. Mulla, Sr. Advocate,
(Mr. S. K. Gambhir, Advocate,

with him), for Appellants; Mr. I. N. Shroff, Advocate, for Respondent.

Judgment of the Court was delivered by

CHANDRACHUD, J.— Since this appeal by special leave is limited to the question of sentence, it would be enough to set out the facts bearing on the sentence.

2. The appellants, Dilip Kumar, Bharatsingh and Rohitsingh were tried by the Sessions Judge, Ujjain, for committing the murder of one Arun Bhargava. The learned Judge convicted Dilip Kumar under Section 302, Bharatsingh under Section 302 read with Section 34, Rohitsingh under Sec. 303 of the Penal Code and sentenced them to death. The High Court of Madhya Pradesh, Indore Bench, confirmed the conviction and sentence of Dilip Kumar and Rohitsingh. The conviction of Bharatsingh was also confirmed but the High Court reduced his sentence to imprisonment for life.

3. On May 3, 1974 this Court granted special leave to the appellants "limited to the question of application of Section 303 in the case of Rohitsingh and sentences in case of all". Counsel for the appellants urged that under this order Bharatsingh is entitled to challenge the sentence of life imprisonment imposed upon him by the High Court and since that cannot be done without challenging Bharatsingh's conviction under Section 302 read with Section 34, the order of conviction is also open to challenge in this appeal. There is no merit in this argument. Rohitsingh's case apart, the special leave petition filed by the appellants was not admitted on the question of conviction and leave was expressly restricted to the question of sentence only. Bharatsingh having been convicted under Section 302 read with Section 34, there is no scope for any argument as regards the sentence imposed on him. The minimum sentence for murder under Section 302 is imprisonment for life and that is the sentence which the High Court has imposed on Bharatsingh.

4. As regards Dilip Kumar, we see no reason to reduce the sentence of death imposed on him by the Ses-

sions Court and confirmed by the High Court. On June 20, 1973 at 9 p.m. the deceased Arun Bhargava was sitting in front of a hotel in Ujjain. Bharatsingh and Rohitsingh caught hold of his arms from behind and Dilip Kumar stabbed him on the chest with a big knife. As a result of the injury, the pleura, the pericardium and the right ventricle of the heart were all cut. Dilip Kumar's conduct cannot be viewed with leniency and the High Court was right in confirming the death sentence passed by the Sessions Court. Motiveless murders are not necessarily acts of mad and unhinged people. Prosecution is often unable to collect satisfactory evidence on the motive behind the crime. That does not call for any leniency and indeed where this is so, criminals would prefer, in order to reduce the gravity of their acts, to suppress the motive leading to the crime.

5. As regards Rohitsingh the main question for consideration is whether his conviction under Section 303, Penal Code, is legal. If it is, the sentence of death has to be upheld because under Section 303, "Whoever, being under sentence of imprisonment for life, commits murder, shall be punished with death." The section leaves no discretion to award a lesser sentence than death.

6. One Prabhu was murdered on October 24, 1971 for which Rohitsingh was sentenced to life imprisonment on May 18, 1972 in Sessions Case No. 5 of 1972. In appeal, Rohitsingh was acquitted by the Madhya Pradesh High Court, on February 27, 1974, being the very date on which the High Court pronounced its judgment in the instant case. The Sessions Court had no option in the matter of sentence because on January 24, 1974 when it found Rohitsingh guilty of the murder of Arun Bhargava in the instant case, he was "under sentence of imprisonment for life" imposed upon him on May 18, 1972 in Sessions Case No. 5 of 1972. But that position had undergone a material change when the High Court delivered its judgment in the instant case on February 27, 1974. Precisely that very day Rohitsingh's conviction and sentence for Prabhu's murder were set aside by the same Bench of

the High Court. In fact, Rohitsingh's appeal arising out of Prabhu's murder was allowed by the High Court and immediately thereafter it took up for consideration the appeal arising out of Arun Bhargava's murder. Thus, when the High Court pronounced its judgment in the instant case holding Rohitsingh guilty of the murder of Arun Bhargava, Rohitsingh was not under the sentence of imprisonment for life. For the matter of that, he was not under any sentence save the sentence of death imposed on him for the murder of Arun Bhargava which was the subject-matter of appeal before the High Court.

7. Despite Rohitsingh's acquittal in the earlier case, the High Court convicted him under Sec. 303 of the Penal Code, on the view that the material date for deciding the application of Section 303 is the date on which the subsequent offence of murder is committed and not the date on which the trial or the appellate court pronounces its judgment in respect of the subsequent offence. The subsequent offence, namely, the murder of Arun Bhargava was committed by Rohitsingh on June 20, 1973 and since on that date he was under a sentence of life imprisonment imposed on him on October 24, 1971 for Prabhu's murder the High Court thought that it was inconsequential that at the time when it pronounced its judgment in the instant case, the sentence of life imprisonment imposed in the earlier case had been set aside. According to the High Court:

"On a plain construction of the provision, we are of the opinion that Section 303 of the Indian Penal Code is attracted to a case where a person having subsisting sentence of imprisonment for the life commits a murder, that murder being committed when the sentence was in force, notwithstanding the fact that in a pending appeal the sentence is set aside subsequent to the commission of the crime."

We have to examine the correctness of this view.

8. Section 303 does not afford a clear enough clue to the solution of the problem raised by the High Court judgment. Its brief and pithy words do not throw sufficient light on

whether the relevant date for deciding upon its applicability could be the date on which the proceeding in respect of the subsequent offence was decided finally. But considering the matter in all its ramifications, the view of the High Court appears to us difficult to sustain.

9. When a person who is sentenced to imprisonment for life commits a murder, the previous conviction assumes a graver proportion and becomes an aggravating circumstance. But the aggravation is on the assumption that the previous conviction is lawful and valid. An order of acquittal in regard to the previous offence wipes out the guilt and turpitude attaching to the previous conviction, for, the true implication of an acquittal is as if the offender did not commit the offence for which he was tried, no matter whether the acquittal is founded on benefit of doubt or rests upon an overall rejection of the prosecution case. The sequiter that the order of acquittal implies the innocence of the accused is not dependent upon the stage of the court proceeding at which the order was passed but it depends, plainly, upon the fact of acquittal itself. Therefore, if a court, whether of the first instance or otherwise, finds on the date on which it records its decision that the accused before it is no longer under a sentence of life imprisonment, it cannot under Section 303 sentence him to death. On the date when the subsequent offence of murder was committed, the accused might have been under a sentence of life imprisonment but such a sentence would cease to have existence in the eye of law if at any subsequent stage the conviction on which the sentence of life imprisonment is founded is set aside or the conviction is maintained but the sentence of life imprisonment is reduced to a lesser sentence. More than one offence in the Penal Code is punishable with life imprisonment and not all sections of the Code which provide for the sentence of life imprisonment make it obligatory to impose that sentence. For example, an offence under Sec. 304, Part I, or Section 326 is punishable with life imprisonment and the court of first instance may sentence the offender under

those sections to life imprisonment. The higher court may set aside the conviction in its entirety and acquit the accused in which case there is no question of imposing any sentence; or it may maintain the conviction and reduce the sentence to a lesser term which under those sections is permissible. In either event, the offender would no longer be under a sentence of life imprisonment, and no matter when that sentence is set aside or reduced, the court dealing with the proceeding relating to the subsequent offence of murder will have to take that circumstance into account. The date of murder, undoubtedly, has relevance but that is in the limited sense that the murder has to succeed, not precede, the offence for which the accused was sentenced to life imprisonment. This sequence is fixed by the pre-condition of Section 303 that a person under sentence of imprisonment for life must be found guilty of murder. But in between the date on which the subsequent offence of murder is committed and the proceeding in respect thereof is terminated, the sentence of life imprisonment founded upon the previous conviction may have been set aside, in which event, Section 303 would cease to have application.

10. It is a well-established proposition that a court seized of a proceeding must take into account events subsequent to the inception of that proceeding. That position is widely accepted in civil law and there is no reason why the principle should not be extended to criminal proceedings with appropriate modifications. When on the conclusion of a Sessions trial, the Sessions Judge finds the accused guilty of murder, he will have no option save to act under S. 303, if he finds that at the date of the offence the accused was under a sentence of life imprisonment for some other offence. The High Court, dealing with an appeal from the judgment of the Sessions Court, may find that the sentence of life imprisonment which was in operation on the date when the Sessions Court delivered its judgment has been, in the meanwhile, set aside by a higher court seized of the previous case. The High Court shall have to take the subsequent event of

acquittal into consideration and by reason of that event Section 303 would cease to have application. It may so happen that this Court seized of an appeal against the High Court judgment may find when it records its own judgment that the sentence of life imprisonment imposed by the trial court but set aside by a higher court has been re-imposed in a further proceeding. In that event, this Court shall have to proceed on the basis that at the time when the accused is alleged to have committed murder, he was under a sentence of imprisonment for life. If the conviction for murder is upheld by this Court, Section 303 would come into play and the accused shall have to be sentenced to death.

11. The High Court thought that the words "Whoever commits murder" in Section 303 indicate that the relevant point of time is the date of commission of the murder and not the date of conviction for murder. According to the High Court there was no warrant for substituting the words "Whoever is convicted for murder" for the words "Whoever commits murder". In taking this view the High Court overlooked the fundamental principle of criminal jurisprudence that an accused is to be presumed to be innocent until his guilt is established. "Whoever commits murder" must mean "Whoever is proved to have committed murder" and not "Whoever is alleged to have committed murder". The proof of murder consists in the final judgment of conviction and therefore, until such a judgment is recorded it is impossible to predicate that the accused has committed murder.

12. The anomaly arising out of the view taken by the High Court may be demonstrated in reference to Section 75 of the Penal Code. Stated briefly, under that section if a person who is convicted of an offence therein mentioned is again found guilty of a similar offence, he is liable to enhanced punishment. It is true that Section 75 uses the words "Whoever having been convicted", but what is important is that for justifying the enhanced punishment, the court convicting the accused for the subse-

quent offence has to find that the previous conviction is in operation on the date of the subsequent conviction. If the previous conviction is in the meanwhile set aside, the accused would not be liable to enhanced punishment because on the date of the subsequent judgment it cannot be said that the accused has a previous conviction.

13. Thus, when Section 303 speaks of a person, "under sentence of imprisonment for life" it means a person under an operative, executable sentence of imprisonment for life. A sentence once imposed but later set aside is not executable and therefore the court convicting an accused of murder cannot take such a sentence into account for imposing the sentence of death by the application of Section 303.

14. On merits, there is no justification for distinguishing the case of Rohitsingh from that of Bharatsingh. They played an identical role in the murder of Arun Bhargava and if Bharatsingh deserved a sentence of life imprisonment, so must Rohitsingh.

15. In the result we dismiss the appeals of Dilip Kumar and Bharatsingh and confirm the sentence of death imposed on Dilip Kumar and the sentence of life imprisonment imposed on Bharatsingh. We allow the appeal of Rohitsingh and reduce his sentence from death to imprisonment for life.

SARKARIA, J.:— 16. I have seen the judgment prepared by my learned brother Chandrachud J. I agree that the appeals of Dilip Kumar and Bharatsingh be dismissed and their conviction and sentences be confirmed. I further agree that Section 303, Penal Code being not applicable to Rohitsingh's case his sentence of death be commuted to imprisonment for life.

17. The case of Rohitsingh involves a question regarding the interpretation and scope of Section 303, Penal Code. In view of the importance of the question, I would like to state my own reasons.

18. The facts are given in full in the judgment of my learned brother and I need not repeat them.

Section 303, Penal Code runs as under:

"Whoever being under sentence of imprisonment for life, commits murder, shall be punished with death."

19. A bare reading of the Section indubitably shows that the crucial point of time when the state of the accused person "being under sentence of life imprisonment", is to be considered, is when the murder in question is committed. On this point, the language of the Section is crystal clear, and it means what it says. The real problem that has come to surface in this case, is about the scope and construction of the phrase, "being under sentence of life imprisonment". The key-word in this phrase is "sentence" which is capable of a strict as well as broad interpretation. In the strict sense, the meaning and ambit of this word would be limited to a sentence which has become final, absolute and infeasible so far as judicial process is concerned. In a broad sense, it may also include a sentence which has not become final, but is being impeached or is still liable to be impeached by way of appeal or revision or other mode known to law. The case has thus resolved itself into the issue, as to which of these two constructions of the expression "sentence" comports best with reason and fair applicability of the section?

20. The learned Judges of the High Court did not address themselves to this pivotal question. They simply assumed that the expression "sentence" is wide enough to include a sentence which is not even final and absolute, but is still being impugned in a pending appeal. Proceeding on this wrong assumption, the learned Judges posed the question as to what was the crucial point of time when such a sentence should be subsisting? Thereafter, they answered it in these terms:

"Thus on a plain construction of the provision we are of the opinion that Section 303 of the Indian Penal Code is attracted to a case where a person having subsisting sentence of imprisonment for life commits a murder, but murder being committed

when the sentence was in force, notwithstanding the fact that in a pending appeal the sentence is set aside subsequent to the commission of the crime."

21. Section 303 makes murder by a life-convict punishable with death, with no alternative sentence. Once it is established that at the time of committing the murder, the prisoner was under a sentence of life imprisonment, the Court has no discretion but to award the sentence of death, notwithstanding the existence of mitigating circumstances which by normal judicial standards and modern notions of penology do not justify the imposition of the capital penalty. Viewed from this aspect, the section is Draconian in severity, relentless and inexorable in operation.

22. It is well settled that such a penal provision must be strictly construed; that is to say, in the absence of clear compelling language, the provision should not be given a wider interpretation, and "no case should be held to fall within which does not come within the reasonable interpretation of the statute." (M. V. Joshi v. M. V. Shimpi). (1961) 3 SCR 986 = (AIR 1961 SC 1494 = 1961 (2) Cri LJ 696). If two constructions are possible upon the language of the statute, the Court must choose the one which is consistent with good sense and fairness, and eschew the other which makes its operation unduly oppressive, unjust or unreasonable, or which would lead to strange, inconsistent results or otherwise introduce an element of bewildering uncertainty and practical inconvenience in the working of the statute.

23. Considered in the light of these principles, the connotation of the expression "sentence" in the phrase "being under sentence of imprisonment for life" must be restricted to a sentence which is final, conclusive and ultimate so far as the judicial remedies are concerned. A sentence of life imprisonment which at the time of the commission of the murder in question, is defeasible or capable of being, or liable to be voided, annulled or undone by way of appeal, revision or other judicial process known to law, is outside the purview of the phrase, "being under

sentence of imprisonment for life" in Sec. 303.

24. The adoption of the wider interpretation of the expression, so as to include a sentence which is not final and ultimate in the judicial process but is still being impeached or is capable of being impeached and annulled by having recourse to judicial remedies available at law, would, in my opinion lead to strange, unreasonable and unjust results. It would further introduce an element of disconcerting uncertainty in the application of the Section and disturbing instability, unpredictability and contradiction in the administration of justice. In that view, the application of the section, it is feared, may become very much of a gamble. Courts must endeavour to avoid this reproach (sic) (approach).

25. The point can be highlighted by taking an extreme illustration. Accordingly I would modify the facts of the instant case, to make it such an illustration.

R. is convicted and sentenced to imprisonment for life for the murder of X by the trial Court on 1-1-1970. He appeals against his conviction to the High Court. During the pendency of the appeal, R. on 10-1-1970, commits the murder of Y. He is convicted by the trial court for this murder but it is found that there are mitigating circumstances in the case which do not justify the imposition of the death penalty. Nevertheless, the Court imposes the death penalty on the ground that Section 303 is attracted and makes a reference to the High Court for confirmation of the death sentence. R. also appeals. R's appeal is dismissed but the reference is accepted and the sentence is confirmed by the High Court on 10-4-1970. R's special leave petition under Art. 136 of the Constitution is also dismissed by the Supreme Court on 10-7-1970. For some reason or the other, — and it is not difficult to conceive such cases — R's appeal in X's murder case could not be disposed of by the High Court before 9-1-1971 on which date, the High Court accepts that appeal and acquits R. with a clear finding that he had been falsely implicated in the murder of X.

26. Would not the invocation of Sec. 303 in such a situation lead to confusion, inconsistency and contradiction? Would it not present a strange, unenviable spectacle where reasoned justice and law stand poles asunder mocking at each other.

27. It is possible to suggest that the court awarding or confirming the death sentence in Y's murder case could avoid this anomalous situation in either of these ways: Firstly, it may postpone the trial/hearing or pronouncement of the sentence till the whole gamut of judicial process has been run and legal remedies are exhausted by R and the ultimate result was known in X's murder case. Secondly, it may pass a conditional sentence of death under Sec. 303 which in the event of the life sentence in X's murder case being set aside by a court in due course of law, would be deemed to have been converted into a sentence of imprisonment for life.

28. Postponement of the trial or pronouncement of the sentence till the happening of an event the ultimate shape of which is uncertain is not desirable. Such a course is bound to cause inordinate delay and practical inconvenience in the disposal of the case. It will offend against the scheme of the Cr. P. Code and the Court Rules which require that murder cases and murder references should be disposed of with utmost expedition. There is no statutory provision in the Code of Criminal Procedure, authorising the court to postpone the proceedings or the trial till the accused has exhausted all his remedies upto the highest court and the ultimate result of the judicial process is known. The second possible course would be manifestly illegal. It is clearly not permissible under the law.

29. The instant case, also, illustrates how illogical, queer and contradictory results may flow from a wider construction of the expression "sentence" for the purpose of Section 303. On one hand, the High Court accepted Rohit's appeal, quashed his conviction and sentence and acquitted him of Prabhu's murder. On the other, inconsistently enough, it worked out the proposition, that despite

his acquittal and the annulment of his sentence of life imprisonment, Rohit was at the time of committing Arun's murder, under a subsisting sentence of life imprisonment for the purpose of Sec. 303, and consequently, for that reason, and that reason alone, on his conviction for Arun's murder, they had no option but to sentence him to death. If I may say so with respect, this anomalous, incongruous and contradictory position into which the learned Judges of the High Court found themselves landed, could be avoided if they had not, at the threshold of their approach, taken it for granted that the expression "sentence" in the aforesaid phrase in Sec. 303, is wide enough to embrace not only a sentence which is final and conclusive but also one which is not so.

30. One wrong assumption led to another infirm deduction, viz. that an order of acquittal passed in appeal does not operate to obliterate a sentence with effect from the date on which it was originally awarded.

31. There is authority for the proposition that an order of acquittal particularly one passed on merits, wipes off the conviction and sentence for all purposes, and as effectively as if it had never been passed. An order of acquittal annulling or voiding a conviction operates from nativity. As Kelson puts it, "it is a true annulment, an annulment with retroactive force". So when the conviction of Rohit for Prabhu's murder, was quashed, the High Court—to borrow the felicitous words of Krishna Iyer J.—'killed the conviction not then, but performed the formal obsequies of the order which had died at birth'.

32. I need not labour the point further. It has been lucidly brought out by my learned brother, Chandrachud J. in his judgment. Moreover, in the view I take,—that the phrase "being under a sentence of imprisonment for life" takes in only that sentence of life imprisonment which, under the law, being the ultimate end product of the entire gamut of litigation fought in the hierarchy of courts, has become final, conclusive and indefeasible and as such is not liable to be impugned, annulled or voided by further judicial action —

further pursuit of this line of argument will be unnecessary, if not academic.

33. For the foregoing reasons, the death sentence awarded to Rohit-singh with the aid of Sec. 303, Penal Code, must be set aside. His conviction under Sec. 302/34, Penal Code for the murder of Arun shall stand and on that count he shall undergo imprisonment for life. Excepting this modification, his appeal is dismissed.

Order accordingly.

AIR 1976 SUPREME COURT 140

(From Andhra Pradesh: 1971

Tax LR 320)

V. R. KRISHNA IYER AND A. C. GUPTA, JJ.

The Commissioner of Expenditure Tax, Andhra Pradesh, Appellant v. PVG Raju, Rajah of Vizianagaram, Respondent.

Civil Appeal No. 30 of 1971, D/- 29-9-1975.

(A) Expenditure Tax Act (1957). Sec. 5 (a) — "Profession or occupation" — Politics is a profession or occupation.

Politics has been a profession and, indeed, under modern conditions in India, perhaps the most popular and uninhibited occupation — with its perils, of course. Law cannot take leave of realities and therefore Section 5 (a) must bear the construction that politics is a profession or occupation. (Para 7)

(B) Expenditure Tax Act (1957). Sec. 5 (j) — Donation — Meaning of — Expenses incurred gratuitously on election of party candidates could be considered as 'donation' within Section 5 (j). (Words and Phrases — Donation — Meaning of).

When a person gives money to another without any material return, he donates that sum. An act by which the owner of a thing voluntarily transfers the title and possession of the same from himself to another, without any consideration, is a donation. A gift or gratuitous payment is, in simple English, a donation.

Held when the assessee, a wealthy person gave money to the candidates of his Party for them to meet their

election expenses, he made donations. There was no suggestion nor evidence that any material return was in contemplation when he spent those sums. Being a politically important man with plenty of money and vitally interested in boosting his party's standing in the State, he donated liberally for candidates set up by the party. In this view Section 5 (j) applied to these donations which earned exemption from the expenditure tax. (Para 8)

Wholly motiveless donation is rare, but material return alone negates a gift or donation. (Para 9)

(The Court expressed a grave doubt on the question whether meeting the expenses of other candidates can be fulfilment of his professional expenses but left it unanswered for the reason that in this case such expenditure answered the description of a 'donation' within meaning of Section 5 (j) — Ed.)

M/s. R. M. Mehta and S. P. Nayar, Advocates, for Appellant; Mr. P. Ram Reddy, Sr. Advocate, (A. V. V. Nair, Advocate with him), for Respondent.

The following Judgment of the Court was delivered by

KRISHNA IYER, J.:—

Keynote thought

Politics and philanthropy may well fall victim to the construction of Sec. 5 (a) and (j) of the Expenditure Tax Act, 1957 (the Act, for short) if we fall victim to the submission naively made, at the first stage, by counsel for the State. In fairness to him, we must state that later he retracted from that position, and rightly so, for the Act, in spirit and letter, does not intend this blow on the profession of politics or the disposition for donations.

2. A fair reading of the provisions in question convincingly excludes from 'taxable expenditure' sums wholly and exclusively incurred for the purpose of a profession or occupation carried on by the assessee and no modern man may dispute that politics is a profession or occupation. Likewise, expenditure by way of gift or donation incurred by the assessee is also excluded and no politically conscious soul will deny that donation to a party in a democracy squarely comes within this exclusionary provision.

The factual matrix

3. Expenditure tax under the Act was sought to be levied from the assessee PVG Raju, the respondent before us. Paradoxical, perhaps it may appear — but here is a case of a rich Maharaja practising the politics of socialism, spending lavishly for furthering his party's popularity and the prospects of his fellow candidates at the elections to the Andhra Pradesh Legislative Assembly. This expenditure, falling under two heads, was taxed by the assessing authority and upheld up to the Tribunal level. The High Court, on reference, reversed the findings on both counts and the Commissioner of Expenditure Tax, the appellant, challenges the legality of this verdict.

4. The back beginning in stating the facts may well be to extract the questions of law referred by the Tribunal in its own words:

"(1) Whether on the facts and in the circumstances of the case the expenditure of Rs. 30,832/- claimed to be the amount incurred by the assessee for the benefit of other candidates for election is excludible from the taxable expenditure either under Sec. 5 (a) or under Section 5 (j) of the Expenditure Tax Act?

(2) Whether on the facts and in the circumstances of the case the sum of Rs. 47,867/- claimed to be party expenses could be excluded from the taxable expenditure of the assessee either under Section 5(a) or under Section 5(j) of the Expenditure Tax Act?

We have to assume the following facts as implied in the very questions referred to the High Court and from the attendant circumstances. They are:

(a) that the respondent, during the relevant period, was the Chairman of the State Socialist Party which was interesting itself in electoral politics;

(b) the respondent was a wealthy socialist;

(c) that he was meeting not only the expenditure of his own elections but spending moneys for the benefit of other candidates belonging to his party;

(d) that he was issuing cheques to the Secretary and other office-

bearers of his party to meet the expenses involved in party work.

He expended Rs. 38,832/- for propelling the election prospects of other party candidates during the election. Likewise, he gave Rs. 47,867/- to his party through its office-bearers. On these facts the question is whether he is eligible for exclusion of the two sums from expenditure tax either under Sec. 5 (a) or under Sec. 5 (j) of the Act.

Consideration of the legal issue

5. It is appropriate to start with reading the relevant portion of Section 5 of the Act:

"S. 5. No expenditure-tax shall be payable under this Act in respect of any such expenditure as is referred to in the following clauses, and such expenditure shall not be included in the taxable expenditure of an assessee.....

(a) any expenditure, whether in the nature of revenue expenditure or capital expenditure, incurred by the assessee wholly and exclusively for the purpose of the business, profession, vocation or occupation carried on by him or for the purpose of earning income from any other source;

(b) to (i)

(i) any expenditure incurred by the assessee by way of, or in respect of any gift, donation or settlement on trust or otherwise for the benefit of any other person."

The assessee was Party Chairman and politics was undoubtedly his profession or occupation, it being admitted that his interest in politics was not casual nor sporadic but abiding and ambitious.

6. The contention of the respondent which met with success before the High Court was that the election expenses of other candidates set up by him as Chairman of the Socialist Party, loosely described as 'party expenditure', were incurred wholly and exclusively for the purpose of his 'profession' or 'occupation'. So, the first point which arrests our attention in examining this contention is as to whether politics of the socialist brand or otherwise is a profession or occupation.

7. There can hardly be any doubt that it is, either, or both:

Harold Laski treated politics as a science and wrote his well-known book on the Grammar of Politics; but the art of politics at a practical level has also been the subject of comment and has been praised and denounced on the basis that it is a profession. To Gandhiji it is sacred as religion. In Lincoln it rises to noble heights of statesmanship. Lenin, Nehru and a galaxy of other great visionaries and makers and moulders of the modern world have dedicated themselves to politics as a profession. Of course in its vulgar and vicious manifestations, this occupation has been regarded by literary giants like Dr. Johnson as 'the last refuge of a scoundrel'. Robert Louis Stevenson has used barbed words: 'Politics is perhaps the only profession for which no preparation is thought necessary (Familiar Studies of Men and Books, 'Yoshida Torajiro')'. George Bernard Shaw uses stinging language in Major Barbara: 'He knows nothing; and he thinks he knows everything. That points clearly to a political career'. It is thus clear, without reference to the wealth of case-law relied on by the High Court, that politics has been a profession and, indeed, under modern conditions in India, perhaps the most popular and uninhibited occupation — with its perils, of course. Law cannot take leave of realities and therefore, Sec. 5(a) must bear the construction that politics is a profession or occupation.

8. The next question is whether the expenditure incurred by the assessee for the election of candidates set up by him as Chairman of his party can be legitimately regarded as incurred 'wholly and exclusively, for the purpose of his profession or occupation'. We have grave doubts whether meeting the expenses of other candidates can be fulfilment of his professional expenses, but this question deserves no deeper probe for the simple reason that S. 5 (i) embraces the expenditure as it does answer the description of a donation. When a person gives money to another without any material returns, he donates that sum. An act by which the owner of a thing voluntarily transfers the title and possession of the same from himself to another, without any con-

sideration, is a donation. A gift or gratuitous payment is, in simple English, a donation. We do not require lexicographic learning nor precedential erudition to understand the meaning of what many people do every day, viz., giving donations to some fund or other, or to some person or other. Political donations are not only common but are assuming deleterious dimensions in the public life of our country. It is therefore clear that when this Raja assessee gave money to the candidates of his Party for them to meet their election expenses, he made donations. Even if he met their election expenditure, it was money gratuitously given on their behalf and therefore amounted to donation. Without straining language, we reach the natural conclusion that what the respondent expended for the other candidates during the elections was 'donation' in the language of the law. There is no suggestion nor evidence that any material return was in contemplation when he spent these sums. Being a politically important man with plenty of money and vitally interested in boosting his Party's standing in the State, he donated liberally for candidates set up by the party. In this view S. 5 (i) applies to these donations which earn exemption from the expenditure tax.

9. The next item relates to sums given to the Socialist Party. It is reasonable to assume that the amounts paid to the office-bearers of the party were without an eye on any material return other than loyalty or gratitude. They were outright gifts. Indeed, many rich people out of diverse motives make donations to political parties. The hope of spiritual benefit or political goodwill, the spontaneous affection that benefaction brings, the popularisation of a good cause or the prestige that publicised bounty fetches — these and other myriad consequences or feelings may not mar a donation to make it a grant for a quid pro quo. Wholly motiveless donation is rare, but material return alone negates a gift or donation. We need not investigate the propriety of political donations 'unlimited' and often invisible. All that we need consider is whether such sums are gifts and do-

nations or are non-gratuitous payments with a tag of return. We have no doubt that on the question as framed, and on the facts and circumstances present, these sums were paid purely as gifts and donations to his Party by the respondent. It is not surprising either, because he was the Chairman of the said party, had a long and liberal purse from which to draw and a large circle of support to build up in the long run.

10. The inevitable conclusion from our discussion is that both the heads of expenditure fall under Section 5 (j) of the Act and, therefore, flow out of the assessable zone. The High Court's conclusion is sound and the appeal deserves to be and is hereby dismissed, but without costs.

Appeal dismissed.

AIR 1976 SUPREME COURT 143

(From: Andhra Pradesh)*

A. ALAGIRISWAMI, P. K. GOSWAMI
AND N. L. UNTWALIA, JJ.

City Corner, Appellant v. Personal Asstt. to Collector and Addl. District Magistrate, Nellore, Respondent.

Civil Appeal No. 837 of 1975, D/- 29-9-1975.

(A) Andhra Pradesh (Andhra Area) Places of Public Resort Act (1888), Sec. 12 — Scope of revisional power.

The power under Sec. 12 is to pass the kind of order which might be passed under Sec. 7 or 9. The reasons for which this power can be exercised are not restricted to those mentioned in Section 7 or 9. The revisional power under Section 12 is not a limited one. It is as wide as that of the original authority. (Para 4)

(B) Andhra Pradesh (Andhra Area) Places of Public Resort Act (1888), Sec. 12 — Order of cancellation of license — Necessity of complying with principles of natural justice. (Constitution of India, Art. 226 — Principles of natural justice).

The order passed under Sec. 12 is a quasi-judicial order and the prin-

* (Writ Appeal No. 96 of 1975, D/- 6-3-1975—Andh Pra.)

JS/KS/D775/75/RSK

ciples of natural justice ought to be followed before it is passed. It is now well established that such is the requirement of law even where the statute in question itself does not so provide. It is also well established that the principles of natural justice do not necessarily conform to a fixed formula, nor is it a procrustean bed into which all proceedings must be fitted. It is not always necessary that the documents asked for should itself be furnished provided the substance of those documents is furnished, always provided, however, that the summary is not misleading. W. P. No. 96 of 1975, D/- 6-3-75 (Andh Pra) though affirmed on principle, reversed on facts. (Para 5)

(C) Constitution of India, Art. 136 — Non-observance of principles of natural justice in passing quasi-judicial order — Appeal has to be allowed though power of High Court under Art. 226 is limited to cases of error apparent on face of record. (Para 5)

M/s. A. V. Koteswara Rao and B. Kanta Rao, Advocates for Appellant; Mr. P. Ram Reddy, Sr. Advocate, (Mr. P. P. Rao, Advocate with him), for Respondent.

The following judgment of the Court was delivered by

ALAGIRISWAMI, J.:— On 15-7-1974 the appellant applied for a licence under the Andhra Pradesh (Andhra Area) Places of Public Resort Act, 1888 for conducting games of skill and dances and other quality performances in a village adjoining the district headquarters' town of Nellore, with its 12 cinema theatres, in Andhra Pradesh. That Act has been extended to this Panchayat. On 25-9-1974 the licence was refused by the Executive Officer of the Panchayat. Its grant had been objected to by the Superintendent of Police as also two associations called Mitramandali and the Town Yuvajanasangham. But on appeal to the Village Panchayat as provided in Section 129 of the Panchayats Act a licence was granted on 1st October, 1974. The Mitramandali made a representation to the Chief Minister and the District Panchayat Officer; the Deputy Superintendent of Police, the Superintendent of Police, the Tehsildar, and the Revenue Divisional Offi-

cer also reported against the grant of licence. On 21st January 1975 the Additional District Magistrate issued a notice to the appellant to show cause why the licence issued to him should not be cancelled. The appellant had in the meanwhile put up semi-permanent structure as required under the terms of the licence which even according to the Executive Engineer, Zila Parishad, Nellore should have cost him Rs. 27,000/-. He commenced his business on 22nd January 1975 and the show cause notice issued by the District Magistrate reached him on the 25th. He sent a reply on the 27th and on the 28th the licence was cancelled. The appellant's writ petition questioning the cancellation was dismissed by a Single Judge of the Andhra Pradesh High Court, so was an appeal against that dismissal by a Division Bench. This appeal has been filed in pursuance of special leave granted by this Court.

2. In his reply to the show cause notice the appellant had asked for copies of the various documents on the basis of which the show cause notice had been issued and stated that in their absence he was not in a position to submit a detailed explanation in reply and he was, however, offering a tentative explanation promising a fuller and detailed explanation after the receipt of the copies. In particular in respect of a reference to a murder in the show cause notice he stated that it took place in the premises of another amusement park long after it was closed for want of licence. The District Magistrate considered that the explanation offered was a routine one and was not convincing.

3. Section 12 of the Andhra Pradesh (Andhra Area) Places of Public Resort Act enables the District Magistrate to call for and examine the record of any proceeding taken under the Act, to call for any report in connection therewith, to make or cause to be made any further enquiry and to pass any order which the authority holding the proceeding might have passed. Under Section 9 any authority granting a license may for reasons recorded in writing, revoke or suspend the same when he has reason to believe:

(a) that the license has been fraudulently obtained;

(b) that the enclosed place or building has been used for other purposes of public resort or entertainment than that for which the license was granted; and

(c) that the place or building can no longer be safely used for the purpose for which the license was granted.

Undoubtedly none of the reasons applied in this case. Under Section 7 if the authority is satisfied

(a) that the enclosed place or building may safely be used for the purpose of public resort or entertainment proposed;

(b) that no objection, arising from its situation, ownership, or the purpose proposed, exists, he shall grant to the applicant a written license. The only ground in this section applicable to the present case would be 'the purpose proposed'.

4. The argument before us was that the power of the District Magistrate to revoke the licence under Sec. 12 can be for only any of the grounds mentioned in Sec. 9. The power under Sec. 12 is to pass any order which the authority holding the proceeding might have passed, that is, an order granting, revoking or suspending. In other words, if the authority competent to grant the license refuses, the District Magistrate in exercise of his power under Section 12 may grant the license and vice-versa. Similarly he can revoke or suspend the license granted by the authority or where the authority has revoked or suspended the licence cancel that order. In other words the power under Section 12 is to pass the kind of order which might be passed under Section 7 or 9. The reasons for which this power can be exercised are not restricted to those mentioned in Sec. 7 or 9. The revisional power under Sec. 12 is not a limited one. It is as wide as that of the original authority. The considerations which the District Magistrate took into account in revoking the appellant's license were the same as those which were before the Village Panchayat when it decided to grant the license. The revising authority is entitled on the same material to take a view dif-

ferent from that of the authority whose order is revised.

5. But the main ground of attack against the order of cancellation is that in making it the District Magistrate had failed to observe the principles of natural justice. The order that the District Magistrate passed is a quasi-judicial order and therefore the appellant is right in contending that the principles of natural justice should have been followed before that order was passed. It is now well established by decisions of this Court that such is the requirement of law even where the statute in question itself does not so provide. It is also well established that the principles of natural justice do not necessarily conform to a fixed formula, nor is it a procrustean bed into which all proceedings must be fitted. The principles of natural justice will always depend upon the facts of each case. The learned Judges of the High Court examined the various documents the copies of which had been asked for by the appellant and came to the conclusion that the show cause notice issued to him contained a summary of all those documents which was sufficient to enable the appellant to make his representation. We cannot say that this conclusion is wrong. It is not always necessary that the documents asked for should themselves be furnished provided the substance of those documents is furnished, always provided, however, that the summary is not misleading. Such is not the case here. But when the appellant asked for the original documents he could at least have been told that he had already been given a summary of the documents which was sufficient to enable him to make his representation and he could make his fuller representation as he had promised in his earlier so-called interim reply. The District Magistrate's characterisation of the interim reply of the appellant as a routine one is not correct. After all the opinion of the Village Panchayat which is a representative body of all the villagers is entitled to great if not greater weight than that of the Mitramandli and the Town Yuvajanasangham, the composition of which or the strength of which we do not know. The Vil-

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lage Panchayat was also competent on a consideration of all the facts to form its own opinion. The opinions of representative bodies should not be lightly brushed aside unless of course there is reason to think that they have acted out of considerations other than relevant. We are of opinion that the order passed by the District Magistrate post-haste immediately he received the appellant's reply without either giving him the copies asked for or at least telling him that the material already furnished was sufficient to enable him to make his representation and if he had any further representation to make he could do so offends the principles of natural justice. We are aware that we are dealing with an appeal questioning the proceedings initiated under Article 226 of the Constitution where the power of the Court is a limited one, that is to say, limited to cases where there is any error of law apparent on the face of the record. But the observance of the principles of natural justice is fundamental to the discharge of any quasi-judicial function. We therefore allow the appeal and set aside the order of the District Magistrate.

There will be no order as to costs.

Appeal allowed.

AIR 1976 SUPREME COURT 145

(From: Industrial Tribunal, Delhi)*

A. ALAGIRISWAMI, P. N. BHAGWATI AND P. K. GOSWAMI, JJ.

The Workmen of Indian Standards Institution, Appellants v. The Management of Indian Standards Institution, Respondent.

Civil Appeal No. 1297 of 1970, D/- 6-10-1975.

(A) Industrial Disputes Act (1947), S. 2 (k) and (j) — Definition of 'industrial dispute' though does not make reference to 'industry', must necessarily be a dispute in an 'industry' as defined by S. 2 (j) by virtue of defini-

*(I. P. No. 174 of 1968, D/- 10-10-1969 —Ind. Tri. Delhi.)

KS/KS/D824/75/KSB

tions of 'employer' in S. 2 (g) and workman in S. 2 (s). (Para 4)

(B) Industrial Disputes Act (1947), Sec. 2 (j) — 'Industry' — Meaning of — Tests to determine indicated — Indian Standards Institution is an undertaking analogous to trade or business and is an 'industry' within Sec. 2 (j).

Per P. N. Bhagwati and P. K. Goswami, JJ:— (Alagiriswamy, J. dissenting):—

The activities of the Indian Standards Institution fall within the category analogous to trade or business and must be regarded as 'industry' as defined in Section 2 (j). AIR 1970 SC 1407 and AIR 1972 SC 763 and AIR 1961 SC 484 Foll. (Para 24)

An activity can be regarded as an 'industry' within the meaning of Section 2 (j) only if there is relationship of employer and employees and the former is engaged in 'business, trade, undertaking, manufacture or calling of employers' and the latter, 'in any calling, service, employment, handicraft or industrial occupation or avocation'. Though 'undertaking' is a word of large import and it means anything undertaken or any project or enterprise, in the context in which it occurs, it must be read as meaning an undertaking analogous to trade or business. In order that an activity may be regarded as an undertaking analogous to trade or business, it must be "organised or arranged in a manner in which trade or business is generally organised or arranged". It must not be casual nor must it be for oneself nor for pleasure. And it must rest on co-operation between employer and employees who associate together with a view to production, sale or distribution of material goods or material services. It is entirely irrelevant whether or not there is profit motive or investment of capital in such activity. It is also immaterial that its objects are charitable or that it does not make profits or even where profits are made, they are not distributed amongst the members, or that its activity is subsidised by the Government. Again it is not necessary that the employer must always be a private individual. The Act, in terms, contemplates cases of indus-

trial disputes where the Government or a local authority or a public utility service may be the employer. It also makes no difference that the material services rendered by the undertaking are in public interest, whether an activity is carried on in public interest or not can, therefore, never be a criterion for determining its character as an industry. Case law discussed. (For dissenting view of Alagiriswami J. See Paras 30 to 32).

(Para 11)

Cases Referred: Chronological Paras

AIR 1972 SC 763 = (1972) 2 SCR 353	
= 1972 Lab IC 413	11, 26, 32
AIR 1970 SC 1407 = (1971) 1 SCR 177	
= 1970 Lab IC 1172	1, 5, 6, 7, 9, 10, 24, 29
AIR 1969 SC 276 = (1969) 1 SCR 600	
= 1969 Lab IC 458	3
AIR 1968 SC 554 = (1968) 1 SCR 742	
= 1968 Lab IC 547	3, 5, 9, 26, 29, 31
AIR 1963 SC 1873 = (1964) 2 SCR 703	9
AIR 1962 SC 1080 = 1962 Supp 3 SCR 157	9
AIR 1961 SC 484 = (1961) 2 SCR 480	25, 32
AIR 1960 SC 610 = (1960) 2 SCR 866	5, 6, 7, 9, 10, 29
26 CLR 508 (Aus)	7, 9, 29

The following Judgments of the Court were delivered by

BHAGWATI, J. (with P. K. GOSWAMI, J.):— Here, in this case, once again arises the question as to what is an 'industry' within the meaning of the Industrial Disputes Act, 1947. This question has continually baffled and perplexed the Courts in our country. There have been various judicial ventures in this rather volatile area of the law. The Act gives a definition of 'industry' in Section 2 (j) but this definition is not very vocal and it has defied analysis, so that judicial effort has been ultimately reduced merely to evolving tests by reference to characteristics regarded as essential for constituting an activity as an 'industry'. The decided cases show that these tests have not been uniform; they have been guided more by an empirical rather than a strictly analytical approach. Sometimes these tests have been liberally conceived,

sometimes narrowly. The latest exposition is to be found in the judgment of a Bench of six Judges of this Court in *Safdarjung Hospital v. K. S. Sethi*, (1971) 1 SCR 177 = (AIR 1970 SC 1407 = 1970 Lab IC 1172). But while applying the tests indicated in this decision, it is necessary to remember that the Industrial Disputes Act, 1947 is a legislation intended to bring about peace and harmony between management and labour in an 'industry' so that production does not suffer and at the same time, labour is not exploited and discontented and, therefore, the tests must be so applied as to give the widest possible connotation to the term 'industry'. Whenever a question arises whether a particular concern is an 'industry', the approach must be broad and liberal and not rigid or doctrinaire. We cannot forget that it is a social welfare legislation we are interpreting and we must place such an interpretation as would advance the object and purpose of the legislation and give full meaning and effect to it in the achievement of its avowed social objective. With these prefatory observations, we proceed to state the facts giving rise to the appeal.

2. The Indian Standards Institution (hereinafter referred to as 'the Institution') is a Society registered under the Societies Registration Act, 1860. The workmen of the Institution represented by the Indian Standards Institution Employees' Union (hereinafter referred to as 'the Union') made certain demands which were not accepted by the management and a dispute accordingly arose between the management and the workmen. The dispute was taken in conciliation but the Conciliation Officer was unable to bring about settlement and he made, what is commonly known as "failure report" to the Lt. Governor of Delhi. The Lt. Governor, thereupon, by an order dated 28-9-1968, referred the dispute for adjudication to the Industrial Tribunal under Sections 10(1)(d) and 12(5) of the Act. The order of the Lt. Governor set out the demands which were to form the subject-matter of adjudication by the Industrial Tribunal. The Union representing the workmen filed a statement of claim in support of these demands. The

management opposed the demands on merits but in addition to the defence on merits, they raised a preliminary objection which, if well founded, would strike at the very root of the jurisdiction of the Industrial Tribunal to entertain the reference. The preliminary objection was that the Institution was not an industry within the meaning of Section 2(j) of the Act and, therefore, the dispute between the management of the Institution and its workmen was not an 'industrial dispute' as defined in S. 2(k) and the Lt. Governor had no jurisdiction to refer it for adjudication under the provisions of the Act. Issue No. 1 arising out of this preliminary objection was in the following terms: "Is Indian Standards Institute an industry or not", and this issue was directed to be tried as a preliminary issue.

3. The Industrial Tribunal proceeded to examine the legal position for the purpose of determining when a particular activity can be regarded as an industry within the meaning of Section 2(j) of the Act. It observed that there were five tests laid down by the decisions of this Court in *Madras Gymkhana Club Employees Union v. Management of the Madras Gymkhana Club*, (1968) 1 SCR 742 = (AIR 1968 SC 554 = 1968 Lab IC 547) and *Cricketer Club of India Ltd. v. Bombay Labour Union*, (1969) 1 SCR 600 = (AIR 1969 SC 276 = 1969 Lab IC 458) which were required to be satisfied before an activity could be held to be an 'industry' and they were as follows:

"1. When the operation undertaken rests upon co-operation between employers and employees with a view to production and distribution of material goods or material services;

2. It must bear the definite character of trade or business or manufacture or calling or must be capable of being described as an Undertaking analogous to business or trade resulting in material goods or material services;

3. The activity to be considered as an 'industry' must not be casual but must be distinctly systematic;

4. The work for which labour of workmen is required, must be productive and workmen must be fol-

lowing an employment calling, or industrial avocation; and

5. When private individuals are the employers, the industry is run with capital and with a view to profits. (These two circumstances may not exist when Government or local Authority enters upon business, trade, manufacture or an undertaking analogous to trade)."

On an application of these tests, the Industrial Tribunal found that the Institution satisfied the first four tests and this indeed was not disputed, but so far as the fifth test was concerned, it was not satisfied since capital was undoubtedly employed in the Institution but the Institution was not run with a view to profit. The profit motive was ruled out by the objectives of the Institution and as the profit motive was lacking, the Institution could not be held to be an 'industry.' The Industrial Tribunal accordingly, by an order dated 10th October, 1969, held that the reference of the dispute between the management of the Institution and its workmen was outside the power of the Lt. Governor and the Industrial Tribunal had no jurisdiction to entertain the reference or to adjudicate upon it. The workmen were obviously aggrieved by this order made by the Industrial Tribunal since it closed the doors of industrial adjudication and left the workmen without any remedy to redress their grievances and hence they preferred the present appeal against the order of the Industrial Tribunal with special leave obtained from this Court.

4. The Industrial Disputes Act, 1947, as its long title and preamble show, has been enacted to make provision for investigation and settlement of industrial disputes. It is only an 'industrial dispute' which can be referred for adjudication under Sections 10(1) (d) and 12 (5) of the Act. What is an 'industrial dispute' is to be found in Section 2 (k) which defines an industrial dispute to mean "any dispute or difference between employers and employees, or between employers and workmen; or between workmen and workmen, which is connected with the employment or non-employment or the terms of employment or with the conditions of labour, of any person". This definition, of

course, does not, in so many terms, refer to 'industry'. But, on the grammar of the expression itself, an industrial dispute must necessarily be a dispute in an industry and moreover the expressions 'employer' and 'workman' used in the definition of 'industrial dispute' carry the requirement of 'industry' in that definition by virtue of their own definitions in Sections 2 (g) and 2 (s). It is, therefore, necessary to examine what is the concept of an 'industry' within the meaning of the Act.

5. Now, the word 'industry' is defined in S. 2 (j) and that section reads:

"'industry' means any business, trade, undertaking, manufacture or calling of employers, and includes any calling, service, employment, handicraft, or industrial occupation or avocation of workmen;"

This definition is in two parts. The first part says that it means any business, trade, undertaking, manufacture or calling of employers and then it goes on to say in the second part that it includes any calling, service, employment, handicraft, or industrial occupation or avocation of workmen. This Court had occasion to consider this definition in the case of *State of Bombay v. The Hospital Mazdoor Sabha*, (1960) 2 SCR 866 = (AIR 1960 SC 610) where this Court sought to expand the concept of 'industry' by a process of judicial interpretation to meet the changing requirements of modern currents of socio-economic thought. It was pointed out by this Court that "Section 2 (j) does not define 'industry' in the usual manner by prescribing what it means: the first clause of the definition gives the statutory meaning of 'industry' and the second clause deliberately refers to several other items of industry and brings them in the definition in an inclusive way." But this interpretation of the definition was disapproved by a larger bench of this Court in *Management of Safdaring Hospital v. K. S. Sethi* (AIR 1970 SC 1407). We shall immediately proceed to examine that decision, as that is the decision which presently holds the field and must ultimately govern the determination of the present case. But before we do so, we must refer to another decision

of this Court which came a little before Safdarjung Hospital case. That is the decision in Secy. Madras Gymkhana Club Employees Union v. Management of the Gymkhana (AIR 1968 SC 554). While dealing with the definition of 'industry' in this case, it was pointed out by this Court that "denotation of the term 'industry' is to be found in the first part relating to employers and the full connotation of the term is intended to include the second part relating to workmen" and it was concluded: "If the activity can be described as an industry with reference to the occupation of the employers, the ambit of the industry, under the force of the second part, takes in the different kinds of activity of the employees mentioned in the second part. But the second part standing alone cannot define 'industry' By the inclusive part of the definition the labour force employed in an industry is made an integral part of the industry for purpose of industrial disputes although industry is ordinarily something which employers create or undertake." We may point out that the concept underlying the observation that "industry is ordinarily something which employers create or undertake" is gradually yielding place to the modern concept which regards industry as a joint venture undertaken by employers and workmen — an enterprise which belongs equally to both. But we need not dwell on this any longer, as it is not of immediate concern to us in this case. It is sufficient to point out that the interpretation of the definition of 'industry' given in Madras Gymkhana case struck a slightly different note from what it was understood to mean in the State of Bombay v. Hospital Mazdoor Sabha case. But again in Safdarjung Hospital case this Court found it necessary to qualify what it had said in the Madras Gymkhana case in regard to the meaning of 'industry' and after referring to the definition of industry in Section 4 of the Commonwealth Conciliation and Arbitration Act, 1909-1970 this Court observed:

"Although the two definitions are worded differently the purport of both is the same. It is not necessary to view our definition in two parts.

The definition read as a whole denotes a collective enterprise in which employers and employees are associated. It does not exist either by employers alone or by employees alone. It exists only when there is a relationship between employers and employees, the former engaged in business, trade, undertaking, manufacture or calling of employers and the latter engaged in any calling, service, employment, handicraft or industrial occupation or avocation. There must, therefore, be an enterprise in which the employers follow their avocations as detailed in the definition and employ workmen. The definition no doubt seeks to define 'industry' with reference to employers' occupation but includes the employees, for without the two there can be no industry. An industry is only to be found when there are employers and employees, the former relying upon the services of the latter to fulfil their own occupations."

This Court then proceeded to add that "every case of employment is not necessarily productive of an industry. Domestic employment, administrative services of public officials, service in aid of occupations of professional men, also disclose relationship of employers and employees but they cannot be regarded as in the course of industry". A workman can be regarded as one employed in an industry only "if he is following one of the vocations mentioned in conjunction with his employers engaged in the vocations mentioned in relation to the employers". Thus, a basic requirement of 'industry' is that the employers must be "carrying on any business, trade, undertaking, manufacture or calling of employers. If they are not, there is no industry as such." Now, what these expressions mean has been discussed in a large number of cases decided by this Court. These cases have all been reviewed in the Madras Gymkhana case. We are, however, not directly concerned with any of these expressions except 'undertaking', for the case of the workmen is not that the management of the Institution is carrying on any business, trade, manufacture or calling but it rests on a very limited ground, namely, that the management of the Institution is car-

rying on an undertaking. It, therefore, becomes necessary to inquire what is the meaning and scope of the term 'undertaking' as used in the definition in Sec. 2 (j).

6. Now, according to its dictionary meaning as given by Webster, "undertaking" means "anything undertaken; any business, work or project which one engages in or attempts; an enterprise". It is a term of very wide denotation. But all decisions of this Court are agreed that an undertaking to be within the definition in Section 2 (j) must be read subject to a limitation, namely, that it must be analogous to trade or business. That was the view expressed in the Hospital Mazdoor Sabha case: vide page 879 of the Report — and the same view was reiterated in the Safdarjung Hospital case: vide page 187 of the Report. But the question is: when can an undertaking be said to be analogous to trade or business: what are the attributes or characteristics which it must possess in common with trade or business in order to be regarded as analogous to trade or business? That is a question which is not very easy to decide, but there are decisions of this Court which afford guidance in dealing with this question.

7. This Court pointed out in the Hospital Mazdoor Sabha case (AIR 1960 SC 610) that in order that an undertaking should be analogous to trade or business, it is not necessary that it should possess the two essential features associated with the conventional notion of trade or business, namely, profit motive and investment of capital. Gajendragadkar, J., (as he then was), speaking on behalf of the Court observed: "It is not disputed that under Section 2 (i) an activity can and must be regarded as an industry even though in carrying it out profit motive may be absent. It is also common ground that the absence of investment of any capital would not make a material difference to the applicability of Section 2 (i). Thus, two of the important attributes conventionally associated with trade or business are not necessarily predicated in interpreting Section 2 (i)". This view was neither overruled nor

departed from in the Safdarjung Hospital case (AIR 1970 SC 1407). On the contrary, the decision in Safdarjung Hospital case re-affirmed this view and gave it the seal of approval of a bench of six judges of this Court. This Court speaking through Hidayatullah, C. J., pointed out in that case: "It is not necessary that there must be a profit motive, but the enterprise must be analogous to trade or business in a commercial sense...It is an erroneous assumption that an economic activity must be related to capital and profit making alone. An economic activity can exist without the presence of both." The learned Chief Justice, after referring to the observations of Isaacs and Rich, JJ., in *Federated Municipal and Shire Council Employees of Australia v. Melbourne Corporation*, 26 CLR 508 (Aus) stated that these observations "indicate that in those activities in which Government takes to industrial ventures, the notion of profit making and the absence of capital in the true sense of the word are irrelevant". It is, therefore, clear that, according to the decisions of this Court — and on this point the decision in Safdarjung Hospital case does not make any departure from that in the Hospital Mazdoor Sabha case — profit motive and capital investment are not essential requisites for an undertaking within the meaning of the definition in Section 2 (j). There can be such an undertaking without the presence of both or either of those attributes or features.

8. What then are the attributes or features which make an undertaking analogous to trade or business so as to attract the applicability of Section 2 (j)? It is difficult to enumerate these possible attributes or features definitively or exhaustively. Indeed, it would not be prudent to do so. So infinitely varied and many-sided is human activity and with the incredible growth and progress in all branches of knowledge and ever widening areas of experience at all levels, it is becoming so diversified and expanding in so many directions hitherto unthought of, that no rigid and doctrinaire approach can be adopted in considering this question. Such an approach would fail to measure up to

the needs of the growing welfare state which is constantly engaged in undertaking new and varied activities as part of its social welfare policy. The concept of industry, which is intended to be a convenient and effective tool in the hands of industrial adjudication for bringing about industrial peace and harmony, would lose its capacity for adjustment and change. It would be petrified and robbed of its dynamic content. The Court should, therefore, as far as possible avoid formulating or adopting generalisations and hesitate to cast the concept of industry in a narrow rigid mould which would not permit of expansion as and when necessity arises. Only some working principle may be evolved which would furnish guidance in determining what are the attributes or characteristics which would ordinarily indicate that an undertaking is analogous to trade or business.

9. What can fairly be regarded as a sufficiently elastic or flexible working principle for this purpose has been discussed in a number of decisions of this Court of which we may refer only to three, namely, the Hospital Mazdoor Sabha case (AIR 1960 SC 610), The Madras Gymkhana case (AIR 1968 SC 554) and the Safdarjung Hospital case (AIR 1970 SC 1409). Though the language used in these decisions to state the working principle is not uniform and there are minor variations in the formulation according as one aspect is more emphasised than the other, the working principle laid down is basically the same. Gajendragadkar, J., (as he then was) speaking on behalf of the Court in the Hospital Mazdoor Sabha case stated the working principle in these terms:

".....as a working principle it may be stated that an activity systematically or habitually undertaken for the production or distribution of goods or for the rendering of material services to the community at large or a part of such community with the help of employees is an undertaking. Such an activity generally involves the co-operation of the employer and the employees; and its object is the satisfaction of material human needs. It must be organised or arranged in a

manner in which trade or business is generally organised or arranged. It must not be casual nor must it be for oneself nor for pleasure. Thus the manner in which the activity in question is organised or arranged, the condition of the co-operation between employer and the employee necessary for its success and its object to render material service to the community can be regarded as some of the features which are distinctive of activities to which Section 2(j) applies."

It was the same working principle which was pithily expressed by this Court through Hidayatullah, J., (as he then was) in the Madras Gymkhana case where it was stated: ".....before the work engaged in can be described as an industry, it must bear the definite character of 'trade' or 'business' or 'manufacture' or 'calling' or must be capable of being described as an undertaking resulting in material goods or material services". This last proposition taken from the judgment in the Madras Gymkhana case was in so many terms accepted as valid in the Safdarjung Hospital case: vide page 189 of the Report. This Court speaking through Hidayatullah, C. J., pointed out in the Safdarjung Hospital case at pages 186 and 187 of the Report:

"But in the collocation of the terms and their definitions these terms have a definite economic content of a particular type and on the authorities of this Court have been uniformly accepted as excluding professions and are only concerned with the production, distribution and consumption of wealth and the production and availability of material services. Industry has thus been accepted to mean only trade and business, manufacture, or undertaking analogous to trade or business for the production of material goods or wealth and material services."

What is meant by 'material' services in this context was explained by the learned Chief Justice in these words:

"Material services are not services which depend wholly or largely upon the contribution of professional knowledge, skill or dexterity for the production of a result. Such services being given individually and by individuals are services no doubt

but not material services. Even an establishment where many such operate cannot be said to convert their professional services into material services. Material services involve an activity carried on through cooperation between employers and employees to provide the community with the use of something such as electric power, water, transportation, mail delivery, telephones and the like. In providing these services there may be employment of trained men and even professional men, but the emphasis is not on what these men do but upon the productivity of a service organised as an industry and commercially valuable. Thus the services of professional men involving benefit to individuals according to their needs, such as doctors, teachers, lawyers, solicitors etc. are easily distinguishable from an activity such as transport service. The latter is of a commercial character in which something is brought into existence quite apart from the benefit to particular individuals. It is the production of this something which is described as the production of material services."

The learned Chief Justice then proceeded to explain why professions must be held to be outside the ambit of industry. This is what he said:

"A profession ordinarily is an occupation requiring intellectual skill, often coupled with manual skill. Thus a teacher uses purely intellectual skill while a painter uses both. In any event, they are not engaged in an occupation in which employers and employees co-operate in the production or sale of commodities or arrangement for their production or sale or distribution and their services cannot be described as material services." It was for this reason, observed the learned Chief Justice, that the establishment of a solicitor was held not to be an industry "because there the services rendered by the employees were in aid of professional men and not productive of material goods or wealth or material services". *National Union of Commercial Employees v. M. R. Meher*, (1962) Supp (3) SCR 157 = (AIR 1962 SC 1080). The learned Chief Justice pointed out that in the *University of Delhi v. Ramnath*, (1964) 2 SCR 703 = (AIR 1963 SC 1873) the

University was also held to be outside the ambit of industry for the same reason. The learned Chief Justice then summarised the working principle —the broad test or criterion for determining what is an undertaking analogous to trade or business — in these terms:

"It, therefore, follows that before an industrial dispute can be raised between employers and their employees or between employers and employees or between employees and employees in relation to the employment or non-employment or the terms of employment or with the conditions of labour of any person, there must be first established a relationship of employers and employees associating together, the former following a trade, business, manufacture, undertaking or calling of employers in the production of material goods and material services and the latter following any calling, service, employment, handicraft, or industrial occupation or avocation of workmen in aid of the employers' enterprise. It is not necessary that there must be a profit motive but the enterprise must be analogous to trade or business in a commercial sense."

and after referring to the observations of Isaacs and Rich, JJ., in *Federated Municipal and Shire Council Employees of Australia v. Melbourne Corporation*, 26 CLR 508 (Aus) pointed out that these observations showed that "industrial disputes occur in operations in which employers and employees associate to provide what people want and desire, in other words, where there is production of material goods or material services." (emphasis added).

10. It would thus be seen that the broad test for determining when an undertaking can be said to be analogous to trade or business laid down in the *Safdarjung Hospital case* (AIR 1970 SC 1407) was the same as in the *Hospital Mazdoor Sabha case* (AIR 1960 SC 610). The *Safdarjung Hospital case* did not make any real departure from the enunciation of this test. It is only in the application of this test to the case of hospitals that the *Safdarjung Hospital case* took a different view and observed that the judgment in the *Hospital Mazdoor*

Sabha case had taken "an extreme view of the matter which was not justified". There was also one other ground on which the decision in the Safdarjung Hospital case disapproved of the view taken in the Hospital Mazdoor Sabha case and that ground was that the decision in the Hospital Mazdoor Sabha case proceeded on an erroneous basis that an activity, in order to be an undertaking analogous to trade or business, need not be an economic activity and applied a wrong test, namely, 'can such activity be carried on by private individuals or group of individuals?' It would, therefore, seem that, in view of the decision in Safdarjung Hospital case, this last test applied in the Hospital Mazdoor Sabha case must be rejected as irrelevant and it must be held that an activity, in order to be recognised as an undertaking analogous to trade or business, must be an economic activity in the sense that it is productive of material goods or material services.

11. To summarise, an activity can be regarded as an 'industry' within the meaning of Section 2(i) only if there is relationship of employer and employees and the former is engaged in 'business, trade, undertaking, manufacture or calling of employers' and the latter, 'in any calling, service, employment, handicraft or industrial occupation or avocation'. Though 'undertaking' is a word of large import and it means anything undertaken or any project or enterprise, in the context in which it occurs, it must be read as meaning an undertaking analogous to trade or business. In order that an activity may be regarded as an undertaking analogous to trade or business, it must be "organised or arranged in a manner in which trade or business is generally organised or arranged." It must not be casual nor must it be for oneself nor for pleasure. And it must rest on co-operation between employer and employees who associate together with a view to production, sale or distribution of material goods or material services. It is entirely irrelevant whether or not there is profit motive or investment of capital in such activity. Even without these two features an activity can be an undertaking analogous to trade or business. It is

also immaterial "that its objects are charitable or that it does not make profits or even where profits are made, they are not distributed amongst the members," Management of FICCI v. Workmen, (1972) 2 SCR 353 at p. 376 = (AIR 1972 SC 763 at p. 777 = 1972 Lab IC 413) or that its activity is subsidised by the Government. Again it is not necessary that "the employer must always be a private individual.....The Act, in terms, contemplates cases of industrial disputes where the Government or a local authority or a public utility service may be the employer..." Madras Gymkhana case, at p. 756 of the Report (1968) 1 SCR 742 = (at p. 563 of AIR 1968 SC 554). It also makes no difference that the material services rendered by the undertaking are in public interest. The concept of public interest in a modern welfare State, where new social values are fast emerging and old dying out, is indeed so wide and so broad and comprehensive in its spectrum and range that many activities which admittedly fall within the category of 'industry' are clearly designed to subserve public interest. In fact, whenever any industry is carried on by the Government, it would be in public interest, for the Government can act only in public interest. Whether an activity is carried on in public interest or not can, therefore, never be a criterion for determining its character as an industry. Having thus examined the legal concept of industry as expounded in the decisions of this Court, we may now proceed to consider whether the activity of the Institution can be characterised as an industry in the light of the broad test discussed by us.

12. The Institution owes its genesis to the Government of India Resolution No. 1 STD (4)/45 dated 3rd September 1946. Prior to this Resolution, British and American standards were generally adopted for our country. But due to diversity of raw materials available in our country and the processes employed for manufacture, it was increasingly felt that the British and other standards were not always suitable for adoption in our country and it was necessary to establish a central standards organisation for fixing Indian standards.

The Government of India, therefore, passed this Resolution for setting up an organisation to be called the Indian Standards Institution with its Headquarters at New Delhi. Pursuant to this Resolution, the Institution was registered and established under the Societies Registration Act, 1860. Clause (3) of the Memorandum of Association sets out objects of the Institution and, so far as material, they are as follows:

"(a) To prepare and promote the general adoption of standards on national and international basis relating to structures, commodities, materials, practices, operations, matters and things and, from time to time, to revise, alter and amend the same.

(b) To promote standardization, quality control and simplification in industry and commerce.

(c)

(d) To co-ordinate the efforts of producers and users for the improvement of materials, products, appliances, processes and methods.

(e) To provide for the registration of standardization marks applicable to products, commodities, etc., for which it issues standards to be branded on or applied to those products, commodities, etc., which conform to standards set.

(f) To provide or arrange facilities for the examination and testing of commodities, processes and practices, and for any investigations or research that may be necessary.

(g)

(h)

(i)

(j) To communicate, information to members on all matters connected with standardization and to print, publish, issue and circulate such periodicals, books, circulars, leaflets and other publications as may seem conducive to any of the objects of the Institution."

The income and property of the Institution, however derived, are directed by cls. (6) and (7) of the Memorandum of Association to be applied towards the promotion of the objects as set forth in the Memorandum of Association and no portion of the income or property is divisible or distributable amongst the members, ei-

ther during the active life of the Institution or on its winding up or dissolution.

13. The Rules and Regulations of the Institution make various provisions in regard to the mechanics of the functioning of the Institution. Rule 2 lays down that there shall be two categories of members, namely, subscribing members and committee members and their rights and privileges are enumerated in Rule 5. Rule 7 vests the management of the affairs of the Institution in a General Council and its composition is laid down in Rule 8 and its functions, in Rule 11. Rule 15 provides for the constitution of the Executive Committee and it lays down that the Executive Committee shall have the powers to manage the day-to-day affairs of the Institution, including administration of ISI (Certification Marks) Act, 1952 in conformity with policies laid down by the General Council. The Institution can have different branches as may be decided upon by the General Council under Rule 18. Rule 19 says that a division shall constitute the main section of the technical activities of the Institution and Rule 20 declares that the work of a division shall be controlled by a Division Council. What shall be the constitution of a Division Council is laid down in Rule 22 and that Rule provides that a Division Council shall be constituted from the representatives of the respective interests of users, manufacturers and other persons or bodies concerned in or associated with the industries included in the Division. Rule 26 deals with Sectional Committees and it says that the Sectional Committee shall be appointed by a Division Council or if necessary, by Executive Committee for the preparation of a particular standard or group of standards and the Sectional Committee shall be composed of representatives of such interests as, in the opinion of the Division Council or Executive Committee, are concerned with the standards referred to the Committee. It emphasises that on the Sectional Committee all interests shall be adequately represented including scientists and technicians, but consu-

mer interest shall, as far as possible, predominate.

14. Now, at this stage it would be convenient to explain what are standards and why they are necessary to be established. Standards are technical documents describing constructional, operational and technological requirements of a material, a product or a process for a given purpose. They furnish such details as materials to be used, dimensions and sizes to be adopted, performance to be expected, and quality to be achieved; they also give methods of tests for comparing and judging quality of goods produced by the manufacturer. Standards may be of any one or more of the following five categories: (a) Dimensional Standards which secure interchangeability and eliminate unnecessary variety of types for the same or similar purposes; (b) Performance and Quality Standards which ensure that the final article will be fit for the job it is designed to do; (c) Standard Methods of Tests which enable materials or products intended for the same purpose to be compared uniformly; (d) Standard Technical Terms and Symbols which provide a common, easily understood technical language for the industry, and (e) Standard Codes of Practice which set out the most efficient methods of installation, use and maintenance of equipment and recommend methods of technical operations. These are necessary in order to meet the challenges posed by the fast developing industrial economy of the country and mass production of economic goods and services. The manufacturer should be able to produce goods of specified quality so that he can win the confidence and good-will of the consumer and build up internal and external markets for his products. He should also be able to increase his productivity, produce goods at minimum cost and achieve overall economy by best utilization of human and material resources at its disposal. Standards which are based on the consolidated results of science, technology and experience, furnish guidance to the manufacturer in this behalf and confer economic benefits for the development of industry and smooth flow of commerce.

15. The procedure for preparing standards is laid down in Rule 29 of the Rules and Regulations of the Institution. The underlying principles for the preparation of standards are that they shall be in accordance with the needs of the industry and fulfil a generally recognised want, that the interests of both producers and consumers shall be considered and that periodic review shall be undertaken. The work of standardisation on any specific subject can be undertaken only when the Division Council concerned is satisfied, as a result of its own deliberations or of an investigation and consultation with the producer and consumer interests, that the necessity for standardisation has been established. When the subject has been so investigated and the need established, the Division Council concerned would refer the work to an appropriate Sectional Committee and the Sectional Committee would then explore and study the subject and prepare a draft of the proposed standard. The draft standard would then be issued in draft form for a period to be determined by the Sectional Committee but not less than three months and widely circulated amongst those likely to be interested for the purpose of securing critical review and suggestions for improvement which, if found desirable, would be incorporated in the draft. This procedure for circulation can, in an appropriate case, be curtailed or dispensed with by the Division Council. The consideration of the comments received as a result of the circulation of the draft standard would be undertaken by the Sectional Committee and the final draft prepared after verification in the appropriate laboratories where necessary. The standard so finalised by the Sectional Committee would then be referred to the Division Council concerned for adoption and on such adoption by the Division Council, it would be published as an Indian Standard.

16. The Institution thus prepares and publishes Indian Standards on different subjects and some of these Indian Standards are also revised so as to keep abreast with the latest developments in manufacturing and testing techniques and to improve

the quality of goods. The Annual Report of the Institution for 1967-68 shows that the number of Indian standards in force on 31st March, 1968 was 4564 and during that year 159 existing Indian standards were revised. The activity of the Institution in regard to preparation and publication of Indian standards has continued to increase over the years and, according to the Annual Report of the Institution for 1973-74, the number of Indian standards in force on 31st March, 1974 was 7760 and during that year, as many as 243 existing Indian standards were subjected to revision.

17. Indian standards thus published, whether new or revised, are sold by the sales service of the Institution at its head-quarters and at the various branch offices and as the Annual Report for 1973-74 shows, the proceeds from the sales of Indian standards have steadily increased from year to year and reached the figure of Rs. 16,24,170/- during the year 1973-74. The Institution also acts as a sole selling agent for sale of overseas standards on commission basis and from this activity, the Institution derives a large income, which during the year 1973-74 amounted to as much as Rs. 3,20,700/-.

18. The Institution also carries on another activity which is the direct outcome of preparation and publication of Indian standards and that activity is the result of implementation of the Indian Standards Institution (Certification Marks) Act, 1952 (hereinafter referred to as the Certification Marks Act). Section 2, cl. (1) defines 'standard mark' to mean the Indian Standards Institution Certification Mark specified by the Indian Standards Institution to represent a particular Indian standard. Sub-section (1) of Section 5 imposes a prohibition that no person shall use, in relation to any article or process, or in the title of any patent, or in any trade mark or design, the standard Mark or any colourable imitation thereof, except under a licence granted under the Act and another prohibition is imposed by sub-section (2) of Section 5 that no person shall, notwithstanding that he has been granted a licence, use in re-

lation to any article or process the Standard Mark or any colourable imitation thereof, unless such article or process conforms to the Indian Standard. Since the Standard Mark is intended to represent a particular Indian Standard, obviously no one can be allowed to use the Standard Mark or any colourable imitation thereof, except under a licence granted by the Institution, for it is only through the machinery of a licence that the institution would be able to exercise a check on the person concerned and ensure that the article manufactured or process employed by him conforms to the Indian Standard and that the Standard Mark is not abused by him and it does not become an instrument of deception. It is for this purpose that Section 8 confers power on the Institution to appoint inspectors for inspecting whether any article or process in relation to which the Standard Mark has been used conforms to the Indian Standard or whether the Standard Mark has been improperly used in relation to any article or process, with or without licence.

19. The Central Government has, in exercise of the power conferred under Sec. 20 of the Certification Marks Act, made the Indian Standards Institution (Certification Marks) Rules, 1955. Rule 4 requires that the design of the Standard Mark in relation to each Indian Standard together with the verbal description of the design of the Standard Mark and the title of the Indian Standard shall be published by the Institution. Rule 5 provides for the making of an application for grant of a licence: Rule 7 stipulates for the holding of a preliminary inquiry by the Institution before granting a licence and Rule 8 lays down when a licence may be granted or renewed. Under Rule 6, the fees and expenses leviable in respect of grant or renewal of licence and in respect of all matters in relation to such licence are left to be prescribed in the Regulations. Regulation 7 of the Indian Standards Institution provides that every application for the grant of a licence shall be accompanied by a fee of Rs. 100/- and every application for a renewal of such licence shall be accompanied by a fee of Rs. 50/- and in

addition to this application fee, there shall be paid by every licensee, an annual licence fee of Rs. 200/- and a marking fee proportionate to the quantum of the annual production of the article or process in respect of which the licence has been granted. Regulation 9 requires every licensee to institute and maintain to the satisfaction of the Institution a system of control to keep up the quality of his production or process by means of a scheme of inspection and testing attached to the licence and Rule 10 confers power on an Inspector to enter upon the premises of a licensee with a view to ascertaining that the Standard Mark is used in accordance with the terms and conditions imposed by the Institution and that the scheme of routine inspection and testing specified by the Institution is being correctly followed.

20. It will, therefore, be seen that the Standard Mark is the most authentic representation to the Consumer that the article or process in respect of which it is used conforms to the relevant Indian Standard and Indian Standard thus becomes meaningful and advantageous by reason of the use of the Standard Mark. But no one can use the Standard Mark without a licence from the Institution and even if there is a licence, the Standard Mark cannot be used in relation to an article or process unless such article or process conforms to the relevant Indian Standard. The issue of licences for use of Standard Marks under the Certification Marks scheme is, therefore, a very important activity of the Institution complementary as well as supplementary to preparation and publication of Indian Standards. The Certification Marks scheme has been making considerable progress from year to year and while, according to the Annual Report of the Institution for 1967-68, the total number of licences issued since the inception of the scheme upto 31st March, 1968 was 1665 and the annual value of goods covered under the scheme was approximately Rupees 3800 million, the total number of licences granted upto 31st March, 1974 increased to 3784 and the annual value of goods covered under the scheme rose to approximately Rupees

5000 million during the year 1973-74 as per the figures contained in the Annual Report for that year. The total income from certification marking does not appear to have been shown separately in the Annual Report of the Institution for the year 1967-68, but according to the Annual Report for 1973-74, it was Rs. 5.2 million during that year. The Annual Reports of the Institution clearly reveal that from year to year the total number of licences granted by the Institution is steadily increasing and so is the total income from certification marking.

21. The Institution has also several laboratories for the purpose of carrying out testing operations. It has a well-equipped library at the Headquarters and there are also laboratories at the branch offices where testing of different articles is carried out. The testing work carried out in these laboratories has shown a consistent rise over the years and while during the year 1967-68 the number of samples received for testing was 3853 and the value of testing work done was Rs. 3,96,468, the number of samples received during 1973-74 was 12726 and the value of testing working done during that year was Rs. 8,76,847.58. The samples tested at the laboratories are not only those submitted by the manufacturers, distributors and consumers, but also those taken by the Inspectors for the purpose of ascertaining whether any article or process in relation to which the Standard Mark is used conforms to the Indian Standard or whether the Standard Mark has been improperly used in relation to any article or process. The laboratories are also used in connection with the preparation of Indian Standards as contemplated in cl. (f) of Rule 29 of the Rules and Regulations of the Institution.

22. Then, the Institution maintains libraries at the Headquarters and at the branch offices which render useful service to the subscribing members, the Committee members, the Staff members and others. The library at the Headquarters, which is open to visitors, has complete sets of overseas standards and specifications and related indices. It has also

classified subject catalogues for consultation and retrieval of information on standardization. It also prepares and circulates for the benefit of its users a monthly list of current published information on standardization. It has also brought out fortyone bibliographies at the request of technical staff and Committee members and also published an important bibliography, namely, 'World List of Standards on Paper Products'. Quite often, technical enquiries are received from the industry and the necessary information supplied by the libraries of the Institution. The libraries also disseminate technical information on national and overseas standards, specifications and other allied subjects.

23. The Institution is also bringing out regularly ISI bulletin, Standards Monthly Additions and miscellaneous publications such as Annual Report, Handbook of ISI publications, brochures, leaflets and a large number of advertisements. These publications are distributed amongst the members and are also sold to non-members and they are intended to publicise the activities of the Institution, promote widespread implementation of Indian Standards, propagate the Certification Marks scheme, create awareness about the importance of standardization and quality control and further the standardization movement in the country. The Institution is also making concerted efforts for furthering standardization movement among different sectors of economy through out the country through different media of publicity and for that purpose it contributes articles, reviews and write-ups on different aspects of standardization and other activities in newspaper journals, souvenir, reference publications etc. and holds inter alia radio broadcasts, press conferences, exhibitions, seminars, conferences and conventions.

24. It is clear from the re'sume' of the activities of the Institution given above that the undertaking of the Institution answers the broad test laid down in the Safdarjung Hospital case, (AIR 1970 SC 1407) and explained by us in the earlier part of the judgment and must be held to be an industry within the meaning of Sec-

tion 2(i). The activities of the Institution are carried on in a systemic manner and are organised or arranged in a manner in which trade or business is ordinarily organised or arranged. The Institution derives large income from its activities, which was about Rs. 4.5 million in 1967-68 and rose to about Rs. 10.2 million in 1973-74, a bulk of the income being accounted for by sale proceeds of Indian Standards and Certification Marking fees. The object of the activities of the Institution is to render material services to a part of the community, namely, manufacturers, distributors and consumers. Standards set the recognised level of good quality, corner stone for building domestic and export markets and developing goodwill and prestige for the manufacturer: they provide the framework for mass production, increase in productivity, simplification in production process and enhancement in labour efficiency: they make for dimensional interchangeability by setting national and also international patterns of interrelated sizes: they incorporate results of the latest developments in research and technology: they increase consumer confidence and goodwill bringing wide markets and quick turnover with savings for the buyer and they bring more profits and lower costs by optimum utilization of scarce resources. The brochure on "Standards for Textiles" points out that amongst various advantages which accrue from the application of standards in the day-to-day manufacturing programmes are increased efficiency, less waste of man-power and material, higher productivity through longer runs in the factory, simplified buying, costing and cataloguing and stabilizing and promoting exports by sending goods of uniform quality abroad. The Certification Marking Scheme involving issue of licences for use of Standard Marks, maintenance of laboratories and libraries, bringing out various publications, such as ISI bulletin Standards Monthly Additions and other brochures and leaflets and publicity through different kinds of media, which constitute the other activities of the Institution apart from preparation and publication of Standards are intended to promote

implementation of Standards, create consciousness about the importance of standardization and quality control amongst different sectors of the economy and further implant standardization activity, with a view to helping the manufacturer, to step up production and lower manufacturing cost, increase labour efficiency by simplifying production processes and ensure dependable and quality goods, increase consumer confidence and good-will and achieve greater turnover and increased profits by maximum utilization of human and material resources, the distributor, to add to his turnover and to his reputation, by marketing uniform quality of goods of high standard assured by compliance with the Standards and the consumer, to benefit from lower prices, higher quality and more safety—in short, get value for the money spent by him. The Institution renders what are termed 'extension services' to industries which opt for them and these extension services are made available in three distinct phases, namely, Pilot Study, Systematic Development and Evaluation. If this is not rendering of material services to a section of the community, we fail to see what other activity can be so regarded. There is also co-operation between the management of the Institution and the employees who are associated together for rendering these material services. It is true that the Standards are prepared by Sectional Committees which are composed of representatives of all concerned, including scientists and technicians, with consumer interest playing a dominant role and they are not exclusively the result of the work carried out by the employees, but the participation of the employees is not altogether absent. Not only do the employees who are technicians participate in the work relating to various aspects of preparation of Standards but the draft standards are also varied in the laboratories of the Institution which are operated by the employees. Moreover, the distribution and sale of Standards prepared and published by the Institution is being made through the employees. The Certificate Marking scheme, maintenance of laboratories and libraries, publication of ISI bulletin, Standard

Monthly Additions and other magazines, journals and leaflets and publicity of the activities of the Institution are all carried on with the help of the employees. There are a large number of employees of the Institution belonging to Grades II, III and IV, apart from officers in Grade I. Some of the employees in Grade II are technical people closely associated with the technical activities of the Institution. There can, therefore, be no doubt that the activities of the Institution fall within the category of undertaking analogous to trade or business and must be regarded as an 'industry' within the meaning of Section 2 (j).

25. This view which we are taking receives support from an earlier decision of this Court in the Ahmedabad Textile Industry Research Association v. State of Bombay, (1961) 2 SCR 480 = (AIR 1961 SC 484). There the question was whether the activity of the appellant-Association, which was a textile research institute established for the purpose of carrying on research and other scientific work in connection with the textile trade or industry and other trades and industries allied therewith or necessary thereto, was an 'industry' for the purpose of the Act. This Court analysed the activity of the appellant-Association and pointed out that it is an "activity systematically undertaken; its object is to render material services to a part of the community (namely, member-mills) — the material services being the discovery of processes of manufacture etc. with a view to secure greater efficiency, rationalisation and reduction of costs of the member-mills; it is being carried on with help of employees (namely, technical personnel) who have no rights in the results of the research carried on by them as employees of the association; it is organised or arranged in a manner in which a trade or business is generally organised; it postulates co-operation between employers (namely, the association) and the employees (namely, the technical personnel and others) which is necessary for its success, for the employers provide monies for carrying on the activities of the association and its object clearly is to render material ser-

vices to a part of the community by discovery of process of manufacture etc. with a view to "secure greater efficiency, rationalisation and reduction of costs." It was observed by this Court that the undertaking as a whole is "in the nature of business or trade organised with the object of discovering ways and means by which the member-mills may obtain larger profits in connection with their industries", and on this view, the Court held that "the appellant-association is carrying on an activity which clearly comes within the meaning of the word 'industry' in Sec. 2(j)". This case bears a very close analogy to the present case and indeed, some of the observations made by this Court in that case — particularly those underlined by us — aptly describe the nature of the activities of the Institution and the reasoning on which the decision in this case is based is equally applicable in the decision of the present case.

26. There is also one other decision of this Court which amply supports the view we are taking and that is the decision in the Management of the FICCI v. Workmen, (AIR 1972 SC 763). The question which arose in that case was whether the Federation of Indian Chambers of Commerce and Industry, for short referred to as FICCI, was an industry within the meaning of Section 2(j). This Court reviewed most of the earlier decisions on the subject and after summarising the broad test for determining what is an industry, proceeded to analyse the activities of FICCI and pointed out that "the Federation carries on systematic activities to assist its members and other businessmen and industrialists and even non-members, as for instance, in giving them the right to subscribe to their bulletin; in taking up their cases and solving their difficulties and in obtaining concessions and facilities for them from the Government. These activities are business activities and material services, which are not necessarily confined to the illustrations given by Hidayatullah, C. J., in the Gymkhana case (AIR 1968 SC 554) by way of illustration only, rendered to businessmen, traders and industrialists

who are members of the constituents of the Federation. There can in our view be no doubt that the Federation is an industry within the meaning of Section 2(j) of the Act". This decision is also very apposite and helpful and leaves no doubt that the activities of the Institution in the present case are an 'industry' so as to attract the beneficent provisions of the Act.

27. We, therefore, allow the appeal, set aside the order passed by the Industrial Tribunal and direct the Industrial Tribunal to proceed with the Reference before it on merits on the basis that the activities of the Institution constitute an 'industry' within the meaning of Section 2(j) of the Act. The respondents will pay to the appellants costs of the appeal as also costs of the hearing before the Industrial Tribunal.

ALAGIRISWAMI, J.:— 28. I am sorry I find myself unable to agree with my learned brother Bhagwati J. The facts of the case have been elaborately set out in his judgment and it is unnecessary to repeat them. It would be necessary, however, to refer to one or two other facts which have not been mentioned in their proper place.

29. After the very clear decision by this Court in its judgment in Gymkhana Club Union v. Management, (1968) (1) SCR 742 = (AIR 1968 SC 554) and its endorsement in its judgment in Safdarjung Hospital v. K. S. Sethi, (1971) (1) SCR 177 = (AIR 1970 SC 1407) the decision in State of Bombay v. The Hospital Mazdoor Sabha, (1960) (2) SCR 866 = (AIR 1960 SC 610) has become irrelevant. The Gymkhana Club case has laid down that any trade, business, undertaking, manufacture or calling of employers is an industry and once the existence of an industry viewed from the angle of what the employer is doing is established, all who render service and fall within the definition of 'workmen' come within the fold of industry, irrespective of what they do. It was also pointed out that the word 'undertaking', though elastic, must take its colour from other expressions used in the definition of 'industry', and must be defined as any business or any work or project resulting in material goods or material

services and which one engages in or attempts as an enterprise analogous to business or trade. It also pointed out that the test adopted in Hospital Mazdoor case (supra) namely, could the activities be carried on by a private individual or group of individuals for the purpose of holding that running a Government hospital was an industry—must be held to have taken an extreme view of what is an industry and that this test is not enlightening. With regard to local bodies it was pointed out that they are political sub-divisions and agencies for the exercise of governmental functions, but if they indulge in municipal trading or business or have to assume the calling of employers they are employers whether they carry on or not business commercially for purposes of gain or profit. It was finally held that before the work engaged in can be described as an industry, it must bear the definite character of 'trade' or 'business' or 'manufacture' or 'trading' or must be capable of being described as an undertaking resulting in material goods or material services and the word 'undertaking' was defined as "any business or any work or project which one engages in or attempts as an enterprise analogous to business or trade". These ideas were crystallised in the judgment in Safdarjung Hospital case and for facility of reference I may quote the first conclusion in the headnote:

"The definition of industry in Section 2(j) of the Industrial Disputes Act, 1947 is in two parts. But it must be read as a whole. So read it denotes a collective enterprise in which employers and employees are associated. It does not exist either by employers alone or by employees alone. It exists only when there is a relationship between employers and employees, the former engaged in business, trade, undertaking, manufacture or calling of employers and the latter engaged in any calling, service, employment, handicraft or industrial occupation or avocation. But every case of employment is not necessarily productive of an industry. A workman is to be regarded as one employed in an industry only if he is following one of the vocations mentioned in relation to the

employers, namely, any business, trade, undertaking, manufacture or calling of employers. In the collocation of the terms and their definitions these terms have a definite economic content of a particular type and on the authorities of this Court have been uniformly accepted as excluding professions and are only concerned with the production, distribution and consumption of wealth and the production and availability of material services. Industry has thus been accepted to mean only trade and business, manufacture, or undertaking analogous to trade or business for the production of material goods or wealth and material services. Material services involve an activity carried on through co-operation between employers and employees to provide the community with the use of something such as electric power, water, transportation, mail delivery, telephones and the like. In providing these services there may be employment of trained men and even professional men, but the emphasis is not on what they do but upon the productivity of a service organised as an industry and commercially valuable, in which, something is brought into existence quite apart from the benefit to particular individuals; and it is the production of this something which is described as the production of material services. Thus, the services of professional men involving benefit to individuals according to their needs, such as doctors, teachers, lawyers, solicitors, etc. are easily distinguishable from an activity such as transport service. They are not engaged in an occupation in which employers and employees cooperate in the production or sale of commodities or arrangement for the production or sale or distribution and their services cannot be described as material services and are outside the ambit of industry. It, therefore, follows that before an industrial dispute can be raised between employers and employees or between employers and employees or between employees and employees in relation to the employment or non-employment or the terms of employment or with the conditions of labour of any person, there must first be established a relationship of employers and em-

ployees associating together, the former following a trade, business, manufacture, undertaking or calling of employers in the production of material goods and material services and the latter following any calling, service, employment, handicraft or industrial occupation or avocation of workmen in aid of the employers' enterprise. It is not necessary that there must be profit motive, but the enterprise must be analogous to trade or business in a commercial sense." It criticised the decision in Hospital Mazdoor case in words which have been summarised in headnote 2 as follows:

"The decision in State of Bombay v. Hospital Mazdoor Sabha holding that a Govt. hospital was an industry took an extreme view of the matter and cannot be justified, because: (a) it was erroneously held that the second part of the definition of 'industry' was an extension of the first part, whereas, they are only the two aspects of the occupation of employers and employees in an industry; (b) it was assumed that economic activity is always related to capital or profit-making and since an enterprise could be an industry without capital or profit-making it was held that even economic activity was not necessary; and (c) it was held that since a hospital could be run as a business proposition and for profit by private individuals or groups of individuals a hospital run by Government without profit must also bear the same character. This test was wrongly evolved from the observations in Federated Municipal and Shire Council Employees of Australia v. Melbourne Corporation. 26 CLR 508 (Aus), which only indicate that in those activities in which Government take to industrial ventures the motive of profit-making and absence of capital are irrelevant. The observations, on the contrary show that industrial disputes occur only in operations in which employers and employees associate to provide what people want and desire, that is, in the production of material goods or services, and not the 'satisfaction of material human needs'."

and also pointed out that if a hospital, nursing home or dispensary is run as a business in a commercial

way there may be found elements of an industry there. Applying these tests it was held that the Safdarjung Hospital was not embarked on an economic activity which could be said to be analogous to trade or business, that there was no evidence that it was more than a place where persons could get treated, that it was a part of the functions of Government and the Hospital was run as a Department of Government and that it could not, therefore, be said to be an industry. The Tuberculosis Hospital was held to be not an industry because it was wholly charitable and a research institute, the dominant purpose of the Hospital being research and training and as research and training could not be given without beds in a hospital, the hospital was run. The Kurji Holy Family Hospital was held not to be an industry on the ground that its objects were entirely charitable, that it carried on work of training, research and treatment and that its income was mostly from donations and distribution of surplus as profit was prohibited.

30. The idea behind these decisions could be crystallised thus: Even where a trade, business, undertaking, manufacture or calling of employers results in production of material goods or rendering of material services, such an undertaking engaged in trade, business, manufacture or calling of employers will not be an industry if it is run on charitable principles or is run by Government or local body as part of its duty. In other words, whenever an undertaking is engaged in activity which is not done with a view to exploit it in a trading or commercial sense but for public interest and without any profit motive or in the form of social service or in the form of activity intended to benefit the general public it will not be an industry.

31. The Indian Standards Institution was set up by a Resolution of the Government of India and registered under the Societies Registration Act, 1860. My learned brother Bhagwati J. has set out the Memorandum of Association, the rules and regulations of the Institution and explained what the standards established by the

Institution are as also its role in the implementation of Indian Standards Institution (Certification Marks) Act, 1952. It is unnecessary to set out all of them at length. A bare scrutiny of the objects of the Institution would show that they are concerned with broad public interest of the country as a whole and no part of the objects of the Institution has anything to do with serving any private interest. The standards are prepared by committees in which all interests are adequately represented, including scientists and technicians but consumer interest has, as far as possible, to predominate. As pointed out by my learned brother, the Standard Mark is the most authentic representation to the consumer that the article or process in respect of which it is used conforms to the relevant Indian Standard and Indian Standard thus becomes meaningful and advantageous by reason of the use of the Standard Mark. The existence of laboratories and libraries are incidental and in furtherance of the specifications of standards and the application of the Standard Marks. The Institution has no capital, it does not distribute profits and even when it is wound up the assets would not go to any private individual. It is not run with a profit motive. It is thus not an enterprise analogous to business or trade. In fact one can go further and say that its activity is only a manifestation of governmental activity. Instead of itself performing these duties the Government have set up the Institution in effect for the purpose of discharging duties which the Government itself has to do in in the service of the general public. What the Institution does is thus to render material services. It is in recognition of the role which the Institution plays as an instrument of Government that it had made a contribution of 40 lakhs and odd out of the income of 73 lakhs of the Institution in the year 1973-74. Thus the material service which the Institution renders is really a subsidised service and it is rendered in public interest. It is an Institution interested and engaged in service to the public. Its activities do not go to swell coffers of anybody. Applying therefore the tests which have been evolved and applied

in the Gymkhana Club case (AIR 1968 SC 554) and the Safdariung Hospital case it is obvious that the Institution is not engaged in any industry.

32. The judgments of this Court in *Management of FICCI v. Workmen*, (1972 (2) SCR 353) = (AIR 1972 SC 763) and *Ahmedabad Textile Industry Research Association v. State of Bombay*, (1961 (2) SCR 480) (AIR 1961 SC 484) are not relevant because in the case of the Federation it was intended to benefit the members of the commercial community and not the public in general. The Ahmedabad Textile Industry Research Association's activities were in the nature of business or trade organised with the object of discovering ways and means by which the member-mills may obtain larger profits in connection with their industries. The activities of the Indian Standards Institution are not intended to benefit any class of businessmen or to enable them to increase their income. It is a public service institution and therefore must be held not an industry.

33. I would, therefore, dismiss the appeal.

ORDER

By the Court:— In view of the decision of the majority, the appeal is allowed and the Industrial Tribunal should proceed with the Reference before it on the merits. The respondents will pay to the appellants costs of the appeal as also costs of the hearing before the Industrial Tribunal.

Appeal allowed.

AIR 1976 SUPREME COURT 163

(From: Patna)*

Y. V. CHANDRACHUD, R. S. SARKARIA AND A. C. GUPTA JJ.

Afsar Shaikh and another, Appellants v. Soleman Bibi and others, Respondents.

Civil Appeal No. 898 of 1968, D/- 6-11-1975.

*(A. F. A. D. No. 779 of 1965, D/- 9-11-1967—Pat.)

KS/LS/E61/75/GGM

(A) Transfer of Property Act (1882), S. 126 — Revocation of Hiba-bil-Ewaz — Undue influence alleged — Proof — Essentials — Mere showing that plaintiff relied upon defendant for advice not sufficient. A. F. A. D. No. 779 of 1965, D/- 9-11-1967 (Pat), Reversed.

The law as to undue influence in the case of a gift inter vivos is the same as in the case of a contract. It is embodied in Sec. 16 of the Contract Act. In view of sub-s. (1) of Section 16 of the Contract Act, the Court trying a case of undue influence, must, to start with, consider two things namely, (1) are the relations between the donor and the donee such that the donee is in a position to dominate the will of the donor? and (2) has the donee used that position to obtain an unfair advantage over the donor? (Paras 21 and 22).

It is not sufficient for a person seeking the relief to show that the relations of the parties have been such that the one naturally relied upon the other for advice, and the other was in a position to dominate the will of the first in giving it. "More than mere influence must be proved so as to render influence in the language of the law, 'undue'". Upon a determination of the issue at the second stage, a third point emerges, which is of the "onus probandi". If the transaction appears to be unconscionable, then the burden of proving that it was not induced by undue influence is to lie upon the person who was in a position to dominate the will of the other. A. F. A. D. No. 779 of 1965, D/- 9-11-1967 (Pat), Reversed. AIR 1967 SC 878; AIR 1924 PC 60 and AIR 1920 PC 65. Ref. (Para 25).

(B) Civil P. C. (1908), Ss. 100 and 101 — Question of law and questions of fact — Whether a person is in a position to dominate the will of another and procure certain deed by undue influence — Question is one of fact — Cannot be reopened in second appeal if decided in accordance with prescribed procedure. AIR 1932 PC 89 and AIR 1963 SC 1279, Ref.

(Para 19)

(D) Civil P. C. (1908), Ss. 100, 101 and 103 — Second appeal — Appeal competent only on ground of error in law or procedure.

Broadly the effect of Ss. 100 and 101 read together, is that a second appeal is competent only on the ground of an error in law or procedure, and not merely on the ground of an error on a question of fact. The High Court has no jurisdiction to entertain a second appeal on the "ground of an erroneous finding of fact, however, gross or inexcusable the error may seem to be". Section 103 enables the High Court in second appeal, where the evidence on record is sufficient to determine an issue of fact necessary for the disposal of the appeal only—

(a) if the lower appellate Court has determined that issue of fact, or

(b) if it has determined that issue wrongly by reason of any illegality, omission, error or defect such as is referred to in sub-section (1) of Section 100. (1890) 17 Ind App 122.(PC), Ref. (Para 18).

(D) Contract Act (1872), S. 16 — "Undue influence" — Separate pleading about undue influence necessary — General allegation that plaintiff is simple old man and reposed confidence in defendant cannot spell out undue influence. A. F. A. D. No. 779 of 1965, D/- 9-11-1967 (Pat), Reversed.

Although "undue influence", 'fraud', 'misrepresentation' are cognate vices and may, in part, overlap in some cases, they are in law distinct categories, and are in view of Order 6, Rule 4, read with Order 6, Rule 2, of the Code of Civil Procedure, required to be separately pleaded, with specificity, particularity and precision. A general allegation in the plaint, that the plaintiff was a simple old man of ninety who had reposed great confidence in the defendant is much too insufficient to amount to an averment of undue influence. A. F. A. D. No. 779 of 1965, D/- 9-11-1967 (Pat), Reversed. (Para 15)

Cases Referred: Chronological Paras
AIR 1967 SC 878 = (1967) 1 SCR 331

22
AIR 1963 SC 1279 = (1964) 1 SCR 270

19
AIR 1932 PC 89 = 59 Ind App 147

19
AIR 1924 PC 60 = 51 Ind App 101

25
AIR 1920 PC 65 = 47 Ind App 1 25

(1890) 17 Ind App 122 = ILR 18 Cal 23 (PC) 18

Mr. Sarjoo Prasad, Sr. Advocate, (Mr. S. N. Prasad, Advocate with him), for Appellants; Mr. B. P. Singh, Advocate, for Respondents.

Judgment of the Court was delivered by

SARKARIA, J.:— This appeal by special leave is directed against a judgment, dated November 9, 1967, of the Patna High Court decreeing the plaintiff's suit after reversing the judgment of the Additional District Judge, Dumka.

2. One Ebad Sheikh, the predecessor-in-interest of the respondents herein, instituted a suit in the Court of Subordinate Judge at Pakur in 1960 for a declaration that the Hiba-bil-Ewaz, dated February 9, 1959, executed by him, was void and inoperative due to fraud and misrepresentation proceeding from the donee, Afsar Sheikh, original defendant No. 1 (appellant No. 1 herein). Ebad claimed a further declaration, confirming his possession over the suit lands which were the subject of the Hiba. In the alternative, he prayed for possession thereof.

3. The plaintiff's case as laid in the plaint is that he is an illiterate, simple villager, aged about 90 years. On April 2, 1957, one Saifuddin fraudulently got executed and registered a will, dated April 2, 1957, by the plaintiff in favour of the former and his wife in respect of the suit lands. When this fraud was discovered by the plaintiff, he brought it to the notice of Afsar-appellant, a distant relation who was in his confidence and used to help him in cultivation of his lands. Afsar then on February 3, 1959, took the plaintiff to Pakur for execution and registration of a deed cancelling the Will. A cancellation deed was drawn up and executed by the plaintiff, but it could not be presented for registration on that date on account of some delay. On February 9, 1959, Afsar again took the plaintiff to Pakur and represented that the cancellation deed which was prepared on February 3, 1959, had been misplaced and lost and consequently it was necessary to execute a fresh deed of cancellation.

With this misrepresentation, Afsar got executed and registered in his favour a Hiba-bil-Ewaz purporting to be a transfer of 12½ Bighas of lands by the plaintiff. Thereafter, Afsar sold some of the land which he had obtained under the Hiba-bil-Ewaz to defendant-appellant 2. This sale-deed executed by Afsar was bogus and without consideration and did not confer any title or interest on the transferee.

4. In his written statement, Afsar defendant denied the allegations of fraud and misrepresentation. He averred that his grandmother was the sister of the plaintiff's mother. The defendant's father died when he was an infant. The plaintiff brought him up as a son. Since his very infancy, the defendant has been living with the plaintiff, managing his affairs and treating him as his father. The defendant further stated that the plaintiff has transferred 10 to 12 Bighas of land to his natural son and an equal area to his second wife. Out of love and affection, the plaintiff conferred a similar benefit on the defendant and voluntarily executed the Hiba-bil-Ewaz after receiving from the donee a dhoti as a symbolic consideration therefor. He denied that the plaintiff at the time of the gift was too old and infirm. According to him, the plaintiff was not more than 75 years of age. He further averred that he was in possession of the suit lands ever since the execution of the Hiba.

5. After considering the pleadings, the trial court framed three Issues. Issue No. 2 as recast on August 8, 1961, was as follows:

"Is the Hiba-bil-Ewaz void and inoperative, having been fraudulently obtained by defendant 1st party, as alleged by the plaintiff? Was it executed bona fide by the plaintiff out of his own free will and given effect to so as to confer valid title upon defendant 1st party with respect to the lands in suit?"

6. The trial court found that there was no fraud or misrepresentation on the part of Afsar. It further held that the donee was in possession of the gifted lands ever since the gift. In the result, it dismissed the suit.

7. Aggrieved, the plaintiff preferred an appeal to the District Judge, who by his judgment, dated July 3, 1962, dismissed the same, and affirmed the findings of the trial court.

8. The plaintiff carried a second appeal to the High Court. The appeal was heard by a learned Single Judge who held that "the mere finding as given by the court below that the plaintiff in the present case had executed the document after knowing its contents is not sufficient in law to throw out the plaintiff's case" because in view of the allegation in the plaint "that defendant No. 1 was assisting him in the management of his property and that as a result thereof the plaintiff had developed confidence in him, which according to the plaintiff, was abused in getting the document dated 9-2-59, executed by the plaintiff," it was incumbent on the court below to find out whether the donee was in a position to dominate the will of the donor in giving advice. In the opinion of the learned Judge, if the trial court had come to the conclusion in favour of the allegations made by the plaintiff then the onus in that case would have shifted to defendant No. 1 to establish that he did not abuse his position and that the deed of Hiba-bil-Ewaz though unconscionable on the very face of it, was not brought about by any undue influence on his part." By his judgment, dated October 16, 1963, he remanded the case to the District Judge "for a fresh hearing on the material already on the record" for recording findings as to whether Afsar had obtained the Hiba-bil-Ewaz by exercising undue influence over the plaintiff, whether consideration had been given for the Hiba-bil-Ewaz and whether the alleged donee had been in possession of the gifted lands.

9. After the remand, the Additional District Judge, Dumka by his judgment, dated June 18, 1965, again affirmed the findings of the trial court. He further found that there was nothing to show that Afsar was in a position to dominate the will of the plaintiff or had got the Hiba-bil-Ewaz executed by exercising undue influence.

10. Against this judgment, dated June 18, 1965, of the Additional District Judge, the plaintiff preferred a Second Appeal in the High Court. This appeal came up for hearing before another learned Judge who by his Judgment dated November 19, 1967, allowed the same and set aside the judgments of the courts below, on the ground that the written statement of the defendant contained a clear admission of intimate relationship between the parties indicative of the "possibility of dominating the will of the plaintiff by defendant No. 1 and consequently the onus had shifted on the defendant to show that the plaintiff had access to independent advice. Since the defendant did not produce any evidence to show that he had refrained from dominating the will of the plaintiff in obtaining the Hiba-bil-Ewaz, "the plaintiff should have been taken to have proved that the document was vitiated by undue influence of defendant No. 1". The learned Judge did not, in terms, set aside the concurrent finding of the courts below on Issue No. 2 relating to fraud and misrepresentation.

11. Against the judgment of the High Court, the defendants have come in appeal before us.

12. We have heard the learned Counsel on both sides and carefully scrutinised the record. We are of opinion that the judgment of the High Court, cannot be upheld as it suffers from manifest errors.

13. The High Court has tried in Second appeal to make out a new case for the plaintiff on the ground of undue influence which was neither pleaded adequately in the plaint, nor put in issue.

14. The specific case set up in the plaint was that the Hiba-bil-Ewaz in question was vitiated by fraud and misrepresentation practised by Afsar defendant. It was in that context stated in a general way, that the plaintiff was a simple, illiterate man of 90 years, and had great confidence in Afsar, and "the parties used to help each other in respective cultivation." Apart from this general and nebulous allegation, no particulars of a plea of undue influence were pleaded. Even the near relationship

between the plaintiff and Afsar was not disclosed. It was not particularised how Afsar was in a position to dominate the will of the plaintiff, in what manner he exercised that influence, how the influence, if any, used by Afsar over him was "undue", and how and in what circumstances the Hiba-bil-Ewaz was an 'unfair' or unconscionable transaction. In short no material particulars showing that the transaction was vitiated by undue influence were pleaded. Rather, somewhat inconsistently with a plea of undue influence, it was alleged that the Hiba was tainted by fraud, misrepresentation and deceit practised by Afsar.

15. While it is true that 'undue influence', 'fraud', 'misrepresentation' are cognate vices and may, in part, overlap in some cases, they are in law distinct categories, and are in view of Order 6, Rule 4, read with Order 6, Rule 2 of the Code of Civil Procedure, required to be separately pleaded, with specificity, particularity and precision. A general allegation in the plaint, that the plaintiff was a simple old man of ninety who had reposed great confidence in the defendant, was much too insufficient to amount to an averment of undue influence of which the High Court could take notice, particularly when no issue was claimed and no contention was raised on that point at any stage in the trial court, or, in the first round, even before the first appellate court.

16. The High Court has tried to spell out a plea of undue influence by referring to paragraph 7 of the written statement in which the defendant inter alia stated that he was "looked after and brought up by the plaintiff as his son and he became very much attached to the plaintiff and since his infancy till the middle of this year this defendant always lived with the plaintiff and used to treat him as his father, helped him and looked after all his affairs." This paragraph, according to the learned Judge, contains "a clear admission of the intimate relationship between the two indicative of the position of dominating the will of the plaintiff by defendant No. 1".

17. We are, with due respect, unable to appreciate this antic construction put on the defendant's pleading. All that has been said in the written statement is that the relationship subsisting between the plaintiff and the defendant was marked by love and affection, and was akin to that of father and son. Normally, in such paternal relationship, the father and not the son, is in a position of dominating influence. The defendants' pleading could not be reasonably construed as an admission, direct or inferential, of the fact that he was in a position to dominate the will of the plaintiff. In spelling out a plea of undue influence for the plaintiff by an 'inverted' construction of the defendants' pleading, the High Court overlooked the principle conveyed by the maxim *secundum allegata at probata*, that the plaintiff could succeed only by what he had alleged and proved. He could not be allowed to travel beyond what was pleaded by him and put in issue. On his failure to prove his case as alleged, the court could not conjure up a new case for him by stretching his pleading and reading into it something which was not there, nor in issue, with the aid of an extraneous document. Thus considered, the High Court was in error when by its judgment, dated October 16, 1963, it remanded the case to the first appellate Court with a direction to determine the question of undue influence "on material already on record."

18. Be that as it may, the High Court was not competent, in second appeal, to reverse the finding of fact recorded, after the remand, by the first appellate Court, to the effect, that Afsar was not in a position to dominate the will of the plaintiff, and he did not exercise any undue influence on the plaintiff to obtain the Hiba-bil-Ewaz, which was voluntarily executed by the plaintiff after understanding its contents and effect. The scope of the powers of the High Court to interfere in second appeal with judgments and decrees of courts below is indicated in Ss. 100, 101 and 103 of the Code of Civil Procedure. Broadly, the effect of Ss. 100 and 101, read together, is that a second appeal is competent only on the

ground of an error in law or procedure, and not merely on the ground of an error on a question of fact. The High Court has no jurisdiction to entertain a second appeal on the "ground of an erroneous finding of fact, however gross or inexcusable the error may seem to be" (Mst. Durga Choudhrani v. Jawahar Singh), (1890) 17 Ind App 122 (PC). Section 103 enables the High Court in second appeal, where the evidence on the record is sufficient, to determine an issue of fact necessary for the disposal of the appeal only—

(a) if the lower appellate Court has not determined that issue of fact, or

(b) if it has determined that issue wrongly by reason of any illegality, omission, error or defect such as is referred to in sub-section (1) of Section 100.

19. It is well settled that a question whether a person was in a position to dominate the will of another and procured a certain deed by undue influence, is a question of fact, and a finding thereon is a finding of fact and if arrived at fairly, in accordance with the procedure prescribed, is not liable to be reopened in second appeal (Satgur Prasad v. Har Narain Das, 59 Ind App 147 = (AIR 1932 PC 89); Ladli Parshad v. Karnal Distillery Co. Ltd., (1964) 1 SCR 270 = (AIR 1963 SC 1279).

20. Bearing in mind the provisions of Section 103 read with Section 100 (1), the further question to be considered is: Was the finding of the first appellate Court on the point of undue influence vitiated by an illegality, omission, error or defect such as is referred to in Section 100 (1)? For reasons to be stated presently, the answer to this question must be in the negative.

21. The law as to undue influence in the case of a gift inter vivos is the same as in the case of a contract. It is embodied in Sec. 16 of the Indian Contract Act. Sub-section (1) of Section 16 defines 'undue influence' in general terms. It provides that to constitute 'undue influence' two basic elements must be cumulatively present. First, the relations subsisting between the parties are such that

one of the parties is in a position to dominate the will of the other. Second, the party in dominant position uses that position to obtain an unfair advantage over the other. Both these conditions must be pleaded with particularity and proved by the person seeking to avoid the transaction.

22. In view of this sub-section, the Court trying a case of undue influence of the kind before us, must, to start with, consider two things, namely, (1) are the relations between the donor and the donee such that the donee is in a position to dominate the will of the donor? and (2) has the donee used that position to obtain an unfair advantage over the donor? (Subhas Chandra v. Ganga Prasad), (1967) 1 SCR 331 at p. 334 = (AIR 1967 SC 878 at p. 880).

23. Sub-section (2) of Sec. 16 is illustrative as to when a person is considered to be in a position to dominate the will of the other. It gives three illustrations of such a position, which adapted to the facts of the present case, would be (a) whether the donee holds a real or apparent authority over the donor, (b) whether he stands in a fiduciary relation to the donor, or (c) whether he makes the transaction with a person whose mental capacity is temporarily or permanently affected by reason of age, illness or mental or bodily distress.

24. Sub-section (3) contains a rule of evidence. According to this rule, if a person seeking to avoid a transaction on the ground of undue influence proves—

(a) that the party who had obtained the benefit was, at the material time, in a position to dominate the will of the other conferring the benefit, and

(b) that the transaction is unconscionable,

the burden shifts on the party benefiting by the transaction to show that it was not induced by undue influence. If either of these two conditions is not established the burden will not shift. As shall be discussed presently, in the instant case the first condition had not been established, and consequently, the burden never shifted on the defendant.

25. In Subhas Chandra's case (ibid), this Court quoted with approval the observations of the Privy Council in Raghunath Prasad v. Sarju Prasad, 51 Ind App 101 = (AIR 1924 PC 60) which expounded three stages for consideration of a case of undue influence. It was pointed out that the first thing to be considered is, whether the plaintiff or the party seeking relief on the ground of undue influence has proved that the relations between the parties to each other are such that one is in a position to dominate the will of the other. Upto this point, 'influence' alone has been made out. Once that position is substantiated, the second stage has been reached — namely, the issue whether the transaction has been induced by undue influence. That is to say, it is not sufficient for the person seeking the relief to show that the relations of the parties have been such that the one naturally relied upon the other for advice, and the other was in a position to dominate the will of the first in giving it. "More than mere influence must be proved so as to render influence in the language of the law, 'undue'", (Poosathurai v. Kappanna Chettiar, 47 Ind App 1 = (AIR 1920 PC 65)). Upon a determination of the issue at the second stage, a third point emerges, which is of the onus probandi." If the transaction appears to be unconscionable, then the burden of proving that it was not induced by undue influence is to lie upon the person who was in a position to dominate the will of the other.

"Error is almost sure to arise if the order of these propositions be changed. The unconscionableness of the bargain is not the first thing to be considered. The first thing to be considered is the relations of the parties. Were they such as to put one in a position to dominate the will of the other".

26. In the present case the High Court did not consider the propositions in the order indicated above, and this led to a wrong decision.

27. In the case before us, after a careful examination of the evidence on record, the first appellate Court found the points to be considered at the first two stages,

against the plaintiff. It held that although the relationship between the donor and the donee was intimate, like that of father and son characterised by mutual cordiality and affection, the donee was not in a position to dominate the will of the donor. No less a witness than the donor himself, as R. W. 10, emphatically maintained in cross-examination: "Afsar worked sometimes as my labourer on wages and I don't understand what confidence has got to do with it". He intransigently refused to concede even the stark fact — which was otherwise found fully established — that he had brought up Afsar as a son from his very infancy and the latter used to look after the former's lands.

28. Thus, even the slender shred in the plaint from which the High Court tried to spell out a whole pattern of fiduciary relationship between the parties and a position of dominant influence for Afsar, was torn and destroyed by the plaintiff himself in the witness-stand.

29. In the context of the first-stage consideration, the District Judge found on the basis of the evidence on record, that although the plaintiff was an old man — and he had intentionally, far overstated his age — yet he was quite fit to look after his affairs. On this point, the District Judge accepted the version of the plaintiffs' own witness (PW 7) which was to the effect, that the plaintiff himself yokes the bullocks, and unaided by anybody else, ploughs his lands. In the face of such evidence, the District Judge was right in holding that Ebad plaintiff, though old, was physically fit to carry on his affairs. There was no evidence to show that the mental capacity of the donor was temporarily or permanently affected or enfeebled by old age or other cause, so that he could not understand the nature of deed or the effect and consequences of its execution. The mere fact that he was illiterate and old, was no proof of such mental incapacity. None of the circumstances mentioned in sub-section (2) of Section 16, had been proved from which an inference could be drawn that the donee was in a posi-

tion to dominate the will of the donor.

30. The failure of the plaintiff to prove this element of 'undue influence,' which was to be considered at the first stage, would itself lead to the collapse of the whole ground of "undue influence".

31. Assuming for the sake of argument that the "Hiba-bil-Ewaz" was induced by influence of Afsar, in whom the former reposed confidence such as a father does in his son, then also it had not been proved that such influence was 'undue'. As a rule "there is no presumption of undue influence in the case of a gift to a son.....although made during the donor's illness and a few days before his death." (Halsbury's Laws of England 3rd Edn. Vol. 17, p. 674).

32. The District Judge has held (as per his judgment dated 18-6-1965) that the plaintiff executed the Hiba-bil-Ewaz of his own free will after understanding the contents of the deed.

33. Indeed, the evidence of the deed-writer, DW 6, who knew Ebad for about 5 years previously, was to the effect that he had scribed the deed (Hiba-bil-Ewaz) according to Ebad's instructions in the presence of the attesting witnesses. DW 6 then read out the contents of the deed to Ebad, who accepted the same to be correct and then thumb-marked it. This account of the witness was not challenged in cross-examination.

34. D. W. 7 is an attesting witness of the deed. He was the Sarpanch of Birkiti Gram Panchayat. He had come to the Registration Office at Pakur on that day in connection with his own business. He was known to Ebad. According to the witness, it was Ebad, the donor,—and not the donee—who had requested the witness to attest the deed. The witness stated that it was Ebad who told him that he was gifting 12½ bighas of land to Afsar in token consideration of a Dhoti given by the latter. The witness corroborated the scribe, that the deed had been drawn up according to the instructions given by Ebad.

35. The first two courts have concurrently found that these witnesses are respectable, independent

and disinterested persons, and their evidence is entirely creditworthy. They also accepted the evidence of DW 3, DW 4 and DW 5 regarding the giving of Dhoti as consideration for the Hiba by the donee to the donor.

36. PW 4 was another deed-writer, who had scribed the cancellation deed (Ex. 1), admittedly executed by the plaintiff on 3-2-1959 to revoke the will. The plaintiff's case was that on 3-2-59, it was Afsar who took him to Pakur and got the cancellation deed executed, and took hold of that deed, and thereafter by a misrepresentation that the deed had been lost, got on 9-2-59, the Hiba-bil-Ewaz executed. The core of this story was gouged out by the plaintiff's own witness, PW 4, who had scribed the cancellation deed. PW 4 did not swear to the presence of Afsar defendant on 3-2-59 at Pakur when the cancellation deed Ex. 1 was written and executed. In view of this, the first appellate court, was right in holding, in concurrence with the trial court, that Afsar never accompanied Ebad to Pakur on 3-2-59, and he not having come into possession of the cancellation deed, no occasion for him arose to induce by misrepresentation or undue influence the execution of the Hiba-bil-Ewaz in question.

37. The first appellate Court further came to the conclusion that this gift was acted upon by the parties, the donee entered into possession of the gifted land, that the plaintiff's natural son Moktul who since long before the gift, had been living separately from him, started residing with the plaintiff, and, according to the plaintiff's own admission, Moktul, sometime prior to the suit (which has been filed about one year after the execution of the Hiba) convened a Panchayat in the Mosque, to consider why the land should be given to defendant 1, and since then the trouble arose which led to the institution of the suit.

38. In short, the District Judge who was the final court of fact, after a survey of the entire evidence on record, found that Afsar was not in a position to dominate the will of Ebad Sheikh and that the execution

of the Hiba-bil-Ewaz was not induced by undue influence.

39. We have discussed the evidence of the important witnesses in some detail to show that on the material on record, the finding of the first appellate court to the effect, that the plaintiff had failed to prove that defendant 1 was in a position to dominate his will, was not wrong or unreasonable. In any case, it did not suffer from any "illegality, omission, error or defect such as is referred to in sub-section (1) of Section 100". It was a finding of fact and the High Court in second appeal had no jurisdiction to interfere with the same, even if it appeared to be erroneous to the High Court, the error not being of a kind indicated in Section 100(1).

40. Since the plaintiff had failed to substantiate the first element essential to the proof of undue influence, the High Court was wrong in holding that the burden had shifted on the defendant to show that the Hiba-bil-Ewaz was not induced by undue influence.

41. For these reasons we allow the appeal, set aside the judgment of the High Court and dismiss the suit, but, in the circumstances of the case, leave the parties to bear their own costs throughout. The appellant shall be entitled to possession and to mesne profits from the date of dispossession to the date of restoration of possession.

Appeal allowed.

ADR 1976 SUPREME COURT 171

(From: Calcutta)*

Y. V. CHANDRACHUD AND A. C. GUPTA, JJ.

Zaffar Mohammad, Appellant v. The State of West Bengal, Respondent.

Criminal Appeal No. 162 of 1971, D/- 25-11-1975.

(A) Drugs and Magic Remedies (Objectionable Advertisements) Act

*(Cri. Revn. No. 145 of 1969, D/- 11-12-1970—Cal.)

LS/LS/E379/75/VBB

(1954), Sec. 2(b) (iii) — "Article" — Meaning — "Machines of science" and "electric treatment" advertised in newspaper to cure nervous diseases — Machines are "articles" within the meaning of S. 2(b) (iii) and therefore 'drug' for purpose of the Act. (Words and Phrases — Article).

Any article, other than food, which is intended to affect or influence in any way any organic function of the body of a human being is a 'drug' within the meaning of Section 2(b) (iii). The so-called "machines of science" or of "electric treatment" whose magically curative properties were advertised in a newspaper by the appellant to cure nervous diseases, and designed according to advertisement to confer on mankind the blessings of new life and new vigour, are "articles" intended to influence the organic function of the human body. A machine is a tangible thing which can both be seen and felt and as such it answers the description of an 'article' within the meaning of Section 2(b) (iii) of the Act. Criminal Revision No. 145 of 1969, D/- 11-12-1970 (Cal). Affirmed though for a different reason. (Paras 3, 4)

Mr. N. C. Talukdar, Sr. Advocate, (Mr. Prodyut Kumar Chakravarty, Advocate with him), for Appellant; M/s. G. S. Chatterjee and Sukumar Basu, Advocates, for Respondent.

Judgment of the Court was delivered by

CHANDRACHUD, J.:— The appellant, who is a Homoeopathic practitioner, runs a dispensary at Harrison Road, Calcutta. In the issue of a Hindi newspaper, "Sanmarg", dated September 14, 1967 he had the following advertisement published:

"New Life, New Vigour, New Spirit, New Wave. If you want a cure, see to-day well known world-famous experienced registered Physician. Special diseases such as oldness in youth, all sorts of defects in nerves, or weakness, laziness are treated with full responsibility, with new methods, new machines of science and electric treatment and are cured permanently."

In behalf of this advertisement, the appellant was prosecuted under Section 7 read with Section 3 of the

Drugs and Magic Remedies (Objectionable Advertisements) Act, 21 of 1954. The learned Presidency Magistrate, 8th Court, Calcutta convicted the appellant of the aforesaid charge and sentenced him to pay a fine of Rs. 100/-. The order of conviction and sentence having been confirmed by the High Court of Calcutta, the appellant has filed this appeal by special leave.

2. The Drugs and Magic Remedies (Objectionable Advertisements) Act provides by Section 3, in so far as relevant, that no person shall take part in the publication of any advertisement "referring to any drug in terms which suggest or are calculated to lead to the use of that drug" for the maintenance or improvement of the capacity of human beings for sexual pleasure or the diagnosis, cure or treatment of any disease or condition specified in the Schedule to the Act. Item 14 of the Schedule refers to "Disorders of the nervous system". Section 7 of the Act makes it penal to contravene any of the provisions of the Act.

3. The contention of the appellant was and before us is that the particular advertisement does not refer to any "drug" and therefore the provisions of the Act are not attracted. For appreciating this contention, it is necessary to refer to Section 2 (b) of the Act which runs thus:

"2. In this Act, unless the context otherwise requires,—

(a) x x x x

(b) "drug" includes—

(i) a medicine for the internal or external use of human beings or animals;

(ii) any substance intended to be used for or in the diagnosis, cure, mitigation, treatment or prevention of disease in human beings or animals;

(iii) any article, other than food, intended to affect or influence in any way the structure or any organic function of the body of human beings or animals;

(iv) any article intended for use as a component of any medicine, substance or article, referred to in sub-clauses (i), (ii) and (iii)."

The learned Magistrate as well as the High Court have taken the view that

the advertisement in question refers to a drug as defined by Section 2 (b) (ii) above as "machines of science" are a "substance" intended to be used in the diagnosis, cure or treatment of diseases in human beings. We do not propose to examine the correctness of this view because it seems to us clear that, in any event, the impugned part of the advertisement refers to a drug as defined by Section 2 (b) (iii). Any article, other than food, which is intended to affect or influence in any way any organic function of the body of a human being is a drug within the meaning of that provision. The so-called "machines of science" or of "electric treatment" whose magically curative properties were advertised by the appellant are articles intended to influence the organic function of the human body. Indeed, the very claim of the appellant is that by the use of these machines he could cure nervous diseases amongst other ailments. That a machine is an "article" requires no great learning either to expound or to understand. A machine is a tangible thing which can both be seen and felt and as such it answers the description of an 'article' within the meaning of Section 2 (b) (iii) of the Act. The 'Shorter Oxford English Dictionary' (Ed. 1964, Vol. I, p. 102) says that 'article' means, inter alia, "a piece of goods or property". Webster's 'New World Dictionary' defines an 'article' as a "commodity" and 'commodity' as "any useful thing" or "any article of commerce". (See Ed. 1962 pp. 83 and 295). Putting it simply, a "machine" is a "thing" and is therefore an "article". Law may not all be commonsense and logic may not be the life of law but commonsense is not taboo in law courts. A machine is after all intended to be and is conceived as a useful thing and is therefore an "article".

4. The Statement of Objects and Reasons to the Act says, that many an advertisement causes the ignorant and the unwary "to resort to quacks who indulge in such advertisements for treatments which cause great harm". The appellant may not be a quack, so will we assume, but his "machines of science" designed to confer on mankind the blessings of

"New Life, New Vigour, New Spirit, New Wave" are most likely to trap the ignorant and the unwary. The articles of commerce which he has banefully advertised must, as far as possible and without doing violence to the language of the Act, be brought within the mischief of the Act. It does no violence either to common-sense or to rules of interpretation to say that a machine is an "article".

5. In the result, we confirm the judgment of the High Court, though for a different reason, and dismiss this appeal.

Appeal dismissed.

AIR 1976 SUPREME COURT 173

(From: Madhya Pradesh)*

M. H. BEG AND P. K. GOSWAMI JJ.

Khemraj, Appellant v. State of Madhya Pradesh, Respondent.

Criminal Appeal No. 134 of 1975, D/- 19-11-1975.

(A) Criminal P. C. (1898), Section 417 (2) — Investigation by Delhi Special Police Establishment — Prosecution launched on complaint by Superintendent of Police — Acquittal — Appeal against acquittal by State Government — Competent — (Delhi Special Police Establishment Act (1946), Section 2).

Investigation under Delhi Special Police Establishment Act 1946, is a Central Investigation. Sec. 417 (2) does not bar jurisdiction of State Government also to direct presentation of appeals against acquittal when it is moved by the Establishment. The Establishment can move either the Central Government or the State Government or the Central Government after deciding to appeal against acquittal may request State Government to do the needful through the Public Prosecutor appointed under the Code. It is purely a matter of procedure. The word "also" in Section 417 (2) seems not to bar the jurisdiction of the State Government to direct the Public Prosecutor to present an ap-

*(Cri. Revn. No. 729 of 1970, D/- 11-12-1974—Madh. Pra.)

LS/LS/E291/75/VSS

peal even in cases investigated by the Establishment. Sub-sec. (1) is in general terms and takes in its purview all types of cases since the expression used therein is "in any case". Sub-sec. (2) advisedly uses the word "also" when power is given to appeal. No objection, therefore, can be taken about the competency of the appeal against acquittal in a case investigated by the Establishment, being filed by Public Prosecutor under the direction of the State Government without impleading it as a party.

(Paras 13, 14, 15, 16)

Mr. S. S. Khanduja, Advocate, for Appellant; Mr. Ram Panjwani Dy. Advocate General, M. P. (Mr. H. S. Parihar Advocate for Mr. I. N. Shroff, Advocate with him), for Respondent.

Judgment of the Court was delivered by

GOSWAMI, J.:— In this appeal by special leave the only point that arises for consideration is whether the appeal filed by the State of Madhya Pradesh in the High Court against the order of acquittal of the appellant under Section 465 read with Section 471 of the Indian Penal Code was competent under the law.

2. The accused (appellant) secured an appointment of Senior Operator Trainee in the Bhilai Steel Project by submitting two forged certificates. The first certificate was regarding his passing the Bachelor of Science examination with Mathematics, Physics and Chemistry, in 2nd Division from the University of Sagar. The second document was an attested copy of his Matriculation certificate in proof of age where his date of birth was shown as August 21, 1941.

3. The minimum educational qualification for the post was that the candidate must be a Science Graduate of a recognised University with any two of the three subjects Mathematics, Physics and Chemistry and the age limit was prescribed between 18 to 23 years as on 1-10-1963.

4. The accused who registered himself as a Science Graduate in the Employment Exchange, Bhilai, was sponsored for the above mentioned post on January 28, 1964. He was ultimately selected for the

post placing reliance on the aforesaid two certificates and he joined the appointment.

5. That, as it transpired, prosecution was launched against the accused on the complaint of the Superintendent of Police, Delhi Special Police Establishment, Jabalpur, and a case was registered against him under Sections 182, 471 and 420, I. P. C. In due course a charge-sheet was submitted against the accused and he was tried under Section 465/471 and Section 420, I. P. C. According to the prosecution the accused was born on August 21, 1936 and he had not passed his B.Sc. examination at all and after tendering the forged certificates procured the employment.

6. The accused was tried by the Special Magistrate, First Class, Jabalpur, for offences under Section 465 read with Section 471 and under 420, I. P. C. The trial court acquitted the accused under Section 465 read with Section 471, I. P. C. and convicted him under Sec. 420, I. P. C. and sentenced him to rigorous imprisonment for one year and to pay a fine of Rs. 500/-. The learned Additional Sessions Judge on appeal maintained the conviction but reduced the sentence to six months' rigorous imprisonment maintaining the fine.

7. The State of Madhya Pradesh preferred an appeal to the High Court against the acquittal of the accused under Section 465 read with Section 471, I. P. C. The accused also preferred a revision application against his conviction under Section 420, I. P. C. Both the matters were heard together and by a common judgment the High Court dismissed the revision application of the accused and allowed the State's appeal and convicted the accused under Section 465 read with Section 471 and sentenced him to rigorous imprisonment for one year. Hence this appeal by special leave.

8. It is submitted on behalf of the appellant that the appeal to the High Court was not competent in view of the provisions of Section 417 (2) of the Criminal Procedure Code.

9. It is admitted that this case is governed by the old Criminal Procedure Code, 1893. We may, there-

fore; at once read S. 417, Criminal Procedure Code, so far as it is relevant for our purpose:

"417 (1) Subject to the provisions of sub-section (5), the State Government may, in any case, direct the Public Prosecutor to present an appeal to the High Court from an original or appellate order of acquittal passed by any Court other than a High Court.

(2) If such an order of acquittal is passed in any case in which the offence has been investigated by the Delhi Special Police Establishment constituted under the Delhi Special Police Establishment Act, 1946, the Central Government may also direct the Public Prosecutor to present an appeal to the High Court from the order of acquittal."

x x x x x

10. Section 417, Criminal Procedure Code, prior to the Amendment Act XXVI of 1955 provided for presentation of appeals by the public prosecutor on the direction of the State Government. The 1955 Amendment introduced several changes and provided for appeals at the instance of the complainant as also on the direction of the Central Government in cases investigated by the Delhi Special Police Establishment. Further changes were introduced in the matter of appeals against acquittal under Section 378 of the Code of Criminal Procedure, 1973, with which we are not concerned in this appeal in view of the repeal provisions under Section 484 (1), Cr. P. C.

11. The Delhi Special Police Establishment (briefly the Establishment), a central police force, is constituted under the Delhi Special Police Establishment Act, 1946 (Act XXV of 1946) (briefly the Delhi Act). Under Section 2 of the Act, the Central Government may constitute a special police force, called the Delhi Special Police Establishment, for investigation of certain offences or class of offences as notified under Section 3 of the Delhi Act. Under Section 4 of the Act the superintendence of the Delhi Special Police Establishment vests in the Central Government and administration of the Special Police Establishment vests in an officer appointed by

the Central Government who exercises such powers exercisable by an Inspector General of Police as the Central Government may specify. Under Section 5 the powers and the jurisdiction of the Establishment can be extended by the Central Government to other areas in a State although not a Union Territory. Once there is an extension of the powers and jurisdiction of the members of the Establishment, the members thereof while discharging such functions are deemed to be members of the Police force of the area and are vested with the powers, functions and privileges and are subject to the liabilities of a police officer belonging to that force. The police officer also subject to the orders of the Central Government exercises the powers of the officer-in-charge of a police station in the extended area. Under Section 6 consent of the State Government is necessary to enable the officer of the Establishment to exercise powers and jurisdiction in any area in the State not being a Union Territory or railway area.

12. Investigation under the Delhi Act is, therefore, a central investigation and the officers concerned are under the superintendence of the officer appointed by the Central Government. The superintendence of the Establishment is also under the Central Government. The Central Government, therefore, is concerned with the investigation of the cases by the Establishment and its ultimate result. It is in that background that in 1955 Section 417 was amended by adding sub-section (2) to the section to provide for appeal against acquittal in cases investigated by the Establishment also on the direction of the Central Government. In view of the provisions of the Delhi Act it was necessary to introduce sub-section (2) in Section 417 so that this Central agency which is solely and intimately connected with the investigation of the specified offences may also approach the Central Government for direction to appeal in appropriate cases.

13. This, however, does not bar the jurisdiction of the State Government also to direct presentation of appeals when it is moved by

the Establishment. The Establishment can move either the Central Government or the State Government. It will be purely a matter of procedure whether it moves the State Government directly or through the Central Government or in a given case moves the Central Government alone. It will again be a matter of procedure when the Central Government decides to appeal it requests the State Government to do the needful through the public prosecutor appointed under the Code.

14. The word 'also' in sub-section (2) of Section 417 is very significant. This word seems not to bar the jurisdiction of the State Government to direct the public prosecutor to present an appeal even in cases investigated by the Establishment. Sub-section (1) of Section 417 is in general terms and would take in its purview all types of cases since the expression used in that sub-section is "in any case." We do not see any limitation on the power of the State Government to direct institution of appeal with regard to any particular type of cases. Sub-section (1) of Section 417 being in general terms is as such of wider amplitude. Sub-section (2) advisedly uses the word 'also' when power is given to the Central Government in addition to direct the public prosecutor to appeal.

15. In the present case we find from the documents produced before us that the move was made by the Superintendent, Delhi Special Police Establishment, by requesting the Secretary, Law Department of the Government of Madhya Pradesh and the decision was taken by the State Government as it appears from the letter of the Under Secretary dated January 28, 1969, to the Advocate General, Madh. Pradesh. The appeal was thereafter filed in the name of the State of Madhya Pradesh. No objection, therefore, can be taken about the competency of the appeal being filed by the State of Madhya Pradesh in this case.

16. As a matter of procedure it will be even permissible for the appeal against acquittal to be filed by the public prosecutor under the direction of the State Government or the

Central Government without impleading either as a party.

17. The objection of the appellant is, therefore, devoid of substance. We may mention that no such objection was even taken in the High Court. In the result the appeal fails and is dismissed.

Appeal dismissed.

AIR 1976 SUPREME COURT 176

(From: Rajasthan)*

M. H. BEG AND P. K. GOSWAMI
JJ.

Mangu and another, Appellants
v. State of Rajasthan, Respondent.

Criminal Appeal No. 135 of 1971,
D/- 6-11-1975.

(A) Supreme Court Rules (1966),
Order 21, Rule 2 and Order 47, Rr. 1,
6— Application under Art. 134 (1) (c)
Constitution before High Court with-
drawn — Ex parte special leave ob-
tained from Supreme Court — Non-
compliance with O. 21, R. 2 — Com-
pliance held could not be dispensed
with by Supreme Court under Order
47, R. 6.

The appellants moved an applica-
tion before the High Court for a cer-
tificate under Art. 134 (1) (c) of the
Constitution. Later on the leave ap-
plication was withdrawn and the
High Court rejected the application
as withdrawn. The appellants later
obtained ex parte special leave. It
was mentioned in the special leave
petition that their application for
leave in the High Court was rejected
"on merits, but not as being out of
time".

Held, that the special leave grant-
ed should be revoked as the appellants
failed to comply with the require-
ments of Order 21, Rule 2 inasmuch
as there was no order of the High
Court refusing to grant the certifi-
cate. (Para 2)

O. 21, R. 2 is mandatory. The
fact that its compliance may be ex-
cused by the Court in appropriate

*(Criminal Appeal No. 159 of 1970,
D/- 25-3-1971—Raj.)

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cases does not affect the mandatory
character of the Rule. (Para 5)

Order 47, Rule 2 requires an ap-
plication to be made in the manner
provided therein to be excused from
compliance with the requirement of
any of the Rules. There was no ap-
plication showing sufficient cause for
exemption from compliance with
Order 21, Rule 2. Thus it was not a
fit case for exercising inherent power
under Order 47, Rule 2 particularly
so when the appellants had made a
definitely wrong statement in the spe-
cial leave application with regard to
their earlier application for leave in
the High Court. (Para 7)

Mr. B. R. L. Iyengar, Sr. Advoca-
te, with Mr. E. C. Agarwala, Advoca-
te with him, for Appellants; S. M.
Jain Advocate, for Respondent.

Judgment of the Court was de-
livered by

GOSWAMI, J.:— The two appel-
lants along with four others were
convicted by the Sessions Judge,
Bhilwara, under Sections 147, 452/149
and 325/149, I. P. C. and sentenced
to imprisonment and fine. The High
Court on appeal acquitted four of
them and maintained the conviction
and sentence of the two appellants
who were involved with several
others. The appellants moved an ap-
plication for a certificate praying for
leave to appeal to this Court under
Article 134(1) (c) of the Constitution.
Later on the leave application was
withdrawn and on May 12, 1971, the
High Court rejected the application
as withdrawn. The appellants later
obtained ex parte special leave on
May 25, 1971. It was mentioned in
para 5 of the special leave petition
that their application for leave in the
High Court was rejected "on merits,
but not as being out of time".

2. A preliminary objection has
been raised on behalf of the respon-
dent that the special leave granted in
this case should be revoked as the ap-
pellants failed to comply with the re-
quirements of Rule 2 of Order 21 of
the Supreme Court Rules inasmuch
as there was no order of the High
Court refusing to grant the certifi-
cate.

3. Under Order 21, Rule 2
"where an appeal lies to the Court on

a certificate issued by the High Court no application to the Court for special leave to appeal shall be entertained unless the High Court concerned has first been moved and it has refused to grant the certificate." Since the application for leave was withdrawn by the appellants it could not be said that the High Court at all considered the matter and then refused to grant the certificate. Withdrawal of the application by the appellants would go to show that they had abandoned the idea of moving the Supreme Court against the judgment. The requirement of Rule 2 has not, therefore, been complied with.

4. It is, however, submitted by Mr. Iyengar that Order 47 of the Supreme Court Rules confers power on this Court to dispense with any of the requirements of these Rules and to pass appropriate orders in exercise of inherent powers. Rule 1 of Order 47 provides that—

"the Court may, for sufficient cause shown, excuse the parties from compliance with any of the requirements of these rules, and may give such directions in matters of practice and procedure as it may consider just and expedient."
Rule 6 says that—

"nothing in these rules shall be deemed to limit or otherwise affect the inherent powers of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court." Rule 2 of Order 47, however, requires an application to be made in the manner provided therein.

5. Rule 2 of Order 21 is, by itself, mandatory. The fact that its compliance may be excused by the Court in appropriate cases does not affect the mandatory character of the rule.

6. There is no application by the appellants showing sufficient cause for exempting them from compliance with the requirement of the rule. We are informed that an opportunity had been earlier given by the Court for making an appropriate application even at this stage. Even this opportunity was not availed of by the appellants.

7. We are, therefore, of the opinion that this is a case which
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does not merit invoking of our inherent powers for dispensing with the requirements of the Rules particularly so when the appellants had made a definitely wrong statement in the special leave application with regard to their earlier application for leave in the High Court.

8. Mr. Iyengar then submits that a perusal of the judgment of the High Court would clearly show that this is a fit case where we should intervene in the interest of justice by suo motu excusing the technical lapse of any procedure. Reluctantly enough we allowed counsel to take us through the judgment of the High Court and we find that it is an appeal only for reappreciating the evidence and does not disclose any manifest grave error of law or miscarriage of justice.

9. This is, therefore, a fit case in which the preliminary objection should prevail. We order that the special leave to appeal which was granted to the appellants be revoked. The appellants shall now surrender to their bail bonds and serve the remaining period of their sentence.

Special leave to
appeal revoked.

AIR 1976 SUPREME COURT 177

(From: 1968 Pat LJR 91)

V. R. KRISHNA IYER AND A. C. GUPTA JJ.

Smt. Sushila Devi, Appellant v. Ramanandan Prasad and others, Respondents.

Civil Appeal No. 857 of 1968, D/- 26-11-1975.

(A) Kosi Area (Restoration of Lands to Raiyats) Act (30 of 1951), Sections 3, 5, 7 — Order for payment of instalment to be made within certain period — Amount if not paid within the period raiyat to lose benefit of order of restoration — Order held final. 1968 Pat LJR 91. Reversed

The original order granting three annual instalments to the raiyat stated clearly that if he failed to pay the first instalment within the period

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mentioned therein, he would lose the benefit of the order of restoration.

Held that though this was a conditional order, it was not an interlocutory order. The provision that on failure to pay the first instalment within the specified period the benefit of the order would be lost gave it a finality; and, therefore, the Circle Officer or any other officer discharging the functions of the Collector under the Act had no power to grant extension of time on the expiry of the period fixed for payment of the first instalment. 1968 Pat LJR 91. Reversed. (Para 5)

(B) Kosi Area (Restoration of Lands to Raiyats) Act (30 of 1951), Sec. 7 (1) (a) — Payment of instalments to be within 5 Years — Remedies pursued by raiyat following the order for payment of instalments being steps taken by him at his own risk he could not as a matter of right ask for exclusion of time in these proceedings in calculating the period of 5 years. 1968 Pat LJR 91, Reversed. (Para 6)

(C) Limitation Act (1963), Section 5 — Court — Meaning of — Collector to whom application under Sec. 3 of Kosi Area (Restoration of Lands to Raiyats) Act (30 of 1951), is made is not a Court though Sec. 15 of the Act vested him with certain specified powers under the C. P. C. 1968 Pat LJR 91, Reversed. (Para 6)

(D) Kosi Area (Restoration of Lands to Raiyats) Act (30 of 1951) Ss. 3, 13 — Whether successive applications under Section 3 are maintainable — 1968 Pat LJR 91, Reversed.

The Act does not permit successive applications to be made under Section 3 giving rise to a fresh proceeding every time in respect of the same subject-matter. If successive applications under Section 3 are permitted to be made, the finality attaching to the order of the Collector as provided in Section 13 would become meaningless, apart from the uncertainty and confusion that would result. 1968 Pat LJR 91, Reversed. AIR 1961 SC 1457 and AIR 1957 SC 38. Rel. on. (Para 6)

Cases Referred: Chronological Paras
AIR 1961 SC 1457 = (1962) 1 SCR 574 6

AIR 1957 SC 38 = 1956 SCR 781 6

F. S. Nariman, Sr. Advocate, (Mr. D.-Goburdhun, Advocate with him), for Appellant; Mr. P. K. Chatterjee Sr. Advocate, (Mr. D. P. Mukherjee, Advocate, with him), for Respondent 1. Respondents Nos. 2-4, Ex parte.

Judgment of the Court was delivered by

GUPTA, J.:— This appeal by certificate under Article 133 (1) (a) of the Constitution granted by the Patna High Court arises out of a proceeding under Section 3 of the Kosi Area (Restoration of Lands to Raiyats) Act, 1951 (hereinafter referred to as the Act). By the order challenged in this appeal the High Court allowed a writ petition filed by the first respondent setting aside an appellate order under Section 16 and restoring the original order passed on an application under Section 3 of the Act. To appreciate the nature of the dispute between the parties, it would be more convenient to refer to the relevant provisions of the Act before we turn to the facts of the case.

2. The Act was passed, as its long title and preamble show, to provide for

"the restoration to former raiyats of certain lands which were sold for arrears of rent or from which they were ejected for arrears of rent or which were treated as abandoned, between the 1st day of January, 1939, and the 31st day of December, 1950, in the absence of the raiyats due to floods in the Kosi River."

Section 3 of the Act is in these terms:

"Steps to be taken for restoration of land to raiyats.— If the holding of a raiyat or portion thereof was sold in execution of a decree for arrears of rent or if a raiyat was ejected from a holding or portion thereof in execution of decree passed under subsection (2) of Section 66 of the Bihar Tenancy Act, 1835, or if the holding of a raiyat or portion thereof was treated as abandoned under Section 87 of the said Act at any time between the 1st day of January, 1939, and the 31st day of December, 1950, and is in the possession of the landlord or any other person, the Collector may, if he thinks fit, of his own motion or otherwise, take steps for the restora-

tion of such holding or portion thereof to the said raiyat."

"Collector" is defined in Section 2(a) as the Collector of a district or any other officer appointed by the State Government to discharge any of the functions of a Collector under this Act. Section 4 requires the Collector to give notice of the proceeding under Section 3 to the raiyat, the landlord, and all other persons interested in the holding or portion thereof forming the subject-matter of the proceeding so as to enable them to file their objections if any. Clauses (a) and (b) of Section 5(1) state the grounds on which objection may be raised to the restoration asked for. Section 5(1) (a) which is relevant for the present purpose reads as follows:

"5. Objection to the restoration of holding and manner of disposal.— (1) On the date fixed in the notice, the landlord or any other person may appear and object to the restoration of the holding or portion thereof on any one or more of the following grounds, namely:—

(a) that he has constructed any building or other structure of a permanent nature or planted any garden on the holding or any portion thereof before the date of the commencement of this Act and that such building, structure or garden is of such a value that the restoration of the land covered by such building, structure or garden will be unfair; and"

Sec. 5(2) provides that if after inquiring into the objections the Collector finds that the building or structure constructed or the garden laid on the land of which restoration is sought is of such value that the restoration will be unfair, the Collector shall drop the proceedings entirely where the building, structure or garden covers the entire area in question, and where only a part of the land is so covered, only partly, in so far as they relate to the site of such building, structure or garden. Section 7 lays down the procedure to be followed by the Collector if the proceedings are not dropped entirely. The Collector is to determine the land liable to be restored to the raiyat and the amount payable by him for the restoration specifying the person to whom the amount is payable;

the amount to be determined is the cost of improvement, if any, effected on the land which the Collector may deem fair and equitable. The Collector shall then ascertain whether the raiyat desires to deposit the amount in one lump sum or in instalments if the raiyat desires to pay the amount in instalments, the Collector will determine the number and amount of such instalments having regard to the means and circumstances of the raiyat. But the instalments shall be payable within a period not exceeding five years. As soon as possible after the entire amount or the amount of the first instalment, as the case may be, is deposited with the Collector, the Collector shall direct the raiyat to be put in possession of the land. Sec. 13 states that subject to appeal under Section 16, orders passed by the Collector under the Act shall be final and bars the jurisdiction of civil courts to vary or set aside any order passed under this Act. Section 16 provides an appeal from every order passed under this Act. (a) when the order was made by the Collector of a District, to the Commissioner, and (b) when the order was made by any officer other than the Collector of the District, to the Collector of the District or to any officer specially empowered by the State Government by a notification to hear such appeals. The section also provides that the decision of the Commissioner or the Collector of the District or any officer so empowered shall be final.

3. The facts of this case are as follows.

The land in dispute was sold on July 11, 1945 in execution of a decree for arrears of rent. The auction-purchaser, one Tilakdhari Lal, obtained delivery of possession and remained in possession for a little over two years before selling the land to the appellant Sushila Devi on December 1, 1948. On October 27, 1957 the first respondent applied for restoration of the land under Section 3 of the Act before the Circle Officer, Birpur, who was appointed by the Government to discharge the functions of a Collector under the Act. According to the appellant she spent a large sum of money on reclamation of the land and build-

ing structures on a part of it. On February 17, 1958 the Circle Officer made an order for restoration in respect of the holding excluding an area of 9.25 acres on which the appellant had built structures. In terms of this order the first respondent was to pay compensation of Rs. 20,000/- to the appellant in three annual instalments of Rs. 10,000/-, Rs. 5,000/-, and Rupees 5,000/-, the first instalment was to have been paid between March 1, 1958 and June 1, 1958. The order added that if the first instalment was not paid within the specified period, the applicant would "lose the benefit of the order of restoration." The first respondent did not pay the instalment within the time allowed, and on September 11, 1958 preferred an appeal to the Collector against the order of the Circle Officer. The appeal was dismissed for default. The first respondent thereafter filed a revision petition before the Commissioner though the Act did not provide for a revision against an appellate order passed by the Collector of the District. The Commissioner however set aside the order of the Collector and remanded the appeal for rehearing. The appellant questioned the correctness of the Commissioner's order by filing a writ petition before the Patna High Court which was allowed by the High Court on June 30, 1964 and the order of the Commissioner was quashed. The High Court observed in its order that it did not think that the decision of the Circle Officer was arbitrary or defective in law. The first respondent obtained a certificate under Article 133 (1) of the Constitution to appeal to this Court against that order of the High Court, but the appeal was dismissed for non-prosecution on July 9, 1965.

4. More than a year had passed after the dismissal of that appeal to this Court when the second chapter of the story began. On October 15, 1965 the first respondent made an application to the Block Development Officer, Birpur, who was discharging the functions of a Collector under the Act for an order extending the time for payment fixed by the order dated February 17, 1958, and for permission to deposit the entire amount as determined by that order in one lump

sum. Seeking to explain the long delay in making the application, the first respondent stated that all this time he had been diligently prosecuting other legal remedies. On this application the Block Development Officer, who was also the Anchal Adhikari, made an order directing notices to be issued to the parties concerned asking them to be present before him on October 22, 1965. As the notice had not been served on the appellant, the Block Development Officer shifted the date to November 17, 1965 for hearing of the matter. On November 17, 1965 also the notice had not been served on the appellant, but the Block Development Officer having heard the first respondent made the following order:

"The applicant is ready to pay the total amount in one instalment. Under this provision given in Kosi Land Restoration Act and Rules, the applicant is directed to deposit the entire amount within a week from this date of his order failing which the claim of applicant be filed. Further action for restoration of land would be taken after a week. The opposite party be informed to receive the amount and appear on 25-11-65. Put up the record on 25-11-65."

Having come to know of the ex parte order made on November 17, 1965 the appellant preferred an appeal from that order to the Additional Collector, Saharsa, who was the appellate authority. The Additional Collector admitted the appeal on November 20, 1965 and stayed further proceedings including the restoration of possession and directed the Block Development Officer to remit the record of the case to him. The copy of the Additional Collector's order appears to have been received in the office of the Block Development Officer on November 22, 1965. But on November 25, 1965 the Block Development Officer passed the following order:

"The area Karamchhari is directed to open zamabandi in the name of applicant and to issue rent receipt. The dealing Asst. is directed to issue delivery of possession in form IV under Clause 'F' of sub-section (1) of Section 7 of Kosi Area Restoration of Lands to Raiyats Act, 1951." Later, on the same day, he recorded

another order saying that the stay order passed by the Additional Collector had been put up before him that day and directing the record to be sent to the Additional Collector. He also added that the stay order had been obtained on the basis of a wrong statement. Assuming that the Block Development Officer came to know of the Additional Collector's order only on November 25 though it was received in his office on November 22, and that too after he had made the order earlier in the day directing delivery of the possession to the first respondent, it is surprising that he took no steps to give effect to the stay order made by the appellate authority which was binding on him. One would have expected that having received the order he would hasten to recall or stay the operation of his own order made earlier in the day, but he did not do so. He merely directed the record to be sent to the Additional Collector with the remark that the stay order must have been obtained upon an untrue representation, a remark that he had no authority to make. Whatever the reason, the Block Development Officer appears to have deliberately ignored the order passed by a superior tribunal which was binding on him, and his conduct deserves severe condemnation. However, on October 3, 1966 the Additional Collector allowed the appeal and set aside the order dated November 11, 1965 and all subsequent orders passed by the Block Development Officer on the view that a second application on the same grounds was not maintainable under Section 3 of the Act, and the first respondent having failed to comply with the terms of the original order dated February 17, 1958, his right to restoration was lost. The first respondent then filed a writ petition before the Patna High Court challenging the order of the Additional Collector and the High Court allowed the petition and restored the order of the Block Development Officer dated November 25, 1965.

5. The High Court allowed the writ petition on three grounds. It was held that the order passed by the Circle Officer on February 17, 1958 was not a final order rejecting or allowing the petition for restoration

and, therefore, the Circle Officer or any other officer discharging the functions of the Collector under the Act had power to grant extension of time notwithstanding the expiry of the period fixed for payment of the first instalment. Secondly, referring to Section 7(1) (e) which provides that the instalments granted must be payable within a period not exceeding five years, the High Court observed that "court's action should not prejudice any party" and held that excluding the time taken for the various remedies pursued by the first respondent, the application made on October 17, 1965 was within the period of five years from the date of the original order. Thirdly, the High Court held that "in any case after coming into force of the new Limitation Act, 1963, the petitioner (first respondent) had a right to ask the court concerned to condone the delay in depositing the same under Section 5 of that Act"; though the application dated October 17, 1965 did not invoke or refer to Section 5 of the Limitation Act, 1963, the High Court held that the order made on that application "should be construed in substance as an order condoning the delay".

6. The original order dated February 17, 1958 granting three annual instalments to the first respondent stated clearly that if he failed to pay the first instalment within the period mentioned therein, he would "lose the benefit of the order of restoration." This no doubt was a conditional order, but a conditional order is not necessarily an interlocutory order as the High Court appears to have thought. The order made it clear that on failure to pay the first instalment within the specified period the benefit of the order would be lost which gave it a finality; no other order was necessary for disposing of the application under Section 3 perhaps possibly making a note as to whether or not the instalment had been paid in time. As regards the second ground, it is difficult to appreciate how the principle that the "court's action should not prejudice any party" can have any relevance in this context. The remedies pursued by the first respondent following the order made on

February 17, 1958 were steps taken by him at his own risk and he cannot as a matter of right ask for excluding the time spent on these proceedings. The third ground on which the decision of the High Court rests relates to the applicability of Section 5 of the Limitation Act, 1963. We do not see how Section 5 could be invoked in connection with the application made on October 17, 1965 by the first respondent. Under Section 5 of the Limitation Act an appeal or application "may be admitted after the prescribed period if the appellant or applicant satisfies the Court that he had sufficient cause for not preferring the appeal or making the application within such period." The Collector to whom the application was made was not a court, though Section 15 of the Act vested him with certain specified powers under the Code of Civil Procedure; also, the kind of application that was made had no time limit prescribed for it, and no question of extending the time could therefore arise. We therefore think that the High Court misdirected itself in referring to Section 5 of the Limitation Act. Further, the application does not appear to have been made for extension of time to pay the instalments. It was an application for permission to deposit the entire amount of Rupees 20,000/- in a lump. This must be taken as a fresh application under Section 3 of the Act. The question that arises therefore is, whether the Act permits successive applications to be made under Section 3 giving rise to a fresh proceeding every time in respect of the same subject-matter. Section 13 provides that every order passed by the Collector under the Act, subject to an order passed in appeal under Section 16 would be final. If successive applications under Section 3 are permitted to be made, the finality attaching to the order of the Collector as provided in Section 13 would become meaningless, apart from the uncertainty and confusion that would result. That there should be finality in litigation and a person should not be vexed twice for the same cause are well-established principles of general application. If any authority is needed, we may refer to two decisions of

this Court where this matter has been elaborately considered: *Daryao v. State of U. P.*, (1962) 1 SCR 574 = (AIR 1962 SC 1457) and *Burn and Co. v. Their Employees*, 1956 SCR 781 = (AIR 1957 SC 38). The Additional Collector was therefore right in dismissing the application made on October 17, 1965 and the reasons given by the High Court for setting aside that order, in our opinion, are not sound. The appeal is accordingly allowed with costs.

Appeal allowed.

AIR 1976 SUPREME COURT 182

(From Kerala: 1971 Tax LR 512)

H. R. KHANNA, P. N. BHAGWATI
AND S. MURTAZA
FAZL ALI, JJ.

A. B. Abdul Kadir and others,
Appellants v. State of Kerala, Respondent.

Civil Appeals Nos. 1689, 1692 and
1694-1705 of 1972. D/- 12-11-1975.

(A) Kerala Luxury Tax on Tobacco (Validation) Act (9 of 1964), Section 3 — Act is within legislative competence of State legislature — Levy of tax — Not in the nature of excise duty — (Constitution of India, Sch. 7, List 1 Entry 84; Sch. 7 List II Entry 62).

Excise duty, it is now well settled, is a tax on articles produced or manufactured in the taxing country. Generally speaking, the tax is on the manufacturer or the producer, yet laws are to be found which impose a duty of excise at stages subsequent to the manufacture or production. AIR 1962 SC 922, Rel. on. (Para 9)

The fact that the levy of excise duty is in the form of licence fee would not detract from the fact that the levy relates to excise duty. It is, however, essential that such levy should be linked with production or manufacture of the excisable article. The recovery of licence fee in such an event would be one of the modes of levy of the excise duty. Where, however, the levy imposed or tax has no nexus with the manufacture or production of an article, the impost or

KS/LS/E214/75/CWM

tax cannot be regarded to be one in the nature of excise duty. (Para 10)

The charging Section 3 creates a liability for payment of luxury tax on the stocking and vending of tobacco. There is no provision which is concerned with production or manufacture of tobacco or which links the tax with the manufacture or production of tobacco. The same is the position of the rules issued on August 3, 1950 and January 25, 1951. (Para 10)

It would, therefore, follow that the levy of tax contemplated by the provisions of Sec. 3 has nothing to do with the manufacture or production of tobacco and, as such, cannot be deemed to be in the nature of excise duty. Argument that the provisions of the Act fall under Entry 84 of List I of the Seventh Schedule to the Constitution must, therefore, be held to be bereft of force. 1971 Tax LR 512 (Kerala), Affirmed. (Para 11)

(B) Constitution of India, Sch. 7 List II Entry 62 — Taxes on luxuries — Luxury — Meaning — Tobacco is an article of luxury.

The word "luxury" has not been used in the sense of something pertaining to the exclusive preserve of the rich. The fact that the use of an article is popular among the poor sections of the population would not detract from its description or nature of being an article of luxury. The connotation of the word "luxury" is something which conduces enjoyment over and above the necessities of life. It denotes something which is superfluous and not indispensable and to which we take with a view to enjoy, amuse or entertain ourselves. An expenditure on something which is in excess of what is required for economic and personal well-being would be expenditure on luxury although the expenditure may be of a nature which is incurred by a large number of people, including those not economically well off. (Para 12)

The use of tobacco has been found to have deleterious effect upon health and a tax on tobacco has been recognized as a tax in the nature of a luxury tax. (Para 13)

A number of factors may have to be taken into account in adjudging a commodity as an article of luxury.

Any difficulty which may arise in borderline case would not be faced in case of an article like tobacco, which has been recognised to be an article of luxury and is harmful to health. Case Law Discussed. (Para 14)

(C) Kerala Luxury Tax on Tobacco (Validation) Act (9 of 1964), Section 3 — Provisions are protected by Art. 304 (b) of Constitution. (Constitution of India, Arts. 301, 302, 304, 255). 1971 Tax LR 512 (Ker.), Affirmed.

The levy directly impedes the free flow of trade and as such is violative of Article 301 of the Constitution. The levy of tax, however, is protected by Article 304 (b) of the Constitution.

(Paras 15 and 26)

It is no doubt true that the assent of the President was given subsequent to the passing of the Bill by the Legislature but that fact would not affect the validity of the impugned Act in view of the provisions of Article 255 of the Constitution.

(Para 16)

Perusal of Article 302 and Article 304 shows that while Parliament can impose restrictions on the freedom of trade, commerce or intercourse between one State and another or within any part of the territory of India as may be required in the public interest, so far as the State Legislatures are concerned, restrictions must satisfy two requirements, firstly, they must be in the public interest and, secondly the restrictions should be reasonable. (Para 17)

The onus of showing that the restrictions on the freedom of trade, commerce or intercourse in the public interest are reasonable, is upon the State. If the court on consideration of the totality of facts finds that the restrictions are reasonable, the court would uphold the same in spite of lack of details in the affidavit filed on behalf of the State.

(Para 19)

Regulation of the sale and stocking of an article like tobacco which has a health hazard and is considered to be an article of luxury by imposing a licence fee for the same is a permissible restriction in public interest within Article 304 (b) of the Constitution. The levy of luxury tax is bound to result in raising the price of

tobacco in the area of erstwhile States of Travancore and Cochin. One of the likely effects of the enhancement of the price of a commodity entailing health hazards is to lower its consumption. (Para 19)

The fact that there is no commercial production of tobacco in the concerned area would show that there is no discrimination between tobacco brought from outside that area and the locally grown tobacco because in fact there is no tobacco of the latter category, except that grown on experimental basis. (Para 20)

The fact that the operation of the Act is confined to a particular area and does not extend to the entire State is due to historical reasons. The object of the Act was to validate the recoveries already made. It is also true that the levy of tax relates only to the period from August 17, 1950 to December 31, 1957, but that too was due to the historical reason that the licence fee had been realised only during that period and the object of the impugned Act was to validate the recovery already made. AIR 1970 SC 1864, Rel. on. (Paras 21, 22)

In judging the reasonableness of the retrospective operation of law for the purpose of Article 304 (b), the test of length of time covered by the retrospective operation could not by itself be treated as decisive. AIR 1963 SC 1667 and AIR 1964 SC 1581, Rel. on. (Para 25)

(D) Kerala Luxury Tax on Tobacco (Validation) Act (9 of 1964), Pre. — Validity of Act — Not a colourable piece of legislation — (Constitution of India, Art. 246).

Where a topic is not included within the relevant List dealing with the legislative competence of the State Legislature, Parliament, by making a law, cannot attempt to confer such legislative competence on the State Legislatures. The above principle would, however, have no application where, what is sought to be done is to validate the recovery of licence fee for stocking and vending of tobacco. The impugned provisions under which that levy is sought to be made with a retrospective effect have nothing to do, with production and manufacture of tobacco. The levy is sought to be made as luxury tax

which is within the competence of the State Legislature and not as excise duty which is beyond the legislative competence of the State Legislature. If the levy in question can be justified under a provision which is within the legislative competence of the State Legislature, the levy shall be held to be validly imposed and cannot be considered to be impermissible. AIR 1966 SC 416, Distinguished. (Para 23)

In enacting the impugned provisions, the State Legislature has exercised a power of levying luxury tax in the shape of licence fee on the vend and stocking of tobacco. The enactment of a law for levying luxury tax is unquestionably within the legislative competence of the State Legislature in view of Entry 62 in List II of the Seventh Schedule to the Constitution. As such, it cannot be said that the impugned Act is a colourable piece of legislation. (Para 24)

(E) Kerala Luxury Tax on Tobacco (Validation) Act (9 of 1964), Section 6 — Validity — Not an encroachment by Legislature upon judicial field.

If a provision regarding the levy of luxury tax is within the competence of the State Legislature, the said Legislature would be well within its competence to enact a law for recovery of an amount which, though already refunded to a party, partakes of the nature of luxury tax in the light of that law. If an amount can answer to the description of luxury tax, there would be no legal impediment to recovering the same as luxury tax, even though initially it was recovered or sought to be recovered as something different from luxury tax. (Para 27)

Cases Referred: Chronological Paras

AIR 1970 SC 1864 = (1970) 2 SCR	52	21
AIR 1970 SC 1912 = (1970) 1 SCR	700	6
AIR 1969 SC 147 = (1968) 3 SCR	829	17
AIR 1966 SC 416 = (1966) 1 SCR	523	23
AIR 1966 SC 1686 = (1966) 1 SCR	865	5
AIR 1964 SC 925 = (1964) 5 SCR	975	18

AIR 1964 SC 1581 = (1964) 7 SCR 185 25
 AIR 1963 SC 1667 = (1964) 1 SCR 897 25
 AIR 1962 SC 922 = (1962) Supp 2 SCR 741 2
 AIR 1961 SC 652 = (1961) 3 SCR 242 24
 AIR 1939 FC 1 = 1939 FCR 18 12
 (1937) 300 US 506 = 81 Law ed 772 17
 (1819) 4 Law ed 579 = 4 Wheat 316 17

Mr. T. S. Krishnamurthy Iyer, Sr. Advocate, (M/s. C. K. Viswanatha Iyer and T. A. Ramachandran, Advocates with him), in Civil Appeals Nos. 1689, 1692 and 1694-1705 of 1972 and M/s. C. K. Viswanatha Iyer and T. A. Ramachandran, Advocates, In Civil Appeals Nos. 1690 and 1692 of 1972, for Appellants; Mr. D. V. Patel, Sr. Advocate, (Mr. K. R. Nambiar, Advocate with him), for Respondent (in all the Appeals).

The following Judgment of the Court was delivered by

KHANNA, J.— Whether the provisions of the Luxury Tax on Tobacco (Validation) Act, (Act 9 of 1964) (hereinafter referred to as the Act) enacted by the State Legislature of Kerala are void on the grounds that (1) the State Legislature lacked the legislative competence to enact that Act, and (2) the provisions of the Act contravened Article 301 of the Constitution and were not protected by Article 304 is the main question which arises for determination in these 16 Civil Appeals Nos. 1689, 1690 and 1692 to 1705 filed on certificate against the judgment of the Kerala High Court. A Division Bench of the High Court has upheld the validity of the Act.

2. We may set out the chequered history giving rise to Civil appeals 1689 and 1692. Learned counsel for the parties are agreed that it is not necessary to set out the facts of the other cases and that the decision in the above two appeals would also govern those other cases. The appellants were dealers in tobacco and tobacco preparations in Martancherry in erstwhile Cochin State. In 1909 Cochin Tobacco Act (Act 7 of 1084 M. E.) was enacted by the Maharaja of Cochin. Section 4 of that Act

prohibited the transport, import or export, sale and cultivation of tobacco, except as permitted by the Act and the rules framed thereunder. In pursuance of the power given by that Act the Diwan of Cochin made rules relating to matters specified in the Act. Under the rules it became necessary to obtain a licence for cultivation of tobacco plant. Drying, curing, manufacturing and the storing of tobacco cultivated in the State was to be done under the supervision of an Excise Officer in licenced manufacturing yards and store houses. The system which was in force for the collection of tobacco revenue upto August 1950 was to auction what were called A class and B class shops. In addition, there were C class shops, the licence for which was granted either on the recommendation of or in consultation with B class licensees. A somewhat similar law was in operation in the erstwhile Travancore State. On April 1, 1950 after the Constitution had come in force and Travancore-Cochin had become a Part B State, Finance Act (No. 25 of 1950) extended the Central Excises and Salt Act (No. 1 of 1944) to Part B State of Travancore-Cochin by Section 11 thereof. Section 13 (2) of the Finance Act provided that "if immediately before the 1st day of April, 1950, there is in force in any State other than Jammu and Kashmir a law corresponding to, but other than, an Act referred to in sub-sections (1) or (2) of Section 11, such law is hereby repealed with effect from the said date". In consequence of this provision in Finance Act, 1950, the rules which were in force on April 1, 1950 were changed in the Cochin area by notification dated August 3, 1950 and the system of auction sales of A class and B class shops was done away with and instead graded licence fees were introduced for various classes of licensees, including C class licensees. Similar change was made for the Travancore area. Notification dated January 25, 1951 was issued in this context. A class licensees under the new rules were called stockists, B class licensees were wholesale sellers and C class licensees were retailers. A class licensees were to pay a specified minimum fee for a fixed maximum

quantity of tobacco and tobacco goods possessed by them and an additional fee for an additional quantity. The fee was to be levied only in respect of the tobacco imported into the State. The State of Travancore-Cochin collected licence fee from the appellants for the period from August 17, 1950 to December 31, 1957. In 1956 the appellants, who were A class licensees, filed writ petitions in Kerala High Court for refund of the licence fee collected from them on the ground that the Cochin and Travancore Tobacco Acts stood repealed by the Finance Act of 1950 because of the extension of the Central Excises and Salt Act to Part B State of Travancore-Cochin. The petitions were opposed on behalf of the State and it was contended that the Cochin Act or the similar Travancore Act did not stand repealed from April 1, 1950. It was urged that the State was competent to frame new rules under the Cochin Tobacco Act and the corresponding Travancore Act. It was further stated that the tax in question could be validly levied under Entry 60 or 62 of List II of the Seventh Schedule to the Constitution. The High Court dismissed the petitions holding that the laws under which the new rules were framed were in force and were valid under Entry 62 of List II of the Seventh Schedule. The appellants then came up in appeal to this Court. It was held by this Court in its judgment dated January 24, 1962 reported in (1962) Supp 2 SCR 741 = (AIR 1962 SC 922) that the Cochin Tobacco Act of 1950 and the rules framed thereunder as also similar provisions in Travancore, requiring licences to be taken out for storage and sale of tobacco and for payment of licence fee in respect thereof were law corresponding to the provisions of the Central Excises and Salt Act, 1944 and hence stood repealed on April 1, 1950 by virtue of Section 13 (2) of the Finance Act, 1950. It was further held that as the parent Acts, namely, the Cochin Tobacco Act and corresponding Travancore Act had stood repealed, the new rules framed in August 1950 and January 1951 under those Acts for the respective areas of Cochin and Travancore for the issue of licences

and payment of fee therefor for storage of tobacco were invalid ab initio.

3. After the above decision of this Court the appellants made a demand to the respondent-State that the amounts of Rs. 1,14,750 collected by the State from them by way of licence fee under the invalid rules might be refunded to them. The Respondent-State refunded Rupees 73,500 to the appellants on April 29, 1963. On July 10, 1963 the appellants filed original petition No. 1268 of 1963 in the Kerala High Court for issue of a writ to the respondent-State to pay the balance amount of Rs. 41,250 which along with interest came to Rs. 52,800 to the appellants. During the pendency of the above petition on December 16, 1963 the Governor of Kerala promulgated Ordinance No. 1 of 1963 which was later replaced by Kerala Luxury Tax on Tobacco (Validation) Act of 1964 (Act 9 of 1964). This Act received the assent of the President on March 3, 1964. Original petition No. 1268 of 1963 was thereupon amended with a view to challenge the validity of the above mentioned Act. In the meanwhile, on January 21, 1964 demand was made in view of the Ordinance by the State Government calling upon the appellants to pay the amount of Rs. 73,500 which had been refunded to them by the State Government. Original Petition No. 934 of 1964 was filed by the appellants in the Kerala High Court to challenge the validity of demand notice dated January 21, 1964 as also the vires of the Act.

4. At this stage it may be appropriate to refer to the relevant provisions of the Act. The preamble of the Act reads as under:

"Preamble: whereas it is expedient to provide for the levy of a luxury tax on tobacco for the period beginning with the 17th day of August, 1950 and ending on the 31st day of December, 1957, and the validation of the levy and collection of fees for licences for the vend and stocking of tobacco for the aforesaid period:

Be it enacted in the Fifteenth Year of the Republic of India as follows:—"

Section 2 (ii) of the Act defines tobacco to include leaf of the tobacco

plant, snuff, cigars, cigarettes, beedies, beedi tobacco, tobacco powder and other preparations or admixtures of tobacco. Sec. 3 is the charging section and provides that "for the period beginning with the 17th day of August, 1950 and ending on the 31st day of December, 1957, every person vending or stocking tobacco within any area to which this Act extends shall be liable and shall be deemed always to have been liable to pay a luxury tax on such tobacco in the form of a fee for licence for the vend and stocking of the tobacco, at such rates as may be prescribed, not exceeding the rates specified in the Schedule." Section 4(1) of the Act gives power to the State Government to make rules by publication in the gazette to carry out the purposes of the Act. According to sub-section (3) of Section 4 of the Act, "the rules and notifications specified below purported to have been issued under the Tobacco Act of 1987 (Travancore Act I of 1987) or the Cochin Tobacco Act, VII of 1984, as the case may be, in so far as they relate or purport to relate to the levy and collection of fees for licences for the vend and stocking of tobacco, shall be deemed to be rules issued under this section and shall be deemed to have been in force at all material times." Among the rules and notifications specified in sub-section (3) of Section 4 are rules published on August 3, 1950 and January 25, 1951. Sections 5 and 6 read as under:

"5. Validation — Notwithstanding any judgment, decree or order of any court, all fees for licences for the vend or stocking of tobacco levied or collected or purported to have been levied or collected under any of the rules or notifications specified in sub-section (3) of Sec. 4 for the period beginning with the 17th day of August, 1950 and ending on the 31st day of December, 1957, shall be deemed to have been validly levied or collected in accordance with law as if this Act were in force on and from the 17th day of August, 1950 and the fees for licences were a luxury tax on tobacco levied under the provisions of this Act, and accordingly,—

(a) no suit or other proceeding shall be maintained or continued in any court for the refund of any fees

paid or purported to have been paid under any of the said rules or notifications; and

(b) no court shall enforce a decree or order directing the refund of any fees paid or purported to have been paid under any of the said rules or notifications.

6. Recovery of Licence fees refunded—

Where any amount paid or purported to have been paid as a fee for licence under any of the rules or notifications specified in sub-section (3) of Sec. 4 has been refunded after the 24th day of January, 1962, and such amount would not have been liable to be refunded if this Act had been in force on the date of the refund, the person to whom the refund was made shall pay the amount so refunded to the credit of the Government in any Government treasury on or before the 16th day of April, 1964, and, where such amount is not so paid, the amount may be recovered from him as an arrear of land revenue under the Revenue Recovery Act for the time being in force."

5. According to the appellants, the label given to the tax imposed by the charging section was only a cloak to disguise its real nature of being an excise duty. The State Legislature, as such, was stated to be incompetent to levy excise duty on tobacco. It was also stated that the provisions of the Act were violative of the provisions of Article 301 of the Constitution. In the meanwhile, a single Judge of the High Court dismissed on July 20, 1964 original petition No. 1268 of 1963 which had been filed by the appellants. The appellants thereupon filed appeal before a Division Bench of the High Court against the judgment of the learned single Judge. The learned Judges of the Division Bench allowed original petition No. 963 of 1964 and quashed demand notice dated January 21, 1964 issued by the State asking for refund of Rs. 73,500. The High Court relied upon a decision of this Court in the case of *Kalyani Stores v. State of Orissa*, (1966) 1 SCR 865 = (AIR 1966 SC 1686) and held that in the absence of any production or manufacture of tobacco inside the appellant-State it was not competent

for the State Legislature to impose a tax on tobacco imported from outside the State. The provisions of Act 9 of 1964 were held to violate Article 301 of the Constitution and not protected by Article 304. The learned Judges also set aside the judgment of the single Judge and allowed the appeals against that judgment in original petition No. 1268 of 1963.

6. The State of Kerala thereafter came up in appeal to this Court. As per judgment dated July 30, 1969 reported in (1970) 1 SCR 700 = (AIR 1970 SC 1912) this Court held that the High Court had not correctly appreciated the import of the decision in *Kalyani Stores*, (AIR 1966 SC 1686) (supra). It was held that only such restrictions or impediments which directly and immediately impeded the free flow of trade, commerce and intercourse fell within the prohibition imposed by Article 301. This Court further observed that unless the High Court first came to the finding whether or not there was the infringement of the guarantee under Article 301 of the Constitution, the further question as to whether the statute was saved under Article 304(b) did not arise. The case was accordingly sent back to the High Court with the direction to take further affidavits in the matter. The Court left it open to the parties to argue as to whether the levy in question was in substance a duty of excise and as such whether it was not competent for the State Legislature to enact the provisions in question.

7. After remand affidavits were filed on behalf of the appellants and the respondent-State. The learned Judges of the High Court as per judgment under appeal gave the following findings:

"(1) The levy being in respect of goods produced outside the State, it cannot be, and is not, an excise duty falling within Entry 84 of the Union List.

(2) The tax is on tobacco, an article of luxury, consumed within the taxing territory, levied on the occasion of its stocking and vending by the importers into the taxing territory. It clearly answers the description of luxury tax falling within Entry 62 of the State List.

(3) There being no competing internal goods, the mere fact that the levy is only on imported goods can only have, like any other tax, the economic effect of reducing the demand by reason of increasing the price. The consequent diminution in the quantity of goods imported into the taxing territory is too remote an effect to be a direct impediment to the free flow of trade offending Article 301 of the Constitution.

(4) However, the payment of the tax in the shape of a licence fee being a condition precedent to bringing the goods into the taxing territory, there would appear to be a direct impediment on the free flow of goods and therefore of trade into that territory notwithstanding that the taxable event is not the movement of the goods but the stocking after completing their journey and reaching their destination, the levy in advance being only for convenience of collection.

(5) Even assuming that the levy offends Article 301, it is saved by Article 304(b) being a reasonable tax levied in the public interest, the condition in the proviso thereto being satisfied by the assent of the President in view of Article 255.

(6) The guarantee in Article 301 and the saving in Article 304(b) being in respect of both inter-State and intra-State trade, the fact that the taxing territory is only a part of the State is of no consequence."

8. On behalf of the appellants their learned counsel Mr. Krishnamurthy Iyer has at the outset contended that the question as to whether the levy of the licence fee upon the appellants constitutes excise duty is concluded by the decision of this Court of January 24, 1962 and the same operates as *res judicata*. As against that, Mr. Patel on behalf of the respondent-State submits that the question decided by this Court on January 24, 1962 was different from that which arises in these appeals and that the said decision does not operate as *res judicata*. The above submission of Mr. Patel, in our opinion, is well founded. What was decided by this Court in its judgment dated January 24, 1962 was that the Cochin Tobacco Act and the similar Travancore

core Act taken along with the rules framed under those Acts by the respective Diwans were in substance law corresponding to the Central Excises and Salt Act. The Cochin Tobacco Act and the similar Travancore Act, it was further held, stood repealed on April 1, 1950 by virtue of Section 13 (2) of the Finance Act, 1950. So far as the rules are concerned which were issued on August 3, 1950 and January 25, 1951, this Court held that as the parent Acts under which those rules were issued stood repealed on April 1, 1950, there would be no power in the State Government thereafter to frame new rules in August 1950 and January 1951 for there would be no law to support the new rules. The above question does not arise for determination in these appeals before us. What we are concerned with is the constitutional validity of the Kerala Act 9 of 1964. This Act was enacted subsequent to the above decision of this Court rendered on January 24, 1962. No question relating to the validity of the above mentioned Act in the very nature of things could arise at the time of the earlier decision in 1962. We, therefore, are of the view that the judgment dated January 24, 1962 of this Court does not operate as res judicata regarding the points of controversy with which we are concerned in these appeals.

9. It has next been argued on behalf of the appellants that the levy for the licence fee for stocking and vending of tobacco, even though described as luxury tax in charging Section 3 of the Act, is in reality and substance an excise duty on tobacco. Excise duty on tobacco under Entry 84 of List I of the Seventh Schedule to the Constitution can only be levied by Parliament and, as such, according to the learned counsel for the appellants, the State Legislature was not competent to enact the impugned Act 9 of 1964. This contention, in our opinion, is equally devoid of force. Excise duty, it is now well settled, is a tax on articles produced or manufactured in the taxing country. Generally speaking, the tax is on the manufacturer or the producer, yet laws are to be found which impose a duty of excise at stages subsequent to the

manufacture or production (see pages 750-51 of the judgment of this Court delivered on January 24, 1962 in the case between these very parties, reported in (1962) Supp 2 SCR 741) = (AIR 1962 SC 922).

10. The fact that the levy of excise duty is in the form of licence fee would not detract from the fact that the levy relates to excise duty. It is, however, essential that such levy should be linked with production or manufacture of the excisable article. The recovery of licence fee in such an event would be one of the modes of levy of the excise duty. Where, however, the levy imposed or tax has no nexus with the manufacture or production of an article, the impost or tax cannot be regarded to be one in the nature of excise duty.

11. In the light of what has been stated above, we may now turn to the provisions of the impugned Act 9 of 1964. The charging Section 3 of this Act creates a liability for payment of luxury tax on the stocking and vending of tobacco. There is no provision of this Act which is concerned with production or manufacture of tobacco or which links the tax under its provisions with the manufacture or production of tobacco. The same is the position of the rules issued on August 3, 1950 and January 25, 1951 and Mr. Krishnamurthy Iyer on behalf of the appellants has frankly conceded that those rules are in no way concerned with the production or manufacture of tobacco. It would, therefore, follow that the levy of tax contemplated by the provisions of Section 3 of the Act has nothing to do with the manufacture or production of tobacco and, as such, cannot be deemed to be in the nature of excise duty. Argument that the provisions of the Act fall under Entry 84 of List I of the Seventh Schedule to the Constitution must, therefore, be held to be bereft of force.

12. The next argument which has been advanced on behalf of the appellants is that the tax on the vending and stocking of tobacco cannot be considered to be luxury tax, as contemplated by Entry 62 of List II of the Seventh Schedule to the Constitution. According to that en-

try, the State Legislatures can make laws in respect of "taxes on luxuries, including taxes on entertainments, amusements, betting and gambling." Question, therefore, arises as to whether tobacco can be considered to be an article of luxury. The word "luxury" in the above context has not been used in the sense of something pertaining to the exclusive preserve of the rich. The fact that the use of an article is popular among the poor sections of the population would not detract from its description or nature of being an article of luxury. The connotation of the word "luxury" is something which conduces enjoyment over and above the necessities of life. It denotes something which is superfluous and not indispensable and to which we take with a view to enjoy, amuse or entertain ourselves. An expenditure on something which is in excess of what is required for economic and personal well-being would be expenditure on luxury although the expenditure may be of a nature which is incurred by a large number of people, including those not economically well off. According to Encyclopaedia Britannica, luxury tax is "a tax on commodities or services that are considered to be luxuries rather than necessities. Modern examples are taxes levied on the purchase of jewellery, perfume and tobacco". It has further been said:

"In the 19th and 20th centuries increased taxes have been placed on private expenditure upon alcohol, tobacco, entertainment and automobiles. Such expenditure is superfluous in the sense that a large part of it may be said to be in excess of what is required for economic efficiency and personal well-being, although the expenditure affects large numbers of people."

In *Re The Central Provinces and Berar Sales of Motor Spirit and Lubricants Taxation Act, 1938*, 1939 FCR 18 = (AIR 1939 FC 1) Gwyer C. J. while dealing with excise duty described spirits, beer and tobacco as articles of luxuries.

13. It is no doubt true that for those who have been lured by the charms and blandishments of Lady Nicotine there are few things which are so soothing to the distraught ner-

ves and so entertaining as tobacco and its manifold preparations. One of them has gone to the extent of saying that he who doth not smoke hath either known no great griefs, or refuseth himself the softest consolation, next to that which comes from heaven (Bulwer-Lytton, *What will he Do with It?*). Charles Lamb in "A Farewell to Tobacco" observes: "For thy sake, tobacco, I would do anything but die". The fact all the same remains that the use of tobacco has been found to have deleterious effect upon health and a tax on tobacco has been recognized as a tax in the nature of a luxury tax. One of the earliest indictments of tobacco is in Robert Burton's *Anatomy of Melancholy* wherein he says:

"It's a plague, a mischief, a violent purger of goods, lands, health, hellish, devilish, and damned tobacco, the ruin and overthrow of body and soul."

Another indictment is from James I of England (*Counterblaste to Tobacco*) when it is said:

"A custom (smoking) loathsome to the eye, harmful to the brain, dangerous to the lungs, and in the black stinking fume thereof, nearest resembling the horrible Stygian smoke of the pit that is bottomless."

The taxation of the objects or procedures of luxurious consumption has aimed at two purposes, on the surface contradictory: the suppressing or limiting of this consumption and the deriving of a public income from it. On closer inspection a good deal of this contradiction vanishes, when it is seen that prohibition and taxation of luxury tend equally to fix certain levels and standards of living, as against economic and social progress, which is tending to "level" such differences (see page 634 of the *Encyclopaedia of the Social Sciences* Volumes IX-X, 14th Printing).

14. It may be added that there is nothing static about what constitutes an article of luxury. The luxuries of yesterday can well become the necessities of today. Likewise, what constitutes necessity for citizens of one country or for those living in a particular climate may well be looked upon as an item of luxury for the

nationals of another country or for those living in a different climate. A number of factors may have to be taken into account in adjudging a commodity as an article of luxury. Any difficulty which may arise in borderline case would not be faced when we are dealing with an article like tobacco, which has been recognized to be an article of luxury and is harmful to health.

15. The learned Judges of the High Court were of the opinion that the levy of tax in question was violative of Article 301 of the Constitution, according to which subject to the provisions of Part XIII, trade, commerce and intercourse throughout the territory of India shall be free. The learned Judges in this connection took the view that the levy of tax as a condition preceding to the entry of goods into a place directly impeded the flow of trade to that place. The conclusion arrived at by the High Court in this respect, in our opinion, was correct and sound. The appellants were A class licensees. According to Rule 16 of the rules issued on January 25, 1951, A class licensees shall be entitled to purchase tobacco from any dealer within or without the State without any quantitative restriction. This class of licensees could sell only to other A class licensees or B class licensees. It was also mentioned in that rule that the licence fee would be realised only for the quantities brought in from outside. Perusal of the rules shows that it was imperative for the A class licensees to pay the licence fee in advance before they could bring tobacco within the taxable territory. We agree with the learned Judges of the High Court that such levy directly impedes the free flow of trade and as such is violative of Article 301 of the Constitution.

16. The next question which arises for consideration is whether the levy of tax is protected by Article 304 (b) of the Constitution. Article 304 (b) reads as under:

"304. Notwithstanding anything in Article 301 or Article 303, the Legislature of a State may by law—

(a)

.....

(b) impose such reasonable restrictions on the freedom of trade, com-

merce or intercourse with or within that State as may be required in the public interest:

Provided that no Bill or amendment for the purposes of clause (b) shall be introduced or moved in the Legislature of a State without the previous sanction of the President." We may observe that the requirement of the proviso regarding the sanction of the President has been satisfied. It is no doubt true that the assent of the President was given subsequent to the passing of the Bill by the legislature but that fact would not affect the validity of the impugned Act in view of the provisions of Article 255 of the Constitution.

17. Clause (b) of Article 304 empowers the Legislature of a State notwithstanding anything in Article 301 or Article 303 but subject to the sanction of the President to impose reasonable restrictions on the freedom of trade, commerce or intercourse with or within that State as may be required in the public interest. Article 302 confers power upon Parliament to impose by law such restrictions on the freedom of trade, commerce or intercourse between one State and another or within any part of the territory of India as may be required in the public interest. Perusal of Article 302 and Article 304 shows that while Parliament can impose restrictions on the freedom of trade, commerce or intercourse between one State and another or within any part of the territory of India as may be required in the public interest, so far as the State Legislatures are concerned, restrictions must satisfy two requirements, firstly, they must be in the public interest and, secondly the restrictions should be reasonable. Shah J. speaking for the majority of the Constitution Bench in the case of State of Madras v. N. K. Nataraja Mudaliar, (1968) 3 SCR 829 = (AIR 1969 SC 147) observed that the exercise of the power to tax may normally be presumed to be in the public interest. The above observations though made in the context of Article 302 have equal relevance under Art. 304. Not much argument is needed to show that the power to tax is essential for the maintenance of any governmental system. Taxes are

levied usually for the obvious purpose of raising revenue. Taxation is also resorted to as a form of regulation. In the words of Justice Stone, "every tax is in some measure regulatory" (*Sonzinsky v. United States* (1937) 300 US 506). According to Roy Blough, the taxing power "becomes an instrument available to Government for accomplishing objectives other than raising revenues" *The Federal Taxing Process*, page 410 (quoted on page 262 of *American Constitutional Law* by Tressolini and Shapiro, 3rd Ed.).

To some extent every tax imposes an economic impediment to the activity taxed as compared with others not taxed, but that fact by itself would not make it unreasonable. It is well-settled that when power is conferred upon the legislature to levy tax, that power must be widely construed; it must include the power to impose a tax and select the articles or commodities for the exercise of such power; it must likewise include the power to fix the rate and prescribe the machinery for the recovery of tax. This power also gives jurisdiction to the legislature to make such provisions as, in its opinion, would be necessary to prevent the evasion of the tax. As observed by Chief Justice Marshall in *M'Culloch v. Maryland*, (1819) 4 Law ed 579, 607 "the power of taxing the people and their property is essential to the very existence of Government, and may be legitimately exercised on the objects to which it is applicable to the utmost extent to which the Government may choose to carry it." There can also be no doubt that the law of taxation in the ultimate analysis is the result of the balancing of several complex considerations. The legislatures have a wide discretion in the matter.

18. In considering the question as to whether the restriction is reasonable in public interest, the court will have to balance the importance of freedom of trade as against the requirement of public interest. Article 304 (b) necessarily postulates that considerations of public interest may require and justify the imposition of restrictions on the freedom of trade provided they are reasonable. In determining the reasonableness of the

restriction, we shall have to bear in mind the importance of freedom of trade and the requirement of public interest. It is a question of weighing one relevant consideration against another in the context of the larger public interest (see *Khyerbari Tea Co. Ltd. v. State of Assam*, (1964) 5 SCR 975 = (AIR 1964 SC 925).)

19. We agree with Mr. Krishnamurthy Iyer that the onus of showing that the restrictions on the freedom of trade, commerce or intercourse in the public interest are reasonable, is upon the State. It is also true that no effort was made in the affidavit filed on behalf of the State in this case to show as to how the restrictions were reasonable, but that fact would not necessarily lead the court to hold that the restrictions are unreasonable. If the court on consideration of the totality of facts finds that the restrictions are reasonable, the court would uphold the same in spite of lack of details in the affidavit filed on behalf of the State. In judging the question of reasonableness of restriction in the present case, we must bear in mind that the levy of luxury tax relates to tobacco, the consumption of which involves health hazard. Regulation of the sale and stocking of an article like tobacco which has a health hazard and is considered to be an article of luxury by imposing a licence fee for the same, in our opinion, is a permissible restriction in public interest within Article 304 (b) of the Constitution. The material on record shows that except for cultivation of tobacco on experimental basis, no tobacco is grown in the area with which we are concerned. The levy of luxury tax is bound to result in raising the price of tobacco in the area of erstwhile States of Travancore and Cochin. One of the likely effects of the enhancement of the price of a commodity entailing health hazards is to lower its consumption.

20. The fact that there is no commercial production of tobacco in the area with which we are concerned would show that there is no discrimination between tobacco brought from outside that area and the locally grown tobacco because in fact there is no tobacco of the latter cate-

gory, except that grown on experimental basis.

21. Argument has been advanced on behalf of the appellants that the provisions of the Act do not apply to the entire State of Kerala but apply only to those areas which were parts of erstwhile States of Travancore and Cochin. The restriction of the operation of the Act to only a part of the area of the State would show, it is urged, that the restriction is unreasonable. This contention, in our opinion, is not well-founded. The fact that the operation of the Act is confined to a particular area and does not extend to the entire State is due to historical reasons. The object of the Act was to validate the recoveries already made. In the case of *Nazeeria Motor Service v. State of Andhra Pradesh*, (1970) 2 SCR 52 = (AIR 1970 SC 1864), the appellants, who were motor transport operators, challenged the increase in surcharge of the fares and freights imposed by the Andhra Pradesh Motor Vehicles (Taxation of Passengers and Goods) Amendment and Validation Act, 1961. It was urged that the Act fell within the mischief of Article 301 of the Constitution and was not protected by Article 304 (b) and Article 19(1) (f) of the Constitution. Contention was also advanced that the provisions of the said Act were violative of Article 14 of the Constitution. In support of the above contentions, reference was made to the fact that the Act had been made applicable to the Andhra area and had not been made applicable to the Telengana area. Some other grounds were also relied upon to challenge the validity of the Act. This Court upheld the validity of the Act and repelled the contentions. No doubt this Court referred to the circumstance that the levy of tax was confined only to the Andhra area and was not operative in the Telengana area in context of the argument that the Act was violative of Article 14 of the Constitution the fact all the same remains that one of the grounds advanced with a view to assail the validity of the Act was that its provisions were not applicable to the Telengana area. We are unable to accede to the submission that this Court lost sight of the fact that the Act was not

applicable to the Telengana area in holding that its provisions were protected by Article 304 (b) of the Constitution.

22. It is also true that the levy of tax relates only to the period from August 17, 1950 to December 31, 1957, but that too was due to the historical reason that the licence fee had been realised only during that period and the object of the impugned Act was to validate the recovery already made.

23. Argument has also been advanced by Mr. Krishnamurthy Iyer that the impugned Act is a colourable piece of legislation because what is sought to be done is to validate the levy made under provisions of law which were found to have been repealed. It is further pointed out that those provisions of the law were found by this Court to be similar to the provisions of the Central Excises and Salt Act and, as such, those provisions were beyond the competence of a State Legislature. Any levy made under those provisions cannot, according to the learned counsel, be validated by the State Legislature. The above argument has a seeming plausibility, but, on deeper examination, we find it to be not tenable. It is no doubt true, as stated by this Court in the case of *Jaora Sugar Mills (P) Ltd. v. State of Madhya Pradesh*, (1966) 1 SCR 523 = (AIR 1966 SC 416), that when an Act passed by a State Legislature is invalid on the ground that the State Legislature did not have legislative competence to deal with the topics covered by it, in that event even Parliament cannot validate such an Act, because the effect of such attempted validation, in substance, would be to confer legislative competence on the State Legislature in regard to a field or topic which, by the relevant provisions of the schedules to the Constitution, is outside its jurisdiction. Where a topic is not included within the relevant List dealing with the legislative competence of the State Legislature, Parliament, by making a law cannot attempt to confer such legislative competence on the State Legislatures. The above principle would, however, have no application where, as in the present case, what is sought to be

done is to validate the recovery of licence fee for stocking and vending of tobacco. The impugned provisions under which that levy is sought to be made with a retrospective effect have nothing to do, as already pointed out above, with production and manufacture of tobacco. The levy is sought to be made as luxury tax which is within the competence of the State Legislature and not as excise duty which is beyond the legislative competence of the State Legislature. If the levy in question can be justified under a provision which is within the legislative competence of the State Legislature, the levy shall be held to be validly imposed and cannot be considered to be impermissible.

24. Where a challenge to the validity of a legal enactment is made on the ground that it is a colourable piece of legislation, what has to be proved to the satisfaction of the court is that though the Act ostensibly is within the legislative competence of the legislature in question, in substance and reality it covers field which is outside its legislative competence. In the present case we find that in enacting the impugned provisions, the State Legislature, as already pointed out above, has exercised a power of levying luxury tax in the shape of licence fee on the vend and stocking of tobacco. The enactment of a law for levying luxury tax is unquestionably within the legislative competence of the State Legislature in view of Entry 62 in List II of the Seventh Schedule to the Constitution. As such, it cannot be said that the impugned Act is a colourable piece of legislation. In the case of Jaora Sugar Mills (P) Ltd., (1966) 1 SCR 523 = (AIR 1966 SC 416) a cess was levied under the Madhya Pradesh Sugarcane (Regulation of Supply and Purchase) Act, 1958 on sugarcane. This Court in the earlier case of Diamond Sugar Mills, (1961) 3 SCR 242 = (AIR 1961 SC 652) had held that such a levy was not valid. Following the above decision the Madhya Pradesh High Court struck down S. 23 which was the charging section of the Madhya Pradesh Sugarcane (Regulation of Supply and Purchase) Act, 1958. There were simi-

lar Acts in several other States which suffered from the same infirmity and to meet that situation, Parliament passed the Sugarcane Cess (Validation) Act, 1961. The Act made valid by Section 3 all the assessments and collections made before its commencement under the various State Acts and laid down that all the provisions of the State Acts as well as the relevant notifications, rules, etc., made under the State Acts would be treated as part of Section 3. It was further provided that the said section shall be deemed to have existed at all material times when the cess was imposed, assessed and collected under the State Acts. The appellant, a sugar factory, was asked to pay the cess for the years 1959-60 and 1960-61. The appellant challenged the levy. The High Court having dismissed the petition, the appellant came to this Court. Among the various contentions which were advanced on behalf of the appellant in the case were: (1) What the validation of the Act had done was to attempt to cure the legislative incompetence of the State Legislatures by validating State Acts which were invalid on the ground of absence of legislative competence in the respective State Legislatures; (2) Parliament had passed the Act in question not for the purpose of levying a cess of its own, but for the purpose of enabling the respective States to retain the amounts which they had illegally collected. The Act was, therefore, a colourable piece of legislation; and (3) The Act had not been passed for the purposes of the Union of India and the recoveries of cesses which were retrospectively authorised by it were not likely to go into the Consolidated Fund of India. The Constitution Bench of this Court speaking through Gajendragadkar C.J. repelled all the above contentions. It was held by this Court that if collections are made under statutory provisions which are invalid because they deal with a topic outside the legislative competence of the State Legislature, the Parliament can in exercise of its undoubted legislative competence, pass a law retrospectively validating the said collections by converting their character into collections made under its own statute operating

retrospectively. So far as the present case is concerned, we have already pointed out above that it was within the competence of the State Legislature to make a law in respect of luxury tax and to recover that tax in the shape of licence fee for vend and stocking of tobacco. The State Legislature has sought to validate the recovery of the amounts already made by treating those amounts as luxury tax. The fact that the validation of the levy entailed converting the character of the collection from an impermissible excise duty into permissible luxury tax would not render it unconstitutional. The only conditions are that the levy should be of a nature which can answer to the description of luxury tax and that the State Legislature should be competent to enact a law for recovery of luxury tax. Both these conditions as stated above are satisfied.

25. As regards the power of the legislature to give retrospective operation to a tax legislation, we may also refer to the case of *Ramkrishna v. State of Bihar*, (1964) 1 SCR 897 = (AIR 1963 SC 1667) wherein it was held that where the legislature can make a valid law, it can provide not only for the prospective operation of the material provisions of the said law but can also provide for the retrospective operation of the said provisions. The legislative power was held to include the subsidiary or the auxiliary power to validate law which had been found to be invalid. It was also observed that in judging the reasonableness of the retrospective operation of law for the purpose of Article 304(b), the test of length of time covered by the retrospective operation could not by itself be treated as decisive. Again in the case of *Enari Chinna Krishna Moorthy v. State of Orissa*, (1964) 7 SCR 185 = (AIR 1964 SC 1581) the Constitution Bench of this Court repelled the argument that a legislation should be held to be invalid because its retrospective operation might operate harshly in some cases.

26. As a result of the above, we would hold that the impugned provisions are protected by Article 304(b) of the Constitution.

27. Lastly, it has been argued that Section 6 of the impugned Act is invalid because it provides for payment of an amount which had been refunded in pursuance of the order of this Court. Section 6 is thus stated to be an encroachment by the legislature upon a judicial field. This contention, in our opinion, is bereft of force. If a provision regarding the levy of luxury tax is within the competence of the State Legislature, the said Legislature would be well within its competence to enact a law for recovery of an amount which, though already refunded to a party, partakes of the nature of luxury tax in the light of that law. If an amount can answer to the description of luxury tax, there would be no legal impediment to recovering the same as luxury tax, even though initially it was recovered or sought to be recovered as something different from luxury tax.

28. As a result of the above, we dismiss these appeals, but, in the circumstances, leave the parties to bear their own costs.

Appeals dismissed.

AIR 1976 SUPREME COURT 195

(From: Delhi)*

P. N. BHAGWATI AND R. S. SARKARIA, JJ.

Om Prakash, Appellant v. Delhi Administration and another, Respondents.

Criminal Appeal No. 138 of 1971, D/- 10-12-1975.

(A) **Prevention of Food Adulteration Act (1954), Ss. 2 (xiii), 7 and 16 — Taking of samples for analysis from different receptacles at one and same time — Taking of each sample constitutes separate transaction of sale. Observations in AIR 1962 Cal 611, Overruled.**

Where samples are taken from different receptacles for the purpose of analysis, the taking of each sample would be a separate transaction of sale and each such transaction of sale would constitute a separate offence, if the sample is found to be adulterated. (1891) 2 QB 304, Relied on; Cr. Rev. No. 232 of 1969, D/- 22-3-1971

*(Criminal Revn. No. 232 of 1969, D/- 22-3-1971—(Delhi).)

LS/LS/E498/75/CWM

(Delhi), Affirmed; Observations in AIR 1962 Cal 611, Overruled. (Paras 8 and 9)

It is only where samples are taken from the same receptacle at one and the same time or within reasonable proximity of time that it may not be possible to say that the taking of each of these samples constitutes a distinct and separate sale. When a sample is once taken from the receptacle for analysis, there cannot be any question of taking another sample for analysis at the same time. It is only where a sample is taken for analysis that its taking constitutes a sale. But in the other two cases, where samples are taken from different receptacles, though stocked at one place—at one time or at different times—or samples are taken from the same receptacle at different times, the taking of each sample would constitute a sale and hence a distinct and separate offence.

(Paras 8 and 9)

Cases Referred: Chronological Paras
AIR 1962 Cal 611 = (1962) 2 Cri LJ 747

(1891) 2 QB 304 = 60 LJMC 143

M/s. K. C. Kalra, R. C. Verma and S. L. Aneja, Advocates, for Appellant; Mr. F. S. Nariman, Sr. Advocate (M/s. B. P. Maheshwari, N. K. Jain and Suresh Sethi, Advocates with him), for Respondent No. 2.

Judgment of the Court was delivered by

BHAGWATI, J.:— This appeal, by special leave, raises a short and interesting question of law relating to the interpretation of the provisions of the Prevention of Food Adulteration Act, 1954. The facts giving rise to the appeal are few and may be briefly stated as follows.

2. On 12th July, 1967, a raiding party headed by Dr. A. D. Kumar, the Assistant Health Officer of the Municipal Corporation of Delhi and comprising inter alia Shanti Nath, Navnit Lal, H. R. Sood and H. K. Bhanot, Food Inspectors, intercepted a truck bearing No. DLL 1925 near Chandni Chowk, Delhi at about 7 a.m. in the morning. The truck contained twenty-five to thirty cans of cow's milk which was being carried for sale by the appellant. The raiding party took the truck inside the compound of the Municipal office and there, samples of cow's milk were taken from eight cans chosen at random by different Food Inspectors, one sample being drawn from each can. Each sample was divided into three parts and after carrying out the usual formalities, one part of each sample was sent to the Public Analyst for analysis. The result of the analysis was that each sample was found to be adulterated under S. 2, sub-section (i), cl. (1) of the Act, in that the percentage of non-fat solids was

lower than that prescribed by item A 11.01.01 read with Item A 11.01.11 in Appendix B to the Prevention of Food Adulteration Rules, 1955. The prescribed minimum percentage of non-fat solids in cow's milk in Delhi was 8.5 while the percentage found in each of the samples was below that figure. In fact, it varied from sample to sample and ranged between 5.47 and 8.06. On finding, as a result of the report of the Public Analyst, that each sample was adulterated under Section 2, sub-section (i), cl. (1), the Municipal Corporation filed four different complaints against the appellant, one in respect of four samples, the other in respect of two samples and the third and the fourth in respect of each of the remaining two samples. The cases arising out of the first two complaints were consolidated and a single charge was framed in respect of six samples on the ground that the appellant sold to the Food Inspectors samples of adulterated cow's milk out of six cans which he was carrying for sale and thereby committed an offence punishable under Section 16 read with Section 7 of the Act. Similar charges were framed in the remaining two cases, the charge in one case being for sale of sample of adulterated cow's milk out of the seventh can and the charge in the other being for sale of sample of adulterated cow's milk out of the eighth can.

3. So far as the first case is concerned, the learned Magistrate accepted the prosecution case, including the report of the Public Analyst and held that the appellant was guilty of selling to the Food Inspectors samples of adulterated cow's milk out of six cans carried by him. But instead of treating the sale of each sample as a distinct and separate offence, the learned Magistrate regarded the sales of the six samples as forming part of the same transaction and constituting only one offence, since all the six samples were taken at the same time from the cans which the appellant was carrying in the truck. The learned Magistrate, in this view, convicted the appellant of a single offence under Section 16 read with Section 7 of the Act and sentenced him to suffer rigorous imprisonment for a period of six months and to pay a fine of Rupees 1,000 or in default to suffer imprisonment for a further period of three months. The other two cases also in view of the report of the Public Analyst and other prosecution evidence, resulted in the conviction of the appellant under Section 16 read with Section 7 of the Act and in each of those two cases, the appellant was sentenced by the learned Magistrate to suffer rigorous imprisonment for a like period and to pay a fine in a like amount as in the first case. The sentences of imprisonment in the three cases were, however,

directed to run concurrently with one another.

4. The appellant preferred three appeals to the Additional Sessions Judge, Delhi, one in respect of conviction and sentence in each case. So far as the first case is concerned, the learned Additional Sessions Judge maintained the conviction, but taking the view that the only deficiency in the quality of samples of cow's milk sold by the appellant being in respect of non-fat solids and there also, the deficiency being very small, ranging only from 0.45 to 2.65, the sentence awarded to the appellant was rather excessive, the learned Additional Sessions Judge reduced the sentence to rigorous imprisonment for three months, leaving the sentence of fine untouched. The conviction in the second case was also maintained in appeal but the learned Additional Sessions Judge held that the offence in that case would constitute a part of the offence in the first case and hence he did not think that a separate sentence would be called for or justified and in this view he confirmed the conviction of the appellant, but set aside the sentence imposed on him. So also in the third case, the learned Additional Sessions Judge made the same order in appeal maintaining the conviction of the appellant but setting aside the sentence passed on him.

5. It does not appear from the record whether the appellant preferred any revision application against the order passed by the learned Additional Sessions Judge in the second and third cases in so far as it confirmed the conviction of the appellant or the State preferred any revision application against that order in so far as it set aside the sentence imposed on the appellant. But so far as the order passed by the learned Additional Sessions Judge in the first case was concerned, the appellant preferred a revision application against it in the High Court of Delhi. The first case, as already pointed out above, related to sales of samples of adulterated cow's milk out of six cans carried by the appellant. Both the learned Magistrate and the learned Additional Sessions Judge had treated the sales of these six samples as forming part of the same transaction and constituting one single offence. The High Court, however, took the view that the sale of each sample constituted a distinct and separate offence and the appellant was, therefore, liable to be tried not for one single offence but for six different offences in respect of sales of six samples. The High Court observed that the sale of each sample was a separate sale and each such sale constituted a separate breach of the provisions of Section 7 of the Act leading to a separate offence punishable under Section 16 of the Act. The High Court accordingly set aside the

order of conviction and sentence passed against the appellant and remanded the case to the learned Magistrate for retrial of the appellant for each of the six different offences constituted by the sales of six samples. This led to the filing of the present appeal with special leave obtained from this Court.

6. The appellant contended that the gravamen of the charge against him was that he had stored for sale adulterated cow's milk in six cans carried by him in the truck. The act of storing was one single act and it was immaterial whether the storing was in one can or in several cans. Merely because samples were taken by the Food Inspectors from different cans, it did not mean that so many different offences were committed by the appellant, for the different samples only confirmed that cow's milk stored by the appellant in these cans was adulterated. The offence was one and single and that was storing adulterated cow's milk for sale, whether in one can or more. It was alleged on behalf of the appellant that even if the offence charged against the appellant were not storing adulterated cow's milk for sale, but selling samples of adulterated cow's milk out of six cans to the Food Inspectors for analysis, taking of sample from each can did not constitute a distinct and separate offence of selling adulterated cow's milk. There was only one sale by the taking of samples from six cans, since all the samples were of the same article of food, namely, cow's milk and were taken at the same place and at the same time. Otherwise, contended the appellant, the result would be that if the Food Inspector goes on taking samples from the same stock of cow's milk or other article of food, the sale of each sample would constitute an independent offence and there would be as many offences as the number of samples taken, though the stock of the commodity is the same. That would be a most startling and unjust consequence. Therefore, said the appellant, though samples were taken by the Food Inspectors from six different cans, there was only one offence of selling adulterated cow's milk committed by the appellant and the High Court was in error in holding that the appellant was liable to be tried for six different offences. These were the two contentions urged on behalf of the appellant in support of the appeal. Neither of these two contentions is, in our opinion, well founded and both must be rejected.

7. It is clear on a plain reading of Section 7 of the Act that the acts prohibited by that section include manufacturing for sale, storing, selling or distributing any adulterated article of food. The law is now well settled that the act of

storing an adulterated article of food would be an offence only if storing is for sale. If adulterated article of food is stored by any person for consumption or for any purpose other than sale, it would not come within the inhibition of the section. Now, when, out of adulterated article of food stored for sale, a quantity is sold, the sale constitutes an offence distinct and independent from the offence of storing for sale. Not only is the act of storing for sale an offence but also the act of selling out of the adulterated article of food so stored. Here in the present case, the charge against the appellant was not of storing adulterated cow's milk for sale. It was a charge of selling to the Food Inspector samples of adulterated cow's milk out of six cans carried by the appellant. It is, therefore, unnecessary to consider whether storing of adulterated cow's milk in each of the six cans constituted a distinct and separate offence and we do not express any opinion on it. The only issue which requires to be considered by us is whether the sale of sample of adulterated cow's milk from each can constituted a distinct and separate offence or there was only one offence committed by the appellant by selling samples of adulterated cow's milk from six cans.

8. Now, the definition of 'sale' in Section 2 (xiii) includes within it sale of any article of food for analysis and it would seem that even if several samples are taken by the Food Inspector for analysis from the same stock of adulterated article of food, taking of each sample would constitute a distinct and independent sale and each such sale would be an offending act attracting the penal provisions of the Act. The position would indeed be beyond doubt where samples are taken from different receptacles, whether at one and the same time or at different times, because each sample would be taken for determining whether the article of food in a particular receptacle is adulterated or not. It may be that the article of food in one receptacle is adulterated, while in the other it is not, and even the nature and degree of adulteration may vary from one receptacle to another. Each sample taken would, therefore, be really and truly for the purpose of analysis. So also there would be no scope for argument where samples are taken from the same receptacle at different times, because sample, taken at an earlier point of time, if found adulterated on analysis, would merely show that the article of food in the receptacle at that particular point of time was adulterated and it would not dispense with the analysis of the article of food in the receptacle at a later point of time, for at such later point of time, the article of food in the receptacle may not be adulterated

or it may consist of different proportions or the adulteration in it may be much more deleterious or injurious to human health. The taking of each sample would be necessary and justified for the purpose of analysis, and hence each taking of sample would constitute a distinct and independent sale. It is only where samples are taken from the same receptacle at one and the same time or within reasonable proximity of time that it may not be possible to say that the taking of each of these samples constitutes a distinct and separate sale. When a sample is once taken from the receptacle for analysis, there cannot be any question of taking another sample for analysis at the same time. The taking of the second sample would be wholly unnecessary so far as the purpose of analysis is concerned and it would lay itself open to an attack that it is not really and truly for the purpose of analysis. It is only where a sample is taken for analysis that its taking constitutes a sale. The taking of the second sample would not, therefore, amount to a sale involving an offence. But in the other two cases, where samples are taken from different receptacles, though stocked at one place—at one time or at different times—or samples are taken from the same receptacle at different times, the taking of each sample would constitute a sale and hence a distinct and separate offence.

9. This view, which we are taking, is clearly supported by the decision of the Queen's Bench Division in *Fecitt v. Walsh*, (1891) 2 QB 304. There, while the appellant was delivering at a workhouse milk contained in five cans pursuant to a contract of sale, the respondent, acting under S. 3 of the Sale of Food and Drugs Act Amendment Act, 1879, procured a sample from each of the five cans and on finding that there was a large deficiency of cream in two of the samples, the respondent laid two separate informations against the appellant in respect of those two samples under S. 9 of the Sale of Food and Drugs Act, 1875. The Justices convicted the appellant in a separate penalty upon each information and on appeal against these convictions, the appellant contended that on the facts, there could not be more than one information against him, since there was only one sale of milk by him and it was being delivered in five cans merely because that was a convenient form of delivery. Day, J., negatived this argument of the appellant and held that procuring of each sample was a separate offence as to each can in respect of which an information could be laid against him and the convictions of the appellant on the basis of separate informations laid against him were, therefore, right. The learned Judge observed:

"As far as he was concerned there were five transactions; in respect of each of those transactions he must have proceeded under the statute and would then be deemed to have purchased in each case from the seller. It seems to me that the sergeant in procuring these samples must be deemed to have been the purchaser in each particular case, and that as he was the purchaser of five samples, the purchase of each one was a separate transaction, and that in respect of each of them an information would lie. As a matter of fact, the respondent only proceeded in respect of two of the samples, obtaining a separate conviction upon separate informations in respect of each of them, and our answer to the first question must be that he was right, and that more than one information could be laid against the appellant."

The analogy of this decision is striking and it clearly shows that where samples are taken from different receptacles for the purpose of analysis, the taking of each sample would be a separate transaction of sale and each such transaction of sale would constitute a separate offence, if the sample is found to be adulterated.

10. The appellant leaned heavily on the decision of the Calcutta High Court in *Sanker Lal Agarwalla v. Corporation of Calcutta*, AIR 1962 Cal 611 where it was held by D. N. Das Gupta, J., that where three Food Inspectors visit the godown of an accused dealing in ghee the same day and at the same time and each takes samples of ghee from three different lots of tins and the three samples collected are found adulterated, the offence committed under the Prevention of Food Adulteration Act by the accused is the same, namely, the offence of storing and selling adulterated ghee at the particular hour of the particular day and it cannot be said that three distinct offences under Section 7 of the Act have been committed by the accused and consequently when "three separate prosecutions under Section 7 of the Act have been launched against the accused and he is convicted in one of the prosecutions, the other two prosecutions are barred under Section 403, Criminal Procedure Code". But we do not think this decision can be invoked in aid of the contention of the appellant. It is clear from the facts of this case that the three prosecutions against the accused were not for three different transactions of sale constituted by the taking of samples from three lots of tins of ghee, but were for three different acts of storing adulterated ghee and it was for this reason that D. N. Das Gupta, J., observed that the single act of storing adulterated ghee could not be split up into three different acts according to brands

and the launching of three different prosecutions on the ground that three distinct offences have been committed by the accused was not justified or warranted by law. We are not concerned with the correctness or otherwise of this observation as it is not relevant for the purpose of the present case. It is no doubt true that some of the observations made in the judgment seem to support the contention of the appellant that where samples are taken at the same time on the same day from different receptacles kept at the same place—as the six cans in the present case were—and each of the samples is found adulterated, there is only one offence committed by the accused and not as many offences as the number of samples taken by the Food Inspectors. But to the extent to which these observations refer to the offence constituted by the taking of samples, we must express our dissent and hold that they do not represent the correct law on the subject.

11. We are, therefore, of the view that the High Court was right in coming to the conclusion that the sale of each of the samples taken from the six cans constituted a distinct and separate offence and the appellant was liable to be tried for each of the six offences. We accordingly dismiss the appeal.

Appeal dismissed.

AIR 1976 SUPREME COURT 199

(From: Allahabad)*

P. N. BHAGWATI, P. K. GOSWAMI AND
N. L. UNTWALLIA, JJ.

Ram Prasad and others, Appellants v.
The State of U. P., Respondent.

Criminal Appeal No. 204 of 1971, D/-
9-12-1975.

(A) Penal Code (1860), Ss. 302, 323 and 34 — Four accused, two armed with lathis, trying to forcibly stack their bundles of grain in front of R's enclosure — R objecting on ground that land where they wanted to stack belonged to him — Assault by accused on R with lathis and kicks and fists — Death of R as a result of head injuries caused by lathis — Offences for which accused could be convicted. Criminal Appeal No. 2072 of 1967, D/- 23-4-1970 (All), Partly Reversed.

In the village where the parties resided, the appellants P, M, H and K wanted to forcibly stack their bundles of Bajra in front of the enclosure of R, the deceased, where he had a hut. R asked the appellants not to do so as the land where

*(Criminal Appeal No. 2072 of 1967, D/-
23-4-1970 (All).)

LS/LS/E499/75/GMJ

they wanted to stack the bundles belonged to him. P and M who were armed with lathis assaulted R with lathis and H and K assaulted him with kicks and fists. When a person intervened he was also assaulted with lathis by P and M and with kicks and fists by the other two. R had three injuries, two on the head caused by lathis and only one at the buttock. The person who intervened had six simple injuries. As a result of the injuries R died the same day.

Held (1) that the knowledge of the appellants that the lathis would be fully and effectively used in the process of forcibly occupying the land was not sufficient to establish the common intention of committing a crime punishable under Section 302. This could be a relevant fact if they had been 5 in number and had formed an unlawful assembly the common object of which was to forcibly occupy the land. There was nothing to indicate that the appellants had arrived at the scene with a pre-planned common intention of causing the death of R. The manner of assault did not necessarily lead to the conclusion that all the four appellants had developed a common intention at the time of the occurrence. Giving of two lathi blows by the two appellants who were armed with lathis did not suffice to show the common intention of the other two appellants. (Para 6)

(2) that in the light of the medical evidence it was clear that each of the two appellants P and M simultaneously gave a blow with great force on the head of R resulting in the fracture of his parietal and temporal bones. The facts showed that when each of them gave a blow on the head of R, at the time of giving the blow they developed and shared a common intention of causing such injury to him which in the ordinary course of nature was sufficient to cause his death. Their conviction under Section 302 read with Section 34 was, therefore, proper but not of the other two, who could only be convicted under Section 353 read with Section 34 along with the other two. Criminal Appeal No. 2072 of 1967, D/- 23-4-1970 (All.), Partly Reversed. (Para 7)

Mr. E. C. Agrawala, Advocate, for Appellants; Mr. O. P. Rana, Advocate, for Respondent.

Judgment of the Court was delivered by

UNTWALIA, J.:— The four appellants in this appeal by special leave are Ram Prasad alias Dhaudhar, Harbars, Mahabir and Kalwa. All have been convicted under Section 302 read with Section 34 of the Penal Code and each has been sentenced to undergo imprisonment for life under this count. All of them have also been convicted under Section 323 read with Section 34 of the Penal Code

and a concurrent sentence of one year's rigorous imprisonment has been awarded to each of them for the said conviction. In substance only two points were urged in support of this appeal by the appellant's counsel and they are as follows:

(1) That the appellants committed the assault on Ram Chandra—deceased and his brother Baljit, P.W. 15 in exercise of their right of private defence of property.

(2) That the conviction of none of the appellants under Section 302 with the aid of Section 34 of the Penal Code is sustainable.

We shall proceed to state only such facts of the case as are necessary for the decision of the above points.

2. The appellants and the members of the prosecution party namely Ram Chandra, the deceased, his son Karori, P.W. 1 and his brother Baljit, P.W. 15 are agnatic relations. There was bad blood and enmity inter se between them. On the 7th of October, 1966 at about 10.30 A.M. in the village where the parties reside, the appellants wanted to forcibly stack their bundles of Bajra in front of the enclosure (gher) of Ram Chandra where he had a hut. Ram Chandra asked the appellants not to do so stating that the land where they wanted to stack their bundles of Bajra belonged to them (him?). Appellants Ram Prasad and Mahabir were armed with lathis. They assaulted Ram Chandra with lathis. Appellants Harbars and Kalwa assaulted him with kicks and fists. When P.W. 15 tried to intervene, he was also assaulted with lathis by the two appellants Ram Prasad and Mahabir and with kicks and fists by the other two. As a result of the injury, Ram Chandra died the same day late in the evening.

3. The Doctor who held the autopsy over the dead body of Ram Chandra found two lacerated wounds skull deep—one at the midline of the head and the other on the left side. On internal examination he found both the parietal and temporal bones fractured and the membranes lacerated. The Doctor opined that the two injuries were sufficient in the ordinary course of nature to cause the death of Ram Chandra. The third injury found on his person was an abraded contusion over the left side buttock upper part. The same Doctor had medically examined Baljit, P.W. 15 and had found six simple injuries on his person in the shape of contusions or abrasions.

4. The land where the occurrence took place and where the appellants wanted to place their bundles of Bajra was claimed on their behalf to be either in their exclusive possession or in joint possession with Ram Chandra. It was, therefore, submitted on their behalf that they

had a right of private defence of property when they were obstructed by Ram Chandra and Baljit from placing their bundles of Bajra upon it. We have no difficulty in rejecting this argument. Both the courts below have concurrently found that the piece of land where the appellants wanted to put their Bajra bundles and where occurrence took place was in exclusive possession of the prosecution party. Having appreciated all that was said by the appellants in this regard, we find no ground to justify any interference by this Court on the question of exclusive possession of the prosecution party over the land in question. It is plain, therefore, that the appellants had no right of private defence of property.

5. The second submission made on behalf of the appellants has force in respect of only two of them, namely, appellants Harbans and Kalwa. We shall immediately show that their conviction under Section 302 read with Section 34 is not justified. On the other hand, we find, although for reasons slightly different from those given by the High Court that appellants Ram Prasad and Mahabir have rightly been convicted under Sec. 302/34 of the Penal Code.

6. The High Court has recorded the following facts to justify the convictions of all the appellants under Sec. 302 with the aid of Section 34:—

"1. That about ten days before 7th of October, 1966 (the day of occurrence) the appellants approached P.W. 1 Karori, and unsuccessfully asked him to give the land on which his enclosure was constructed to Smt. Anandi so that they may take the land which had gone to Smt. Anandi in the family partition, themselves. This is proved by the evidence of P.W. 1 Karori and we have seen no reason to doubt it.

2. That on the day of occurrence all the four appellants, two of whom are brothers and the other two father and son and all four of whom are collaterals and according to the prosecution witnesses form a party came together with bundles of Bajra with them and two of the appellants were armed with lathis.

3. That the appellants forcibly wanted to stack their Bajra bundles on the land adjoining the hut of Ram Chandra deceased.

4. That in view of the circumstance that two of the appellants were armed with lathis, and had come determined to forcibly occupy the land by putting the bundles of Bajra on it, it can be safely presumed that that all the appellants knew that in order to forcibly occupy the land they would go to the extent of fully and effectively using lathis.

5. That no sooner Ram Chandra objected to the appellants putting their

Bajra bundles on the land adjoining the hut, the appellants opened an assault on him without making the least effort to argue with him or to persuade him to let them do so. They did not withdraw nor did they have recourse to intervention of common friends or of public authorities.

6. That the appellants continued beating Ram Chandra and Baljit Singh until Ram Chandra fell down unconscious and apparently dead. At no stage any of the appellants tried to relent or withdraw from the assault.

7. That all the appellants ran away together in the same direction."

Facts 1, 2 and 3 do not establish the sharing of any common intention by the appellants of committing the murder of Ram Chandra. The knowledge of the appellants as recorded in fact 4 that the lathis would be fully and effectively used in the process of forcibly occupying the land is not sufficient to establish the common intention of committing a crime punishable under Section 302. This could be a relevant fact if they would have been 5 in number and would have formed an unlawful assembly the common object of which was to forcibly occupy the land. Fact 7 also does not establish any common intention. Facts 5 and 6 are not accurately recorded. On the Doctor's evidence Ram Chandra had only 3 injuries—two injuries on the head caused by lathis and only one at the buttock. In such a situation it is difficult to attribute common intention of causing the death of Ram Chandra to appellants Harbans and Kalwa. There is nothing to indicate that the appellants had arrived at the scene with a pre-planned common intention of causing the death of Ram Chandra. The manner of assault as deposed to by the prosecution witnesses does not necessarily lead to the conclusion that all the four appellants had developed a common intention at the time of the occurrence. Giving of two lathi blows by the two appellants who were armed with lathis did not suffice to show the common intention of the other two appellants.

7. So far the cases of appellants Ram Prasad and Mahabir are concerned they stand on a different footing. Reading the evidence of P.Ws. 1 and 15 in the light of the medical evidence it is clear that each of the said two appellants simultaneously gave a blow with great force on the head of Ram Chandra resulting in the fracture of his parietal and temporal bones. The facts unmistakably show that when each of them gave a blow on the head of Ram Chandra, at the time of giving the blow they developed and shared a common intention of causing such injury to him which in the ordinary course of nature was sufficient to cause

his death. The High Court has said that assuming, as had been argued, that the two injuries on the head of Ram Chandra had been caused by the same appellant—one out of the two who were armed with lathis, still all were liable to be convicted with the aid of Section 34 of the Penal Code. This view is not correct. If the author of the two injuries on the head of Ram Chandra was a single person, then it was difficult to found upon this basis the conviction of others with the aid of Section 34. And then it was not known who that single person was. But in our judgment on the evidence of the prosecution which has been relied upon by the two courts below the irresistible conclusion is that appellants Ram Prasad and Mahabir had caused one injury each by hurling their lathis with great force on the head of Ram Chandra. We, therefore, sustain their conviction under Section 302 read with Section 34 of the Penal Code but not of the other two.

8. The appeal is partly allowed. The conviction and sentence of all the four appellants under Section 323 read with Section 34 of the Penal Code are upheld. The conviction and sentence of appellants Ram Prasad and Mahabir under Section 302 read with Section 34 of the Penal Code are also maintained, but those of appellants Harbans and Kalwa under this count are set aside.

Appeal partly allowed.

AIR 1976 SUPREME COURT 202

(From : Punjab)*

P. N. BHAGWATI, P. K. GOSWAMI AND
N. L. UNTWALIA, JJ.

Bhagwan Singh, Appellant v. The State of
Haryana, Respondent.

Criminal Appeal No. 201 of 1971, D/-
9-12-1975.

(A) Evidence Act (1872), S. 154 — Hostile
witness — Cross-examination under S. 154 —
Value of his evidence — Prosecution under
S. 165-A, Penal Code — Conviction upon
such evidence not barred — (Penal Code
(1860), S. 165-A).

Where the Court gives permission to the Prosecutor to cross-examine his own witness, thus characterising him as, a hostile witness, that fact does not completely efface his evidence. The evidence remains admissible in the trial and there is no legal bar to base a conviction upon his testimony if corroborated by other reliable evidence. (Para 8)

Where in a prosecution of a C. I. D. Constable under S. 165-A, Penal Code, for

* (Criminal Appeal No. 1165 of 1969, D/-
10-3-1971 (Punjab & Har)).

abetment of the offence under Section 161, in an attempt to save the accused in a Criminal Case under Section 411, Penal Code, the Court permitted the prosecution to cross-examine its own witness, a Head Constable (who had detected the case), after declaring him hostile:

Held that the fact that the witness was declared hostile did not completely efface his evidence; it remained admissible in the trial. Since his testimony was corroborated by other evidence, there was no legal bar to base his conviction upon it. (Held that there was clear abetment of the offence by the C. I. D. constable under Section 161 and the ingredients of Section 165-A were established against him). Criminal Appeal No. 1165 of 1969, D/- 10-3-1971 (Punjab & Har), Affirmed. (Para 8)

Mr. D. Mookherjee, Sr. Advocate (Mr. R. L. Kohli, Advocate with him), for Appellant; Mr. H. S. Marwah, Advocate for Mr. R. N. Sachthey, Advocate, for Respondent.

Judgment of the Court was delivered by

GOSWAMI, J.:— This appeal by special leave is directed against the judgment of the High Court of Punjab and Haryana affirming the conviction of the appellant under Section 165-A, Indian Penal Code.

2. The facts briefly are that the appellant, Bhagwan Singh, is a C. I. D. police constable and would be naturally familiar with Head Constable, Jagat Singh (P. W. 1). Jagat Singh had detected a case under Section 411, I. P. C., on April 25, 1968. In that case one Rameshwar Das of Ambala City was arrested by Jagat Singh at Murthal Bus Stand after searching his person and recovering from him 20 gold coins and 47 gold bangles weighing 101 tolas. Rameshwar Dass was produced in Court on April 27, 1968 and was remanded to judicial custody till April 29. In order to help Rameshwar Dass, Om Parkash and Sulekh Chand, who were co-accused with the appellant (since acquitted), apparently took the help of the appellant to approach Jagat Singh to save Rameshwar Dass from the criminal case. The appellant suggested to Jagat Singh to substitute the seized gold coins by 20 other gold coins which he would be supplied with and if he would do that he would be paid Rs. 1,000/- for this help in the criminal case. When this was proposed to Jagat Singh, the other two accused were with him. At first Jagat Singh refused to accede to this unusual request but later on asked him to see him at Dogra Hotel the same day at 5.30 P. M.

3. While Jagat Singh gave that hope to the appellant and the two co-accused, the former also immediately approached the Deputy Superintendent of Police, Gurbhakh Singh (P. W. 6) and informed him about this matter. The D. S. P. recorded his statement which is marked as Ext. P-A. The D. S. P. sent for the Station House Officer of the Police Station, Sonapat, and directed him to go to the Dogra Hotel and arrange for the

detection of the crime. Jagat Singh was also directed to go to the Hotel and meet the appellant and others as previously suggested by him. The D. S. P. along with the Sub-Inspector, Ram Singh (P. W. 4), waited in a shop near the Dogra Hotel and after the appellant had passed the money to Jagat Singh a signal, as arranged, was given on which the raiding party rushed to the Hotel and found Jagat Singh and the appellant sitting on a table facing each other. At that time currency notes of the value of Rupees 1,000/- were in the hands of Jagat Singh and these were taken possession of by the police and on search of the appellant 20 gold coins having hook-marks were recovered from his pocket.

4. The above story of the prosecution was sought to be established by the evidence of P. W. 1, Jagat Singh, P. W. 2, Ajit Singh, P. W. 4, Ram Singh, S. H. O. and P. W. 6, D. S. P. Gurbhaksh Singh. One of the witnesses of the raiding party was given up as being won over by the appellant. Mathuram (P. W. 3), proprietor of the Hotel, also did not fully support the prosecution case and was declared hostile by the prosecutor.

5. The Special Judge, Rohtak, convicted the appellant and sentenced him to undergo rigorous imprisonment for one year and acquitted the other two co-accused, as stated earlier. The High Court on appeal maintained the conviction and sentence. Hence this appeal by special leave.

6. We have heard the learned counsel for the appellant and are unable to find any infirmity in the conviction. It is clear that the two co-accused being interested in Rameshwar Dass took the help of the appellant to influence Jagat Singh for substitution of the stolen exhibits in order that the case under Section 411, I. P. C. against Rameshwar Dass would absolutely fail. Jagat Singh was definitely approached by the appellant in view of his belonging to the same force and he attempted to bribe Jagat Singh by paying Rs. 1,000/- which must have been supplied by the two co-accused interested in Rameshwar Dass to ruin the prosecution case. Once the stolen gold coins were substituted, the identity would be lost and the accused would be entitled to acquittal and even the accused in that event might be able to claim the gold coins. The appellant thus attempted to bribe Jagat Singh in order to show favour to Rameshwar Dass by accepting the bribe.

7. In this case the Public Prosecutor obtained permission from the Court to cross-examine P. W. Jagat Singh since he did not specifically refer to the two co-accused in his examination-in-chief. Mr. Debabrata Mukherjee, on behalf of the appellant, submit that since the prosecution case rests principally upon Jagat Singh's testimony, the whole edifice is destroyed on that witness being declared hostile and the appellant is entitled to an acquittal.

8. We have carefully perused the evidence of Jagat Singh, who was examined in the trial after more than a year of detection of the case. The prosecution could have even avoided requesting for permission to cross-examine the witness under Section 154 of the Evidence Act. But the fact that the court gave permission to the Prosecutor to cross-examine his own witness, thus characterising him as, what is described as a hostile witness, does not completely efface his evidence. The evidence remains admissible in the trial and there is no legal bar to base a conviction upon his testimony if corroborated by other reliable evidence. We are satisfied in this case that the evidence of Jagat Singh, but for whose prompt assistance the case would not have seen the light of day and whose statement had immediately been recorded by the D. S. P., is amply corroborated by other evidence mentioned above to inspire confidence in his testimony. Apart from that the fact of recovery of the gold coins in the pocket of the appellant gave a seal of finality to the truth of the charge against the appellant. If Jagat Singh had accepted the bribe he would have been guilty under Section 161, I. P. C. There is, therefore, clear abetment by the appellant of the offence under Section 161, I. P. C. and the ingredients of Section 165-A, I. P. C. are established against him.

9. There is thus no merit in this appeal and the same is dismissed.

Appeal dismissed.

AIR 1976 SUPREME COURT 203

(From: (1969) 74 ITR 107 (Cal))

K. K. MATHEW AND
S. MURTAZA FAZL ALI, JJ.

Kalyanji Mavji and Co., Appellant v.
Commissioner of Income-tax, West Bengal-II, Respondent.

Civil Appeal No. 522 of 1971. D/-
10-12-1975.

(A) Income-tax Act (1922). S. 34 (1)
(b) — Escaped assessment — Reassessment — Word "information", used in Section 34 (1) (b) — Connotation and import of.

The word 'information' used in Section 34 (1) (b) is of the widest amplitude and comprehends a variety of factors. Nevertheless the power under Section 34 (1) (b), however wide it may be is not plenary, because the discretion of the Income-tax Officer is controlled by the words "reason to believe." The following tests and principles would apply to determine the applicability of S. 34 (1) (b) to the following categories of cases:

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(1) Where the information is as to the true and correct state of the law derived from relevant judicial decisions;

(2) Where in the original assessment the income liable to tax has escaped assessment due to oversight, inadvertence or a mistake committed by the Income-tax Officer;

(3) Where the information is derived from an external source of any kind. Such external source would include discovery of new and important matters or knowledge of fresh facts which were not present at the time of the original assessment;

(4) Where the information may be obtained even from the record of the original assessment from an investigation of the materials on the record, or the facts disclosed thereby or from other enquiry or research into facts or law. If these conditions are satisfied then the Income-tax Officer would have complete jurisdiction to re-open the original assessment. It is obvious that where the I. T. O. gets no subsequent information, but merely proceeds to re-open the original assessment without any fresh facts or materials or without any enquiry into the materials which form part of the original assessment, Section 34 (1) (b) would have no application. (Case law discussed).

(Paras 9, 13)

In the instant case, at the time of the original assessment for the year 1956-57 the assessee firm filed the return claiming the deduction of a certain sum being the amount of interest paid by it on the debts incurred for the partnership business and filed the balance-sheet in support of his plea. The Income-tax Officer accepted the claim. For the assessment year 1957-58 the assessee showed the same income and the deduction claimed was allowed. However, in the year 1958-59 the I. T. O. concerned suspected the correctness of the return particularly the deduction of interest and found that as the amount of the deduction claimed was utilised for giving interest-free loans to the partners for clearing up their income-tax dues it could not be said to be a loan incurred for the expenses of the partnership business and he accordingly disallowed the deduction claimed by the assessee. This discovery led the I. T. O. to issue notice to the assessee under Section 34 (1) (b) for re-opening the original assessment of the year 1956-57. He called upon it to prove its plea but the assessee led no evidence before the I. T. O.

Held that the case squarely fell within the ambit of Section 34 (1) (b) inasmuch as the I. T. O. proceeded on the basis of the information which came to him after the original assessment by fresh facts revealed in the assessment for the year

1958-59 and consisted of the conduct of the assessee itself in not adducing any evidence to support its plea. It was not a case of a mere change of opinion by the I. T. O. on the materials which were already on the record. AIR 1968 SC 49. Applied; (1969) 74 ITR 107 (Cal) Affirmed. (Paras 14, 15)

Cases Referred: Chronological Paras

1973 Tax LR 48 = 85 ITR 467 (Bom) 16
1972 Tax LR 981 = 82 ITR 831 (SC) 14
AIR 1970 SC 300 = (1970) 1 SCR 726 11
AIR 1968 SC 49 = 67 ITR 11 4, 12, 15, 16
AIR 1967 SC 230 = (1966) Supp SCR 174 10

[1961] 41 ITR 221 (SC) 9

AIR 1959 SC 257 = (1959) Supp (1) SCR 10, 11, 12

AIR 1957 Pat 638 = 32 ITR 289 9

M/s. S. R. Banerjee, N. H. Goswami and Arvind Minocha, Advocates, for Appellant; M/s. B. B. Ahuja and S. P. Navar Advocates, for Respondent.

Judgment of the Court was delivered by

FAZL ALI, J.:— This appeal by special leave involves the interpretation of the scope, extent and ambit of S. 34 (1) (b) of the Income-tax Act, 1922 with particular reference to the connotation and import of the word 'information' used in Section 34 (1) (b). Although the question appears to have been settled in one form or the other by the decisions of this Court, the changing and diverse society such as ours' dealing in complex commercial activities continues to produce multifarious facets of taxable income which has escaped assessment cloaked under difficult propositions and knotty legal problems. It is the onerous task of this Court to dispel the doubts and resolve and reconcile the differing views taken by the High Courts in various situations which every time poses a new problem.

2. The points involved in the instant case have baffled many a legal brain so much so that the High Court also appears to have been in two minds whether to place the information in the instant case as based on the materials already on the record of the original assessment of 1956-57 revealed by closer circumspection or to the information derived from subsequent or fresh facts. Before, however, examining the legal incidents of Section 34 of the Income-tax Act, 1922, it may be necessary for us to travel into the domain of the facts of the present case which are short and simple.

3. The assessee appellant M/s. Kalyanji Mavji and Company is a re-sistered partnership firm dealing in various commercial activities. The said firm filed its return for the year 1956-57 corresponding to the accounting Gujarati Diwali Year 2001 showing a total income of

Rs. 7,44,551/- after claiming a deduction of a sum of Rs. 43,116/- being the amount of interest paid by the assessee on the debts incurred for the partnership business. The Income-tax Officer accepted the return but on appeal to the Appellate Assistant Commissioner the assessment was reduced by a sum of Rs. 9,200/- by his order dated July 3, 1958. For the assessment year 1957-58 the assessee showed the same income and the deduction claimed was allowed. The next year 1958-59, however, presented quite a different complexion. While the assessee filed his return in the year 1958-59, the Income-tax Officer concerned suspected the correctness of the return particularly the deduction of interest and found that as the amount of the deduction claimed was utilised for giving interest-free loans to the partners for clearing up their income-tax dues it could not be said to be a loan incurred for the expenses of the partnership business and he accordingly disallowed the deduction claimed by the appellant. This discovery led the Income-tax Officer to issue notice to the appellant under Section 34 (1) (b) of the Income-tax Act, 1922 — hereinafter referred to as 'the Act' — for reopening the assessment of the year 1956-57 — hereinafter to be referred to as 'the original assessment' — on the ground that the deduction having been wrongly allowed, taxable income had escaped assessment. After hearing the appellant the Income-tax Officer completed the assessment and included the sum of Rs. 43,116/- to the total income shown by the assessee. Thereafter the appellant filed an appeal before the Appellate Assistant Commissioner against the order of the Income-tax Officer but the appeal was dismissed by the Appellate authority which confirmed the order of the Income-tax Officer. It may be pertinent to note here that in his order the Appellate Assistant Commissioner pointed out that in the assessment years 1958-59 and 1959-60 the Income-tax Officer found that the appellant had no evidence with him to show that the funds borrowed on which the interest was paid were utilised for the purpose of the business and not diverted to the partners. Thereafter the appellant filed a second appeal to the Income-tax Appellate Tribunal, "B" Bench Calcutta. The Tribunal after having accepted the facts culminating in the order of the Appellate Assistant Commissioner was of the opinion that the information of the Income-tax Officer resulting in the notice under Section 34 (1) (b) of the Act to the assessee was not based on any fresh facts but was derived from the materials on the record of the original assessment. The Tribunal further found that if the Income-tax Officer while completing the original assessment would have been

careful enough to scrutinise the balance-sheet he would have at once detected the infirmity on the basis of which the subsequent Income-tax Officer issued the notice under Section 34 (1) (b) of the Act to the appellant. The Tribunal further was of the opinion that the subsequent Income-tax Officer merely changed his opinion on the basis of the very materials that were before him when the original assessment was made and that was not sufficient to attract the provisions of Section 34 (1) (b) of the Act. The Tribunal accordingly allowed the appeal and set aside the order of the Income-tax Officer issuing notice to the assessee under Section 34 (1) (b) for reopening the original assessment. Thereafter the respondent, namely, the Commissioner of Income-tax approached the Tribunal for making a reference to the High Court under Section 66 (1) of the Act as a result of which the Tribunal referred the case to the High Court at Calcutta after framing the following question:

"Whether on the facts and in the circumstances of the case, the Tribunal was right in holding that the re-assessment made by the Income-tax Officer under Section 34 (1) (b) of the Indian Income-tax Act, 1922 was incompetent?"

The High Court, after hearing the parties, differed from the view taken by the Tribunal and held that the present case squarely fell within the ambit of S. 34 (1) (b) of the Act inasmuch as the information on the basis of which the Income-tax Officer sought to re-open the original assessment was based on subsequent facts as also on the materials of the original assessment revealed by more careful and closer circumspection of those materials. The High Court referred to a number of decisions of this Court as also to the decisions of the Calcutta High Court. The appellant sought leave to appeal to this Court against the order of the High Court, which having been refused, the appellant obtained special leave from this Court, and hence this appeal.

4. In support of the appeal it was contended by Banerjee that the view taken by the High Court is legally erroneous inasmuch as the admitted facts of this case would disclose that the information relied upon by the Income-tax Officer in order to re-open the original assessment was not derived from external sources but amounted to a mere change of opinion on the very facts and materials that were present on the record of the original assessment. It was also submitted that it was not open to the Income-tax Officer to have re-opened the original assessment merely because he took a different view of the matter in the assessment year 1958-59. Lastly it was argued that the High Court had not correctly applied the

ratio laid down by this Court in Commissioner of Income-tax, Gujarat v. A. Raman and Co., 67 ITR 11 = (AIR 1968 SC 49).

5. Mr. Ahuja appearing for the Revenue submitted that the order of the Income-tax Officer was fully justified and the High Court had taken the correct view of the law.

6. In order to appreciate the contentions advanced by counsel for the parties, it is necessary to make a brief survey of the provisions of Section 34(1) of the Income-tax Act, 1922. The section runs thus:

"34. (1) If—

(a) the Income-tax Officer has reason to believe that by reason of the omission or failure on the part of an assessee to make a return of his income under Section 22 for any year or to disclose fully and truly all material facts necessary for his assessment for that year, income, profits or gains chargeable to income-tax have escaped assessment for that year, or have been under-assessed or assessed at too low a rate, or have been made the subject of excessive relief under the Act, or excessive loss or depreciation allowance has been computed, or

(b) notwithstanding that there has been no omission or failure as mentioned in clause (a) on the part of the assessee, the Income-tax Officer has in consequence of information in his possession reason to believe that income, profits or gains chargeable to income-tax have escaped assessment for any year, or have been under-assessed, or assessed at too low a rate, or have been made the subject of excessive relief under this Act, or that excessive loss or depreciation allowance has been computed,

he may in cases falling under clause (a) at any time and in cases falling under clause (b) at any time within four years of the end of that year, serve on the assessee, or, if the assessee is a company, on the principal officer thereof, a notice containing all or any of the requirements which may be included in a notice under sub-section (2) of Section 22 and may proceed to assess or reassess such income, profits or gains or recompute the loss or depreciation allowance; and the provisions of this Act shall, so far as may be, apply accordingly as if the notice were a notice issued under that sub-section

Provided x x x x"

It would be seen that Section 34(1) contemplates two categories of cases for reopening the previous assessment—(1) where there has been an omission or failure on the part of the assessee to make return of his income under S. 22 or to disclose fully and truly all material facts necessary for his assessment; and (2) where there has been no such omission

on the part of the assessee but the Income-tax Officer on the basis of information in his possession finds that income chargeable to tax has escaped assessment for any year. It is, therefore, manifest that the first category deals with cases where an assessee is himself in default and the second category deals with cases where there is no fault on the part of an assessee but where the income chargeable to tax has actually escaped assessment for one reason or the other and the Income-tax Officer comes to know about the same. In the instant case, however, we are concerned with clause (b) of Section 34(1) extracted supra. Before however proceeding to interpret the ambit and import of Section 34(1)(b) it may be necessary to consider the history of Section 34 of the Act which appears to have passed through different phases with amendments and additions made to the section from time to time.

7. Section 34 as it stood in 1922 was as follows:

"34. If for any reason income, profits or gains chargeable to income-tax has escaped assessment in any year, or has been assessed at too low a rate, the Income-tax Officer may, at any time within one year of the end of that year, serve on person liable to pay tax on such income, profits or gains, or in the case of a company on the principal officer thereof, a notice containing all or any of the requirements which may be included in a notice under sub-section (2) of Section 22 and may proceed to assess or reassess such income, profits or gains, and the provisions of this Act shall, so far as may be, apply accordingly as if the notice were a notice issued under that sub-section:

Provided that the tax shall be charged at the rates at which it would have been charged had the income, profits or gains not escaped assessment or full assessment, as the case may be."

It would be seen that in the section as it stood in 1922 the word 'information' was not there at all and the section merely empowered the Income-tax Officer to reopen the assessment of any year where income chargeable to tax had escaped assessment. No conditions or limitations on the power of the Income-tax Officer were at all laid down under the section. It appears that the appropriate Legislature in its wisdom thought that this would be too wide a power to be given to the Income-tax Officer and may not be workable. In these circumstances, by the Indian Income-tax (Amendment) Act, 1939, this section was recast as under:

"34(1) If in consequence of definite information which has come into his possession the Income-tax Officer, discovers that income, profits and gains chargeable

to income-tax have escaped assessment in any year, or have been under-assessed, or have been assessed at too low a rate, or have been the subject of excessive relief under this Act the Income-tax Officer may, in any case in which he has reason to believe that the assessee has concealed the particulars of his income or deliberately furnished inaccurate particulars thereof, at any time within eight years, and in any other case at any time within four years of the end of that year, serve on the person liable to pay tax on such income, profits or gains, or in the case of a company, on the principal officer thereof, a notice, containing all or any of the requirements which may be included in a notice under sub-section (2) of Section 22, and may proceed to assess or re-assess such income, profits or gains, and the provisions of this Act shall, so far as may be, apply accordingly as if the notice were a notice issued under that sub-section:

Provided x x x x x"

8. It may be pertinent to note that by virtue of this amendment the concept of the Income-tax Officer deriving definite information was introduced for the first time. The word 'information' was qualified by 'definite' and an additional condition was incorporated namely that the Income-tax Officer discovers that income chargeable to tax had escaped assessment. This provision led the Courts to approach the provisions of the section with greater circumspection and stricter scrutiny as a result of which many cases of escaped assessments had to be set at naught by some decisions of the Courts. This led the Parliament to take a fresh view of the situation. Accordingly by the Income-tax and Business Profits Tax (Amendment) Act, 1948, the section was re-cast in the present form as quoted above. There were further amendments in 1954 and 1956 with which we are not concerned. Ultimately by the Income-tax Act, 1961, the section underwent a complete transformation and even the setting of the section was changed which now forms Section 147 (a) and (b) of the Income-tax Act, 1961. We are now concerned in this case only with Section 34 (1) (b) as it stood after the amendment of 1948.

9. Another pertinent fact which may be mentioned here is that although Section 34 was the subject of several amendments, yet the word 'information' which was introduced in 1939 has not been defined at all. Since the word 'information' has not been defined, it is difficult to lay down any rule of universal application. At the same time it cannot be disputed that the object of the Act was to see that the tax collecting machinery is

made as perfect and effective as possible so that the tax-payer is not allowed to get away with escaped income-tax. The fact that the adjective 'definite' qualified the word 'information' and the word 'discovers' which were introduced in the Income-tax (Amendment) Act, 1939 were deleted by the Amendment Act of 1948 would lead to the irresistible inference that the word 'information' is of the widest amplitude and comprehends a variety of factors. Nevertheless the power under Section 34 (1) (b), however wide it may be, is not plenary, because the discretion of the Income-tax Officer is controlled by the words "reason to believe". It was so held by this Court in *Bhimraj Pannalal v. Commissioner of Income-tax, Bihar and Orissa*, (1961) 41 ITR 221 (SC) while affirming the decision of the Patna High Court in *Bhimraj Pannalal v. Commissioner of Income-tax, Bihar and Orissa*, 32 ITR 289 = (AIR 1957 Pat 638). This legal proposition, however, is not disputed. It, therefore, follows that information may come from external sources or even from materials already on the record or may be derived from the discovery of new and important matter or fresh facts. The word 'information' will also include true and correct state of the law derived from relevant judicial decisions either of the Income-tax authorities or other Courts of law which decide income-tax matters. Where the ground on which the original assessment is based is held to be erroneous by a superior Court in some other case, that will also amount to a fresh information which comes into existence subsequent to the original assessment. A subsequent Privy Council decision is also included in the word 'information'. Thus it is very difficult to lay down any hard and fast rule. But this Court has in two leading cases laid down some objective tests and principles to determine the applicability of Section 34 (1) (b) of the Act which we shall now discuss.

10. In *Maharaj Kumar Kamal Singh v. The Commissioner of Income-tax, Bihar and Orissa*, (1959) Supp (1) SCR 10 = (AIR 1959 SC 257) the word 'information' fell for interpretation by this Court, where it was observed thus:

"We would accordingly hold that the word 'information' in Section 34 (1) (b) includes information as to the true and correct state of the law and so would cover information as to relevant judicial decisions. If that be the true position, the argument that the Income-tax Officer was not justified in treating the Privy Council decision in question as information within Section 34 (1) (b) cannot be accepted.

x x x x x x

In our opinion, even in a case where a return has been submitted, if the Income-tax Officer erroneously fails to tax a part of assessable income, it is a case where the said part of the income has escaped assessment. The appellant's attempt to put a very narrow and artificial limitation on the meaning of the word 'escape' in S. 34 (1) (b) cannot therefore succeed."

It will be seen that this Court was in favour of placing not a narrow but a liberal interpretation on the provisions of Section 34 (1) (b) of the Act. This decision was considered by this Court in Commr. of Wealth Tax, West Bengal v. Imperial Tobacco Company of India Ltd., (1966) Supp SCR 174 = (AIR 1967 SC 230) where Wanchoo, J., speaking for this Court observed as follows:

"It may be added that after the decision of this Court in Maharaj Kumar Kamal Singh's case it is now settled that "information in Section 34 (1) (b) included information as to the true and correct state of law, and so would cover information as to relevant judicial decisions" and that such information for the purpose of Section 34 (1) (b) of the Income-tax Act need not be confined only to cases where the Income-tax Officer discovers as a fact that income has escaped assessment."

11. Similarly in Commr. of Income-tax, Excess Profits Tax, Hyderabad, Andhra Pradesh v. V. Jagan Mohan Rao, (1970) 1 SCR 726 = (AIR 1970 SC 300), while following the decision of this Court in Maharaj Kumar Kamal Singh's case (AIR 1959 SC 257) (supra) it was observed as follows:

"In these circumstances it was held by this Court firstly that the word information in Section 34 (1) (b) included information as to the true and correct state of the law, and so would cover information as to relevant judicial decisions, secondly that 'escape' in Section 34 (1) was not confined to cases where no return had been submitted by the assessee or where income had not been assessed owing to inadvertence or oversight or other lacuna attributable to the assessing authorities. But even in a case where a return had been submitted, if the Income-tax Officer had erroneously failed to tax a part of the assessable income, it was a case where that part of the income had escaped assessment. The decision of the Privy Council, therefore, was held to be information within the meaning of Section 34 (1) (b) and the proceedings for reassessment were validly initiated."

12. The matter was again fully considered by this Court in A. Raman and Company's case, (AIR 1968 SC 49) where Shah, J., speaking for the Court extended the connotation of the word 'informa-

tion' to two different categories of cases and observed as follows:

"The expression "information" in the context in which it occurs must, in our judgment, mean instruction or knowledge derived from an external source concerning facts or particulars, as to law relating to a matter bearing on the assessment."

x x x x

Jurisdiction of the Income-tax Officer to reassess income arises if he has in consequence of information in his possession reason to believe that income chargeable to tax has escaped assessment. That information must, it is true, have come into the possession of the Income-tax Officer after the previous assessment, but even if the information be such that it could have been obtained during the previous assessment for an investigation of the materials on the record, or the facts disclosed thereby or from other enquiry or research into facts or law, but was not in fact obtained, the jurisdiction of the Income-tax Officer is not affected." An analysis of this case would clearly show that the information as contained in Section 34 (1) (b) must fulfil the following conditions:

(1) The information may be derived from an external source concerning facts or particulars as to law relating to a matter bearing on the assessment;

(2) That the information must come after the previous or the original assessment was made. In fact the words "in consequence of information" as used in Section 34 (1) (b) clearly postulate that the information must be subsequent to the original assessment sought to be re-opened; and

(3) That the information may be obtained even on the basis of the record of the previous assessment from an investigation of the materials on the record, or the facts disclosed thereby or from other enquiry or research into facts or law.

These categories are in addition to the categories laid down by this Court in Maharaj Kumar Kamal Singh's case (AIR 1959 SC 257) which has been consistently followed in several decisions of this Court as shown above.

13. On a combined review of the decisions of this Court the following tests and principles would apply to determine the applicability of Section 34 (1) (b) to the following categories of cases:

(1) Where the information is as to the true and correct state of the law derived from relevant judicial decisions;

(2) Where in the original assessment the income liable to tax has escaped assessment due to oversight, inadvertence or a mistake committed by the Income-

tax Officer. This is obviously based on the principle that the tax-payer would not be allowed to take advantage of an oversight or mistake committed by the Taxing Authority;

(3) Where the information is derived from an external source of any kind. Such external source would include discovery of new and important matters or knowledge of fresh facts which were not present at the time of the original assessment;

(4) Where the information may be obtained even from the record of the original assessment from an investigation of the materials on the record, or the facts disclosed thereby or from other enquiry or research into facts or law.

If these conditions are satisfied then the Income-tax Officer would have complete jurisdiction to re-open the original assessment. It is obvious that where the Income-tax Officer gets no subsequent information, but merely proceeds to re-open the original assessment without any fresh facts or materials or without any enquiry into the materials which form part of the original assessment, Section 34 (1) (b) would have no application.

14. Learned counsel for the appellant heavily relied on the decision of this Court in *Bankipur Club Ltd. v. Commissioner of Income-tax, Bihar and Orissa*, 82 ITR 831 at p. 834 = (1972 Tax LR 981 at p. 982) (SC) in support of the proposition that in the instant case the Income-tax Officer has proceeded to re-open the assessment on the basis of the very materials which formed the subject of the original assessment. It was submitted that in the original assessment the assessee had claimed a deduction and had produced the balance-sheet and these very factors were also present when the Income-tax Officer sought to make the assessment for the years 1958-59 and 1959-60, and since no fresh facts were brought to his notice it was not open to him to re-open the original assessment. The facts of the case relied upon by the appellant are clearly distinguishable from the facts of the present case. In *Bankipur Club Ltd.*'s case it appears that the Club had in its return placed all the materials with full details. The facts placed before the Income-tax Officer were self-evident and no calculation or scrutiny was necessary to find out the effect of the materials placed before the Income-tax Officer. In view of this peculiar situation, Hegde, J., speaking for the Court observed:

"The fact that the club had received certain amounts as guests' charges from its members had been placed before the Income-tax Officer. It is not the case of the Income-tax Officer that he did not

come to know all the relevant facts when he made the original orders of assessment. It is also not his case that at the time he made those orders he was not aware of the true legal position. It was for the Income-tax Officer to show that he had received some information subsequent to his passing the original orders of assessment. No such material was placed before the Tribunal. That being so, the Tribunal, in our opinion, was right in holding that the Income-tax Officer was incompetent to initiate proceedings under Section 34 (1) (b)."

In the instant case it would appear that three additional facts had come into existence after the original assessment for the year 1956-57 was made by the Income-tax Officer. These were— (1) that for the assessment year 1958-59 the Income-tax Officer did not accept the assessee's plea that he should be allowed deduction for a sum of Rs. 43,116/-; (2) that the Income-tax Officer came to a finding that the assessee had not proved that the amount of deduction claimed was really in connection with the partnership business but held that this was on account of interest-free advance to the partners to pay their income-tax dues; and (3) the conduct of the appellant in not clearing the doubts of the Income-tax Officer when the appellant was given the notice to contest the assessment merely on the question of law also spoke volumes against the assessee and was also an additional factor which weighed with the Income-tax Officer. It would be seen that the Income-tax Officer in his order, which is Annexure A to the statement of case filed by the Tribunal, observed as follows:

"In the course of the assessment proceedings for 1958-59 however it was discovered that the assessee's claim of payment of interest on money borrowed was not proper. Inasmuch as the entire money borrowed had been utilised not for the purpose of business but in giving interest free advance to the partners of the firm In fact no argument as regards the allowance or disallowance of the interest amount in question was placed but the entire argument of the representative proceeded on the basis that the action under Section 34 itself was illegal....."

There is no doubt that there has been under assessment in this case and there is also no doubt that the fact of under-assessment has been brought to the notice of the Income-tax Officer only in the course of the income-tax proceedings for 1958-59."

Similarly the Appellate Assistant Commissioner in his order, which is Annexure B to the statement of the case, observed as follows:

"At the time of the original assessment the appellant claimed an interest of Rs. 43,116/- which was allowed by the I.T.O. in full. However, later on, while making the assessment for the assessment years 1958-59 and 1959-60, the I.T.O. found that the appellant had no evidence with him to show that the funds borrowed on which the interest was paid, in fact, were utilised for the purpose of the business and not diverted to the partners."

These findings by the two authorities have been clearly mentioned in the order of the Tribunal, which, while narrating the facts, observed as follows:

"Subsequently, however, when the Income-tax Officer was making the assessment for the assessment year 1958-59, he discovered that the assessee did not utilise the borrowed money for the purpose of the business but for giving interest free advances to its partners. The Income-tax Officer, therefore, had reason to believe that income to the extent of Rs. 43,116/- had been under-assessed and he issued notice under Section 34."

Thus in view of the findings given by the Income-tax authorities the following facts emerge:—

(1) that at the time of the original assessment the appellant had filed his return claiming a deduction of Rs. 43,116/- and filed the balance-sheet in support of his plea;

(2) that the balance-sheet showed that the capital of the firm was Rupees 8,70,000/-, total drawings by the partners stood at Rs. 29,31,998/- and the loans were Rs. 6,63,292/-. The Income-tax Officer who completed the original assessment appears to have accepted the claim of the appellant because the balance-sheet without any further scrutiny and a close calculation would not have revealed that the amount of deduction claimed was really in the nature of interest free loans given to the partners to meet their income-tax liabilities;

(3) that in 1958-59 the Income-tax Officer discovered that the deduction claimed by the appellant was not correct and he accordingly called upon it to prove its plea but the appellant led no evidence before the Income-tax Officer. From this the Income-tax Officer concluded that the amount sought to be claimed as deduction was not incurred for the purpose of the partnership business.

Thus, therefore, the subsequent information was— (i) the discovery by the Income-tax Officer that the deduction was wrongly claimed and his disallowance of that deduction; and (ii) the conduct of the appellant itself in not adducing any evidence or materials to prove its stand that the deduction was validly claimed.

15. We might mention that it was submitted by Mr. Banerjee that in fact the amount sought to be deducted was paid towards the income-tax liability of the partners and this was done to protect the business itself and to improve the credit of the partners. Even this specific plea does not appear to have been taken before the Income-tax Officer. We are, however, not concerned with this particular plea because we are given to understand by the counsel for the appellant that the appeals against the assessment orders for the years 1958-59 and 1959-60 are pending before the Income-tax authorities. In these circumstances we are clearly of the opinion that the facts of the present case clearly fall within the tests and principles laid down by this Court in *A. Raman and Company's case*, (AIR 1968 SC 49) inasmuch as the Income-tax Officer proceeded on the basis of the information which came to him after the original assessment by fresh facts revealed in the assessment for the year 1958-59 and consisted of the conduct of the appellant itself in not adducing any evidence to support its plea. We are, therefore, unable to agree with the view of the Tribunal that this was a case of a mere change of opinion by the Income-tax Officer on the materials which were already on the record.

16. Our attention was also drawn by the learned counsel for the appellant to the decision of the Bombay High Court in *Commissioner of Income-tax, Bombay City II v. H. Holck Larsen*, 85 ITR 467 at p. 479 = (1973 Tax LR 48 at p. 54) (Bom). In this case, Chandrachud, J., as he then was, speaking for the Court after review of the authorities of this Court and other High Courts, observed as follows:

"What is obligatory in order to apply Section 34 (1) (b) is that he must have 'information' in his possession in consequence of which he has reason to believe that the income has escaped assessment or is under-assessed etc. The distinction really consists in a change of opinion unsupported by the subsequent information on the one hand and a change of opinion based on information subsequently obtained, on the other. In the former class of cases, the assessment proceedings are attempted to be reopened without the discovery of an error and without receiving any information as to fact or law..... Such a reopening is based on a 'mere' change of opinion and is without jurisdiction..... In the latter class of cases, the reopening is based on information leading to the requisite belief and is therefore within the jurisdiction of the officer."

This decision is really based on the question whether it is open to the Income-tax Officer to change his opinion subsequent-

ly on the same materials and reopen the original assessment. We are no doubt inclined to agree with the view expressed by Chandrachud, J., in the aforesaid case, but as this question is not free from difficulty as there is some divergence of judicial opinion on the subject, we would refrain from giving any definite decision on this point, particularly when in the view we take in the instant case, this point does not really arise for determination in this case, which is really based on another principle, namely, that the information was derived by the Income-tax Officer from fresh facts and is clearly covered by the principles laid down in *A. Ramani and Company's case*, (AIR 1968 SC 49).

17. For the reasons given above, we find ourselves in complete agreement with the view taken by the High Court. Accordingly the appeal fails and is dismissed but without any order as to costs.
Appeal dismissed.

AIR 1976 SUPREME COURT 211

(From Delhi)*

A. N. RAY, C. J., M. H. BEG, R. S. SARKARIA AND P. N. BHAGWAT, JJ.

Union of India and others, Appellants v. Iqbal Singh, Respondent.

Civil Appeal No. 1223 of 1972 D/- 10-12-1975.

(A) Displaced Persons (Compensation and Rehabilitation) Act (1954), Sections 40, 9 and 4 — Displaced Persons (Compensation and Rehabilitation) Rules (1955), Rules 16, 18, 19, 20 and 21 — Maximum compensation — Rule 21 does not authorise clubbing of claims as well as separate right of claimant as a legatee under a Will.

Rule 21 of the Displaced Persons (Compensation and Rehabilitation) Rules, 1954 does not authorise clubbing together of a claim as well as a separate right of a claimant as a legatee under a will which is distinct from the displaced person's claim to compensation as a displaced person. The right of such a legatee stands on different footing from a claim made under Section 4 of the Act for payment of compensation or a rehabilitation grant. The amount of compensation or a rehabilitation grant is payable to a displaced person under the provisions of the Act. The dispute under Section 9 of the Act is different in character from a claim for compensation or rehabilitation as a displaced person. It could relate to a right by inheritance to or by succession under a will of another claimant. But

*(Civil Writ No. 117-D of 1961, D/- 19-8-1969 — (Delhi)).

LS/LS/E502/75/GGM

each person has to be paid separately as indicated by Rule 17. ILR (1964) 1 Punj 742. Approved. (Para 10)

Rule 18 only shows different kinds of claims of each displaced person in properties left by him in West Pakistan which can be clubbed together. It does not deal with rights or claims of another genus which may devolve upon a claimant in his capacity as an heir or a legatee of another displaced person who may have acquired a separate right of his own as a claimant to compensation under the Act. (Para 11)

It is true that the Act is intended for payment of compensation for rehabilitation of displaced persons and matters connected therewith. There is, however, nothing in the Act to prevent a claimant from making a gift or a will in respect of the amount he may be entitled to get. No provision of the Act takes away rights of transfer of or inheritance to verified claims. Inheritance to and devolution of rights of claimants are clearly beyond the purview or scheme of the Act. (Para 9)

(B) Transfer of Property Act (1882), Section 6 — Property — Statutory rights of claimants to compensation are separate rights to property of each claimant — Such rights are property within the meaning of section — (Displaced Persons (Compensation and Rehabilitation) Act (1954), Section 4.)

The statutory rights of claimants to compensation, which crystallize on assessment and verification of claims, are separate rights to property of each claimant covered by the wide definition of 'property' in Section 6 of the T. P. Act. They cannot evaporate or vanish suddenly with the death of a claimant. (Para 9)

Cases Referred: Chronological Paras ILR (1964) 1 Punj 742 13

Mrs. Shyamla Pappu, Sr. Advocate (Mr. M. M. Shroff Advocate with her), for Appellants; Mr. D. Goburdhan and Mr. R. Goburdhan, Advocates, for Respondent.

Judgment of the Court was delivered by

BEG, J.:— The Union of India and the Commissioners of the Rehabilitation Department of the Govt. of India are the appellants before us after certification of this case, under Article 133 (1) (a) of the Constitution. It involves a consideration of the meaning of some rules framed under Section 40 of the Displaced Persons (Compensation and Rehabilitation) Act 44 of 1954 (hereinafter referred to as 'the Act').

2. The respondent Iqbal Singh, a displaced person from Rawalpindi, in West Pakistan, had a verified claim assessed at over Rs. 32 lacs from compensation under the Act. His uncle, Jai Singh, had also a verified claim assessed

at Rs. 26,06,413/-. On 21st November, 1952, Jai Singh executed a will under which he gave various legatees, including the respondent, shares in the compensation which was due to be paid to him. Jai Singh died on 7th February, 1953. In an inquiry under Section 9 of the Act the respondent was held to be a beneficiary under Jai Singh's will to the extent of 19% of the amount due to be paid to Jai Singh. The Assistant Settlement Officer, however, clubbed together the individual claim of over Rs. 32 lacs of Iqbal Singh respondent, and the share of Rupees 4,95,028/- as a legatee in the separate claim of Jai Singh. He then awarded the maximum compensation of Rs. 2 lacs under Rule 16 which says:

"16. Scale of compensation. — Compensation shall be payable in accordance with the scale specified in appendices VIII or IX as the case may be".

3. Appendix VIII is the relevant appendix giving percentages of the assessed claims which were to be paid as "compensation" for the verified claims ranging from Rs. 500 to Rs. 18 lacs and above. The maximum prescribed for Rs. 18 lacs and above is Rs. 2 lacs as "compensation". Thus, no claimant could get more than that as compensation whatever be the amount at which his claim was assessed. The result of clubbing together by the Assistant Settlement Officer was that the respondent was not to get more than Rs. 2 lacs even though his own claim as compensation was for that much so that he was, if this decision was correct, to be totally deprived of his share in the legacy left by his uncle. His case is that he is entitled to Rs. 2 lacs on his claim of Rs. 32 lacs, and, in addition, to his share of 19% also as a legatee of the will relating to the amount which was payable to Jai Singh deceased as claimant. The character of the first was "compensation" and of the second was that of a "legacy" under a will.

4. In appeal, the Assistant Settlement Commissioner accepted the respondent's case, by an order dated 29th July, 1957, and directed that the respondent's claim be paid separately from the share in the claim he was entitled to as a beneficiary under the will mentioned above.

5. On 26th April, 1957, the Regional Settlement Commissioner, however, revised the order of the Assistant Settlement Commissioner and held that the respondent could not, under the existing rules, get any share of compensation separately as a legatee out of the estate of Jai Singh.

6. The respondent appealed to the Settlement Commissioner who agreed with the Regional Commissioner. The Central Government also rejected a revi-

sion petition of the respondent under Section 33 of the Act.

7. The respondent then filed a Writ Petition before the Circuit Bench of the Punjab High Court which came up finally before a Division Bench of the Delhi High Court and was allowed. Orders of the Central Government and the Settlement Commissioner were quashed and the order of the Assistant Settlement Commissioner was restored by the High Court.

8. It has been urged on behalf of the appellants that the High Court overlooked the scheme of the Act and misinterpreted the relevant rules. The main contention advanced by Mrs. Shymla Pappu, appearing on behalf of the appellants, is that the whole purpose of the Act was to compensate and rehabilitate individual displaced persons with a maximum limit imposed on what could be awarded to a displaced person for this purpose. It is urged that the respondent could not obtain more than the maximum amount prescribed by Appendix VIII under Rule 16. It is submitted that the combined effect of Rules 16 to 21, interpreted in the light of the scheme of the Act, is that the amount of compensation payable to an individual cannot in any case, exceed Rs. 2 lacs. Rule 21 is especially relied upon. It says:

"21. Mixed claims. — Where a person holds a number of verified claims in different capacities, the total compensation payable to him shall be determined in accordance with the provisions of Rules 18, 19 and 20."

9. It is true that the Act is intended for payment of compensation for rehabilitation of displaced persons and matters connected therewith. There is, however, nothing in the Act to prevent a claimant from making a gift or a will in respect of the amount he may be entitled to get. No provision of the Act takes away rights of transfer of or inheritance to verified claims. Nothing like an abatement or extinction of a claim by the death of the claimant is provided for by the Act. Inheritance to and devolution of rights of claimants are clearly beyond the purview or scheme of the Act. They are untouched by the provisions of the Act and are governed by other provisions of law. The statutory rights of claimants to compensation, which crystallize on assessment and verification of claims, are separate rights to property of each claimant covered by the wide definition of "property" in Section 6 of the Transfer of Property Act. They cannot evaporate or vanish suddenly with the death of a claimant. Rules framed under Section 40 of the Act have to be and are those reasonably necessary for carrying out the purposes of the Act. They can-

not go beyond the objects for which they can be framed. Those objects are confined to determination and payment of compensation for what was left in Pakistan and do not extend to deprivation of anything acquired in India in capacities other than those relevant for purposes of compensation.

10. In the instant case, the right of the respondent as a legatee under the will of Jai Singh was recognised separately in proceedings under Section 9 of the Act. The respondent thus acquired a right which was different in character from his claim as a displaced person. After having gone through the Rules 17 to 20, we are unable to construe Rule 21 as an authority for clubbing together of a claim as well as a separate right of a claimant as a legatee under a will which is distinct from the displaced person's claim to compensation as a displaced person. The right of such a legatee stands on a different footing from a claim made under Section 4 of the Act for payment of compensation or a rehabilitation grant. The amount of compensation or a rehabilitation grant is payable to a displaced person under the provisions of the Act. A dispute decided under Section 9 of the Act is very different in character from a claim for compensation or rehabilitation as a displaced person. It could relate to a right by inheritance to or by succession under a will of another claimant. But, each person has to be paid separately as indicated by Rule 17.

11. Great reliance was placed on Rule 18 on behalf of the appellants. This rule lays down:

"18. Compensation to be determined on the total value of all claims. — For the purpose of determining the compensation payable to an applicant, the Regional Settlement Commissioner shall, except as otherwise provided in these rules, add up the assessed value of all claims of the applicant in respect of all kinds of properties, other than agricultural land situated in a rural area, left by him in West Pakistan and the compensation shall be assessed on the total value of all such claims."

This rule shows that only different kinds of claims of each displaced person in properties left by him in West Pakistan which can be clubbed together. It does not deal with rights or claims of another genus which may devolve upon a claimant in his capacity as an heir or a legatee of another displaced person who may have acquired a separate right of his own as a claimant to compensation under the Act. Clubbing together of "claims" in different kinds of properties has reference to an individual's claim to 'compensation', and rehabilitation and not to claims of different displaced per-

sons which could, by transfer or devolution, vest separately in an individual.

12. Rule 19 deals with compensation payable to joint families and Rule 19-A prescribes maximum amounts payable in such cases. Rule 19-B refers to compensation ordinarily payable to karta of joint families. Rule 20 provides for the assessment of compensation of a co-owner. These are the different types of claims of the same displaced person in different capacities as claimant, in each capacity, to compensation due to himself alone. There is no provision for clubbing together of compensation to different displaced persons each with a right of his own except as members of joint families, which are treated as legal entities by themselves. The rights of a successor of another displaced person are outside the rule. There is nothing in the Act or the rules framed thereunder to conflict with this natural and ordinary interpretation of fairly clear and simple language used.

13. The judgment of the Division Bench of the Delhi High Court (H. R. Khanna, C. J. and S. N. Shankar, J) by which the Writ Petition of the respondent was allowed, shows that it had been conceded in the High Court, on behalf of the Rehabilitation Department, that Rule 18 would not apply to the case of the respondent before us. The Division Bench had relied upon an earlier decision of the Punjab High Court in Karam Singh v. Union of India, ILR (1964) 1 Punj 742, where, upon similar facts, it had been held:

"It is significant that in Rule 18 it is clearly stated that the compensation has to be determined on the total value of all claims pertaining to properties left by a claimant in West Pakistan. Therefore, it is the property left by the petitioner to which he can make a claim. The property left by his uncle cannot be said to be the property left by him within Rule 18. Properties left by a joint family are properties which the claimant, who claims to be a member of the joint family, can properly be said to have left in West Pakistan. Though the capacity in which he held those properties and so also in the case of properties held by him as a co-sharer with other persons is different from the capacity in which the properties left by him in West Pakistan in his personal and exclusive occupation are concerned. This cannot be said to be the case where he gets the property of another displaced person by reason of inheritance or by transfer. The capacities contemplated by Rule 21 are set out in Rules 18, 19 and 20 and in any case have to be analogous to them."

14. We find ourselves in entire agreement with the view adopted by the

214 S.C. [Prs. 1-2] State of M. P. v. Rameshwar Prasad (Fazl Ali J.) A.I.R.

Division Bench of the Delhi High Court and dismiss this appeal with costs.

Appeal dismissed.

AIR 1976 SUPREME COURT 214

(From: Madhya Pradesh)*

K. K. MATHEW AND S.

MURTAZA FAZL ALI, JJ.

State of Madhya Pradesh and another, Appellants v. Rameshwar Prasad (Dead) by L. Rs. and others, Respondents.

Civil Appeal No. 521 of 1971, D/- 10-12-1975.

(A) States Re-organisation Act (1956), Section 115 — Gradation list after integration of State — Employees affected must file representations after provisional list is published and not to wait till final gradation list is published. Misc. P. No. 188 of 1964, D/- 17-11-1964 (Madh Pra), Overruled. Misc. P. No. 127 of 1966, D/- 20-9-1969 (Madh Pra), Reversed.

It appears from a perusal of the various clauses of Section 115 that the statute contemplates three stages for determining the seniority of the Officers — (i) the formation of Advisory Committees and determination of principles on the basis of which the seniority is to be determined; (ii) the preparation of a provisional gradation list so as to give an opportunity to the employees concerned to file their objections; and (iii) the publication of the final gradation list after consideration of the objections filed by the employees, concerned and taking an overall view of the matter. In fact the purport of Section 115 (5) (b) of the Act, was that there should be a fair and equitable treatment of all persons affected by the provisions of that section. This could only be done if before a final gradation list was prepared the officers were given an opportunity to acquaint the Government with their respective points of view. It was indeed a strange view to take that the provisional gradation list was absolutely of no consequence and after the said list was finalised and the time for filing representation expired, then alone the employees concerned should have been asked to file their representations. This is really putting the cart before the horse. Once the list was finalised, it would be difficult for the Government to review its orders which would lead to serious complications and dislocation to the service structure of the State. Misc. P. No. 188 of 1964, D/- 17-11-1964 (Madh Pra), Overruled; Misc. P. No. 127 of 1966, D/- 20-9-1969 (Madh Pra), Reversed.

(Para 7)

*(Misc. Petn. No. 127 of 1966, D/- 20-9-1969 (Madh Pra).)

LS/LS/E504/75/MVJ

(B) States Re-organisation Act (1956), Section 115 — Gradation list — List prepared after objective and thorough consideration of various aspects of career of employees — List held valid.

Where in preparing a provisional gradation list the four principles namely (i) the nature and duties of a post; (ii) the responsibilities and powers exercised by the officers holding a post; the extent of territorial or other charge held or responsibilities discharged; (iii) the minimum qualifications, if any, prescribed for the two posts, and (iv) the salary of the post, were followed and in addition the equated grades held by the affected employee and the other officers were also taken into consideration in order to fix the seniority.

Held, that the Government had prepared the final gradation list after an objective and thorough consideration of the various aspects of the career of the employees and the principles which governed the list were wholly in consonance with the provisions of Section 115 of the Act. AIR 1973 SC 69. Relied on.

(Para 12)

Cases Referred: Chronological Paras
AIR 1973 SC 69 = (1973) 1 SCR 945 10
AIR 1968 SC 850 = (1968) 2 SCR 186 9
(1964) Misc. Petn. No. 188 of 1964, D/- 17-11-1964 (Madh Pra) 5, 7

Mr. Ram Panjwani, Dy. Advocate General Madhya Pradesh and (Mr. H. S. Parihar, Advocate for Mr. I. N. Shroff, Advocate with him), for Appellants; M/s. P. P. Rao and S. P. Nayar, Advocates, for Respondent No. 2.

Judgment of the Court was delivered by

FAZL ALI, J.:— This is an appeal by special leave by the State of Madhya Pradesh against the judgment of the Madhya Pradesh High Court dated September 20, 1969, by which the final gradation list of seniority of certain officers prepared by the Government following the integration of the Madhya Pradesh State after merging the erstwhile States of Maha Koshal, Madhya Bharat, Vindhya Pradesh and Bhopal has been partially quashed. The respondent in whose favour the High Court decided the case is already dead and has therefore no interest in the result of the proceedings. But as the gradation list has been struck down by the High Court, the Government as also the officers who had been given a particular seniority are undoubtedly affected by the order of the High Court. That is why both the State of Madhya Pradesh and the Union of India have pressed this appeal.

2. The facts of the case lie within a very narrow compass. In 1938 the respondent Rameshwar Prasad was recruited as Excise Sub-Inspector by the then Government of C. P. and Berar. On June 1,

1947, the Sales Tax Act came into force in the erstwhile State of Maha Koshal and in 1948 the respondent was promoted as Assistant District Excise Officer and Assistant Sales Tax Officer in the Maha Koshal Region. In 1949 the States of Vindhya Pradesh and Madhya Bharat were formed. On April 1, 1950 the Sales Tax Act came into force in Vindhya Pradesh and a month later i.e., on May 1, 1950, the Sales Tax Act was enforced in Madhya Bharat. Thereafter in accordance with the report given by the States Reorganisation Commission, the States Reorganisation Act was passed by which the new State of Madhya Pradesh was carved out by merging the erstwhile States of Maha Koshal, Madhya Bharat, Vindhya Pradesh and Bhopal. The appellants have produced before us the White Paper issued by the Government regarding the merger and reorganisation of the various States referred to above which is not in dispute at all. After the reorganisation, the services of the respondent were allocated to the new State of Madhya Pradesh. We might further mention that prior to the integration of Vindhya Pradesh and Madhya Bharat both the States had their similar Sales Tax Act which was known as Internal Customs Duty and there were number of officers who were manning the Tax Organisation in those States holding almost ranks equal to the respondent.

3. After the reorganisation of the States it became necessary to prepare a common gradation list of the officers of various Departments so that the officers who were allocated to the new State of Madhya Pradesh did not suffer any prejudice. Section 115 of the States Reorganisation Act, 1956 provided, amongst others, that the Central Government, by general or special order, was to determine the successor State to which every person referred to in sub-section (2) of Section 115 was to be allotted. Sub-section (5) of Section 115 enjoined on the Central Government to establish one or more Advisory Committees for the purpose of division and integration of the services among the new State and ensuring of fair and equitable treatment to all persons affected by the provisions of the section and the proper consideration of any representation made by such persons. In pursuance of these statutory provisions the Central Government appointed an Advisory Committee for the newly integrated State of Madhya Pradesh to prepare a gradation list which would reflect the seniority of the officers concerned in a fair and equitable manner so that no prejudice or injustice was caused to any officer by virtue of the integration of the States. According to the appellants on the recommendations of the Advisory Committee certain principles for determining the se-

niority of the officers coming from the erstwhile States were determined and in accordance with the same a provisional gradation list was prepared showing seniority of the officers as on November 1, 1956. These principles were formulated by virtue of a Notification No. 2581/2577/V-ST. dated October 28, 1961, which has been quoted in para. 3 of the Petition for Special Leave to appeal and may be extracted as follows:

"2581/2577/V-ST. — Whereas, the following principles have been formulated for being observed, as far as may be, in the integration of Government servants allotted for service to the new State of Madhya Pradesh viz.:-

i. In the matter of equation of posts—

(i) Where there were regularly constituted similar cadres in the different integrating units the cadres will ordinarily be integrated on that basis; but

(ii) Where, however, there were no such similar cadres the following factors will be taken into consideration in determining the equation of posts;

(a) nature and duties of a post;

(b) powers exercised by the officers holding a post, the extent of territorial or other charge held or responsibilities discharged;

(c) the minimum qualifications, if any, prescribed for recruitment to the post; and

(d) the salary of the post."

It has not been shown to us that the principles laid down by the Government Notification in accordance with the recommendations of the Advisory Committee were in any way unfair or inequitable or worked injustice to the employees concerned. On the other hand we find that the principles formulated by the Advisory Committee strike a just balance vis-a-vis the various employees coming from erstwhile States in order to determine their seniority by classifying the officers into three categories, namely, Assistant Sales Tax Officers of Maha Koshal, Inspectors of Sales Tax of Madhya Bharat and Sales Tax Inspectors including Assistant District Excise and Sales Tax Officers of Vindhya Pradesh. Having classified these officers the seniority has been fixed according to the length of service and the grades held by the officers concerned.

4. In the provisional gradation list the respondent was shown at No. 22. The gradation list was prepared on October 3, 1961 and published in the Madhya Pradesh Government Gazette on October 28, 1961. Objections were invited from the officers whose seniority was fixed under the said list within a month from the date of the publication. It is common ground that the respondent filed no objection at all within the time fixed. The Government after considering the princi-

ples laid down by the Advisory Committee and the formula evolved by the gradation list and the consideration of the representations of the officers who had filed their objections in pursuance of the publication of the provisional gradation list prepared a final gradation list on November 7, 1964, and published the same in the Government Gazette on November 11, 1964.

5. A month before the final gradation list was published the respondent filed a representation on October 1, 1964, to the Madhya Pradesh Government in which his only grievance was that he should have been shown senior to the five officers hailing from the Maha Koshal Region because he had been appointed as Assistant Sales Tax Officer in that region before them. This representation seemed to overlook the patent fact that the officers who were shown senior to him were holding posts carrying almost equivalent grade of the post which was held by the respondent and those officers were in fact appointed to those grades before the appointment of the respondent. Another representation was filed by the respondent on February 18, 1965. But a few months before this the Madhya Pradesh High Court in *Kanhayalal Pandit v. State of Madhya Pradesh*, Misc. Petn. No. 188 of 1964, D/- 17-11-1964 (Madh Pra) held that the affected employees of the State could make their representations only after the final gradation list was published. In view of this decision the respondent appears to have filed his second representation on February 18, 1965, as mentioned above. In this representation also the respondent contended that the services rendered by the Madhya Bharat and Vindhya Pradesh officers prior to the coming into force of the Sales Tax Acts in the respective States should not have been counted for the purpose of determining the seniority of the respondent.

6. Thereafter the respondent filed a writ petition in the Madhya Pradesh High Court on February 16, 1966, praying for quashing the gradation list. The appellant filed his return on July 8, 1966, and the High Court by its judgment dated September 20, 1969, allowed the petition and quashed the gradation list insofar as it affected the respondent and the other five officers who were shown above him. The appellant then filed an application for leave to appeal to the Supreme Court which was dismissed on November 21, 1969 and thereafter moved this Court for special leave to appeal which was granted on March 26, 1971.

7. The High Court appears to have quashed a part of the gradation list mainly on two grounds. In the first place it held, following the decision of the High Court in *Kanhayalal Pandit's case* Misc

Petn. No. 188 of 1964, D/- 17-11-1964 (Madh Pra) that as the final gradation list was published on November 11, 1964 the respondent had the right to make his representation thereafter and since his representation was not considered the order of the Government sanctioning the final gradation list was legally erroneous. Secondly it was held by the High Court that the contention of the respondent that the services rendered by the other five officers in Madhya Bharat and Vindhya Pradesh ought not to have been considered as valid and should have been given effect to by the Government in preparing the final gradation list. We are satisfied after perusal of the materials that the first ground on which the High Court quashed the gradation list was not at all sound and on that ground alone the order of the High Court is liable to be set aside. It is manifest that the object of preparing a tentative or provisional gradation list was to give an opportunity to the officers whose seniority was determined in the list to make their representations in order to satisfy the Government regarding any mistake or error that had crept in the gradation list. If the employee concerned did not file his representation within a month from the date of the publication of the provisional gradation list, then his representation should have been rejected outright. The Madhya Pradesh High Court was in error in taking the view that the employee concerned should have waited for filing his representation until the final gradation list was published. The Madhya Pradesh High Court in *Kanhayalal Pandit's case* had observed as follows:

"According to the view taken in these cases, the preparation of combined gradation list by the State Government is, generally speaking, only an incidental or subsidiary act such as would aid and assist the Central Government in discharging its statutory responsibility of integration of services. If so, the petitioner should wait until the final gradation list is published, for it may well be that he may have no cause for any grievance against that list. On the other hand, if he finds that he is aggrieved thereby, he is entitled to represent against it under Section 115 (5) *ibid* and he has a right to insist that his representation receives 'proper consideration'. There is, in this view, no ground for interfering at present with the order passed by the Government of India on the petitioner's representation dated 5 January, 1962."

The aforesaid view taken by the High Court is not at all intelligible. In fact the purport of Section 115 (5) (b) of the States Reorganisation Act, 1956 was that there should be a fair and equitable treatment of all persons affected by the provisions of that section. This could only be

done if before a final gradation list was prepared the officers were given an opportunity to acquaint the Government with their respective points of view. It was indeed a strange view to take that the provisional gradation list was absolutely of no consequence and after the said list was finalised and the time for filing representation expired, then alone the employees concerned should have been asked to file their representations. This is really putting the cart before the horse. Once the list was finalised, it would be difficult for the Government to review its orders which would lead to serious complications and dislocation to the service structure of the State. It appears to us from a perusal of the various clauses of Section 115 of the States Reorganisation Act that the statute contemplated three stages for determining the seniority of the officers — (i) the formation of Advisory Committees and determination of principles on the basis of which the seniority was to be determined; (ii) the preparation of a provisional gradation list so as to give an opportunity to the employees concerned to file their objections; and (iii) the publication of the final gradation list after consideration of the objections filed by the employees concerned and taking an overall view of the matter. In these circumstances, therefore, the view of the Madhya Pradesh High Court that the representation filed by the respondent was premature is legally erroneous and we are unable to agree with the same. We are, therefore, of the opinion that the judgment of the Madhya Pradesh High Court in Kanahyalal Pandit's case decided on November 17, 1964, was not correctly decided. The High Court in the instant case has based its order mainly on the judgment of the Madhya Pradesh Court in Kanahyalal Pandit's case which being incorrectly decided, the judgment of the High Court in this case must be quashed on this ground alone, and the representation filed by the respondent long after the expiry of the time mentioned in the Gazette publishing the provisional gradation list would have to be rejected as belated.

8. Even on merits a cursory glance of the principles and the formula formulated by the Government in preparing the gradation list would reveal that no injustice or prejudice was caused to the respondent. In paragraph 3 of the counter-affidavit by the appellants it has been averred as follows:

"It is further submitted that the inter se seniority in Madhya Bharat and Vindhya Pradesh units had become final after taking into consideration the service rendered in the Princely States and cannot now be challenged. After the seniority in the units of Madhya Bharat and Vindhya Pradesh was finally determined, the

posts of Assistant Sales Tax Officers of Mahakoshal were equated with Inspectors of Sales Tax of Madhya Bharat and Sales Tax Inspectors including Assistant District Excise and Sales Tax Officer of Vindhya Pradesh region. According to the principles adopted for determining the seniority, the length of continuous service on equated post was considered. The seniority of a person is determined with reference to a particular date allotted to him for this purpose. When once the seniority in the integrating units was determined in this manner by the Governments of those units, it is submitted that the seniority of the incumbents from the units of Madhya Bharat and Vindhya Pradesh could not be disturbed after the reorganisation of States under Section 115 of that Act to the detriment of the incumbents."

It has thus been explained by the appellants that as the Sales Tax Department in the integration States of Madhya Pradesh was new the persons absorbed in the Department brought with them the seniority already assigned to them. It was also pointed out in the counter-affidavit that in these circumstances it cannot be said that as the Sales Tax Department came into existence in 1950 in Madhya Bharat and Vindhya Pradesh regions, the personnel of these regions ipso facto became junior to those in Mahakoshal region where the Act had come into force in 1947. We fully agree with the explanation given by the appellants in the counter-affidavit as the same appears to be reasonable and convincing, and seeks to chalk out an objective formula so that the least prejudice is caused to the employees concerned. It is, manifest that the services rendered in the erstwhile princely States by the officers who were put above the respondent were taken into account in the equated posts. Thus the equation of the posts was in conformity with the principles laid down in Section 115 of the States Reorganisation Act and was done in consultation with the Advisory Committee and was finally approved by the Central Government. To accept the prayer of the respondent would be to set at naught the services rendered by the officers who were put above the respondent in the erstwhile princely State in grades which were more or less similar to the one held by the respondent. In these circumstances we find ourselves unable to agree, even on merits, with the view taken by the High Court.

9. In *Union of India v. P. K. Roy*, (1968) 2 SCR 186 at p. 198 = (AIR 1968 SC 850 at p. 856) a similar argument made by some of the employees coming from erstwhile princely States was repelled and this Court observed as follows:

"In our opinion, the procedure adopted in this case does not contravene the

provisions of Sec. 115 (5) of the said Act, because it was the Central Government which laid down the principles for integration, it was the Central Government which considered the representations and passed final orders, and both the preliminary and final gradation lists were prepared and published by the State Government under the direction and with the sanction of the Central Government."

10. Similarly in *N. Subba Rao v. Union of India*, (1973) 1 SCR 945 = (AIR 1973 SC 69) this Court laid down that under Section 115 of the States Reorganisation Act two requirements were necessary — (i) that there should be a division and integration of the services among the new States; and (ii) that a fair and equitable treatment should be ensured to all persons affected by the integration. In that case also the Conference of the Chief Secretaries had preceded the drawing up of the provisional gradation list formulating four principles, namely, (i) the nature and duties of a post; (ii) the responsibilities and powers exercised by the officers holding a post; the extent of territorial or other charge held or responsibilities discharged; (iii) the minimum qualifications, if any, prescribed for the two posts; and (iv) the salary of the post. These principles were approved by the Court in that case.

11. In the instant case also the appellants have stated in their counter-affidavit that the principles mentioned above were duly taken into consideration and in addition to this the equated grades held by the respondent and the other officers were also taken into consideration in order to fix the seniority of the respondent.

12. In these circumstances we are satisfied that the Government had prepared the final gradation list after an objective and thorough consideration of the various aspects of the career of the employees and the principles which governed the list were wholly in consonance with the provisions of Section 115 of the States Reorganisation Act, 1956.

13. For these reasons, therefore, the appeal is allowed and the judgment of the High Court dated September 20, 1969 is set aside. As the respondent is already dead we make no order as to costs.

Appeal allowed.

AIR 1976 SUPREME COURT 218

(From:— 1973 Lab IC 995 (Mad).)

A. N. RAY, C. J., M. H. BEG, R. S. SARKARIA AND P. N. SHINGHAL, JJ.

Union of India, Appellant v. P. M. Jayarajan, Respondent.

Civil Appeal No. 219 of 1974. D/- 3-12-1975.

(A) Constitution of India, Art. 312-A (as introduced by Constitution (Twenty-eighth Amendment) Act 1972 — Former Secretary of State Service Officers (Conditions of Service) Act (1972), Ss. 8 and 12— Respondent former Secretary of State Service Officer staying in Uganda — Conversion rate of pension payable to him. 1973 Lab IC 995 (Mad), Reversed. (Civil Service Regulations, Article 934).

By virtue of power conferred under Article 312-A, the Parliament made the Former Secretary of State Service Officers (Conditions of Service) Act. The provisions of this Act or any order made thereunder is effective notwithstanding that it is inconsistent with any law or rule etc., other than the Act. Therefore, the former Members of the Indian Civil Service as a result of the Conditions of Service Act, 1972 are not entitled to claim payment of pension in sterling or outside India or by converting £ 1000 at the rate of exchange exceeding the rate of exchange of Rupees thirteen and one-third to the pound sterling. AIR 1974 SC 2055. Followed. (Para 10)

Consequently the decision of the Madras High Court on the basis of Article 934 of the Civil Service Regulations cannot be sustained by reason of the change in law. 1973 Lab IC 995 (Mad), Reversed. (Para 11)

Cases Referred: Chronological Paras AIR 1974 SC 2055 = (1975) 1 SCR 797 = 1974 Lab IC 1362 7

Mr. R. M. Mehta and Mr. S. P. Nayar, Advocates, for Appellant; Mr. A. V. Rangam and Miss A. Subhashini, Advocates, for Respondent.

Judgment of the Court was delivered by

RAY, C. J.:— This appeal is by special leave from the judgment dated 3rd March, 1972, of the High Court of Madras.

2. The respondent in an application under Article 226 of the Constitution asked for a writ of mandamus directing the appellant Union to pay the respondent pension at the rate of 1s-9d per rupee in accordance with Regulations 934-A and 934-D of the Civil Service Regulations.

3. The respondent is a Ceylonese national. He joined the Indian Civil Service on 6th October, 1933. After 15th August, 1947, he continued to serve in our country until his retirement on 31st December, 1949.

4. At his retirement he was sanctioned an annuity of £ 743-2 shillings-6 pence per annum. He commuted a part of his pension leaving a balance of Rupees 500/- per month.

5. Between March, 1968 and October, 1969, he resided in Uganda in East Africa. When the respondent was in Uganda he claimed pension at the rate of 1s-9d to a rupee. His request was accepted by the Accountant General, Madras. The Union Government reversed the decision and directed that the conversion rate should be 1s-6d to a rupee and the excess payment should be recovered from the respondent. The respondent thereafter made an application under Article 226 of the Constitution.

6. The High Court accepted the petition of the respondent on the ground that the respondent shifted his residence from Ceylon to Uganda and was, therefore, entitled to benefit under the second proviso to Article 934 of the Civil Service Regulations. The second proviso to Article 934 was as follows:—

"Provided that save where a pensioner resides in India (which for the purpose of this Article and Articles 934-A, 934-B, 934-C, 934-D and 935 shall be deemed to include Burma, Ceylon, Nepal, and the French and Portuguese establishments in India) the minimum rate of conversion shall be 1/9 per rupee."

7. The question of payment of pension to Members of the Indian Civil Service in Sterling was examined by this Court in *V. B. Raju v. State of Gujarat*, (1975) 1 SCR 797 = (AIR 1974 SC 2055). The Constitution (Twenty-eighth Amendment) Act, 1972 introduced Article 312-A. Article 312-A confers power on Parliament to make law, inter alia, to vary or revoke prospectively or retrospectively the conditions of service as respects pension of persons who having been appointed by Secretary of State or Secretary of State in Council to a Civil Service of the Crown in India before the commencement of the Constitution retired or otherwise ceased to be in service at any time before the commencement of the Constitution (28th Amendment) Act, 1972. The Constitution (28th Amendment) Act, 1972 came into existence on 27th August, 1972.

8. Parliament on 21st September, 1972 made the law called the Former Secretary of State Service Officers (Conditions of Service) Act, 1972. A former Secretary of State Officer means a person referred to in sub-clause (a) or sub-clause (b) of clause (1) of Article 312-A of the Constitution. The respondent is a former Secretary of State Service Officer within the meaning of sub-clause (a) of clause (1) of Article 312-A. Section 8 (1) of the Conditions of Service Act, 1972 enacts that no former Secretary of State Service Offi-

cer shall be entitled or be deemed to have been entitled, to claim (a) pension in sterling; or (b) that his pension shall be paid outside India; or (c) where his pension was expressed in sterling or a fixed sterling minimum was applicable in respect of the pension payable to him, that his pension shall be computed in the rupee equivalent of the amount fixed in sterling at a rate of exchange exceeding the rate of rupees thirteen and one-third to the pound sterling.

9. Section 12 of the Former Secretary of State Service Officers (Conditions of Service) Act, 1972, states that the provisions of this Act or of any order made thereunder shall have effect notwithstanding anything inconsistent therewith contained in any law other than this Act or in any rule, regulation or order or other instrument having effect by virtue of any law other than the 1972 Act.

10. The Constitution Bench of this Court in *V. B. Raju's case* (supra) held that the former Members of the Indian Civil Service as a result of the Conditions of Service Act, 1972, are not entitled to claim payment of pension in sterling or outside India or by converting £ 1000 at the rate of exchange exceeding the rate of exchange of Rupees thirteen and one-third to the pound sterling.

11. The judgment of the High Court cannot be sustained by reason of change in law. The appeal is accepted and the judgment of the High Court is set aside. Parties will pay and bear their own costs.

Appeal allowed.

AIR 1976 SUPREME COURT 219

(From Punjab & Haryana)*

A. N. RAY, C. J., M. H. BEG,
R. S. SARKARIA AND
P. N. SHINGHAL, JJ.

J. R. Malhotra and another, Appellants v. The Additional Sessions Judge, Jullundur and others, Respondents.

Civil Appeal No. 999 of 1975, D/- 11-12-1975.

(A) Income-tax Act (1961), Ss. 132 and 132-A — Seizure of money and documents found to be invalid — Retention of money by Revenue — Validity. (Criminal P. C. (1898), S. 523).

Under a warrant of authorisation certain amount and some documents were seized from R. The High Court held that the seizure was invalid and directed the revenue to return the money and the documents to the Police for proceeding in

*(Civil Writ Petn. No. 2292 of 1975, D/- 6-5-1975 (Puni & Har)).

LS/LS/E501/75/MVJ

accordance with law. The revenue authorities filed an application under S. 523, Criminal P. C. for an order for retention of the money for satisfaction of its dues against R. There was no order of assessment and no income-tax demand against R.

Held, that the Revenue could not retain the money without the authority of law or a legal order. It could not indirectly keep the money on the plea that there would be a demand and therefore, the money should be allowed to be kept with it. (Para 19)

Mr. S. P. Nayar Advocate, for Appellants; Mr. B. Datta and Mr. Harbans Singh, Advocates, for Respondents. Nos. 2-4.

The Judgment of the Court was delivered by

RAY, C. J.:— This appeal is by special leave from the order dated 6th May, 1975 of the High Court of Punjab and Haryana dismissing in limine the writ petition of the appellant.

2. The appellant filed a writ petition in the High Court challenging the order dated 4th January, 1975 of the Additional Sessions Judge, Jullundur who allowed the revision petition of the respondent Romesh Chander and dismissed the petition of the appellant.

3. The facts leading to the order are these: On 6th August, 1971 the respondent Romesh Chander was travelling in a car. His car was intercepted by the police. A sum of Rs. 1,61,411/- was found in a bag in his hands. The respondent Romesh Chander was taken to the police station. A criminal case was registered against him under Sections 411, 413 and 414 of the Indian Penal Code and under Sections 4, 5, 6 and 8 of the Foreign Exchange Act, 1947. The Commissioner of Income-tax issued a warrant of authorisation empowering certain officers under Section 132 of the Income-tax Act to conduct a search and seizure. Pursuant to that authorisation the authorised officer seized the sum of Rs. 1,61,411/- and certain books and documents. The business premises of the respondent Romesh Chander and the other respondents who were his partners were searched and certain documents and books were seized.

4. The respondent Romesh Chander by a writ petition challenged the warrant of authorisation. The High Court of Punjab and Haryana on 25th May, 1972 held the search to be invalid and directed the Revenue to return the money and the books. On appeal the High Court on 22nd November, 1972 accepted in part the appeal of the Revenue and held that the amount and the books and documents be returned by the Revenue to the Station

House Officer, Police Station, Kartarpur who was directed to proceed in accordance with law.

5. The respondent Romesh Chander filed an application on 12th March, 1973 in the Court of the Judicial Magistrate, Jullundur and alleged that the police had not filed any challan against the respondent Romesh Chander for a long time and prayed for an order that the Station House Officer, Kartarpur be directed to get the money from the Income-tax Authorities and comply with the orders of the High Court.

6. The Revenue Authorities filed an application under Section 523 of the Code of Criminal Procedure on 25th March, 1973 before the Judicial Magistrate, Jullundur and prayed that orders might be passed directing that the sum of Rs. 1,61,411/- be retained by the Income-tax Department in partial satisfaction of their outstanding demand against the respondent Romesh Chander, and the papers of the Respondent Romesh Chander be also retained by the Revenue Authorities for completion of assessment proceedings against the respondent Romesh Chander.

7. In the aforesaid application of the Revenue Authorities before the Judicial Magistrate, Jullundur it was alleged that a regular assessment order had been passed on 26th June, 1972 against the respondent Romesh Chander and the demand of the Revenue Authorities against the respondent Romesh Chander was Rupees 7,90,293/-. The Revenue further alleged that the respondent Romesh Chander was given 35 days notice to pay the amount and because he did not pay the amount demanded, the sum of Rs. 1,61,411/- was adjusted on 5th October, 1972, towards the outstanding demand. It also appeared in the aforesaid application of the Revenue before the Judicial Magistrate, Jullundur that the criminal case registered against the respondent Romesh Chander had been "filed as untraced" by the order of the Court dated 25th January, 1973.

8. The Judicial Magistrate on 24th April, 1973 passed an order directing the Income-tax authorities to return the amount in dispute, the books and other documents to the Station House Officer, Police Station, Kartarpur.

9. The order of the Judicial Magistrate was affirmed by the Additional Sessions Judge, Jullundur in revision on 5th May, 1973.

10. The order of the Judicial Magistrate and the order of the Additional Sessions Judge, Jullundur were challenged by the Revenue in CrI, Revn. No: 430 of 1973 in the High Court of Punjab and Haryana. On 26th June, 1974 the High Court set aside the orders and remanded the

matter to the Judicial Magistrate, Jullundur for determining whether the amount in dispute could be adjusted in law against the outstanding tax dues from the respondent Romesh Chander and further whether the adjustment made by the Commissioner of Income-tax on 5th October, 1972 was valid and justifiable.

11. Meanwhile the respondent Romesh Chander filed an application under Section 146 of the Income-tax Act before the Income-tax Officer against the order of assessment. The respondent Romesh Chander also filed an appeal against the assessment orders before the Appellate Assistant Commissioner on 3rd August, 1972. The application of the respondent Romesh Chander under Sec. 146 of the Income-tax Act was rejected by the Income-tax Officer on 2nd August, 1973. The respondent Romesh Chander filed an appeal against the rejection of the petition on 27th August, 1973. On 17th September, 1973 the appeals filed by the respondent Romesh Chander against the orders of the Revenue in regard to assessment of income-tax of the respondent were heard. The Income-tax Officer on 18th September, 1973 asked for adjournment to explain the departmental case. The Appellate Assistant Commissioner granted adjournment and informed the respondent Romesh Chander by letter dated 22nd September, 1973 that steps had been taken by the department to stop all recovery proceedings against the respondent Romesh Chander and that the appeal would be heard later on.

12. On 22nd September, 1973 the respondent Romesh Chander filed an application before the Appellate Assistant Commissioner that the operation of the assessment order during the pendency of the appeals might be stayed and the demand of the tax be held in abeyance. The Appellate Assistant Commissioner by letter dated 27th September, 1973 informed the respondent Romesh Chander that recovery of demand of Rs. 7,90,293 for the assessment year 1972-73 had been stayed by order of the Revenue Authorities dated 18th September, 1973.

13. It is in this background that the Judicial Magistrate, Jullundur on 3rd June, 1974 on revision petitions filed by the appellant and the respondent Romesh Chander held that the amount of Rupees 1,61,411 be retained by the income-tax department in partial satisfaction of their outstanding demand against the respondent Romesh Chander. The Judicial Magistrate also held that in view of the invalidity of the order made under Section 132 (5) of the Income-tax Act the adjustment of the amount in dispute by the Commissioner of Income-tax on 5th October, 1972 was not valid. The Judicial

Magistrate further held that the business papers of the respondent Romesh Chander might be retained by the Income-tax Department for the statutory period for completing pending assessment proceedings.

14. The respondent Romesh Chander went up in revision against the order of the Judicial Magistrate. The Revenue also went up in revision. By order dated 4th January, 1975 the Additional Sessions Judge, Jullundur allowed the revision petition of the respondent Romesh Chander and dismissed the petition of the appellant Revenue. The Additional Sessions Judge, Jullundur directed the Income-tax Authorities to return the amount of Rs. 1,61,411 and the books to the respondent Romesh Chander.

15. The appellant Revenue filed a writ petition in the High Court challenging the order dated 4th January, 1975 of the Additional Sessions Judge, Jullundur.

16. The High Court rightly rejected the writ petition at sight. The Additional Sessions Judge, Jullundur held that the criminal case against the respondent Romesh Chander was filed by an order of the Judicial Magistrate dated 25th January, 1973. The second finding of the Additional Sessions Judge is that the High Court by order dated 20th March, 1974 remanded the matter to the court of the Judicial Magistrate to find out whether it was permissible in law to adjust the amount of Rs. 1,61,411 against the outstanding dues of the respondent Romesh Chander and the Judicial Magistrate held that adjustment was not justifiable under the relevant statutory provision. The Judicial Magistrate, however, held that the respondent Romesh Chander was not entitled to the amount and that the income-tax department could retain the amount in partial satisfaction of their outstanding demand. Before the Additional Sessions Judge, Jullundur the Revenue contended that the assessment was valid under Section 226 (4) of the Income-tax Act independently and under Section 132 of the Income-tax Act. The Additional Sessions Judge, Jullundur referred to the appeals filed by the respondent Romesh Chander against the assessment proceedings and observed that the appeal had been heard on 17th September, 1973 and on the following day, viz., 18th September, 1973 the matter was adjourned at the instance of the Revenue. The Additional Sessions Judge, Jullundur further said that the search and seizure were illegal and therefore, the assessee was entitled to the return of all the documents and the amount in question.

17. The orders of the Appellate Assistant Commissioner dated 17th Octo-

ber, 1975 show that there is no order of assessment and there is no income-tax demand.

18. There is no criminal case against the respondent Romesh Chander. The order of the High Court dated 25th May, 1972 directed the return of the sum of Rs. 1,61,411 and the documents to the respondent Romesh Chander. The order of the learned Single Judge was affirmed by the High Court on 22nd November, 1972. No appeal was preferred against the order of the High Court. The order of the High Court was that the amount of Rs. 1,61,411 and the books and other documents were to be returned to the Station House Officer. After the criminal case had been filed the authorities have no right to keep the money, under any provision of law. There is no question of adjustment of the sum of Rs. 1,61,411 by reason of the fact that there is no valid order of assessment and there is no demand for income-tax.

19. The Revenue cannot indirectly keep the money on the plea that there will be a demand, and, therefore, the money should be allowed to be kept with the Revenue. There must be authority of law under which the money can be kept. There is no legal order to keep the money. The appeal, therefore, fails and is dismissed with costs.

Order accordingly.

AIR 1976 SUPREME COURT 222

(From : Orissa)*

A. N. RAY, C. J., M. H. BEG, R. S. SARKARIA AND P. N. SHINGHAL, JJ.

Pratap Narain Singh Deo, Appellant v. Shrinivas Sabata and another, Respondents.

Civil Appeal No. 1536 of 1970, D/- 4-12-1975.

(A) Workmen's Compensation Act (1923), Ss. 4-A, 4, 3 and 19 — Accident resulting in personal injury to workman — Liability of employer arises as soon as personal injury is caused — S. 19 does not suspend such liability — Failure to pay compensation — Employer liable to pay interest and penalty.

In case of a personal injury caused to a workman by an accident which arises out of and in the course of employment, unless the right to compensation is taken away under sub-sec. (5) of Sec. 3, the employer becomes liable to pay the compensation as soon as the aforesaid personal injury is caused to the workman.

* (O. J. C. No. 877 of 1969, D/- 10-10-1967 (Orissa).)

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S. 19 only provides for settlement by the Commissioner of any question regarding liability of any person to pay compensation or the amount or duration of compensation, in default of any agreement, if such question arises in any proceeding under the Act. The section does not have the effect of suspending the liability of an employer to pay compensation under S. 3 till after the settlement contemplated under S. 19. It is the duty of the employer to pay compensation under S. 4-A (1) at the rate provided by S. 4 as soon as the personal injury is caused to the workman. Where the employer fails to do so and also makes no provisional payment under S. 4 (2) but challenges the jurisdiction of the Commissioner, the employer is liable to pay interest and penalty.

(Paras 7 and 8)

(B) Workmen's Compensation Act (1923), S. 2 (1) (l) and (g) — Total disablement — Personal injury to carpenter in the course of employment — Amputation of left hand above elbow — Since carpenter cannot work with one hand disablement is total and not partial. (Para 5)

(C) Constitution of India, Art. 136 — Appeal by special leave — New case on facts neither admitted nor established, cannot be allowed to be set up. (Para 5)

Mr. Santosh Chatterjee and Mr. G. S. Chatterjee, Advocates, for Appellant.

Judgment of the Court was delivered by

SHINGHAL, J.:— This appeal by special leave is by Pratap Narain Singh Deo who is the proprietor of two cinema halls in Jeypore, district Koraput, Orissa. It is not in dispute that Srinivas Sabata, respondent No. 1, (hereinafter referred to as the respondent) was working as a carpenter for doing some ornamental work in a cinema hall of the appellant on July 6, 1968, when he fell down, and suffered injuries resulting in the amputation of his left arm from the elbow. He served a notice on the appellant dated August 11, 1968 demanding payment of compensation as his regular employee. The appellant sent a reply dated August 21, 1968 stating that the respondent was a casual contractor, and that the accident had taken place solely because of his own negligence. The respondent then made a personal approach for obtaining the compensation, but to no avail. He therefore made an application to the Commissioner for Workmen's Compensation, respondent No. 2, stating that he was a regular employee of the appellant, his wages were Rs. 120 per mensem, he had suffered the injury in the course of his employment and was entitled to compensation under the Workmen's Compensation Act, 1923, (hereinafter referred to as the Act). Notice of the application was served on the appel-

lant on October 10, 1968 calling upon him to show cause why penalty to the extent of 50 per cent. and interest at 6 per cent. per annum should not be imposed on him under Section 4-A of the Act on the amount of compensation payable by him because of the default in making the payment of the compensation. The appellant contested the respondents' claim on the grounds mentioned above and on the further ground that respondent No. 2 had no jurisdiction to entertain and adjudicate on the claim. He filed a memorandum of agreement on April 10, 1969 accepting the liability to pay compensation for a sum which was found by the Commissioner to be so grossly inadequate that he refused to register it.

2. The Commissioner held in his order dated May 6, 1969 that the injury had resulted in the amputation of the left arm of the respondent above the elbow. He held further that the respondent was a carpenter by profession and "by loss of his left hand above the elbow he has evidently been rendered unfit for the work of carpenter as the work of carpentry cannot be done by one hand only." He therefore adjudged him to have lost "100 per cent. of his earning capacity." On that basis, he calculated the amount of compensation at Rs. 9,800 and ordered the payment of penalty to the extent of 50 per cent. together with interest at 6 per cent. per annum, making a total of Rs. 15,092.

3. The appellant felt aggrieved and filed a writ petition in the High Court of Orissa, but it was dismissed summarily on October 10, 1969. He has therefore come up in appeal to this Court by special leave.

4. It has not been disputed before us that the injury in question was caused to the respondent by an accident which arose out of and in the course of his employment with the appellant. It is also not in dispute that the injury resulted in amputation of his left arm at the elbow. It has however been argued that the injury did not result in permanent total disablement of the respondent, and that the Commissioner committed a gross error of law in taking that view as there was only partial disablement within the meaning of Section 2 (1) (g) of the Act which should have been deemed to have resulted in permanent partial disablement of the nature referred to in Item 3 of Part II of Schedule I of the Act. This argument has been advanced on the ground that the amputation was from 8" from tip of acromion and less than 4½" below tip of olecranon. As will appear, there is no force in this argument.

5. The expression "total disablement" has been defined in Section 2 (1) (i) of the Act as follows:

"(1) 'total disablement' means, such disablement, whether of a temporary or permanent nature, as incapacitates workman for all work which he was capable of performing at the time of the accident resulting in such disablement."

It has not been disputed before us that the injury was of such a nature as to cause permanent disablement to the respondent, and the question for consideration is whether the disablement incapacitated the respondent for all work which he was capable of performing at the time of the accident. The Commissioner has examined the question and recorded his finding as follows:

"The injured workman in this case is carpenter by profession..... By loss of the left hand above the elbow, he has evidently been rendered unfit for the work of carpenter as the work of carpentry cannot be done by one hand only."

This is obviously a reasonable and correct finding. Counsel for the appellant has not been able to assail it on any ground and it does not require to be corrected in this appeal. There is also no justification for the other argument which has been advanced with reference to Item 3 of Part II of Schedule I, because it was not the appellant's case before the Commissioner that amputation of the arm was from 8" from tip of acromion to less than 4½" below the tip of olecranon. A new case cannot therefore be allowed to be set up on facts which have not been admitted or established.

6. It has next been argued that the Commissioner committed a serious error of law in imposing a penalty on the appellant under Section 4-A (3) of the Act as the compensation had not fallen due until it was 'settled' by the Commissioner under Section 19 by his impugned order dated May 6, 1969. There is however no force in this argument.

7. Section 3 of the Act deals with the employer's liability for compensation. Sub-section (1) of that section provides that the employer shall be liable to pay compensation if "personal injury is caused to a workman by accident arising out of and in the course of his employment." It was not the case of the employer that the right to compensation was taken away under sub-section (5) of Section 3 because of the institution of a suit in a civil court for damages, in respect of the injury, against the employer or any other person. The employer therefore became liable to pay the compensation as soon as the aforesaid personal injury was caused to the workman by the accident which admittedly arose out of and in the course of the employment. It is therefore futile to contend that the compensation did not fall due until after the Commissioner's order

dated May 6, 1969 under Section 19. What the section provides is that if any question arises in any proceeding under the Act as to the liability of any person to pay compensation or as to the amount or duration of the compensation it shall, in default of agreement, be settled by the Commissioner. There is therefore nothing to justify the argument that the employer's liability to pay compensation under Section 3, in respect of the injury, was suspended until after the settlement contemplated by Section 19. The appellant was thus liable to pay compensation as soon as the aforesaid personal injury was caused to the appellant, and there is no justification for the argument to the contrary.

8. It was the duty of the appellant, under Section 4-A (1) of the Act, to pay the compensation at the rate provided by Section 4 as soon as the personal injury was caused to the respondent. He failed to do so. What is worse, he did not even make a provisional payment under sub-section (2) of Section 4 for, as has been stated, he went to the extent of taking the false pleas that the respondent was a casual contractor and that the accident occurred solely because of his negligence. Then there is the further fact that he paid no heed to the respondent's personal approach for obtaining the compensation. It will be recalled that the respondent was driven to the necessity of making an application to the Commissioner for settling the claim, and even there the appellant raised a frivolous objection as to the jurisdiction of the Commissioner and prevailed on the respondent to file a memorandum of agreement settling the claim for a sum which was so grossly inadequate that it was rejected by the Commissioner. In these facts and circumstances, we have no doubt that the Commissioner was fully justified in making an order for the payment of interest and the penalty.

9. The appeal fails and is dismissed.

Appeal dismissed.

AIR 1976 SUPREME COURT 224

(From : Kerala)*

A. N. RAY, C. J., M. H. BEG, R. S. SARKARIA AND P. N. SHINGHAL, JJ.

Mahammadunni's son Kappatta Kathokandath Bava, Appellant v. Kushoosa's son Ampalath Veetil Kunnathodath Mahammadunni and others, Respondents.

Civil Appeal No. 1268 of 1970, D/- 2-12-1975.

*(A. S. No. 217 of 1964, D/- 17-7-1969 (Ker.).)

LS/LS/E516/75/SSG

(A) Evidence Act (1872), S. 114 — Insanity — Proof of.

Suit for partition—Question in respect of property allotted to a woman in partition decree—Death of woman during pendency of suit—Her husband claiming share on basis of marriage—Fact that woman was in lucid interval at the time of her marriage proved—Claim of husband held justified. (Paras 18, 19)

Cases Referred: Chronological Paras AIR 1917 Mad 265 = ILR 40 Mad 660 16

Mr. T. S. Krishnamoorthy Iyer, Sr. Advocate, (Mr. N. Sudhakaran and Mr. P. K. Pillai, Advocates with him), for Appellant; Mr. A. S. Nambiyar, Advocate, for Respondent 2.

Judgment of the Court was delivered by

A. N. RAY, C. J.:— This is an appeal by certificate from the judgment dated 17th July, 1969 of the High Court of Kerala.

2. The question in this appeal is whether defendants Nos. 1 and 4 are entitled to share in the property allotted to defendant No. 3 in a partition decree. Defendant No. 4 is the appellant.

3. This appeal arises out of a suit instituted on 19th November, 1957 for partition of properties. Properties mentioned in Schedules A and B to the plaint belonged to the mother of defendant No. 3. Properties mentioned in Schedule C to the plaint were joint properties of the father and the mother of defendant No. 3.

4. The plaintiff and defendant No. 2 are the sons of one of the brothers of the mother of defendant No. 3. Defendant No. 1 is the son of another brother of the mother of defendant No. 3. Defendant No. 4 is the son of defendant No. 3's father's brother.

5. Defendant No. 3 died during the pendency of the suit. Thereafter defendant No. 1 filed his additional written statement and claimed half share in the property of defendant No. 3 on the ground that defendant No. 1 had married defendant No. 3 on 30th August, 1959.

6. The trial Court allotted to defendant No. 3 3/6th share in properties mentioned in Schedules A and B to the plaint. The plaintiff and defendant No. 1 and defendant No. 2 were each given 1/6th share in properties in Schedules A and B to the plaint. With regard to Schedule C properties the plaintiff and defendant No. 1 and defendant No. 2 were each given 9/96th share and defendant No. 3 was given 51/96th share and defendant No. 4 was given 18/96th share.

7. The question in this appeal is whether defendants Nos. 1 and 4 are entitled to share in the property allotted to defendant No. 3 in a partition decree. Defendant No. 4 is the appellant.

THE All India Reporter

1976

Allahabad High Court

AIR 1976 ALLAHABAD 1

M. P. SAXENA, J.

Smt. Jairaji, Applicant v. Firm Jagarnath Prasad and others, Opposite Parties.

Civil Revn. No. 1229 of 1974, D/- 22-2-1975.*

(A) Civil P. C. (1903), Section 151, Order 21, Rules 95, 97, 99 — Delivery of possession to auction purchaser — Resistance by stranger claiming possession in his own right — Second warrant under Order 21, Rule 95 can be issued — Application by such objector recording objections does not lie under Section 151.

In a case where the delivery of possession to auction purchaser is resisted not by judgment-debtor or any person claiming on his behalf but by a stranger claiming possession in his own right, a second writ of possession can be issued under Order 21, Rule 95 after resistance or obstruction provided the court is prima facie satisfied that the resistance or obstruction has been offered by the person on a ground which is patently without substance or whose claim is on the face of it unacceptable and cannot be said to be in good faith. But a stranger to a decree for possession of immovable property cannot approach the court by means of an application under Section 151, C. P. C. and record his resistance or his obstruction to delivery of possession of the property either to the decree-holder or purchaser, as the case may be, before he has been dispossessed. The executing court has no power to compel a decree-holder to move an application under Order XXI, Rule 97, C. P. C. If on the other hand the executing court is satisfied that the claim is

prima facie not acceptable and not bona fide, it will be well within its rights to issue a second Parwana for delivery of possession. It is not required to make an enquiry of the nature contemplated by Order XXI, Rule 97 nor any procedure is prescribed for it. This enquiry will be made only for satisfaction of the court whether the person to be dispossessed prima facie belongs to the category given under O. XXI, Rule 95, C. P. C. 1970 All LJ 1311 and AIR 1953 Trav-Co 123 and AIR 1955 Trav-Co 225 (FB), Rel. on; 1969 All LJ 929 and AIR 1924 All 495 (FB) and AIR 1919 Pat 425 (2) (FB) and AIR 1933 Bom 457 (FB) and AIR 1953 Cal 499 and (1887) ILR 11 Bom 473 and (1890) ILR 13 Mad 504 and (1896) ILR 18 All 233 and (1904) ILR 26 All 365 and AIR 1962 Andh Pra 72, Ref.

(Para 15)
Cases Referred: Chronological Paras
1970 All LJ 1311 = 1971 Ren CJ 901 15
1969 All LJ 929 = ILR (1969) 2 All 222 14

AIR 1962 Andh Pra 72 6

AIR 1955 Trav-Co 225 = 1955 Ker LT 413 (FB) 15

AIR 1953 Cal 499 = 91 Cal LJ 55 12

AIR 1953 Trav-Co 123 = 1952 Ker LT 660 16

AIR 1933 Bom 457 = 35 Bom LR 1033 (FB) 11

AIR 1924 All 495 = 22 All LJ 626 (FB) 13, 14

AIR 1919 Pat 425 (2) = 4 Pat LJ 94 (FB) 10

(1904) ILR 26 All 365 = 1 All LJ 86 10

(1896) ILR 18 All 233 = 1896 All WN 84 9

(1890) ILR 13 Mad 504 9, 10

(1887) ILR 11 Bom 473 10

A. N. Bhargava, for Applicant.

ORDER:— This is a revision application under Section 115, Civil Procedure Code against the order dated 10-9-1974 passed by the learned Additional District Judge, Gyanpur, Varanasi.

*(Against judgment and order passed by Prahlad Narain, Addl. Dist. J., Gyanpur, Varanasi, in Misc. Case No. 34 of 1974, D/- 10-9-1974).

2. Briefly stated the facts giving rise to this application are that firm Jagarnath Prasad Thekedar, opposite party had filed a suit (No. 18 of 1961) for the recovery of money. In that suit attachment before judgment of certain property including a house with Ahata and Parti land bounded as below and situate in Qasba Bhadoi, District Varanasi, was made:

North:— House and Ahata of Sukhnandan Lal

South:— House of Pyagram Gupta.

East: Pucca Road which goes from Bhadoi to Gyanpur.

West: Ahata of Sukhnandan Lal in possession of Elaka Prasad Baijnath Prasad.

In execution of the decree the said house was put to auction on 15-1-1969 and was purchased by the decree-holder. The sale was confirmed on 17-8-1972 and the sale certificate was issued on 7-9-1972. On the same day the decree-holders auction purchasers moved an application under Order XXI, Rule 95, Civil Procedure Code for possession over the said house after removal of locks etc. if any. On 18-9-1972 they gave another application (7-D) praying that police aid may also be provided because the judgment-debtors were likely to resist delivery of possession. It may be stated here that Hansraj, Judgment-debtor, had died and the application was moved against his widow Smt. Jaswant Devi, son Prem Kumar, daughters Smt. Krishna Devi, Smt. Sarla Devi and Smt. Sudarshan Devi. On 28-9-1972 the court passed the following order:

"Issue warrant of possession returnable by 28-10-1972."

3. On 11-10-1972 the application 7-D was allowed and a letter was directed to be issued to the Circle Officer Bhadoi for giving necessary police aid on payment of requisite charges by the decree-holder. On 25-10-1972 the court Amin went to deliver possession of the house. The pairokar of the decree-holder took him to Mauza Bagh Talab Sardar Khan and pointed out a house of which possession was to be delivered. The Amin was accompanied by a police constable also. The Amin compared the boundaries of this house with those given in the sale certificate and found that they tallied with each other. The only difference was that in the sale certificate the house was shown to be situate in Qasba Bhadoi but, in fact, it lay in village Bagh Talab Sardar Khan. Plot No. or house No. was not given in the sale certificate. The Amin found that the house consisted of several rooms and manufacture of carpets was going on in the rooms and the Verandah and about 20 persons were working there. When some of these persons and one woman

Smt. Jairaji (the revisionist) came near him he apprised them with the purpose of his visit. Smt. Jairaji gives out to him that the house belongs to her and she had got it constructed with the sanction of the Municipal Board. She showed the plan and sanction for construction. She also gave out that she was carrying on carpet manufacturing business in that house and the judgment-debtor or his heirs had no concern with it nor it was ever attached or sold in execution of any decree. She also represented that the house shown in the sale certificate lies in Qasba Bhadoi while this house is situate in Bagh Talab Sardar Khan and there is sufficient distance between the two places. She, therefore, refused to deliver possession of the house and also gave a written application (11-C) to that effect to the Amin. As the Amin apprehended reasonable apprehension of breach of the peace, he came back without executing the Parwana and submitted his report (10-C 2) to the court on 28-10-1972 narrating all the facts.

4. On 4-11-1972 the defendant auction-purchaser gave another application (12-C) under Order XXI, Rule 95, Civil Procedure Code for issuing the parwana for delivery of possession again. This time it was prayed that a Vakil Commissioner be appointed to execute the Parwana and aid of one Sub-Inspector and four police constables be provided. On this application the following order was passed on the same day:

"Issue writ to Sri Shiva Kumar Srivasatva Advocate who is appointed Commissioner to do the needful in terms of the application, a copy whereof shall be sent to him. Fee Rs. 50/- plus necessary expenses. Report by 4-12-1972."

On 10-11-1972 Smt. Jairaji, the revisionist moved an application (16-C 2) under Section 151, Civil Procedure Code stating that the judgment-debtor auction-purchaser was trying to dispossess her by misrepresentation that she was resisting delivery of possession on behalf of the judgment-debtors when, in fact, she had no connection with them and was in possession of the house in her own right. She, therefore, prayed for time to file a detailed objection. The court ordered:—

"Let the applicant file his regular claim by the 25-11-1972. This will be disposed of under Order XXI, Rule 97 (2) C. P. C. on 9-12-1972. Stay despatch of warrant of possession in the meantime."

5. The applicant took further time for this purpose and ultimately filed a detailed objection on 2-12-1972. They purported to be under Order XXI, Rule 97, C. P. C. probably in view of the Court's order dated 10-11-1972. She objected to the delivery of possession, inter alia, on the grounds that the house is situate in Mauza Bag Talab Sardar Khan and not in Bhadoi as shown in the sale certificate;

that it was never attached nor sold in execution of any decree, that she has no concern with the judgment-debtors nor she was in possession on their behalf; that the house was constructed by her and she was in possession of it in her own right and had resisted delivery of possession on the first occasion.

6. On 5-12-1972, the decree-holder gave an application (23-C-2) to the effect that the objections filed by Smt. Jairaji are legally not maintainable under Order XXI, Rule 97, Civil Procedure Code and this point may be disposed of first. They also filed detailed objections (24-C) to her application. 9-12-1972 was fixed for disposal of the preliminary objection. On this date the decree-holder relied on the case of *M. Ramiah v. Km. Malliah*, (AIR 1962 Andh Pra 72) and contended that except a decree-holder or his assignee, no third party can adopt the forum of Order XXI, Rule 97, Civil Procedure Code and if he does file an application under this provision impleading the decree-holder the latter can contend that such an application does not lie and the third party is not entitled to ask for an enquiry in the matter and the application should be dismissed. The court, therefore, dictated an order holding that the objections under Order XXI, Rule 97, Civil Procedure Code are legally not maintainable but before he could dictate the order of its dismissal Smt. Jairaji moved another application (25-C) praying that her objections be treated under Section 151 or Order XXI, Rule 95 or 99, Civil Procedure Code. The Court, therefore, did not dismiss (21-C) but gave time to the decree-holder to file objections to this also. These objections (26-C) were filed on 14-12-1972. On 23-12-1972 the amendment application (25-C) was allowed on payment of costs and 10-2-1973 was fixed for reconsideration of the matter whether the objections (21-C) as amended were maintainable under Section 151 or Order XXI Rule 95 or 99, C. P. C.

7. On 22-12-1972 Smt. Jairaji gave one more application (28-C) alleging that the decree-holder wants to dispossess her from the house illegally under the cover of Rule 95 of Order XXI in spite of the fact that after the first resistance she had given application under Section 151, Civil Procedure Code stating that she was in possession of it in her own right and that the entire proceedings regarding delivery of possession amount to abuse of the process of law.

8. On 21-4-1973 she filed two papers to establish her prima facie title to the property. In rebuttal the decree-holder also filed certain papers. After hearing the learned counsel for both sides the learned Lower Court arrived at the conclusion that the application of Smt. Jairaji

is neither maintainable under Section 151, Civil Procedure Code nor under Order XXI, Rule 95 or Rule 99, Civil Procedure Code. As regards Section 151 it observed that it is an established principle of law that where specific provisions exist in the Civil Procedure Code for a particular situation aid of Section 151, Civil Procedure Code cannot be invoked. As regards the argument that despite overt resistance to delivery of possession offered by her the decree-holder auction-purchaser was committing an abuse of the process of the court by not having recourse to Order XXI, Rule 97, Civil Procedure Code so that she may file an objection under sub-rule (2) of this Rule and the insistence of the decree-holder auction-purchaser to make a subsequent application under Order XXI, Rule 95 even after resistance which amounts to clear abuse of the process of court, the learned lower court observed that the applicant, if she had really any interest in the house, could have filed objections on earlier occasions and as she did not do so but offered resistance at a late stage, she was herself guilty of the abuse of the process of court and was not entitled to invoke the inherent powers of the court.

In view of extreme latches on the part of Smt. Jairaji she could not be permitted to file objections under Section 151, Civil Procedure Code until she was actually ejected. After eviction she was at liberty to file an objection under Order XXI, Rule 100, Civil Procedure Code. As regards the provision of Order XXI, Rule 95 or 99, Civil Procedure Code, the learned lower court observed that objection of the nature filed before him was not maintainable under Rule 95 of Order XXI. Since the stage of Order XXI, Rule 97 has not been reached, even Rule 99, Civil Procedure Code will not come into play. Accordingly Smt. Jairaji's application was dismissed as legally not maintainable and the decree-holder auction-purchaser was directed to take further steps on his application under Order XXI, Rule 95, Civil Procedure Code presented on 4-11-1972, viz., 12-C. It is against this order that the present revision application has been filed mainly on the ground that after the first resistance the learned lower court was not competent to issue a second warrant of delivery of possession without directing the decree-holder to take recourse to Order XXI Rule 97, Civil Procedure Code. The aforesaid facts make it clear that firm Jagarnath Prasad Thekedar, opposite party, is the decree-holder auction-purchaser. Smt. Jairaji, the revisionist, is not the judgment-debtor but is a stranger. It is further clear that the first application for delivery of possession was allowed on 28-9-1972 and on 25-10-1972 when the Amin went to deliver possession the revisionist offered resistance. There-

after the auction-purchaser moved a second application under Order XXI, Rule 95, Civil Procedure Code for possession with police aid and it was allowed. Obviously the main question which arises for consideration is whether the decree-holder auction-purchaser was entitled to a fresh warrant for possession and was not obliged to proceed under Order XXI, Rule 97 or to file a suit after the first resistance. Before going into the merit of this question it will be proper to refer to certain cases in this regard.

9. In *Muttia v. Appasami*, ((1890) ILR 13 Mad 504) it was held that the purchaser of property at an auction sale in the execution of a decree is entitled to make a fresh application for delivery without being compelled to make a complaint under Section 334 of the Code of 1887 (which corresponds to Order XXI, Rule 97 of the Code of 1908) where an attempt to get possession of the property purchased is resisted. In *Narain Das v. Hazari Lal*, ((1896) ILR 18 All 233) the question whether second application lies or not was not expressly decided. All that was held was that so far as resistance or obstruction is concerned, the decree-holder, if he wishes to take proceedings under Section 328 of the Code must do so within one month but the bar created by the limitation imposed by this section does not extend to and hold good so as to bar complaints against acts of resistance or obstruction made upon fresh proceedings taken by the decree-holder. It may be stated here that Rule 97 of Order XXI, are composed of Sections 328 and 334 of the old Code.

10. In *Kesri Narain v. Abdul Hasan*, (1904) ILR 26 All 365 (367) decree-holder auction-purchasers had applied to the court under Section 318 (Order XXI, Rule 95 of the present Code) for delivery of possession of the property which they had purchased. The court ordered the Amin to put them into possession of the property. The Amin returned the warrant unexecuted reporting that a person other than the judgment-debtor had resisted the purchasers in getting possession. The purchasers did not, as they might have done, apply to the court under Section 335 of the Code (Order XXI, Rule 97, Civil Procedure Code) to inquire into the matter of the resistance. But after the expiry of thirty days allowed for making such an application, they made a fresh application to be put into possession. The court executing the decree rejected the second application for possession because no application under Section 335 (Order XXI, Rule 97, Civil Procedure Code) was made within the time limited by law. Against this order the auction-purchasers filed a revision application in this Court. It was disposed of by a Division Bench consisting of Aikman and Knox, JJ.

Aikman, J., observed that the purchasers' application under Section 335 (Order XXI, Rule 95, Civil Procedure Code) was rightly rejected because if a purchaser at a sale in execution of a decree falls within the period allowed by law to apply to the court to inquire summarily into the matter of the resistance to his getting possession he is relegated to his remedy of a civil suit against the person resisting. The case of *Muttia v. Appasami*, ((1890) ILR 13 Mad 504) (*ibid*) was distinguished on the ground that in that case the resistance was offered not by a third party but by the judgment-debtor. Reliance was placed on the case of *Vinayakrav Amrit v. Devrao Govind*, ((1387) ILR 11 Bom 473) in which an order of a subordinate court refusing a second application for delivery of possession was sustained on the ground that to grant the second application "would virtually make clause 167 of the statute of limitation a dead letter". Accordingly he was of opinion that the only remedy open to the purchaser was to bring a regular suit against a resister.

He was inclined to reject the revision application accordingly. Knox, J., on the other hand was inclined to the view that the application for delivery of possession under Section 318 is substantially an application for execution of a decree by ordering delivery of possession of the property purchased. In his opinion the principle laid down in *Muttia v. Appasami* (*ibid*) governed that case. However, in view of the expression of opinion of Aikman, J., he concurred with the order rejecting the revision application. It makes it clear that in that case the view taken was that if an auction-purchaser applies for delivery of possession and a stranger resists, the former cannot have a second warrant for delivery of possession issued. His remedy is either to move an application under Order XXI, Rule 97, Civil Procedure Code or to file a civil suit. In *Raghunandan Prosad Misra v. Ram Charan Manda*, (AIR 1919 Pat 425 (2)) (FB) the Full Bench discussed a larger number of cases and after tracing the history of the relevant provisions from the Code of Civil Procedure 1859 to the Code of 1908 expressed a view that even in the case of an auction-purchaser (who is not a decree-holder) if an application for delivery of possession has become infructuous by reason of obstruction he is entitled to make an application for a fresh writ of possession without applying under Order XXI, Rule 97 of the Present Code.

11. In *Mukund Bapu v. Tanu Sakhu*, (AIR 1933 Bom 457) (FB) the Full Bench held that it was not incumbent upon the decree-holder upon obstruction to the first warrant of possession to apply under Order XXI, Rule 97 and that it was open to him to make an applica-

tion under Order XXI, Rule 35 to obtain a fresh warrant for possession:

12. In the Official Trustee of West Bengal v. Monmotho Nath Sadhukhan, (AIR 1953 Cal 499) it was observed that the decree-holder has the right to take out a fresh writ of possession and every resistance or obstruction to such writ gives a fresh period of limitation for the purpose of Order XXI, Rule 97, Civil Procedure Code from the time of that particular resistance or obstruction.

13. This question came up before the Full Bench of this Court in the case of Sobha Ram v. Tursiram. (AIR 1924 All 495) (FB) That was a case where the auction-purchaser of a property in execution of a decree had attempted after confirmation of the sale, to obtain possession of the property under Order XXI, Rule 95 but was resisted in that attempt. It was found that the persons who had offered resistance, were in possession of the property in their own right and not on behalf of or through the judgment-debtor and that their removal could not be contemplated. It was contended before the Bench that a court has no jurisdiction to make any inquiry when an application under Order XXI, Rule 95, Civil Procedure Code is made. Suleiman, J., pointed out the difference between a case where the property was in possession of the judgment-debtor or a person claiming through him and a case where the property was in possession of a person holding it in his own right. He observed:—

"Examining the rule, however, one is bound to hold that the court cannot pass an order delivering possession of the property to the auction-purchaser as against a person other than the judgment-debtor who is holding property on his behalf or claiming title under him unless the court is satisfied that he is such a person. I fail to see how an order can be passed under that Rule against such a person unless either that person admits or he holds the property in that capacity or the court is otherwise satisfied that he is holding as such. It may be that no thorough inquiry need be made under Rule 95, but there is nothing under that rule which prevents the court from being satisfied on prima facie evidence as to whether this other person is holding the property on behalf of the judgment-debtor and claiming the title under him or not. If the court is satisfied that he is so holding the property, the order can be passed forthwith. If, however, the court comes to the conclusion that he is holding the property on his own account, there is no option to the

court but to dismiss the application under Rule 95." (Underlined by me.)

The aforesaid observations of the court make it clear that if there is some person other than the judgment-debtor who is not his representative and not holding the property on his behalf and who resists or obstructs his possession, there are two remedies open to the auction purchaser viz. either to bring a regular suit for possession against that person or to have recourse to speedier remedy by way of application under Order XXI, Rule 97, C. P. C. It is well settled that the auction purchaser is not bound to have recourse to the second remedy. If he follows this remedy but unsuccessfully, then his remedy to bring a regular suit is curtailed and the period of time is prescribed by Article 11-A of the Limitation Act no thorough inquiry need be made under Rule 95, but there is nothing under that rule which prevents the court from being satisfied on a prima facie evidence whether this other person is holding the property on behalf of the judgment-debtor or in his own right. An application under Rule 97 cannot be made until the decree-holder or the auction-purchaser has been resisted or obstructed in the delivery of possession.

14. This matter came up for consideration before a Division Bench of this Court in the case of Ragho Prasad v. P. N. Agarwal, (1969 All LJ 929). That was also a case in which resistance was offered at the time of the first delivery of possession and after the second writ of possession was issued an objection was taken that the decree-holders were not entitled to a fresh warrant for possession. All that they could do was to apply under Order XXI, Rule 97 of the Code or to file a suit. Pathak and Gulati, JJ., after a resume of various provisions of Rules 35, 97, 98 and 99 of Order XXI and a number of cases, observed that the said rules appear to indicate the following scheme of execution:

"Under Rule 35 the execution court directs delivery of possession of the property to the decree-holder and to his agent in that behalf and, if necessary, it will direct the delivery of possession by removal of the judgment-debtor or any other persons bound by the decree who refuses to vacate the property. A person bound by the decree includes a person claiming through the judgment-debtor. The provision for removal of the person bound by the decree who does not vacate takes into account a situation where resistance to possession is offered or obstruction is made by the judgment-debtor or any other person bound by the decree on a ground which is patently without substance. It will include the case of a person who claims to be in possession in his

own right and independently of the judgment-debtor but whose claim is on the face of it unacceptable and cannot be said to be made in good faith. In such a case there is, in my opinion, no bar to the issue of fresh warrant for possession. Such a bar, it seems to me, cannot be spelled out either from Rule 35 or Rule 97. Where, however, resistance is offered or obstruction is made by a judgment-debtor on a ground which appears to necessitate investigation, the proceeding will be under Rule 97. So also where resistance or obstruction proceeds from a person claiming to be in possession in his own right and independently of the judgment-debtor and whose claim cannot be rejected as not being made in good faith without investigation the decree-holder must proceed under Rule 97. While an ex facie consideration of the ground for resistance or obstruction can be had, under Rule 35

a ground for claim, which cannot be disposed of, is obviously without foundation needs to be investigated under Rule 97. In support of the aforesaid view reliance was placed on the following observation of Kanhaiya Lal, J., in *Sobharam v. Tursiram*, (AIR 1924 All 495) (FB) (ibid):

"The person who refuses and is to be removed may be the judgment-debtor or a person holding possession on his behalf or a person claiming under a title created by a judgment-debtor subsequently to the ejectment which resulted in the sale. Before a court can pass an order for his removal the court has, however, to be satisfied that he belongs to one or other of the categories mentioned and in order to satisfy itself that he does belong to one or other of these categories the court may have to make such prima facie inquiry as the circumstances of case may require." (Underlined by me.)

In the case of *Ragho Prasad v. P. N. Agrawal* (ibid) the executing court had found that the claim of the person in possession was obviously without substance and he was in possession through his father, the judgment-debtor. Therefore, the Division Bench held that the claim could not be said to have been made in good faith and was liable to be ignored outright without applying the provisions of Rule 35. As the executing court did not reach the stage when Rule 97 could come into play, it was open to it to issue a fresh warrant for possession.

15. In *B. K. Tewari v. G. H. Jafri*, (1970 All LJ 1311) it was held that where an application under Order XXI, Rule 95, Civil Procedure Code is made it is the duty of the Court to be satisfied that certificate under Rule 94 has been

granted to the applicant and property is in possession of the judgment-debtor or some person on his behalf before issuing order for delivery to be made. Rule 95 does not provide for any notice being issued to persons against whom possession is claimed but there is no bar if before an order is passed for delivery to be made, the persons against whom such an application has been made or any one else to come to court and say that the property was not in possession of such a person as is contemplated under Rule 95 or that it was in possession of a person who is neither the judgment debtor nor a person claiming under a title created by the judgment debtor subsequently to the attachment of the property, for by coming to court in deciding as to whether the court should order delivery to be made by putting the purchaser or his nominee in possession. If an order for delivery of possession is already passed there is no occasion for any objection being made."

From the aforesaid discussion it is clear that even under Order XXI, Rule 95, Civil Procedure Code a second writ of possession can be issued after resistance or obstruction provided the court is prima facie satisfied that resistance or obstruction has been offered by the person on a ground which is patently without substance or whose claim is on the face of it unacceptable and cannot be said to be in good faith. In the instant case also there was no bar to the executing court to issue a second writ of possession if it was satisfied that the claim of the person offering resistance or obstruction viz., the present applicant, was prima facie not acceptable or not bona fide. It is important to state that the applicant had represented to the court that she was not liable to be dispossessed in execution of the decree because the house in dispute is situate in Mauza Bagh Talab Sardar Khan while the house shown in the sale certificate is situate in Qasba Bhadoi. According to her, there is sufficient distance between the two places. She also alleged that she was a shikmi tenant of this land and after obtaining sanction of the Municipal Board she constructed this house. According to her, she was carrying on carpet manufacturing business in this house with the assistance of about 20 labourers. She not only gave these objections in writing to the Amin when she resisted delivery of possession on the first occasion but also filed them in court when order for issue of a fresh Parwana was passed. She filed certain papers also in support of her contention. A perusal of the record shows that the court did not apply its mind to her contentions. It cannot be presumed to have done so simply because the second warrant of possession was issued. Even in the order under revision there is not

a word to show that the court applied its mind to her contentions and satisfied itself that her claim was prima facie not acceptable or not bona fide. It confined itself to the simple question whether her application was maintainable under Section 151 or Order XXI, Rule 95 or 99, Civil Procedure Code. As discussed above, no such application could be made under O. XXI, Rule 95 or Rule 99. It could not be done even under Section 151, Civil Procedure Code. In this connection reference may be made to the case of Cuseph George v. Varkey Varkey, (AIR 1953 Trav-Co 123) and Keshavan Padmanabhan v. Neelakantan Narayanan, (AIR 1955 Trav-Co 225) (FB) in which it has been held that a stranger to a decree for possession of immovable property cannot approach the court by means of an application under Section 151, Civil Procedure Code and record his resistance or his obstruction to delivery of possession of the property either to the decree-holder or purchaser, as the case may be, before he has been dispossessed. The learned lower court was, therefore, right in holding that the application was not maintainable under Order XXI, Rule 95 or 99, Civil Procedure Code or Section 151, Civil Procedure Code. The revision application has also no force and is liable to be dismissed. Since the executing court does not appear to have satisfied itself on the question whether the claim of the applicant is prima facie acceptable and bona fide or not, it will do so now before issuing the Parwana. If it finds that her claim is acceptable and bona fide it will refuse to issue second Parwana for delivery of possession and it will be for the decree-holder to apply under Order XXI, Rule 97, Civil Procedure Code or to file a regular suit. An executing court has no power to compel a decree-holder to move an application under Order XXI, Rule 97, Civil Procedure Code. If on the other hand the executing court is satisfied that the claim is prima facie not acceptable and not bona fide, it will be well within its rights to issue a second Parwana for delivery of possession. It is not required to make an enquiry of the nature contemplated by Order XXI, Rule 97 nor any procedure is prescribed for it. This enquiry will be made only for satisfaction of the court whether the person to be dispossessed prima facie belongs to the category given under Order XXI, Rule 95, Civil Procedure Code.

16. The revision application is accordingly dismissed, but in the circumstances of this case the parties shall bear their own costs of this revision.

Petition dismissed.

AIR 1976 ALLAHABAD 7

(LUCKNOW BENCH)

MATHUR, C. J. AND K. B. SRIVASTAVA, J.

Chaturbhuj Sharma, Appellant v. Durga Dayal and others, Respondents.

Special Appeal No. 21 of 1972. D/- 22-8-1974.*

(A) Constitution of India, Article 226 — Allotment made in undue haste under Section 7 of the U. P. (Temporary) Control of Rent and Eviction Act (3 of 1947), — Writ petition justified even though the party has not filed an appeal under Section 7-F of the Act or filed a civil suit. (U. P. (Temporary) Control of Rent and Eviction Act (3 of 1947), Section 7).

Where the authority under the U. P. (Temporary) Control of Rent and Eviction Act, made an allotment in undue haste of the house in the possession of the petitioner, held that there was sufficient justification for the petitioner to file the writ petition challenging the allotment, even though he did not first avail himself of the remedy of appeal under Section 7-F of the Act. (Para 9)

Not resorting to a civil suit challenging the order of allotment on the ground of want of jurisdiction is also not a bar to the filing of a writ petition, as a final decision in a civil suit might take a long time and as, unless action is taken quickly, the petitioner would be adversely affected by being dispossessed.

(Paras 12, 13)

(B) Constitution of India, Article 226 — Right to apply under — A selling house property to B and handing over possession to him — Authority under the U. P. (Temporary) Control of Rent and Eviction Act (3 of 1947) allotting the property to X before registration of the sale deed — A has sufficient interest to join with B in filing writ petition for questioning order of allotment. (Para 10)

(C) U. P. (Temporary) Control of Rent and Eviction Act (3 of 1947), Section 7 (c) — Possession — Owner of house allowing relations also to live in the house.

Where the owner of a house permits his relatives to live in the house he cannot be said to exclude himself from residing therein. (Para 17)

(D) U. P. (Temporary) Control of Rent and Eviction Act (3 of 1947), Section 7 — Order of allotment can be passed only where the property is actually vacant or vacancy is likely to happen — Vendee in actual possession before registration of sale to the knowledge of the authority. —

*(Against Judgment of J. S. Trivedi, J. in C. M. W. No. 1547 of 1971, D/- 19-5-1972).

No allotment order can be passed.

(Para 22)

(E) Interpretation of Statutes — Object of enactment.

The object of an enactment is often judged from the contents thereof and it is not necessary that the object of any enactment or a provision thereof is only one and not more. Where any provision has been worded generally, the Court will not be justified to restrict its scope. (Para 23)

(F) Registration Act (1908), Sections 47, 48, 61 (2) — Operation of document, date of — Vendee in possession pending registration of sale deed cannot be held to be not in possession as owner.

In considering from which date a document operates, only the provisions of Section 47 should be considered and not of Section 48. (Para 23)

Section 47 in one way, gives a retrospective effect to a document after it has been duly registered. Like the retrospective enactments, a document having retrospective effect from the earlier date and not necessarily on the date when the transaction is complete. (Para 25)

A vendee who has taken possession, on the date of sale, of the property sold, cannot be held, not be in possession as owner during the period between the date of the sale deed and its registration. (Para 33)

Cases Referred: Chronological Paras

AIR 1966 SC 115 = (1965) 3 SCR 567

27, 29, 30

ILR (1966) 2 All 784

30

AIR 1965 SC 430 = (1964) 6 SCR 727

26

AIR 1964 All 369 = 1963 All LJ 1104

29

AIR 1961 SC 1747 = (1962) 2 SCR 474

22, 26, 32

AIR 1960 Andh Pra 616

31

AIR 1960 J. and K. 112

32

AIR 1957 Andh Pra 535 = 1956 Andh WR

34

339

AIR 1938 All 431 = 1938 All LJ 557

29

AIR 1938 Mad 801 = (1938) 2 Mad

LJ

362

34

AIR 1938 Pat 134 = 19 Pat LT 383

31

AIR 1937 Nag 143

31

AIR 1933 Cal 212 = 36 Cal WN 733

31

AIR 1928 PC 86 = 26 All LJ 598

28

AIR 1927 PC 42 = 54 Ind App 89

28

AIR 1927 All 545 = 25 All LJ 742

29

AIR 1925 Mad 710 = 48 Mad LJ 496

31

MATHUR, C. J.:— This is an appeal by Chaturbhuj Sharma against the order of a learned single Judge of this Court allowing the writ petition of Durga Dayal and U. P. Tuberculosis Association, Lucknow, and thereby quashing the allotment order dated 25-10-1971 passed by the District Magistrate under Section 7 of the U. P. (Temporary) Control of Rent and Eviction Act in favour of the appellant.

2. The material facts of the case are as follows:—

The disputed house known as 'Bhagwati Niwas' can, for purposes of this proceeding, be deemed to consist of two parts, the northern portion is in the occupation of the appellant. The dispute centres about the southern portion and the allotment order in question pertains to this portion. Durga Dayal, petitioner No. 1, purchased the house in 1939. In or about 1942 the northern portion was let out to one Sardar Rajendra Singh, and thereafter to the appellant. The petitioner's case is that he (Durga Dayal) was throughout in occupation of the southern portion though in the year 1949 he permitted his brother, Shri (later Mr. Justice) S. D. Khare, to occupy the southern portion. This portion was later occupied by his sister's husband, Shri (later Mr. Justice) Gur Saran Lal Srivastava, and thereafter his son. His another sister's son Dr. B. P. Singh, was transferred to Lucknow and as no residence was available for his occupation he was also allowed to live in the southern portion with effect from 11-7-1966. When an official residence was allotted to Dr. B. P. Singh, sometime in August, 1971, he shifted to the Government accommodation. The petitioners' case is that the southern portion was throughout in his (Durga Dayal's) occupation, though the relations mentioned above were allowed to reside along with him.

3. On 5-10-1971, the appellant, Chaturbhuj Sharma, applied to the Rent Control and Eviction Officer for allotting the southern portion of the house to him. On 9-10-1971 the Inspector contacted the petitioner No. 1 in connection with the allotment application when petitioner No. 1 handed over the writing which has now been filed by the District Magistrate under orders of this Court passed a few days back. Further inquiry was made by the Town Rationing Officer, Divesh Chandra Ghosh, whereafter he submitted the report Annexure B-2 to his counter-affidavit. The report is dated 23-10-1971. It was thereafter on 25-10-1971 that the impugned allotment order was passed.

4. It is not in dispute that on 22-10-1971, petitioner No. 1, Durga Dayal, executed a sale deed in favour of petitioner No. 2, U. P. Tuberculosis Association. A Bank Draft for Rs. 60,000/- and a cheque for the remaining sale consideration were handed over to petitioner No. 1 the same day. The possession over the southern portion was, according to the petitioners, delivered to petitioner No. 2 on the morning of 23-10-1971. Petitioner No. 2 informed the District Magistrate, to be more correct the Deputy Commissioner, Lucknow, of the transfer and also of the delivery of possession under letter dated 23-10-1971. Annexure 3 to the writ petition. Similar information was also communicated to the Town Rationing Officer

on 23-10-1971 when he visited the spct for inquiry as shall be evident from his report Annexure B-2 to his counter-affidavit. Even then the allotment order was passed on the 25th of October. The sale deed was, however, registered on 23-10-1971.

5. The case of the appellant and also of the District Supply Officer and the District Magistrate is that petitioner No. 1 was never in occupation of the southern portion. It is said that petitioner No. 1 is a leading Advocate of Barabanki practising there and he could have no occasion to reside at Lucknow in this portion of his house. It is also said that his father-in-law has a house in the same locality Pandariba where petitioner No. 1 used to stay during his visits to Lucknow.

6. The petitioners did not move the State Government under Section 7-F of the Act against the order of allotment but preferred the present writ petition and at the same time obtained a stay order. Even though the stay order was passed on 26-10-1971, the appellant managed to secure possession over the southern portion.

7. The learned single Judge has recorded the finding that there was no vacancy and, therefore, no order of allotment under Section 7 could be passed. The action taken was held to be mala fide.

8. The learned Advocate for the appellant has raised an objection to the entertainment of the writ petition. It is contended that the petitioners had an alternative remedy by way of an application under Section 7-F before the State Government and when this remedy was not availed of, this Court should not have entertained the writ petition. The other point contended is that none of the petitioners could be regarded as aggrieved parties who could seek redress from this Court. None of these grounds are such as would justify our not entertaining the writ petition at this stage.

9. We need not express any opinion on the allegation of mala fide. It is, however, evident that the Rent Control Authorities had acted in a great hurry. When it had been brought to the notice of the District Magistrate and also of the Town Rationing Officer that the disputed house 'Bhagwati Niwas' had been purchased by the U. P. Tuberculosis Association and possession had been delivered to the purchaser on 23-10-1971, they should not have acted in a hurry by passing the order of allotment within two days. There could be no reason to suspect the bona fides of the sale transaction. The U. P. Tuberculosis Association is a public institution maintaining proper records. Nothing has been brought to our notice which may show that the sale was

on insufficient consideration or was made to defeat the ends of justice. Consequently, it was necessary for the respondents to allow such time that the sale deed could be registered and the sale becoming complete. Even if they were in a hurry to pass an order, equity demanded that they should have acted upon the sale deed and passed an order as if the new owner was the U. P. Tuberculosis Association and not Durga Dayal. It is this undue haste which created a doubt in the mind of the petitioners that all this was being done to favour the appellant who was previously a State Minister. It may be that the respondents thought that they would gain the favour of the appellant and his friends, without the appellant having any intention to have the order of allotment passed quickly. Therefore, we would not endorse the allegation of mala fide, but the undue haste shown by the respondents could be a sufficient justification for the petitioners to move the High Court under Article 226 of the Constitution and not to first avail of the remedy under Section 7-F of the U. P. (Temporary) Control of Rent and Eviction Act and, if necessary, to challenge the allotment order before the High Court.

10. Even though Durga Dayal had transferred the house to the U. P. Tuberculosis Association on 22-10-1971 he can be regarded as a party interested in having the allotment order quashed. It can be assumed that there was an understanding that vacant possession shall be delivered over the southern portion and if the U. P. Tuberculosis Association could not secure vacant possession thereof, there could be some disputes followed by litigation between the petitioners in which petitioner No. 1 would have been put to considerable inconvenience and harassment. Petitioner No. 1 could, therefore, join petitioner No. 2 in having the allotment order quashed. Even though the sale deed had not been registered by the time the petition was moved, petitioner No. 2 had interest in the property knowing fully well that after the registration of the sale deed, it shall become full owner of the property and can claim the benefits from the date of the execution. It was handed over possession over the southern portion and as a result of the allotment order it would have been dispossessed therefrom. The writ petition moved by the petitioners could, therefore, be entertained by the High Court; in any case, it will not be proper to quash the proceedings on this technical ground, at such a late stage.

11. Two material questions of fact in issue are whether the southern portion of Bhagwati Niwas was in the occupation of Durga Dayal, petitioner No. 1, before the execution of the sale deed. Naturally,

if he was in occupation thereof, he could deliver possession to petitioner No. 2 on the morning of 23-10-1971. The other question of fact in issue is whether in the facts and circumstances of the case, petitioner No. 1 could be deemed to have been in occupation of the southern portion during the time it was occupied by his relations. In case findings of fact can be recorded in favour of petitioner No. 1, the material question shall be whether the possession of petitioner No. 2 from the morning of 23-10-1971 can be deemed as owner or its possession was unauthorised which could be disregarded by the Rent Control Authorities and the accommodation could be regarded as vacant and allotted by the District Magistrate under Section 7.

12. It is strenuously contended on behalf of the appellant that the questions of fact involved in the present proceeding are all of a controversial nature such that this Court should not in a proceeding under Article 226 enter into. It was thus urged that if this Court did not enter into the facts it could not interfere with the order of allotment passed by the Dist. Magistrate. It shall have to be kept in mind that the orders passed by the Dist. Magistrate including the Rent Control and Eviction Officer under the U. P. (Temporary) Control of Rent and Eviction Act, cannot be challenged in a civil suit. They are, as provided in S. 16 of the U. P. (Temporary) Control of Rent and Eviction Act, final. The order of allotment can, therefore be challenged in a civil suit only if it is without jurisdiction or otherwise a nullity. Where an accommodation is not vacant and even then an order of allotment is passed the order is clearly without jurisdiction. Hence the petitioners had an alternative remedy by way of a civil suit. But it is a matter of common knowledge that the final decision of a civil suit takes a very long time and in suitable circumstances the High Court can in spite of there being a remedy open by way of civil suit, exercise its jurisdiction under Article 226 of the Constitution.

13. The circumstances of the present case make it evident that unless action was taken quickly, the petitioners would have been adversely affected in that even though in actual possession they would have been dispossessed from the accommodation. When the stay order passed by the High Court on 26-10-1971 became infructuous, the petitioners could have been put to still greater difficulty if they would have availed of the alternative remedy of filing a civil suit. Consequently, it would not be justified to quash the present proceeding under Article 226 on the ground that an alternative remedy was available. However, while expressing an opinion on facts, we shall have to keep in mind that the present is a pro-

ceeding under Article 226 and not a civil proceeding where evidence of the parties is recorded in detail. If on facts, no clear finding can be recorded, the best thing shall be to proceed on facts as asserted by the public authorities, namely, the District Supply Officer and the District Magistrate. But if the material on record justifies the recording of a clear finding, that course can be adopted.

14. The District Magistrate and also the Town Rationing Officer, who was the Rent Control and Eviction Officer, had before them the writing given by petitioner No. 1 and also the letter sent by petitioner No. 2. In his writing dated 9-10-1971 the petitioner No. 1 had clearly mentioned that the southern portion of the house had always been in his personal occupation and that his entire luggage was in the southern portion of the house. In case the Town Rationing Officer regarded this assertion to be incorrect, he could himself visit the house or depute his Inspector to direct the petitioner No. 1 to unlock the southern portion to find out if any luggage was kept therein and also whether he could be deemed to be in actual occupation of this portion. No such steps were taken. Similarly in its letter dated 23-10-1971 petitioner No. 2 had informed the District Magistrate that possession had been delivered to petitioner No. 2 on the morning of 23-10-1971. If this assertion was not regarded to be correct the District Magistrate could have taken a similar action to find out if petitioner No. 2 was then in actual occupation of the southern portion.

15. The report Annexure B-2 to the counter-affidavit of the Town Rationing Officer contains many inaccuracies. Even then if the report is read as a whole, it would give the impression that the petitioner No. 1 was throughout in occupation of the southern portion, at occasions along with the relations otherwise all by himself.

16. Similar inference can be drawn from the other material on record which may have been in the notice of the public authorities or could come to their notice if a proper inquiry was made. In his letter dated 14-6-1967, addressed to petitioner No. 1, Annex. 8 to the rejoinder affidavit, the appellant clearly mentioned that the other portion, namely, the southern portion was in the occupation of petitioner No. 1. This was during the period Dr. B. P. Singh was also residing in this portion. Paragraphs 7 to 12 of the writ petition also lead to the same inference. In paragraph 7 it is clearly asserted that the southern portion was never let out to anyone; at first the previous owner himself occupied the entire house including the southern portion, and after the purchase in 1939, petitioner No. 1 oc-

cupied the entire house till 1942 and it was in 1942 that the northern portion was let out to Sardar Rajendra Singh. Further details in respect of the northern portion need not be given. Similarly, in paragraphs 9 and 11 it was made clear that the relations mentioned above had occupied the southern portion along with petitioner No. 1. These assertions were evasively denied by the respondents of the writ petition, namely, the present appellant and the Town Rationing Officer. In case the southern portion had been let out to any person after the purchase in 1939 and before its occupation by Shri (later Mr. Justice) S. D. Khare, particulars of the tenancy could be given. On the basis of the affidavits on record it must, therefore, be held that after the purchase of the house in 1939 the southern portion was not let out to anyone. It must therefore, have been in the personal occupation of petitioner No. 1. The fact that petitioner No. 1 is a leading advocate of Barabanki is of no importance. He could be visiting Lucknow either on private work or in the course of his professional duties. He could easily think of retaining the southern portion for his own use. Consequently, when it appears that the southern portion was never given on rent, no other inference can be drawn except that petitioner No. 1 was in actual occupation of this portion of the house.

17. When the house is needed by the owner himself and he permits his relations to live in the house, he does not exclude himself from residing therein. Ordinarily, therefore, the possession of the relations permitted to reside is not exclusive of the owner. In other words, even during the period the relations of petitioner No. 1 stayed in the southern portion of the house, petitioner No. 1 was also in possession thereof. This finds support from the writing dated 9-10-1971 which the petitioner No. 1 had given to the Rent Control and Eviction Officer while the question of allotment was pending. In this letter he has referred to his entire luggage being in the southern portion. When petitioner No. 1 permitted his relations to live in the house, he would not have removed the luggage and brought it back when the relations left it. It is, therefore, established that the southern portion of Bhagwati Niwas was throughout in the personal occupation of petitioner No. 1. The fact that his father-in-law had a house in this very locality will not make a difference. The visits of petitioner No. 1 to Lucknow were casual and, consequently, he could for some time stay with his father-in-law also. The actual possession of petitioner No. 1 over southern portion would thus extend upto the morning of 23-10-1971 when it was transferred to petitioner No. 2. Petitioner No. 2 had intimated to the District Magistrate of hav-

ing secured possession over the southern portion of the house on the morning of 23-10-1971. There is nothing to show that this assertion is incorrect. Consequently, at the time the allotment order was passed the southern portion was in occupation of petitioner No. 2.

18. This leads us to the consideration of the question of law involved. As already mentioned above, the sale deed was executed on 22-10-1971 but was registered on 28-10-1971. The allotment order was passed in between 25-10-1971. The question arises whether the possession of petitioner No. 2 can be regarded as an authorized one, such that his possession could be disregarded and in the eye of law there was a vacancy to justify the District Magistrate to pass an order under Section 7 of the U. P. (Temporary) Control of Rent and Eviction Act.

19. It is strongly contended on behalf of the appellant that petitioner No. 2 acquired title in the property only after the registration of the sale deed on 28-10-1971 and its possession before this date was not as owner. It is said that when the possession was not as owner, nor could it be as a legal tenant, the possession of petitioner No. 2 was unauthorised and the Rent Control Authorities could disregard the executed sale deed and regard the possession to be unauthorized and a vacancy having arisen could allot the accommodation to a suitable person.

20. A finding on this question will depend upon the scope of Section 47 of the Registration Act which provides that on a document being registered, it shall take effect from the date of execution, namely, the date the document would have come into operation had registration thereof not been necessary.

21. Before making comments on the provisions of the Registration Act and the Transfer of Property Act it shall be proper to refer to the object of the U. P. (Temporary) Control of Rent and Eviction Act, whether that enactment can justify the hasty attitude adopted by the Rent Control Authorities.

22. The U. P. (Temporary) Control of Rent and Eviction Act was passed to afford relief to tenants. To this extent the rights of owners were taken away. But this Act was not enacted to dispossess the owners from the accommodation in their actual occupation. An order under Section 7 could be passed only when there was an actual vacancy or a vacancy was likely to arise. When the intention of the framers of the above Act was not to deprive the owners of their possession of their buildings, it is necessary for the Rent Control Authorities to keep this aspect in mind. They are not to allot the accommodation to an out-

sider when due to the delays in the registration of a document the title of the transferee does not become complete soon after the execution of the document. In case the sale transaction was not brought to their notice, they could rightly presume that no sale deed had been executed. In the instant case it had been pointedly brought to the notice of the Rent Control authorities that possession had been delivered to the transferee on the morning of 23-10-1971. If the District Magistrate did not accept the contents of the letter received by him he could direct his subordinate authorities to verify whether in fact any sale deed had been executed. He could also direct petitioner No. 2 to produce the sale deed. The bona fide of the present sale deed has not been challenged and even if there was any doubt in the mind of the Rent Control Authorities, they could have directed the petitioners to have the document registered promptly and fix the period for the purpose. If the sale deed was not produced before the Sub-Registrar for registration within period, the sale deed could be disregarded and then the District Magistrate could pass an order under Section 7. When the underlying object of the enactment is not to dispossess the owners in possession, such intention was to be given effect to which was not done in the present case.

Section 47 of the Registration Act runs as follows:—

"A registered document shall operate from the time from which it would have commenced to operate if no registration thereof had been required or made, and not from the time of its registration."

This section thus makes a provision from which date a document registered subsequently shall operate. Section 47 has been placed in Part X bearing the heading "Of the effects of registration, and non-registration". The effect of registration, therefore, is that a document after registration becomes effective and comes into operation from the date of execution. On the basis of an observation made in *Rani Saran Lall v. Mst. Domini Kuer*, (AIR 1961 SC 1747) it was however contended that the object of the section was to decide which of the two or more registered documents in respect of the same property was to have effect. It is suggested that this is the only object of Section 47 with the result that in the instant case where there was only one instrument, Sec. 47 did not come into operation and had to be disregarded. We cannot accept this contention.

23. The object of an enactment is often judged from the contents thereof and it is not necessary that the object of any enactment or a provision thereof is only one and not more. Where any pro-

vision has been worded generally, we would not be justified to restrict its scope. As Section 47 has been worded generally, its scope can be, as mentioned above, when it is considered along with Sec. 48 of the Transfer of Property Act. But if we have to find out from which date the document shall operate in so far as the parties to the document are concerned, Section 48 does not come into operation and a finding shall have to be recorded on consideration of the provisions of Section 47 alone. In other words, we would not be justified to restrict the scope of Section 47 of the Registration Act and to hold that its object is only what is detailed in Section 48 of the Transfer of Property Act. If such was the intention of the Legislature, Section 47 would not have been incorporated in the Registration Act and instead a more comprehensive Section 48 would have been incorporated in the Transfer of Property Act.

24. In this connection it may be observed that the Supreme Court had made the observations in connection with the right of pre-emption governed by the Mohammadan Law where such right arose only out of a valid, complete and bona fide sale. There the Supreme Court was considering the effect of a demand made before the sale was complete, i.e., after the execution of the sale deed and before the registration thereof. In substance, the rights claimed by the pre-emptor and the rights of the transferee were in issue. The Supreme Court were not considering from which date the rights of a transferee can be enforced irrespective of whether there has or has not been any other demand or transaction. The above observation made in the Supreme Court case cannot, therefore, be regarded to be applicable to all the situations.

25. Section 61 (2) of the Registration Act lays down that the registration of a document shall be deemed to be complete after the endorsements and certificate referred to and mentioned in Sections 59 and 60 have been copied into the margin of the Register Book. Under Section 54 of the Transfer of Property Act, the transfer by sale of immovable property of a value of Rs. 100/- and more can be made only by registered document. On reading Section 54 of the Transfer of Property Act along with Section 61 of the Registration Act, it can be said that the sale is complete after the compliance of Sections 59, 60 and 61 has been made and not when the document has been executed or presented for registration. Title to the property may pass when the transaction is complete, that is, after the necessary endorsements have been made in the Register Book. But the transferee can, if permissible under the law, acquire right in the property from an earlier date. Section 47 of the Registration Act, in one

way, gives a retrospective effect to a document after it has been duly registered. Like the retrospective enactments, a document having retrospective effect from the earlier date and not necessarily on the date when the transaction is complete. When the matter is considered in this light the transaction of sale may not be complete before registration, but after registration it takes effect from the date of execution namely, that the purchaser can assert his rights of ownership from the date of execution even though his title became complete on a later date. When the owner can assert his rights of ownership from an earlier date, his possession during the period prior to the registration shall after the registration of the document be as owner and not as a licensee or an outsider. On a careful consideration of the provisions of the Registration Act, we are of opinion that a document registered on a subsequent date operates from the date of its execution even though it can be said that the title of the transferee is not complete till the registration.

26. Our attention has been drawn to a few decisions of the Supreme Court, the Privy Council, Allahabad High Court and also the other High Courts and we find that the consensus of opinion is in favour of the view that we are adopting. In *Ram Saran Lall v. Domini Kuer*, AIR 1961 SC 1747 (Supra) the point for consideration was when was the sale complete and not the date from which it operates. In paragraph 8 it was observed that:

"We will assume that the learned Attorney General's construction of the instrument of sale that the property was intended to pass under it on the date of the instrument is correct. Section 47 of the Registration Act does not, however, say when a sale would be deemed to be complete. It only permits a document when registered, to operate from a certain date which may be earlier than the date when it was registered. The object of this section is to decide which of two or more registered instruments in respect of the same property is to have effect. The section applies to a document only after it has been registered. It has nothing to do with the completion of the registration and, therefore, nothing to do with the completion of a sale when the instrument is one of sale. A sale which is admittedly not completed until the registration of the instrument of sale is completed, cannot be said to have been completed earlier because by virtue of Section 47 the instrument by which it is effected, after it has been registered, commences to operate from an earlier date."

On the other hand, the above makes it evident that even though the sale is complete on a subsequent date it operates by virtue of Section 47 of the Registration Act

from the date of execution. The transferee can thus enforce his rights of ownership from the date of registration.

The case of *K. J. Nathan v. S. V. Maruthi Rao*, (AIR 1965 SC 430) contains a similar observation, namely, that:

"Though Ex. A-19 was registered on June 22, 1948, under Section 47 of the Registration Act the agreement would take effect from July 5, 1947" (July 5, 1947 is the date of execution of the document).

27. In *Alapati Venkataramiah v. Commr. of Income-Tax*, (AIR 1966 SC 115) it was observed that till a conveyance was executed and registered no title could pass to the transferee. This is what we have already indicated above. This case nowhere lays down that a conveyance when executed and registered shall take effect from the date of registration and not from the date of execution.

28. *T. V. Kalyanasundaram Pillai v. Karuppa Mooppanar*, (AIR 1927 PC 42) and *Venkat Subba Srinivas Hegde v. Subba Rama Hegde*, (AIR 1928 PC 86) relate to a gift deed and not a sale deed. However, the principles laid down therein will clearly establish that the rights and benefits under the document can be exercised from the date of execution. It was held that once a gift is executed and has been delivered to the donee, the donor cannot revoke the gift even before its registration on the ground that the gift is not completed until the deed is registered. When the donee can claim under the document even though not registered, there is no reason why a transferee cannot assert his rights as owner of the property even though his title is not complete and would become complete after the registration of the document.

29. In *Mohammad Bashir Khan v. Mt. Kulsum Bibi*, (AIR 1927 All 545) Pre-emption Act of 1922 was held to be inapplicable because the sale deed had been executed before 17th February, 1923, the date from which the provisions of the Act were applicable. This view was taken even when the deed of transfer was registered after that date. In other words, the transfer was deemed to have been made on the date of execution, and not on the date of registration. In *Mahadeo Singh v. Mian Din*, (AIR 1938 All 431) it was held that after executing the sale deed it is not open to the executant to go back on his agreement and revoke it. The observation that the sale deed is completed when it is executed by the vendor is however, contrary to the provisions of Section 61 of the Registration Act and the law laid down in *Alapati Venkataramiah v. Commr. of Income-tax*, AIR 1966 SC 115 (Supra). The view taken in *Raja Ram v. Girraj Kishore*, (AIR 1964 All 369) supports the view that we are taking. The material observation is:

"unless a sale deed is registered, the mere fact of its execution does not make it operative, but by reason of Section 47 once registration has been effected the sale deed becomes operative retrospectively from the date of execution."

30. *Hira Lall Burman v. The District Board, Aligarh*, (ILR (1966) 2 All 784) is not very helpful as it proceeds on a different ground, namely, from which date the transferee becomes the owner of the property. It may, however, be observed that the observations in this case appear to be contrary to the law laid down in *Alapati Venkataramiah v. Commr. of Income-tax*, AIR 1966 SC 115 (Supra).

31. Cases of other High Courts in which a document registered subsequently was held to take effect from the date of execution are: *Faiyazuddin Khan v. Mt. Zahur Bibi*, (AIR 1938 Pat 134), *Bhagawathula Kameswara Rao v. Doddaku Veera Raghavulu*, (AIR 1960 Andh Pra 616), *Champat Rao Mahadeo v. Mahadeo Bajirao Kunbi*, (AIR 1937 Nag 143) and *Nabadwip Chandra Das v. Loke Nath Roy*, (AIR 1933 Cal 212).

On the application of this principle, sale deed executed before the filing of the suit but registered thereafter was held not to be affected by the doctrine of *lis pendens*. See *Akki Guru Basappa v. Valuvathi*, (AIR 1925 Mad 710).

32. A contrary view has, however, been expressed in *Nabir Ganai v. Mohammad Ismail Ganai*, (AIR 1960 J & K 112). Therein it was held that as between parties, registered document takes effect from the date of its execution but as between third parties it takes effect from the date of registration. In case it was desired to lay down an inflexible rule applicable to all cases, we would with respect differ. The Supreme Court has clearly laid down in *Ram Saran Lall v. Mst. Domni Kuer*, (AIR 1961 SC 1747) that the object of Sec. 47 of the Registration Act is to determine the priority of various transactions pertaining to the same immovable property. Parties to the various instruments shall not be the same. The transferees would invariably be different persons. Consequently, the observation that a document takes effect as between third parties from the date of registration is contrary to the law laid down by the Supreme Court.

33. To avoid the possibility of any misunderstanding it may be mentioned that departure from the scope of Section 47, Registration Act may be made in exceptional cases involving a question of limitation but not where the effect of the document and the rights of the transferor and the transferee have to be determined. In such a case Section 47 must be interpreted as it is, that is, no restrictions not

contemplated by the section be imposed.

34. One of the cases in which, in our opinion also, departure can be made from the strict scope of Section 47 is that of *Paritala Narasimham v. Ayinampudi*, (AIR 1957 Andh Pra 535). It was held therein that the transfer cannot be ante-dated for the purpose of Section 54 of the Insolvency Act. Also see *Venkadari Samappa v. Official Receiver*, (AIR 1938 Mad 801).

35. From the above it shall be evident that except for the Jammu and Kashmir High Court, every High Court, has taken the view that by virtue of Section 47 of the Registration Act, a registered document takes effect from the date of its execution and this, in our opinion, is the only view that can be taken of the provisions of Section 47 of the Registration Act.

36. Once the document takes effect from the date of execution, the transferee can assert his rights under the document from the date of the execution. Once the transferee can assert his rights from that date, his possession of the property under transfer shall be as owner and in no other capacity.

To sum up, petitioner No. 1 was in occupation of the southern portion of Bhagwati Niwas from the date of the purchase in 1939 upto the sale and transfer of possession to the new owner on 23-10-1971 and that the possession of petitioner No. 2, which is a transferee from petitioner No. 1, from the morning of 23-10-1971, is as owner, for the reason that even though the sale deed was registered on 28-10-1971, by virtue of Section 47 of the Registration Act, it operates from the date of execution that is from 22-10-1971. When the document operates from 22-10-1971, parties to the document can assert rights as if such rights had accrued from that date. The possession of petitioner No. 2 from the morning of 23-10-1971, was therefore, as owner and in no other capacity. When petitioner No. 2 was occupying the disputed southern portion of the house as owner, there could be no vacancy to entitle the District Magistrate to pass an order of allotment under Section 7 of the U. P. (Temporary) Control of Rent and Eviction Act. The impugned order of allotment is thus without jurisdiction and deserves to be quashed.

The special appeal has no force and it is hereby dismissed with costs. The stay order is vacated.

Appeal dismissed.

AIR 1976 ALLAHABAD 15**R. B. MISHRA AND M. P. MEHROTRA, JJ.****K. B. Agarwala, Appellant v. Smt. Chandrawati and others, Respondents.**

Special Appeal No. 74 of 1975, D/- 8-8-1975.*

(A) **U. P. Urban Buildings (Regulation, Letting, Rent and Eviction) Rules, 1972, Rule 25** — Application for bringing legal Representative on record to be filed within one month from date of death of party — Stay order passed by High Court cannot stop running of limitation — It is no bar to move an application for substitution — An application filed beyond one month is hit by mandatory provision of Section 3 (1) of the Limitation Act, 1963, and is bound to be rejected. (Paras 3, 4)

(B) **U. P. Urban Buildings (Regulation, Letting, Rent and Eviction) Rules 1972, Rule 25** — Legal Representative has a right under Rule 25 to claim that an application for substitution moved beyond one month shall be rejected — Mere fact that another application for eviction can be moved against L. R. of deceased tenant will not detract from such a right.

(Para 5)

(C) **Evidence Act (1872), Section 115** — Death of party pending proceeding against him — Though Legal representative not brought on record, filing a petition for answering certain interrogatories by L. R. — By such participation without any waiver of his right to contest to be brought on record, cannot be construed as consent of L. R. to be brought on record.

(Para 3)

Cases Referred: Chronological Paras (1974) Spl. Appeal No. 153 of 1974, D/- 20-9-1974 (All) 2

Deokinandan and B. Dayal, for Appellant; G. N. Verma and Standing Counsel, for Respondents.

MEHROTRA, J.:— This special appeal is directed against the judgment of a learned single Judge of this Court. The brief facts are these: The appellant before us, Sri K. B. Agarwala, is the landlord of premises No. 21, Muir Road, Allahabad. He initiated proceedings under Section 21 of the U. P. Act No. 13 of 1972 against the late Pt. Shiv Charan Lal who was alleged to be the tenant of the said premises. It was alleged that he had left the residence in the said premises and had shifted to Khair in the district of Aligarh. It was alleged that Pt. Shiv Charan Lal had illegally permitted the respondents Nos. 3 and 4 to reside in the said premises. The landlord also aver-

* (Against Judgment of C. D. Parekh, J., in Civil Misc. Writ No. 5601 of 1974, D/- 10-2-1975).

red that he was in personal need of the house in question. The three opposite parties to the application under Section 21, namely, Pt. Shiv Charan Lal as well as the respondents Nos. 3 and 4 took several pleas in defence. An application under Order 11, Rule 1, Civil Procedure Code was moved by Pt. Shiv Charan Lal seeking leave to serve interrogatories on the landlord. The said application was rejected by the Prescribed Authority and an appeal against the order of the Prescribed Authority before the District Judge, Allahabad, also did not succeed. Thereafter, Pt. Shiv Charan Lal moved this Court by Civil Misc. Writ Petition No. 1554 of 1973. During the pendency of the said petition Pt. Shiv Charan Lal died on 16-9-73. It may be stated here that in the said writ petition a stay order dated 9th March, 1973, was passed staying proceedings before the Prescribed Authority. After the death of Pt. Shiv Charan Lal Smt. Chandrawati, his widow, who is respondent No. 1 in the special appeal, applied to be brought on the record, in the writ petition as the legal representative of the deceased. The substitution was made when the landlord on 3-4-1974 waived his objection. The writ petition came up for final hearing on 13th February, 1974 and the same was dismissed on an undertaking given by Shri Deokinandan, learned counsel for the landlord, that his client would reply to the interrogatories which were sought to be served on him. The dispute went back to the Prescribed Authority. On 2-3-1974 the landlord, Sri K. B. Agarwala, moved an application, a true copy whereof is annexure 7 to the writ petition. It was prayed that Smt. Chandrawati be brought on record as the legal representative of the deceased Pt. Shiv Charan Lal. In the body of the application circumstances were set out and reasons given as to why the application could not be made earlier. The application was allowed by the Prescribed Authority on 4th May, 1974. Smt. Chandrawati moved an application dated 31st July, 1974, a true copy whereof is Annexure 9 to the writ petition, and it was prayed that the aforesaid order dated 4th May, 1974, be set aside and the substitution application moved on 2nd March, 1974, should be dismissed. The landlord, Sri K. B. Agarwala, filed an objection to this application of Smt. Chandrawati. A true copy of the said objection dated 30th August, 1974, is Annexure 10. By its order dated 6th September, 1974, the Prescribed Authority rejected Smt. Chandrawati's application dated 31st July, 1974. Thereafter, the writ petition from which this special appeal has arisen, was filed by Smt. Chandrawati in this Court. She prayed that the order dated 4th May, 1974, be set aside. She also claimed that the order dated 6th September, 1974, be

quashed as the same was based on wrong premises and assumptions. There was a further prayer for a writ or direction in the nature of mandamus directing the landlord, Sri K. B. Agarwala, to abide by the undertaking given by his counsel in the earlier writ petition No. 1554 of 1973. The writ petition was allowed by learned single Judge of this Court and the aforesaid orders dated 4th May, 1974, and 6th September, 1974, were quashed. The learned single Judge held that no notice was issued to Smt. Chandrawati of the substitution application (which is dated 22nd February, 1974, though it was moved on 2nd March, 1974). It was further held that the order dated 4th May, 1974, was passed ex parte without affording an opportunity to the legal representatives to contest the aforesaid application. The application was held to be time-barred in view of the provisions of Rule 25 of the Rules framed under the U. P. Act No. 13 of 1972. The learned single Judge also held that the proceedings already stood abated when the aforesaid application dated 22nd February, 1974, was moved on 2nd March, 1974, and that there was no application under Section 3 of the Limitation Act. On these findings, the writ petition was dismissed. Feeling aggrieved the landlord has come up in the instant special appeal against the order of the learned Single Judge and in support of the appeal we have heard Shri Deokinandan and in opposition Shri G. N. Verma has made his submissions.

2. Learned counsel for the appellant contended that there could be no abatement as Order 22 of the Civil Procedure Code does not apply to the proceedings before the Prescribed Authority under the U. P. Act No. 13 of 1972. He further contended that if an order was passed without issuing notice to the legal representative then such an order could not be said to be bad in law as no vested right of the legal representative was infringed in the instant case inasmuch as a second application under Section 21 could undoubtedly be moved against the legal representative and the rejection of the first application could not be fatal to the maintainability of the second application. He contended that the provision of Order 22 Rule 9 C. P. C. is a different one inasmuch as after abatement a second suit cannot be filed on the same cause of action. Learned counsel next contended that as there was a stay order from this Court staying proceedings before the prescribed Authority therefore, the aforesaid substitution application could not be moved before the said stay order stood discharged by the dismissal of the writ petition on 13-2-1974. Lastly, it was contended that Smt. Chandrawati herself chose to come on record by moving an application dated 2nd September, 1974, a

true copy whereof is Annexure 5. Learned counsel placed reliance on an unreported decision of this Court dated 20th September, 1974, in Special Appeal No. 153 of 1974, R. C. Garg v. Union of India,

3. We have given due consideration to the aforesaid submissions of the learned counsel for the appellant. In our opinion, however, the appeal lacks merit. We do not agree with the contention made on behalf of the appellant that by moving the application dated 2nd September, 1974, the legal representative gave up her right to contest the substitution application. It should be pointed out that Smt. Chandrawati had already moved an application dated 31st July, 1974, for recalling the ex parte order dated 4th May, 1974. The said application was pending disposal on the date when Smt. Chandrawati moved the application dated 2nd September, 1974, praying that the landlord be ordered to reply in full to certain interrogatories. The application dated 31st July, 1974, had been directed by the court to be put up for disposal on the date of the final hearing of the application under Section 21. The final hearing was ultimately fixed for 6th September, 1974. It is, therefore, obvious that the application dated 2nd September, 1974, was made for the sake of precaution so that if Smt. Chandrawati did not succeed in her application dated 31st July, 1974, then her case should not suffer on account of her failure to press the interrogatories served on the landlord. Otherwise also we do not think that a mere participation in the proceedings without any waiver of her right to contest to be brought on record can be construed as the consent of the legal representative to be brought on record. We also do not see any merit in the learned counsel's contention that on account of the stay order passed by this Court the landlord could not move an application for the substitution of the legal representative in the proceedings before the prescribed Authority. The stay order merely was a direction to the prescribed Authority not to proceed with the case but there was no stay order against any party moving the prescribed Authority for bringing the legal representative on record. Moreover, Section 9 of the Indian Limitation Act clearly lays down that where once time has begun to run, no subsequent disability or inability to institute a suit or make an application stops it. Admittedly, for bringing a legal representative on record, the starting point for limitation is the date of death. Rule 25 of the U. P. Urban Buildings (Regulation, Letting, Rent & Eviction) Rules, 1972 lays down as under:

"Rule 25. Bringing legal representatives on record. (1) Every application for substituting the names of the heirs or

legal representatives of any person who was a party to any proceedings under the Act and died during the pendency of the proceeding shall be preferred within one month from the date of the death of such person.

(2) The application shall contain the names and addresses and other details of the heirs or legal representatives and their relationship with the deceased and, be accompanied by an affidavit in its support, and thereupon, the application shall be decided after a summary enquiry by the authority concerned."

Pt. Shiv Charan Lal died on 16th September, 1973 and, therefore, the limitation began to run from the said date and any stay order passed by a court could not stop the running of limitation. So far as the contention of the learned counsel on the question of abatement is concerned, we do not think that is really a material question. Whether the proceedings stood abated or not in the sense in which that expression is used in Order XXII, Civil Procedure Code really did not arise in the instant case. The short point was that an application for bringing on record the legal representatives could be moved before the Prescribed Authority within one month from the death of a party to the proceeding. It is admitted by the learned counsel for the appellant that the new Limitation Act, 1963 is applicable to the proceedings under the U. P. Act No. 13 of 1972. Sub-section (1) of Section 3 of the Limitation Act clearly lays down:

"Subject to the provisions contained in Sections 4 to 24 (inclusive) every suit instituted, appeal preferred, and application made after the prescribed period shall be dismissed, although limitation has not been set up as a defence."

4. In this view of the matter, the legal representative was entitled to say that any application for substitution made beyond the period of one month was hit by the mandatory provision of Section 3 and was, therefore, bound to be rejected. Whether there was an abatement or not is not a material point and did not fall for adjudication. We think, with respect to the learned single Judge, that he should not have raised and gone into that question.

5. Lastly, we do not agree with the learned counsel for the appellant that no right accrued in favour of the legal representatives to question the ex parte order passed on 4-5-74, on the ground that the substitution application was a time-barred one because it was open to the landlord to move a second application under S. 21. The distinction which he has sought to make with reference to the suits, in our opinion, is not valid. The legal representative has a right under Rule 25 of the aforesaid rules to claim that any

application moved beyond one month shall be rejected in view of the provisions of Section 3 of the Limitation Act. It is a valuable right and the mere fact that a second application can be moved under Section 21 against the legal representative, in no way, detracts from such right.

6. We do not think that in these proceedings, we should go into the merits of the application dated 22nd February, 1974. Whether a separate application under Section 5 of the Limitation Act was necessary or not, whether sufficient cause was made out or not all these and other aspects have to be decided by the Prescribed Authority and not by us.

7. We, therefore, dismiss the appeal and direct that the Prescribed Authority shall dispose of the aforesaid substitution application dated 22nd February, 1974, after due notice to the legal representative sought to be brought on record and the parties shall be entitled to raise such pleas as are open to them in law in support of or against the said application. In the circumstances, costs shall be easy.

8. The record of the Prescribed Authority shall be sent down without any further delay.

Appeal dismissed.

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SATISH CHANDRA, J.

Arya Ayurvedic Trust, Machhodari Park, Varanasi and another, Petitioners v. Board of Revenue, U. P., Allahabad and others, Respondents.

Civil Misc. Writ No 3405 of 1972, D/- 25-4-1975.

(A) Civil P. C. (1908), O. 1, Rr. 8, 9, 10 — Suit in name of wrong plaintiff — Suit by trust through its secretary — Defect curable under O. 1, R. 10.

A suit filed by a trust through its secretary was dismissed in appeal on the ground that the trust not being a legal person a suit filed in its name was incompetent.

Held, it is true that a trust is not but the trustees are jointly owners of the property. Even so one of them, with the permission of the Court can sue under the provisions of O. 1, R. 8 of the Civil P. C. When the plaint stated that the suit was by the trust through its secretary, it was the secretary who was suing on behalf of the trustees, he being authorised by them in this regard. When the trial Court repelled the objection that the suit was not properly framed, obviously it had granted permission to the secretary to sue.

(Paras 7, 11)

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Further, O. 1, R. 9, Civil P. C. provides that no suit shall be defaulted by the reason of misjoinder or non-joinder of parties and O. 1, R. 10 provides that where a suit is filed by a wrong person as plaintiff any other person may be substituted as plaintiff at any stage. (Para 9)

Outright dismissal of the suit was, therefore, not justified. (Para 10)

Gyan Prakash and G. N. Verma, for Petitioners; Sankatha Rai, Standing Counsel, for Respondents.

ORDER:— This petition is directed against the judgment of the Board of Revenue, dismissing the suit of petitioner No. 1 as not maintainable.

2. The petitioner filed a suit for declaration and ejectment under Sections 223-B/209 of the U. P. Zamindari Abolition and Land Reforms Act on the allegation that the land in dispute was the grove of the plaintiff. The defendant No. 1 used to purchase its fruits. He, in collusion with the Lekhpai, got his name wrongly recorded over the grove and was trying to interfere with the plaintiff's possession. It was prayed that the plaintiff be declared to be the bhumidhar in possession, and, in the alternative, if the defendant be found to be in possession, he should be evicted.

3. In defence it was pleaded that the plaintiff was not a legal person. It was not the bhumidhar. The land in dispute was not a grove. The land was given by the zamindar to the defendant's brother, Vishwanath, and it was Viswanath who had planted the grove. As a result of a private partition in the family the grove fell to the defendant's share. It was also pleaded that the suit was barred by limitation.

4. The trial court repelled the various pleas in bar and decreed the suit. This decree was upheld in appeal. Aggrieved, the defendant went up to the Board of Revenue in second appeal.

5. The Board held that the plaintiff of the suit was the "Arya Ayurvedic Trust, through Sheo Prasad Verma, Honorary Secretary of the Trust". It held that a Trust is not a legal person and could not sue in its own name. In law the property vests in the Trustees and the Trustees alone could sue. The Board held that the principal point was as to whose name should appear as plaintiff. Since the Trust was not a legal person, the suit which was filed in the name of the Trust was incompetent. The Board held that it is the body of the Trustees which was competent to bring the suit and in whose name and on whose behalf the suit should have been filed. The Board did not go into the other points raised in second appeal and dismissed the suit on the technical

ground that the correct person has not filed the suit. Aggrieved, the plaintiff has come to this Court.

6. In view of Section 342 of the U. P. Zamindari Abolition and Land Reforms Act, the Code of Civil Procedure applies to all proceedings under that Act. Order 1, Rule 8, C.P.C. provides that where there are numerous persons having the same interest in one suit, one or more of such persons may, with the permission of the Court, sue or be sued, or may defend, in such suit on behalf of or for the benefit of all such persons so interested. It is thus evident that even if it be the law that the trust is not, but the Trustees jointly are the owners of the property, and, therefore, all the Trustees are interested in the property, even so, under Order 1, Rule 8, C.P.C. one or more of such persons can sue. In the present case, the Honorary Secretary of the Trust signed the plaint. His name appeared at the heading of the plaint as the person through whom the suit was being filed on behalf of the Trust. The Trust name, namely, Arya Ayurvedic Trust, may not be a legal person by itself, but it is obvious that the institution was described as such in the deed of trust. It in law was the popular name of the Trustees in whom the property had vested for executing the purposes of the Trust. When the plaint stated that the suit was by Arya Ayurvedic Trust through the Honorary Secretary, it was the Honorary Secretary who was suing on behalf of the Trustees of the institution which was popularly known as Arya Ayurvedic Trust. He was entitled to sue with the permission of the Court.

7. The Board of Revenue has, in its judgment, referred to the resolution dated 10th August, 1963, passed by the Board of Trustees authorising Sri Sheo Prasad Verma, Honorary Secretary, to take suitable action in regard to matters that may go up before the law courts about trust property. It has also been noticed that this resolution was confirmed by the Board of Trustees at its meeting held on 3rd May, 1964. It is thus evident that the Board of Trustees had expressly authorised the Secretary to represent them in litigation in law courts. This authorisation was, in my opinion, sufficient to enable the Secretary to bring the suit in his own name within meaning of Order 1, Rule 8, C.P.C. When the trial court repelled the claim that the suit was not properly framed, obviously it had granted permission to the Secretary to sue.

8. Order 1, Rule 8, C.P.C. further provides that the Court shall in such case give, at the plaintiff's expense, notice of the institution of the suit to all such persons either by personal service or, where

from the number of persons or any other cause such service is not reasonably practicable, by public advertisement, as the Court may in each case direct. Sub-rule (2) provides that any person on whose behalf or for whose benefit a suit is instituted or defended under sub-rule (1) may apply to the Court to be made a party to such suit. These provisions are meant for the benefit and protection of the other persons who have the same interest as the one who has filed the suit. In the present case none of the other Trustees has taken any objection to the frame of the suit. This is not a case where there is any conflict or controversy between the Trustees inter se. The defendant did not take any objection that the Court should have given notice to the various other Trustees. His plea was that the suit, as framed, was not maintainable. That appears to me to be a misguided plea.

9. Order 1, Rule 9, C.P.C. provides that no suit shall be defaulted by reason of misjoinder or non-joinder of parties, and the Court may, in every suit, deal with the matter in controversy so far as regards the rights and interests of the parties actually before it. Order 1, Rule 10, C.P.C. provides that where a suit has been instituted in the name of the wrong person as plaintiff, the Court may, at any stage of the suit, order any other person to be substituted or added as plaintiff.

10. In view of these provisions the Board of Revenue was not, even on its finding that a wrong person had appeared as the plaintiff, entitled to dismiss the suit outright.

11. The heading of the plaint, namely, "Arya Ayurvedic Trust through Sheo Prasad Verma, Honorary Secretary, meant, in substance, the same thing as saying "Sheo Prasad Verma, Honorary Secretary, Arya Ayurvedic Trust". The real person suing was the Honorary Secretary on behalf of the Arya Ayurvedic Trust, which was the popular name of the Trustees. In view of the fact that the Board of Trustees had expressly directed the Honorary Secretary to conduct litigation on their behalf, it could not be said that the Honorary Secretary had no entitlement to institute the suit on behalf of the trustees.

12. Learned counsel for the parties placed reliance upon a large number of decided cases, but I do not propose to go into them, because, in my opinion, none of them really touch the crucial point at issue in this petition.

13. In the result the petition succeeds and is allowed. The impugned judgment of the Board of Revenue is quashed. The matter is sent back to the Board for decision of the second appeal in accordance

with law and in the light of the observations made above. The petitioners will be entitled to costs.

Petition allowed.

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(LUCKNOW BENCH)

R. L. GULATI AND T. S. MISRA, JJ.

Smt. Rampa Devi and others, Appellants v. Bishambhar Nath Puri and others, Respondents.

First Misc. Civil Appeal No. 6 of 1968, F. A. F. O. No. 52 of 1971, D/- 24-7-1975.*

(A) Partnership Act (1932), Sections 58 and 69 — Registration of firm not necessary to initiate proceedings stated in sub-sections (3) and (4) of Section 58 — Non-registration is a bar for those mentioned in sub-sections (1) and (2) — Suit for rendition of accounts of unregistered firm maintainable. (Para 3)

(B) Partnership Act (1932), Sections 58 and 69 — Non-registration of firm does not invalidate arbitration clause embodied in the Deed. (Para 3)

(C) Partnership Act (1932), Sections 58 and 69 — Unregistered firm cannot under Section 20 Arbitration Act move the Court to enforce arbitration clause — Dispute may however be referred to arbitration without court's intervention—(Arbitration Act (1940), Section 20). (Para 4)

T. S. MISRA, J.:— This appeal arises in the following circumstances.

2. The appellants, before instituting the suit which has given rise to this appeal, had filed an application under Section 20 of the Arbitration Act for appointment of an arbitrator in terms of the arbitration agreement contained in the deed of partnership. That application was rejected by the Court below on the ground that the partnership deed was not duly registered under Section 58 of the Indian Partnership Act and therefore the petition was barred by the provisions of Section 69 of that Act. The matter was brought to this Court in appeal. The order of the court below was upheld with the observations that the petition under Section 20 was not maintainable because of the bar created by Section 69 of the Act. The plaintiff-appellants thereafter filed the suit for rendition of accounts and, in the alternative, for dissolution of the firm in which the defendants were the partners. The defendants before filing the written statement filed an application under Section 34 of the Arbitration Act

*(Against Interim order D/- 15-5-1967 passed by Civil J., Kheri, in Civil Suit No. 5 of 1966).

for stay of the suit on the ground that there subsisted an arbitration agreement between the parties whereunder the matter in dispute should have been referred to arbitration and that the defendants had been ready and willing to refer the matter to arbitration on the date of the institution of the suit and were still ready and willing to do so. In reply to that application the plaintiffs stated, *inter alia*, that "if the defendants are still ready to get the dispute decided through the forum of arbitration, the plaintiffs agree that in this very suit an application be made under Section 21 of the Arbitration Act and get the dispute decided by the arbitrator appointed by this Hon'ble Court". It was also urged before the Court below that in view of the decision given in the petition under Section 20 of the Arbitration Act, the arbitration agreement was void and unenforceable. Hence the defendants were not entitled to invoke the provisions of Section 34 of the Arbitration Act. In support of their contention they had placed reliance mainly on the decision of this Court given in their petition under Section 20 of the Arbitration Act. The court below did not accept that contention and held that the arbitration agreement was not void but was valid. Since it did not find that the defendants were not ready and willing to go in arbitration or that the defendants had taken part in the proceedings before filing an application under Sec. 34 of the Arbitration Act, the court below exercised its discretion in staying the suit by its impugned order. The plaintiffs have now come up to this court in first appeal.

3. For the appellants it was urged that the arbitration agreement was void inasmuch as the partnership deed which contained the clause relating to arbitration had not been registered under Section 58 of the Partnership Act. We are unable to accept this contention. It is not mandatory that all partnership agreements must be got registered under Section 58 of the Partnership Act failing which they would be void. A partnership agreement may be got registered and may not be got registered. The registration of the partnership agreement becomes relevant only when a suit to enforce a right arising from a contract or conferred by the partnership Act is instituted in a court by or on behalf of a person suing as a partner in a firm against the firm or any person alleged to be or to have been a partner in a firm. However, in certain matters the registration of the partnership may not be necessary. As provided by sub-sections (3) and (4) of S. 69 of the Partnership Act, if a suit or a claim or a set off does not exceed Rs. 800/- in value, it would not be necessary to have the partnership deed registered before maintaining the suit. Similarly, if the suit is in-

stituted for accounting or dissolution of the firm, it would not be necessary to have the partnership registered before filing the suit. In other cases as mentioned in sub-sections (1) and (2) of Section 69 of the Act, the registration of the partnership deed would be necessary, otherwise, the suit would not be maintainable. In the instant case, the plaintiffs had commenced the proceedings for rendition of accounts. The case, therefore, falls within the ambit of sub-section (3) of Section 69 and for that purpose, the non-registration of the partnership deed would not be a hindrance to the maintainability of the suit. It is thus quite manifest that non-registration of a partnership deed must not invariably render the partnership agreement invalid and void, nor would it render an arbitration agreement contained in the partnership deed void.

4. It was next contended that the plaintiffs had filed an application under Section 20 of the Arbitration Act before instituting the present suit and as the defendants had resisted that application, it was not necessary for the plaintiffs to give another notice for arbitration before filing the present suit. This contention, in our view, is also meritless. True, it is that the plaintiffs had commenced an action under Section 20 of the Arbitration Act in which they failed mainly on the ground that the petition was barred by the provisions of Section 69 of the Partnership Act, but it was nowhere laid down that the arbitration agreement was void. It was merely held that because of the non-registration of the partnership deed, the remedy to file a petition under Section 20 of the Arbitration Act to enforce the arbitration agreement was not available. But this did not mean that the plaintiffs and the defendants could not refer the dispute to arbitration without the intervention of the court. They had agreed that "in case of any dispute between the partners relating to partnership, the matter shall be referred to arbitration and the award of the arbitrator will be binding on all the partners." In terms of this agreement the parties thereto could appoint an arbitrator and refer the dispute to him. This they could do outside the court and without seeking any help of the court. The defendants pleaded in their application under Section 34 of the Arbitration Act that "even at the time of the commencement of the proceedings in the abovenoted suit and also at present the applicants are ready and willing to settle the dispute or disputes, if any, through arbitration as laid in the partnership agreement dated 23-10-1952". The plaintiffs having failed to give any notice to the defendants to appoint an arbitrator and to refer the dispute to an arbitrator so appointed, could not, in our view, resist the claim set up under Sec-

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tion 34 of the Arbitration Act by the defendants. In our view the court below did not commit any error in exercise of its discretion under Section 34 of the Arbitration Act in staying the suit.

5. No other point was urged.

6. In the result, this appeal fails and is, accordingly, dismissed. As none has appeared on behalf of the respondents, we make no order as to costs.

Appeal dismissed.

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M. P. MEHROTRA, J.

Ram Nagina Singh, Applicant v. Thakur Ram Janki, Respondent.

Civil Revn. No. 1256 of 1971, D/- 23-7-1975.*

(A) Arbitration Act (1940), Section 47 Proviso — Award sought to be treated as Compromise under Order 23, Rule 2, Civil P. C. — Consent. AIR 1962 Andh Pra 123, Dissented from — (C. P. C. (1903), Order 23, Rule 2).

The consent must be given to the Court when the award is taken up by it and is sought to be treated as an adjustment or compromise under Order 21, Rule 2, Civil Procedure Code or under Order 23 Rule 3, Civil Procedure Code. The antecedent consent outside the court, even if it is given after the delivery of the award, is not contemplated by the proviso to Section 47 of the Arbitration Act. AIR 1955 All 353 (FB), Rel. on; AIR 1962 Andh Pra 123, Dissented from. (Case Law Discussed). (Para 3)

(B) Civil P. C. (1908), Section 115 — Court below acting in violation of Section 47 Proviso of Arbitration Act — Revision maintainable — (Arbitration Act (1940), Section 47 Proviso).

If a Court of law treats an award to be a compromise or adjustment under Order 21, Rule 2, Civil Procedure Code or Order 23, Rule 3, Civil Procedure Code without the consent of the parties, then the court should be deemed to be acting illegally and without jurisdiction. The revision would be maintainable as the court below should be deemed to have acted against the mandatory provisions of the law laid down in the proviso to Section 47 of Arbitration Act. (Para 12)

Cases Referred: Chronological Paras
AIR 1968 Madh Pra 208 = 1968 MPLJ 122
AIR 1962 Andh Pra 123 = (1961) 2 Andh
WR 96 2, 4, 11
AIR 1962 Cal 581 2

*(Against judgment and decree passed by Prem Singh, 2nd Temp. Civil and Sessions J., Gorakhpur, in C. A. No. 247 of 1969, D/- 4-8-1971).

JS/JS/D657/75/CWM

AIR 1961 Pat 448 = 1961 BLJR 383 2
1957 All LJ 192 2
AIR 1957 Pat 656 = 1957 BLJR 14 2
AIR 1955 All 353 = 1955 All LJ 96 (FB) 2, 4, 5, 9

AIR 1953 Cal 690 = 92 Cal LJ 181 2, 7, 8
AIR 1953 Mad 781 = 66 Mad LW 480 (FB) 4, 7, 10

AIR 1952 Pat 66 2
AIR 1952 Pat 258 = (1951) ILR 30 Pat 985 2, 7

AIR 1950 Orissa 169 = ILR (1950) Cut 1 6

AIR 1942 All 145 = 1942 All LJ 137 (FB) 4, 9

R. R. Agarwal, for Applicant; Shambhu Pd. for Respondent.

ORDER:— This revision is directed against the decree passed by the lower appellate court in an appeal against a compromise decree passed by the trial court. The lower appellate court dismissed the appeal and the plaintiff-appellant feeling aggrieved, has come up in the instant revision.

2. The brief facts are these: There was a dispute between the parties in respect of a piece of land which was claimed to be the Sahan land by the plaintiff-appellant. It was alleged that the defendant-respondent interfered with the possession of the plaintiff over the said piece of land and wanted to enclose the same. Therefore, the suit was filed by the plaintiff claiming a permanent injunction restraining the defendant from acting in the said manner. The defendant-respondent disputed the plaintiff's claim and claimed the land to belong to himself. During the pendency of the suit the parties referred their dispute to some arbitrators without the intervention of the court. An award was made by the arbitrators which was accepted by both parties and in token of their acceptance the parties signed the award. Thereafter, the defendant treating the award as a compromise moved the court to pass a decree in its terms. The plaintiff, however, filed objections and raised two grounds. He denied that the award was in the nature of a compromise between the parties. He further contended that the award if treated as a compromise was too vague to be acted upon. The trial court overruled both these contentions of the plaintiff and treating the award to be a compromise between the parties passed the decree thereon. The plaintiff felt aggrieved with the trial court's decree and went up in appeal to the lower appellate court. Two questions were raised before the said court. Firstly, it was contended that the consent spoken of in the proviso to Section 47 of the Arbitration Act is to be confined only to such consent as is given before the court and not a consent given outside the court. Secondly, it was contended that the award

was very vague and no executable decree could be passed in its terms. Both these contentions were repelled by the lower appellate court and the trial court's decree was confirmed. The plaintiff applicant has now come up in the instant revision and his learned counsel has again contended that the consent outside the court to an award will not be a good consent. Reliance has been placed on the following cases on behalf of the plaintiff-applicant:

Zeauddin v. Abdur Rafique, (AIR 1952 Pat 66); *Raghunandan Rai v. Sukhlal Rai*, (AIR 1952 Pat 258); *AIR 1957 Pat 656*; *Sitaramji Maharaj v. Ramnath Singh*, (AIR 1961 Pat 448); *Jumman Khan v. Mujibul Hasan Khan*, (1957 All LJ 192); *Moradwaj v. Bhudar Dass*, (AIR 1955 All 353) (FB); *Jugal Das Damodar Modi & Co. v. Purshottam Umedbhai*, (AIR 1953 Cal 690); *Kissan Gopal Nathani v. Murlidhar Chowdhury*, (AIR 1962 Cal 581); *Salima Bibi v. Mohd. Ibrahim Sahib*, (AIR 1962 Andh Pra 123); *Bisnath v. Bastimal*, (AIR 1968 Madh Pra 208).

3. The learned counsel for the defendant-opposite party has contended that the revision is not maintainable in law as no jurisdictional error was committed by the courts below in passing their orders.

4. It was next contended that as the suit was in respect of the Sehan land and by the award the said land was divided between the parties the acceptance of the award by the parties would mean that they accepted the division effected by the arbitrator. The division of land having been accepted by the parties, the provisions of Order 23, Rule 3, Civil Procedure Code were clearly attracted and it was not necessary to consider the effect of the proviso to Section 47 of the Arbitration Act. In other words, it was submitted that the arbitration proceedings were separate from the act of the parties in accepting the division of land. The compromise was not illegal nor beyond the scope of the suit. Hence a decree was bound to be passed on its basis in terms of Order 23, Rule 3, Civil Procedure Code. Reliance was placed on the following cases:

Dular Koeri v. Fayag Koeri, (AIR 1942 All 145) (FB); *AIR 1955 All 353* (FB); *Abdul Rahman Saheb v. Mohammad Siddiq*, AIR 1953 Mad 781 (FB); *Salima Bibi v. Md. Ibrahim Saheb*, (AIR 1962 Andhra Pra 123).

5. In my view, the contention raised on behalf of the plaintiff-applicant is correct. In the Full Bench decision of our court reported in AIR 1955 All 353 (FB) (Supra), it has been laid down as under:—

"I am, therefore, of opinion that an award obtained without the intervention of court in respect of matters which are

the subject-matter of a proceeding pending in a court of law can only be given effect to as an adjustment under Order 23, Rule 2, Civil Procedure Code or under Order 23, Rule 3, Civil Procedure Code if all the parties interested give their consent to this being done and not otherwise."

6. These observations clearly mean that the consent must be given to the court when the award is taken up by it and is sought to be treated as an adjustment or compromise under Order 23, (sic) (Order 21?—Ed.) Rule 2, Civil Procedure Code or under Order 23, Rule 3, Civil Procedure Code. The antecedent consent outside the court, even if it is given after the delivery of the award, is not contemplated by the proviso to Section 47 of the Arbitration Act. This interpretation of the said Full Bench is also supported by the fact that in the earlier part of the judgment the following observations of Ray, C. J., in AIR 1950 Orissa 169 were approved:—

"But the proviso also requires in terms, the consent of all the parties interested as a condition precedent for the exercise of the power to take the matter into consideration. It is to be noticed that the award cannot be taken into consideration on the application of one only of the parties, nor by court itself suo motu. The context indicates that the consent specified in the proviso is a consent given at the time when the matter is to be taken into consideration."

7. It should also be noticed that the said Full Bench also approved the law laid down in AIR 1952 Pat 258, AIR 1953 Cal 690 and AIR 1953 Mad 781 (FB). In AIR 1952 Pat 258, a Division Bench of the Patna High Court laid down as under:—

"Therefore, apart from any authority, it is clear that under this proviso it is not open to the court to record any arbitration award under Order 23, Rule 3, Civil Procedure Code if objection to the recording of it is made by any party."

8. In AIR 1953 Cal 690, it was laid down as under:

"The proviso to Section 47 applies to all arbitration awards obtained otherwise than under the provisions of the Act and enables the consideration of the award as a compromise or adjustment of the suit with the consent of all the parties interested, by the court before which the suit is pending and by no other court. The consent of the parties to the submission is not sufficient if there are other parties interested. The joint consent of all the parties interested is necessary at the point of time when the court is to take the award into consideration as a compromise or adjustment. The antecedent consent is immaterial just as antecedent invalidity does not debar the court from

recognising it as compromise by common consent. The proviso does not render the award valid nor does it make it enforceable as an award proprio vigore. The proviso enables the recognition of the award for a limited purpose by consent. Where such consent is withheld, it cannot be recognised even for that limited purpose."

9. The learned counsel for the defendant-opposite party placed reliance on the Full Bench decision of the Allahabad High Court reported in AIR 1942 All 145 (Supra). The said Full Bench has been distinguished in the later Full Bench decision reported in AIR 1955 All 353 (FB) (Supra) on the ground that the reference to arbitration in the earlier Full Bench case was made before the commencement of the Arbitration Act of 1940 and, therefore, the case fell to be decided under the old law. It is well known that the proviso to Section 47 was added to resolve the conflict which prevailed under the old law on the point whether an award obtained otherwise than as laid down could be treated as compromise or adjustment under Order 23 (sic), Rule 2 or under Order 23, Rule 3, Civil Procedure Code. As a single Judge I am, bound by the law laid down in the latter Full Bench decision of this Court.

10. In view of the aforesaid interpretation of the said Full Bench decision of our court, it is not necessary to consider the law laid down in the decisions of other courts on which reliance has been placed by the learned counsel for the defendant-opposite party. It may, however, be observed that AIR 1953 Mad 781 (FB) (Supra) is, in no way, against our aforesaid Full Bench. In the Madras decision, it was laid down as under:

"Under the proviso to Section 47, an arbitration award obtained otherwise than in proceedings taken in accordance with the act cannot without more be recognised as a compromise or adjustment of the suit; no decree can be passed thereon under proviso of Order 23, Rule 3, Civil Procedure Code.

But if, after an award is made the parties thereto agree to accept it, that will be a compromise and a decree passed thereon can be passed under Order 23, Rule 3, Civil Procedure Code. That the parties had consented to the reference is not such a consent."

11. AIR 1962 Andh Pra 123 undoubtedly supports the contention put forward on behalf of the defendant-opposite party. However, it is a single Judge pronouncement and it is not of any avail in view of the contrary pronouncement of the aforesaid Full Bench of this Court.

12. In my view, the preliminary objection about the maintainability of the revision is untenable. If a court of law treats an award to be a compromise or

adjustment under Order 23 (sic) (Order 21?—Ed.) Rule 2, Civil Procedure Code or Order 23, Rule 3, Civil Procedure Code without the consent of the parties, then the court should be deemed to be acting illegally and without jurisdiction. In my view, the revision would be maintainable as the court below should be deemed to have acted against the mandatory provisions of the law laid down in the proviso to Section 47.

13. The revision is accordingly allowed and the orders passed by the courts below are (set) aside. The application moved on behalf of the defendant-opposite party under O. 23, Civil Procedure Code praying that the award be treated as compromise or adjustment between the parties shall stand rejected and the trial court shall proceed with the trial of the suit. In the circumstances of the case, I make no order as to costs.

Revision allowed.

AIR 1976 ALLAHABAD 23

M. P. SAXENA, J.

Ch. Birbal Singh, Appellant v. Harphool Khan and another, Respondents.

Second Appeal No. 1836 of 1966, D/- 9-7-1975.*

(A) Negotiable Instruments Act (1881), Section 118 — Nature of presumption to be drawn—(Words and Phrases—"Execution of document" meaning of).

In a case based on pronotes the initial burden lies on the plaintiff to prove execution of the pronote and when this burden is discharged it is then that the Court shall raise a presumption in favour of the plaintiff for holding that the pronote was for consideration and it will be for the defendant to rebut that presumption. AIR 1961 SC 1316. Rel. on.

(Para 7)

The 'execution' of a document consists in signing a document written out, read over and understood and does not consist of merely signing a blank paper. AIR 1916 Pat 206 and AIR 1934 Lah 293 (2), Rel. on.

(Para 7)

(B) Civil P. C. (1908), Section 100 (1) (c) — "Substantial error or defect in procedure" — Wrong appreciation of evidence.

Section 100 (1) (c) does not refer to error or defect in the appreciation of evidence adduced by the parties on merits. Even if the appreciation of evidence made by the lower appellate Court is patently erroneous and the finding of fact record-

*(Against Judgment and decree of Uma Kant Verma, Dist. J., Meerut in C. A. No. 47 of 1966, D/- 27-4-1966.)

ed in consequence is grossly erroneous, that cannot be said to introduce a substantial error or defect and the High Court cannot therefore interfere with the conclusions recorded by the lower appellate Court. (Para 7)

(C) Evidence Act (1872), S. 17 — Admission — Admission of having signed on blank paper is no admission of execution of document. 1968 All LJ 480, Rel. on. (Para 10)

Cases Referred: Chronological Paras
1968 All LJ 480 10

AIR 1963 SC 302 = (1963) 3 SCR 604 7

AIR 1961 SC 1316 = 1961 Andh LT 601 7

AIR 1934 Lah 293 (2) = 36 Pun LR 275 7

AIR 1922 All 401 (2) = 20 All LJ 672 7

AIR 1916 Pat 206 = 35 Ind Cas 56 7

S. K. Tewari, for Appellant; Lalji Sahai, for Respondents.

JUDGMENT:— This is a plaintiff's second appeal against the judgment and decree dated 27th April, 1966, passed by the learned District Judge, Meerut, dismissing his suit for the recovery of Rs. 1500/-.

2. The plaintiff-appellant had filed a suit for the recovery of Rs. 1,500/- on the basis of a pronote and a receipt dated 11-6-1962 for Rs. 1,000/- alleged to have been executed by the defendants and carrying an interest at the rate of one and a half per cent per mensem. Nothing was said to have been paid towards this loan.

3. The defendant No. 1 alone contested the suit inter alia, on the grounds that the defendants neither borrowed any amount nor executed the pronote and the receipt in suit; that the plaintiff had to get a joint wall of the parties re-constructed and the defendants were to bear half costs. In that connection the plaintiff obtained their thumb impressions on blank papers. It was alleged that they had paid Rs. 230/- to the plaintiff as their contribution towards the cost of the construction of the wall.

4. The learned trial court held that the pronote and the receipt were executed by the defendants for consideration of Rs. 1,000/- and that nothing was paid towards it. He, therefore, decreed the suit for the recovery of Rs. 1000/- with pendente lite and future interest at the rate of Rs. 6/- per cent. The decretal amount was, however, allowed to be paid by six monthly instalments of Rs. 300/- each.

5. The defendants filed an appeal reiterating the pleas taken in the written statement. The learned District Judge, Meerut, held that the plaintiff had failed to prove execution of the pronote and the receipt as well as its consideration. Therefore, the appeal was allowed and the suit was dismissed with costs of both the courts.

6. The plaintiff has now come up in second appeal and the main point pressed before this Court is that the execution of the pronote and the receipt was not only proved by him but was also admitted by the defendant No. 1 and under Section 118 of the Negotiable Instruments Act the learned first appellate court should have raised a presumption in favour of consideration and it was wrong in placing the burden on the appellant to prove consideration when it should have been done by the defendants.

7. The point has been argued at great length from both sides. I have given my anxious consideration to the whole matter and have no hesitation to say that in a case based on pronote the initial burden lies on the plaintiff to prove execution of the pronote and when this burden is discharged it is then that the court shall raise a presumption in favour of the plaintiff for holding that the pronote was for consideration and it will be for the defendants to rebut that presumption. The same principle was laid down in the case of Kundan Lal Ralla Ram v. Custodian Evacuee Property, Bombay, (AIR 1961 SC 1316). Before proceeding further it may be considered as to what the word "execution" signifies. In Shaikh Ebadut Ali v. Muhammad Fareed, 35 Ind Cas 56 = (AIR 1916 Pat 206) it was held that the word "execution" consists in signing a document written out, read over and understood and does not consist of merely signing a blank paper. The same view was taken in the cases of Mirza Gorganj v. Bhola Mal Nibachand, (AIR 1934 Lah 293 (2)) and Pirbhu Dayal v. Tula Ram, (AIR 1922 All 401 (2)). Therefore, the first question which arises for consideration is whether the execution of the pronote was proved by the plaintiff or admitted by the defendants. The plaintiff examined himself and one Pheru, the marginal witness of the pronote. Both of them contradicted each other on material points to the extent that the learned first appellate court was justified in rejecting their evidence. According to the plaintiff, the said advance was made by him in his Kothri which is north facing. He immediately resiled from this statement and gave out that the money was advanced at the house of Mithan Lal, the scribe of the pronote and the receipt. According to him, Ratna and Pheru were present at that place and the pronote was scribed by Mithan Lal at his house. He had also stated that the necessary stamp and form for executing the pronote and the receipt were brought by Mithan Lal. Pheru on the other hand gave out that the advance was made at the house of the plaintiff and the pronote and the receipt were also executed at that place. According to him, these documents were scribed by one Pirthvi and not by Mithan Lal, as

stated by the plaintiff. He also gave out that the stamp and the forms were brought by Harphool. Obviously these contradictions should not have been there if the pronote and the receipt were actually written out in the presence of the defendants and their thumb marks were obtained thereafter. It may further be stated that neither Mithan Lal, the alleged scribe of the documents nor Ratna was produced in this case. In this manner the learned first appellate court was perfectly justified in holding that the plaintiff had failed to prove execution of the pronote and the receipt. The conclusion is based on sound reasonings. As held in the case of *V. Ram Chandra Ayyar v. Rama Lingam Chettiar*, (AIR 1963 SC 302). Section 100 (1) (c), Civil Procedure Code does not refer to error or defect in the appreciation of evidence adduced by parties on merits. Even if the appreciation of evidence made by the lower appellate court is patently erroneous and the finding of fact recorded in consequence is grossly erroneous, that cannot be said to introduce a substantial error or defect and the High Court cannot interfere with the conclusions recorded by the lower appellate court. In the instant case the conclusions cannot be characterised as erroneous or wrong and cannot be disturbed.

8. Another question which arises for consideration is whether the defendants had admitted execution of the pronote and the receipt. In their written statement they categorically denied that they had borrowed any amount from the plaintiff or executed any pronote or receipt in his favour. According to them, the plaintiff had obtained their thumb marks on blank paper in connection with the contribution of costs towards construction of a joint wall. Therefore, there is no scope for argument that the defendants had admitted execution of the pronote and the receipt in their written statement.

9. Under Order X, Rule 2 Civil Procedure Code the defendant No. 1 had made it clear that their thumb marks were taken on blank papers and the pronote and the receipt were not written in their presence. Even this statement does not amount to admission of the execution.

10. On the back of the pronote and the receipt the learned counsel for the defendants had simply endorsed "only thumb impressions admitted the rest denied". It makes it clear that the defendants admitted only thumb marks on these documents and not that they had thumb marked after the documents were written out and the burden remained on the plaintiff to prove this fact. Reference may be made to the case of *Thakur Lal v. Ram Adhar*, (1963 All LJ 480) in which it was held that mere admission of putting signatures and thumb marks on a

blank sheet of paper does not amount to an admission of execution. In such circumstances it is necessary for the plaintiff to prove due execution of the pronote and it is only when due execution is established that a presumption under Section 118 (a) of the Negotiable Instruments Act can be raised. When the initial burden is not discharged by the plaintiff, there is no question of raising presumption in favour of the plaintiff.

11. Lastly, learned counsel for the appellant has placed considerable reliance on the statement of Harphool defendant wherein he had stated "Hamse rukka Likhwaya tha". It is vehemently argued that this statement points to the conclusion that the pronote was written. I am reluctant to draw this inference because literally this statement means that the pronote was scribed or written by the defendants when the plaintiffs' own admission is that it was not written by them. Obviously these documents do not purport to have been written by the defendants nor it could be done as they are illiterate and had affixed their thumb marks. This statement will, therefore, be construed to mean that they had thumb marked the pronote and the receipt as alleged in the written statement. In this view of the matter execution of the pronote and the receipt was neither proved nor admitted and no presumption in favour of consideration could be raised nor the burden shifted on the defendants to prove want of consideration. It may further be said that on account of the infirmities in the evidence discussed above, the pronote cannot be held to be for consideration.

12. For all these reasons the learned first appellate court was right in dismissing the suit and the appeal is hereby dismissed with costs to the defendant-respondents.

Appeal dismissed.

AIR 1976 ALLAHABAD 25

GOPI NATH, J.

Prag Narain, Appellant v. Brahmaddatt and another, Respondents.

First Appeal No. 145 of 1971. D/- 8-7-1975.*

(A) Civil P. C. (1908), Section 92 — Sanction under — Sanction given to several persons — Suit by some only is not competent.

An authority to sue given by the Advocate General under Section 92 to several persons is a joint authority and

*(Against order of District J., Etah in Suit No. 3 of 1968. D/- 27-4-1971)

JS/KS/D692/75/LGC

must be acted upon by all jointly. Where therefore sanction is given to five persons and one of them dies before the institution of the suit, the suit by the remaining four is incompetent. AIR 1967 SC 1540 Applied. AIR 1938 PC 184 and AIR 1975 All 36 (FB), Rel. on. (Para 5)

Cases Referred: Chronological Paras
AIR 1975 All 36 = 1974 All LJ 793 (FB) 5

AIR 1967 SC 1540 = (1967) 3 SCR 916 5
AIR 1938 PC 184 = 65 Ind App 198 5

G. K. Sahai, for Appellant; S. S. Chaudauria, for Respondents.

JUDGMENT:— This is an appeal against the judgment and decree of the learned District Judge, Etah, dated 27th April, 1971. The suit giving rise to this appeal was filed under Section 92 of the Code of Civil Procedure. It related to the trust created by one Smt. Gomti, widow of Hardeo Prasad in 1909. The relief claimed was for the removal of Sri Brahmadatt, defendant-respondent, who was the Sarbarakar of the trust on the ground that he had mismanaged the temple of Sri Radha Kishan, the subject-matter of the trust. Accounts were also claimed for him.

2. One of the defences raised by the defendant-respondent was that the suit was not properly instituted as the sanction granted by the Advocate-General under Section 92 was to five persons while the suit was filed by only four. The learned judge negatived this contention and held that the suit was validly filed. On merits it was held that no act of mismanagement was committed by the defendant and the suit was liable to be dismissed on merits.

3. Aggrieved plaintiff filed the present appeal. The defendant-respondent filed an application before the Hon'ble the Chief Justice for the hearing of the appeal on the preliminary question as to whether the suit was maintainable, having been filed only by four out of the five persons, to whom sanction was granted by the Advocate-General. The preparation of the paper book was dispensed with for the time being. The appeal was accordingly listed for the consideration of the question whether the suit as filed was maintainable. I have heard learned counsel for the parties.

4. The permission granted to file the instant suit is Ext. 2. It has been granted in favour of five persons, namely, Sri Prag Narain, Sri Ram Das, Sri Mithhu Lal, Sri Jhau Lal and Sri Girdhari Lal. It appears that Mithhu Lal died after the grant of permission and before the institution of the suit which accordingly was filed only by four persons, namely, Prag Narain, Ram Das, Jhau Lal and Girdhari. The respondents' contention is that the suit was not main-

tainable. Learned counsel for the appellant, has urged that the suit could be filed only by the surviving four permission holders.

5. The controversy is settled by the decision of the Supreme Court in *Narain Lal v. Seth Sunder Lal Tholia Jorhi*, (AIR 1967 SC 1540). It was held in that case that an authority to sue given by the Advocate-General under Section 92 to several persons is a joint authority and must be acted upon by all jointly.

"Where therefore sanction is given to four persons and one of them died before the institution of the suit, the suit by the remaining three is incompetent. In such a case a fresh sanction must be obtained by the survivors for the institution of the suit".

See also *Mt. Ali Begam v. Badr-ul-Islam Ali Khan*, (AIR 1938 PC 184). See also *Uma Shanker v. Salig Ram*, 1974 All LJ 793 = (AIR 1975 All 36) (FB). It is, therefore, clear that a suit under Section 92 cannot be filed by only some out of several persons to whom permission was granted under that section. In the instant case permission was granted to five persons while the suit was filed by only four. The suit, therefore, was not maintainable.

6. The appeal fails and is accordingly dismissed. In the circumstances of the case I make no order as to costs.

Appeal dismissed.

AIR 1976 ALLAHABAD 26

AMITAV BANERJI, J.

D. S. Awasthi and others, Applicants
v. Virendra Swaroop, Respondents.

Election Petn. No. 43 of 1974, D/-
19-5-1975.

(A) Constitution of India, Article 191
(1) (a) — U. P. State Legislature (Prevention of Disqualifications) Act (15 of 1971), Section 3 — Chairman of U. P. Legislative Council does not hold office of profit under State Government — He is not disqualified from being chosen as member of U. P. Legislative Council.

The Chairman of U. P. Legislative Council is not disqualified from being chosen as a member of U. P. Legislative Council as he does not hold an office of profit under the State Government within Article 191 (1) (a) because: (1) he is not appointed by the State Government but is elected to that office (2) the Government has no power to remove or dismiss him and he can be removed under Art. 183 only by the members of the Legislative Council (3) he does not perform his function of conducting the business of the House of the Legislative Council for the Govt. as the Council is an independent

body (4) the Govt does not exercise and control over the performance of his functions by the Chairman who is the master of the House (5) merely because the State Govt. pays the salary and allowances of the Chairman it does not make him hold his office, under the Government (6) the mere fact that the M. P. Government in M. P. Vidhan Mandal Sadasya Nirhate Nivaran Adhiniyam (16 of 1967) has included the Chairman of the Legislative Council as holder of office of profit under the Government will not lead to the inference that the Chairman of the Legislative Council in other States particularly in U. P. holds an office of profit under the Government and that is why the Chairman has not been included in Section 3 as holder of an office of profit under the Government. (1971) 3 SCC 870 and (1959) 20 ELR 221 and AIR 1958 Bom 325 and AIR 1958 Bom 314, Rel. on. (Para 23)

Cases Referred: Chronological Paras

(1971) 3 SCC 870 = 1970 UJ (SC) 334	12
AIR 1964 SC 254 = (1964) 4 SCR 311	11
(1959) 20 ELR 221	10
AIR 1958 SC 52 = 1958 SCR 387	11
AIR 1958 SC 937 = 1959 SCR 1167	11
AIR 1958 Bom 314 = 60 Bom LR 217	9, 20
AIR 1958 Bom 325 = 1958 Nag LJ 115	7
AIR 1957 SC 264 = 1957 SCR 152	10
AIR 1954 SC 364 = 1955 SCR 393	10

S. N. Shukla and Dr. B. Dwivedi, for Applicant; N. S. Misra, Prabodh Gaur, N. B. Singh, V. Swaroop and S. N. Verma, for Respondents.

ORDER:— Reasons for the findings on Issues No. 1 (a) and (b):

On the 12th May, 1975, after I had heard the counsel for the parties, I had recorded the following findings on issues Nos. 1 (a), 1 (b).

"I, therefore, answer issues Nos. 1 (a) and (b) in the negative and against the petitioners."

2. I had also indicated that the reasons would be given later. I now proceed to give the reasons for the above findings.

3. The two issues Nos. 1 (a) and (b) are as follows:—

1 (a) Whether the respondent No. 1 was disqualified from being chosen as a Member of the legislative Council of the State since he was at the time of the filing of his nomination holding the office of the Chairman of the Legislative Council, U. P.?

(b) Whether the respondent No. 1 was holding an office of profit under the State Government and was precluded from being elected a Member of the Legislative Council of the State in view of the provisions of Article 191 of the Constitution of India? Those two issues required no evidence and the learned Counsel for the parties

were heard in support of their respective contentions. Before I advert to the argument raised on behalf of the petitioner it will be relevant to mention the specific case that was taken in the election petition. The relevant averments are contained in paragraph 6 of the election petition and the relevant ground in respect thereof is raised in paragraph 33 (iv). This paragraph of the election petition reads as follows:—

6. That the respondent No. 1 (who is the Returned Candidate) had filed his nomination paper during the term of his office of Chairman of Legislative Council, U. P. without resigning from the said office and as such an objection was filed against his candidature by the Respondent No. 3, on 3-3-1974 inter alia on the ground that Shri Virendra Swaroop, respondent No. 1 was getting salary under the provisions of the U. P. State Legislature (Officers Salaries and Allowances) Act, 1952 and as such he was clearly disqualified from being chosen as a member of the Legislative Council of State under Article 191 of the Constitution of India and further that the Acts made by the U. P. State Legislature for prevention of disqualification also do not include the office of Chairman of the U. P. Legislative council. The true copy of the objections filed by petitioner No. 3 is Annexure III to this petition."

Paragraph 33 (iv) contains the ground on which the election was challenged. Ground No. (iv) reads as follows:

"Because on the date of his election the returned candidate Shri Virendra Swaroop was disqualified to be chosen to fill the seat under Article 191 of the Constitution of India as he held the office of profit, under the Government."

4. The contention of the learned counsel for the petitioner is that the respondent No. 1 was precluded from being elected as a Member of the Legislative council, Uttar Pradesh as he was holding an office of profit under the State Government and that no exemption had been made under the Constitution or under any provision of law to except the holder of such office from being disqualified from being chosen as a Member of the Legislative Council of the State. The relevant provision of the Constitution is contained in Article 191 (1) and clause (a). It reads as follows:—

"191. (1) A person shall be disqualified for being chosen as, and for being, a member of the Legislative Assembly or Legislative Council of a State—

(a) if he holds any office of profit under the Government of India or the Government of any State specified in the First Schedule, other than an office declared by the Legislature of the State by law not to disqualify its holder;"

It, therefore, makes it clear that no person can be chosen to be a Member of the Legislative Council of a State if he holds an office of profit under the State Government except in a case where the holding of such office has by a law been declared not to be a disqualification. In the present case learned counsel for the petitioner contended that the respondent No. 1 held, at the time of the filing of his nomination paper, the office of the Chairman of the Legislative Council, Uttar Pradesh; it was an office and an office of profit as well. He further contended that this was an office of profit under the State Government. The controversy in the present case is limited to only one question namely, whether the respondent No. 1 held an office of profit under the State Government. Learned Advocate-General appearing for the respondent No. 1 very fairly conceded that the respondent No. 1 was not only holding an office but an office of profit, but it was not under the State Government. He also conceded that there was neither any provision in the Constitution nor any other law under which the holding of such an office was declared not to be a disqualification. The principal question, therefore, to be considered in this case is whether the respondent No. 1 held an office of profit under the State Government at the time when he filed the nomination paper. If the answer is in the affirmative then the holding of such an office will be a disqualification but if the answer is in the negative, then it would not amount to any disqualification for the respondent No. 1 from being chosen as a Member of the Legislative Council, Uttar Pradesh.

5. In support of his above contention learned counsel urged that the Government exercises its powers through the Executive, Legislative and the Judicial branches of the Government. Each one of them is a branch of the Government. Consequently, he submitted that any person holding an office of profit under any one of the above 3 branches will be deemed to be holding an office under the State Government. Another contention of his which needs to be considered along with these submissions is that the salaries and allowances of the Chairman of the Legislative Council are paid by the State Government and that makes him a holder of an office of profit under the State Government.

6. It is conceded by the counsel for the parties that there is no reported decision of any High Court or the Supreme Court as to whether the office of the Chairman of the State Legislative Council or the Speaker of the State Assembly holds an office of profit under the State Government. This question will, therefore, have to be considered in reference to the various provisions of the Constitu-

tion of India and in reference to certain decisions of various High Courts and of the Supreme Court of India.

7. A question arose whether the Member of the Legislative Council of the State holds an office of profit in the case of *Ramnarain v. Ramchandra*, AIR 1958 Bom 325. A Division Bench of the Bombay High Court considered the provisions of Article 191 (1) (a) of the Constitution in an appeal under Sec. 116-A of the Representation of the People Act, 1951. One of the questions considered in that appeal was that the respondent Ramchandra was a sitting member of the Bombay Legislative Council and was also receiving pay in that capacity. A question whether he was holding an office of profit under the State Government arose in that case. It was held in that case that the payment of salary to the member of the Legislative Council made the office of the member of the Legislative Council as an office of profit, but the Court repelled the contention that the payment of salary by the State Government to such a person will amount to his holding an office of profit under the State Government. The counsel for the appellant Ramnarain in that case had contended that the chief criterion to ascertain as to whether a person was holding office under the State Government was the source from which the salary was paid. Repelling this contention it was observed:

"In our view, the source from which the salary is paid to a person holding office is not necessarily the sole test to determine whether he is holding an office under the State Government. The principal criterion is whether the appointment to the office and removal therefrom of a person is under the control of the State Government. If it be so, then it could safely be said that that person holds an office under the State Government. In the instant case, the appointment of the respondent to the office of the membership of the Bombay Legislative Council was not under the control of the State Government."

It was then observed:

"It is common ground that the respondent was elected to the Bombay Legislative Council, and under the provisions of Section 157 of the Act of 1951 he assumed the office of the membership of the Legislative Council as and from the date his name was notified in the Official Gazette. Notification of members elected is not at the option of the State Government but is obligatory on it under the provisions of Section 74 of the Act of 1951. Thus, the respondent does not owe the appointment to this post to the State Government. There is no provision in any of the enactments enabling the State Government to remove any member of the Legislative Council from his office."

It was held in this case that a Member of the Legislative Council was not a person holding an office of profit under the State Government at the time of his election. It was further held that the provisions of Article 191 (1) (a) of the Constitution were not attracted to the facts of that case.

8. It will, therefore, be seen that the principal test laid down in the above decision was whether the appointment to the office and its removal is under the control of the State Government. The source from which the payment of salary and allowances was made was held not to be the chief criterion for ascertaining as to whether a person holding office was under the State Government or not.

9. In the case of Dr. Deorao Laxman Anande v. Keshav Laxman Borkar, AIR 1958 Bom 314 another Division Bench of the Bombay High Court considered the provisions of Article 191 (1) (a) of the Constitution and the test for deciding whether it was an office of profit under the State Government. This was also an appeal against the order passed by an Election Tribunal. One of the questions for consideration was whether the appellant was disqualified to be a Member of the Legislative Assembly since he was an Insurance Medical Practitioner and whether such an office was an office of profit under the State of Bombay. Three tests were stated to be the principal tests for determining whether an office is under the Government and to put it in the words of Chainani, J., it was expressed thus:

"In our opinion, the principal tests for deciding whether an office is under the Government, are (1) what authority has the power to make an appointment to the office concerned, (2) what authority can take disciplinary action and remove or dismiss the holder of the office and (3) by whom and from what source is his remuneration paid? Of these, the first two are, in our opinion, more important than the third one."

10. In the case of Rustom Satin v. Dr. Sampooranand, (1959) 20 Election LR 221 a Division Bench of this Court had occasion to consider whether the Chairman of the Legislative Council and the Ministers of State were Government servants. In the case of the Chairman of the Uttar Pradesh Legislative Council an argument was advanced by the learned counsel for the appellant in that case that Shri Chandra Bhal was a Government servant: (1) because he received his salary from the State exchequer, (2) because his name appeared in the Civil List, and (3) because his services were whole-time. The Division Bench observed:

"In our opinion, none of these reasons can be said to provide the correct test for determining that question. It

seems to us that the relevant tests for determining that question are:

(1) whether the person concerned was appointed by the Union or the State Government and whether his services could be terminated by the former.

(2) whether the appropriate Government has power to take disciplinary action against that person and further whether it can regulate, control and supervise his work."

The Division Bench further relied on two decisions of the Supreme Court in *Lakshminarayan, Ram Gopal and Sons Ltd. v. Government of Hyderabad*, 1955 SCR 393 = (AIR 1954 SC 364) and *Dharangadhara Chemical Works Ltd. v. State of Saurashtra*, 1957 SCR 152 = (AIR 1957 SC 264) where their Lordships of the Supreme Court had occasion to lay down the chief characteristics which distinguish the relation of master and servant on the one hand, from those of principal and agent and contractor and workman on the other. It was held by the Supreme Court in the former case that a master has the further right to direct how the work is to be done by the servant, while in the latter case it held that

"the Prima facie test for the determination of the relationship between master and servant is the existence of the right in the master to supervise and control the work done by the servant not only in the matter of directing what work the servant is to do but also the manner in which he shall do his work."

The Division Bench applied those tests and held that Shri Chandra Bhal was not a Government servant. The Division Bench further observed as follows:

"He owed his appointment as chairman of the Legislative Council to his election under Article 182 of the Constitution. The circumstances under which his services could come to an end are enumerated in Art. 183, while the procedure which had to be followed before he could be removed from his office is laid down in Article 185. In none of these crucial matters the State Government has any hand. The manner in which the business of the Legislative Council is to be conducted is laid down in Articles 188 and 189, but even they do not lay down the manner in which the work of the Chairman can be controlled, regulated or supervised, presumably because as Chairman he would himself be in charge of them. Further, Article 189 (1) also gives the Chairman the right to vote in case of equality of votes in the Council, a right which we should not expect any Government servant to have. The argument that, as the salary and the allowances of the Chairman are paid out of the Government coffers he should be regarded as its servant, is also not tenable. The salary and allowances are paid to him by the

Government not because the later is his master but because Article 186 of the Constitution enjoins their payment on the State Government."

These observations of the Division Bench are significant for they pertain to the holder of an office of the Chairman of the Legislative Council of Uttar Pradesh. It is true that in this case their Lordships were not considering the provisions of Art. 191 (1) (a) of the Constitution, but nevertheless they were considering whether Shri Chandra Bhal, the then Chairman of the Legislative Council of Uttar Pradesh was a Government servant. Their answer was in the negative. This authority of the Division Bench of our court, is, therefore, an authority for the proposition that the Chairman of the Legislative Council of the State of Uttar Pradesh is not a Government servant.

11. I will now refer to a decision of the Supreme Court in the case of *Guru Gobinda Basu v. Sankari Prasad*, AIR 1964 SC 254 where their Lordships were considering whether a person appointed as auditor of Durgapur Projects Ltd. and the Hindustan Steel Ltd., held an office or profit under the Government within the meaning of Article 102 (1) (a) of the Constitution. The provisions of Article 191 (1) (a) and Article 101 (1) (a) are similar. The Court considered the provisions of Article 102 of the Constitution and the decisions in the case of *Abdul Shakur v. Rikhab Chand*, AIR 1958 SC 52 and *Ramappa v. Sangappa*, AIR 1958 SC 937. In both these cases the Supreme Court had laid down that the decisive test was the test of appointment. Their Lordships then observed:

"In view of these decisions we cannot accede to the submission of Mr. Chaudhuri that the several factors which enter into the determination of this question the appointing authority, the authority, vested with power to terminate the appointment, the authority which determines the remuneration, the source from which the remuneration is paid and the authority vested with power to control the manner in which the duties of the office are discharged and to give directions in that behalf must all co-exist and each must show subordination to Government and that it must necessarily follow that if one of the elements is absent, the test of a person holding an office under the Government Central or State, is not satisfied. The cases we have referred to specifically point out that the circumstance that the source from which the remuneration is paid is not from public revenue is a neutral factor not decisive of the question. As we have said earlier whether stress will be laid on one factor or the other will depend on the facts of each case. However, we have no hesitation in saying that where the several ele-

ments, the power to appoint, the power to dismiss, the power to control and give directions as to the manner in which the duties of the office are to be performed, and the power to determine the question of remuneration are all present in a given case, then the officer in question holds the office under the authority so empowered."

It would thus be seen that their Lordships laid down that where all the elements, namely, the power to appoint, the power to dismiss, the power to control and give directions as to the manner in which the duties of the office are to be performed, and the power to determine the question of remuneration are all present in a case then the person is said to hold an office of profit under the State Government.

12. In the case of *Shivamurthy Swami v. Agadi Senganna Andanappa* (1971) 3 SCC 870 their Lordships of the Supreme Court laid down five tests to find out whether the office in question is an office under the Government and whether it is an office of profit. These five tests are:

(1) Whether the Government makes the appointment.

(2) whether the Government has the right to remove or dismiss the holder.

(3) Whether the Government pays the remuneration.

(4) What are the functions of the holder? Does he perform them for the Government and

(5) does the Government exercise any control over the performance of these functions?

13. It is thus clear that in order to show that a person has held an office of profit under the State Government these tests laid down by their Lordships of the Supreme Court have to be satisfied.

14. It will, therefore, be necessary to apply these tests to see whether the Chairman of the Legislative Council of Uttar Pradesh holds an office of profit under the State Government.

15. The first question is whether the Government makes the appointment. I am of the opinion that the answer must be in the negative. The members of the Legislative Council are elected by an electoral college as provided for in Article 171 (3) of the Constitution. It provides for the election of one-third of the total number of members by the members of municipalities, district boards and other local authorities. One-twelfth of the total number of members of the Legislative Council are elected by graduates of the Universities of the State. Similarly, one-twelfth of the total number of members of the Legislative Council are elected by teachers of educational institutions within the State. One-third of the total number

of the members of the Legislative Council are elected by the members of the Legislative Assembly. The remainder are nominated by the Governor, in accordance with clause (5) of Article 171 and these members have special knowledge or practical experience in respect of literature, science, art, co-operative movement and social service. It will thus be seen that five-sixth of the total membership of a Legislative Council are elected. Both the elected and the nominated members choose two members of the Council to be respectively the Chairman and Deputy Chairman of the Legislative Council. It will thus be seen that the members are thus elected barring those who are nominated by the Governor and these members then choose the Chairman and the Deputy Chairman. The Government has no hand for making any appointment. Where a person is elected to an office there can be no concept of a person being appointed to that office. Appointment connotes that it is done by some one authorised to make the appointment. There is no provision in the Constitution giving any power to any authority to make the appointment to the office of the Chairman, Legislative Council. It cannot, therefore, be said that the Government appoints the Chairman of the Legislative Council. The first test is, therefore, not satisfied. The Second test is whether the Government has the right to remove or dismiss the holder. Article 183 of the Constitution provides for the vacation and resignation and the removal from the offices of Chairman and Deputy Chairman. There are three clauses in Article 183. A Chairman of the Legislative Council has to vacate his office if he ceases to be a member of the Council. Secondly, he may resign his office. Thirdly, he may be removed from his office by a resolution of the Council passed by a majority of all the then members of the Council. There is no other provision in the Constitution for the removal of the Chairman of the Legislative Council. There is no provision for his dismissal at all. The only way he can be removed from his office is by his fellow-members of the Legislative Council and not by the Government. There is no provision that either the Governor or the Chief Minister of the State may remove him or get him dismissed. Consequently, the second test is also not satisfied.

16. The next test is whether the Government pays the remuneration. The answer to this test will be in the affirmative. Article 186 of the Constitution provides that salaries and allowances to the Speaker and the Deputy Speaker and the Chairman and Deputy Chairman of the Legislative Assembly and Legislative Council respectively shall be paid as may be fixed by the Legislature of the State

by Law, which in effect means that the salaries and allowances are to be paid by the State Government. The State Government pays the salary of the Chairman of the Legislative Council because Article 186 enjoins such payment. It is a constitutional provision. The burden of paying the Chairman of the Legislative Council has been placed on the State Government.

17. The next test is: What are the functions of the holder and does he perform them for the Government? The function of the Chairman of the Legislative Council is principally to conduct the business of the House of the Legislative Council. It is a legislative body. It deliberates and has rules of business to conduct its affairs. Bills introduced either by the Government or by members are to be considered, deliberated upon and either passed or rejected. The function of the Chairman is to preside over the sittings of the House and guide its activities. He does not do so at the bidding of the Government or at the command of the Government. He is the master of the House and does not take orders from the Government as to how the business of the House is to be conducted. His principal function, therefore, is to see that the business before the House is conducted properly and duly. He does not take orders from the Government nor does the Government under any provision of the Constitution direct him as to how he should conduct the business of the House. He does not perform the functions for the Government. Where there are two Houses of Legislature in a State the legislative Council, being the Upper House has to consider all legislations brought before it and either vote in its favour or reject it. The voting is also done by members who are also not appointed by the Government. It will, therefore, be seen that the Legislative Council is an independent body and the Chairman of the Legislative Council is a person independent of Government control. I am, therefore, of the opinion that the Chairman of the Legislative Council does not perform any function for the Government as Chairman.

18. The last test is whether the Government exercises any control over the performance of these functions. In my opinion, this test is again not satisfied in the present case for there is nothing in the constitution which gives the State Government any control as to how these functions of the Chairman of the Legislative Council are to be performed. As stated earlier, the Chairman of the Legislative Council is the master of the House. How the proceedings should be conducted, in what manner and in what order, are the prerogative of the Chairman, and

in his absence, of the Deputy Chairman. Nothing could be shown from any provision under the Constitution as to how the Government exercises any control over the performance of these functions by the Chairman of the Legislative Council. In common practice it is found that the party which commands a majority in the Legislative Council usually manages to appoint one of their members the Chairman of the Legislative Council. If that party also happens to form the Government then the Chief Minister may also belong to the same Party, but that does not mean that it is the Chief Minister who controls or regulates the business in the Legislative Council. That privilege is entirely of the Chairman of the Legislative Council. I am therefore, not satisfied that this test is also satisfied in the present case.

19. Therefore, out of the five tests if the State Government pays the salary or allowances of the Chairman of the Legislative Council it does not make him hold an office of profit under the State Government. As stated earlier, he is paid by the State Government not because of a decision by the State Government but because the Constitution enjoins it under Article 186. After all, the Chairman and the Deputy Chairman of the Legislative Council and the Speaker and Deputy Speaker of a Legislative Assembly of a State have to be paid their salaries and allowances. Some authority has to pay. Which should be that authority? Naturally, their salaries and allowances must come out from the coffers of the State. In the case of the Speaker and Deputy Speaker of the Lok Sabha and the Deputy Speaker of the Rajya Sabha their salaries and allowances are paid by the Union of India. That does not make them either a Government servant or a holder of an office of profit under the Government. According to the principles laid down by their Lordships all the five tests must be satisfied before it is held that a person is holding an office of profit under the State or the Union Government. It has been seen in the present case that the tests laid down by their Lordships of the Supreme Court are not satisfied in the present case. Merely because the State Exchequer pays the salaries and allowances of the Chairman of the Legislative Council does not make him a person holding an office of profit under the State Government. The other essential tests had to be satisfied. These have not been satisfied. Consequently, it cannot be said that the Chairman of the Legislative Council, Uttar Pradesh holds an office of profit under the State Government.

20. The contention of the learned counsel that the Legislature of a State is a part of the Government and, therefore, a member of the Legislature, be-

came a part of the Government and as such he became the holder of an office of profit under the State Government cannot be accepted. This argument, if taken to its logical conclusion, would result in serious anomalies in the interpretation of the various constitutional provisions. Then in that event every member of the Assembly or Legislative Council will be a holder of an office of profit under the Government. This contention cannot be accepted. The constitutional provisions have to be interpreted as they exist. External aid is not necessary to interpret Article 191 (1) (a) of the Constitution. It states in simple language about the disqualifications for membership of the State Legislative Assembly or the State Legislative Council under certain conditions. In my opinion, there is no ambiguity in the words used in clause (a). The words "office" or "office of profit" under the Government of India or the Government of a State have come up for judicial interpretation in various courts and we have authoritative pronouncements on the subject. None of them contemplate or visualise the situation where every member of the Assembly or the Legislative Council is deemed to be holding an office of profit simply because he has been chosen as a member of the Assembly or the Legislative Council. In the case of AIR 1958 Bom 314 (supra) dealing with the object of Article 191 it was observed:

"The object of this provision is to secure independence of the members of the Legislature and to ensure that the Legislature does not contain persons, who have received favours or benefits from the executive and who, consequently, being under an obligation to the executive, might be amenable to its influence. Putting it differently, the provision appears to have been made in order to eliminate or reduce the risk of conflict between duty and self-interest amongst the members of the Legislature. This object must always be borne in mind in interpreting Article 191."

I am in respectful agreement with the aforesaid view. If the object was to ensure that the Legislature does not contain persons who have received favours or benefits from the executive then the very object would be negated if it be held that all the members of the Assembly and the Legislative Council held office of profit under the State Government. That was never the intention of the framers of the Constitution. The object was to have only such persons elected to the membership of the Legislature who were not receiving any favours or benefits from the Government and were not under governmental control. Otherwise, the Legislature would never be independent body. It would then be subservient to the Executive. Under our Con-

stitution the part assigned to the Legislature is clear and definite. It is an independent body. It is not subservient to the Executive or the Government. The independence of the members could only be ensured if the membership of the Legislature was restricted to persons who have not received favours or benefits from the Executive and who are consequently, not under its obligation. If the contention of the learned counsel for the petitioners is accepted it would lead to a proposition which is not conceived of under the Constitution. I am, therefore, unable to accept the above contention of the learned counsel for the petitioners.

21. Learned counsel then referred to certain provisions of the Constitution by way of analogy to contend that the exemption clause in respect of the Chairman of the Legislative Council was deliberately not made because he held an office of profit under the Government. Learned counsel cited the provisions of Article 191 (2) which makes provisions for an exemption clause in respect of a Minister either for the Union or for a State. Clause (2) of Article 191 reads as follows:

"(2) For the purposes of this article, a person shall not be deemed to hold an office of profit under the Government of India or the Government of any State specified in the First Schedule by reason only that he is a Minister either for the Union or for such State."

It was contended that in respect of a Minister there was an exemption in Article 191 (2) itself but not in respect of the Chairman of the Legislative Council. Consequently, it was urged that the Chairman of the Legislative Council, who also held an office of profit, did so under the State Government. A Minister in the State Government holds an office of profit under the State Government. He is a part and parcel of the Executive branch of the State Government. He can be removed or dismissed from his post of a Minister by the Governor. The Government has power to take disciplinary action against him and further it can regulate or supervise his work. Further, if sub-clause (2) of Article 191 were not there, then in that event every Minister of the State Government would be under an obligation to resign from the office of Minister prior to the filing of his nomination for seeking election either to the Legislative Assembly or to the Legislative Council. It will then result in a situation that even before the date of nomination all the Ministers of the State Govt. have to resign or quit their offices. Thus until the elections were over the State Govt. would be left without a Minister or even a Chief Minister. The framers of the Constitution never intended that such a situation should develop. It was, there-

fore, necessary to provide for an exemption clause in respect of a Minister of the State Government.

22. Learned counsel for the petitioners then referred to sub-clause (4) and to the Explanation of Article 66 which relates to the election of Vice-President. Sub-clause (4) states that a person shall not be eligible for election as Vice-President if he holds any office of profit under the Government of India or the Government of any State or under any local or other authority subject to the control of any of the said Governments. Explanation which follows sub-clause (4) reads as follows:

"Explanation — For the purposes of this article, a person shall not be deemed to hold any office of profit by reason only that he is the President or Vice-President of the Union or the Governor of any State or is a Minister either for the Union or for any State."

A similar provision exists in the case of the President of the Union in Article 58. These Articles 58 and 66 are contained in Part V of the Constitution which relates to the Union. It is also contained in Chapter I which relates to the Executive. Article 53 provides that the Executive power of the Union shall be vested in the President and shall be exercised by him either directly or through officers subordinate to him in accordance with this Constitution. The Vice-President shall be ex-officio Chairman of the Council of States and during the period when the President is not available or there is a vacancy in the office of the President the Vice-President shall act as President and exercise all the powers of the President. Articles 58 and 66 relate to two highest offices of the Union under our Constitution. These are Executive posts and it was, therefore, necessary to make provision for exemption from the disqualification in respect of the offices held by those two highest officials of the Union. If there was no exemption clause then any person holding the office of President, Vice-President, Governor of a State, Minister of Union or State Government had to vacate these offices before seeking election to the office of the President or of the Vice-President of India. If the exemption clause was not there then even for seeking a second term the President or the Vice-President would have to vacate their offices. It was, therefore, necessary to provide for the exemption clause in respect of the offices held by them. The Vice-President of India also presides over the Council of States but is also the holder of an office next to the President and has certain other duties as well. The Chairman of the Legislative Council has no functions of the Governor of a State nor does he officiate or act as the Governor of a State when the Gover-

nor is removed, dies or resigns or vacates the office. Therefore, it cannot be contended that the Chairman of the Legislative Council also holds an office of profit under the State Government. There can be no analogy on the basis of Articles 58 and 66 in relation to the office held by the Chairman of the Legislative Council of a State.

23. It was then contended that the State of Madhya Pradesh had enacted a law called the Madhya Pradesh Vidhan Mandal Sadasya Nirhate Nivaran Adhinyam, 1967 which provides that

"a person shall not be disqualified for being chosen as, or for being, a member of the Madhya Pradesh Legislative Assembly or the Madhya Pradesh Legislative Council by reason only of the fact that he holds any of the offices of profit under Government specified in the Schedule."

The Schedule to this Act mentions a list of offices provided under Government and thereunder at serial Nos. 1 and 2 are mentioned a Speaker and Deputy Speaker of the State Legislative Assembly and a Chairman and Deputy Chairman of the State Legislative Council. On the basis of the above learned counsel contended that the Chairman of the State Legislative Council holds an office of profit under Government in the State of Madhya Pradesh. It appears so from a perusal of the Madhya Pradesh Act No. 16 of 1967. In Uttar Pradesh there is an Act called the U. P. State Legislature (Prevention of Disqualification) Act, 1971, U. P. Act No. 15 of 1971. In Section 3 of the above Act certain offices which are said to be offices of profit have been exempted from the disqualification. The list of such offices as contained in clauses (a) to (t) of Section 3 does not include either the Speaker or the Deputy Speaker of the State Legislative Assembly or the Chairman or the Deputy Chairman of the State Legislative Council. Clause (a) of Section 3 refers to the Minister of a State or Deputy Minister or a Parliamentary Secretary to the Minister for the Union or for the State. The mere fact that the State of Madhya Pradesh has included the Chairman of the State Legislative Council as a holder of an office of profit under Government will not lead to the inference that the holder of the office of the Chairman of the Legislative Council in other States and particularly in the State of Uttar Pradesh holds an office of profit under Government. It is not known under what circumstances the Chairman and the Deputy Chairman of the Madhya Pradesh State Legislative Council and the Speaker and Deputy Speaker of the Madhya Pradesh State Legislative Assembly were said to be holding an office of profit under Government. Merely because one State has such a provision would not lead to the in-

ference that the Chairman of the Legislative Council of any other State also holds an office of profit under the Government of the State. Similar provision as like the Madhya Pradesh Act does not appear to exist in any other State. If the tests laid down by their Lordships of the Supreme Court are applied the Chairman of the Legislative Council cannot be said to be holding an office of profit under the Government. Consequently, in my opinion, there was no necessity to provide in the U. P. Act No. 15 of 1971 that the Chairman of the Legislative Council or the Speaker of the Legislative Assembly were (not?) holding an office of profit under the State Government.

24. The next contention was that the words "the holder of an office" connote that it was being held under some one. The question was: under which authority was the Chairman of the Legislative Council holding office. This contention, in my opinion, is without substance. The office of the President or the Vice-President or the Speaker of the Lok Sabha or of the Legislative Assemblies or the Chairman of the Legislative Councils are all offices under the Constitution. They are not being held under somebody. They are offices provided for in the Constitution itself. Consequently, the question of there being a master and servant relationship does not exist in respect of these offices. The concept of "holding office under someone" arises only in the case of posts or services under some Government, statutory body, local authority and the like. The concept is not applicable in the case of holders of offices under the Constitution. The suggestion of the learned counsel that the office of the Speaker of the Assembly or the Chairman of the Legislative Council was necessarily held under the Government cannot, therefore, be accepted.

25. For the reasons indicated above I am of the opinion that the Chairman of the Legislative Council, Uttar Pradesh does not hold any office of profit under the State Government. Consequently, I hold that respondent No. 1 was not disqualified from being chosen as a member of the Legislative Council of the State at the time of the filing of his nomination and further hold that the respondent No. 1 was not holding an office of profit under the State Government at the time when he had filed his nomination for seeking election to the Legislative Council, U. P. I further hold that respondent No. 1 was not precluded from being elected as a member of the Legislative Council of the State under the provisions of Article 191 of the Constitution of India.

Order accordingly.

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R. B. MISRA, J.

Kashinath Seth and another, Petitioners v. The Collector, Central Excise, Allahabad and others, Respondents.

Civil Misc. Writ No. 6429 of 1971, connected with Civil Misc. Writ No. 563 of 1972, D/- 19-5-1975.

(A) Precedents — Supreme Court decisions — Ratio to be viewed in factual background. (Civil P. C. (1908), Preamble). (Constitution of India, Article 141).

An interpretation of law accepted by the Supreme Court is binding on all the courts under Article 141 of the Constitution but circumspection has to be exercised in precisely ascertaining as to whether any such rule or law was actually laid down by the Supreme Court in its decision. The ratio of a decision must be confined strictly to the factual background in which it was given and surely there is no justification for reading in it some principle or rule relating to a point which did not arise for adjudication in that case. 1973 All WR (HC) 663, Foll. (Para 12)

(B) Gold (Control) Act (1968) (as amended by Act 21 of 1971), Sections 71, 73, 74 and 75 — Validity — Provisions not unreasonable and not violative of Article 19 of the Constitution. (Constitution of India, Article 19 (f) (g)).

Original Sections 71 and 73 were held unconstitutional by the Supreme Court in AIR 1971 SC 1170. Those sections have since been amended by Act No. 21 of 1971. The unreasonableness in confiscating the property of the real owner in the hands of a pawn-broker merely for his omission to make declaration under Section 16, has been mitigated by adding proviso to Section 71 and removing the word "twice" in Section 73. Sections 71 and 73 as amended are therefore intra vires. Consequently, Sections 74 and 75 which are dependent on Sections 71 and 73 cannot be said to be ultra vires. (Para 17)

The vice of smuggling has assumed such a large proportion that the Government has to intervene and punish the smugglers or those abetting smuggling with strong hand and, therefore, the Parliament imposed severe punishment. The confiscation of the property or the imposition of fine in lieu thereof cannot be challenged on the ground of severity. Courts cannot question the wisdom of the Legislature. AIR 1971 SC 1170, Disting and Expl. (Para 17)

(C) Gold (Control) Act (1968), Sections 55 and 66 — Maintenance of accounts — Purpose of — Failure to make entries for more than a week — Effect —

HS/IS/ C879/75/HGP

Seizure of entire stock including articles accounted for — Legality.

Section 55 (2) enjoins on the dealer to make the entries in the register and forms prescribed under the Act. If that is not done and the entries are left to be made after several days, the very purpose for which the accounts are sought to be maintained shall be defeated and the dealer may not choose to fill in the forms for months together and, in that event, it will be difficult for the authorities to check and verify the business transactions carried on by the dealer. Where the dealer, on his own admission, failed to maintain the accounts for a period of more than a week he must be held to have contravened the provisions of Section 55. (Para 19)

The seizure of entire stock in trade, including those items, which were accounted for in the account books, was however wholly illegal and in excess of the powers conferred upon the authorities under Section 66. AIR 1972 All 16, Foll. (Para 21)

Cases Referred: Chronological Paras
1973 All WR (HC) 663 = 1973 All LJ 963

12
AIR 1972 All 16 = 1972 All WR (HC) 612

3, 22
AIR 1972 All 231 = 1972 All LJ 204

3
AIR 1971 SC 1170 = 1971 (Supp) SCR 254

7, 9, 10, 11

Dhar, for Petitioners; Standing Counsel, for Respondents.

ORDER:— These are two petitions under Article 226 of the Constitution challenging the constitutionality of Section 71 read with Sections 73, 74, and 75 of the Gold (Control) Act, 1968, being violative of Article 19 of the Constitution of India. As the two petitions involve common questions of facts and law, they are being disposed of by one common judgment.

2. In Writ Petition No. 6429 of 1971, petitioner no. 1 is a Partnership firm. It carries on the business in gold, ornaments and articles of gold under the name and style of M/s. L. Kashi Nath Seth, at Lucknow. The petitioner firm is a licensed dealer under the Gold (Control) Act, 1968. It is authorised to acquire ownership, possession, custody and control of gold, ornaments and articles of gold in accordance with the provisions of the Gold (Control) Act.

3. On 27th April, 1971, at about 11.00 A. M., the Superintendent of the Central Excise Department, Lucknow, and other officials along with other persons of the staff raided the business premises of the petitioner and conducted a search. During the course of search, the officials of the Excise Department found ornaments kept on the ground floor for sale for which there was no licence. They further found that the account books of the

firm were not maintained for certain period and the forms prescribed under the Gold (Control) Act were also not maintained. One piece of foreign gold was found from the possession of one of the artisans working at the business premises of the petitioner. The officials of the Excise Department took into custody 2583 pieces of ornaments, which weighed 22,151.370 grams. The petitioner protested against the search of premises and the seizure of the aforesaid goods, but the officials of the Excise Department did not release the goods. The petitioners, thereupon, filed a writ petition under Article 226 of the Constitution challenging the search and seizure of the ornaments from the shop. It was, later on, numbered as writ petition No. 2939 of 1971. The writ petition was eventually allowed by order dated 10th August, 1971. The decision in that case is reported in AIR 1972 All 16. In that case, this Court held that the respondents had seized the ornaments in respect of which no contravention of the Act was alleged or ascertained and that there was nothing on the record to show that the respondents had a reasonable belief that the particular ornaments, which had been seized, were those ornaments in respect of which contravention of the Act had taken place. Thus, in the absence of the existence of the condition precedent, the officials acted in excess of their authority in seizing the ornaments. Special Appeal filed against that judgment was also dismissed. The appellate judgment is also reported in AIR 1972 All 231.

4. In the meantime, the petitioner was given a notice dated 11th October, 1971, to show cause why the goods mentioned in the notice should not be confiscated under Section 71 of the Gold (Control) Act. The petitioners have come to challenge the said notice and the proceedings consequent thereto on the ground that Sections 71, 73, 74 and 75 of the Gold (Control) Act, 1968 are all ultra vires.

5. In writ petition No. 563 of 1972, the petitioner has also challenged the seizure besides the notice dated 19th January, 1972, to show cause why the goods mentioned in the said notice be not confiscated and the penalty be not imposed.

6. Thus, the question for consideration in the two writ petitions is whether—
(Contd. on Col. 2)

ther Sections 71, 73, 74 and 75 are ultra vires being violative of Article 19 of the Constitution.

7. Shri S. N. Kacker, appearing for the petitioners, contended that Sections 71 and 73 were held unconstitutional by the Supreme Court in *Badri Prasad v. Collector of Central Excise*, AIR 1971 SC 1170. While dealing with the provisions of Sections 71 and 73 of the Gold (Control) Act, the Supreme Court observed as follows:—

"There does not however seem any justification for an order of confiscation of gold under Section 71 of the Act merely because of a failure to comply with Section 16 relating to declaration. It is no doubt true that the owner is to be given a hearing in terms of Section 79 and he has a right of appeal under Section 80 but the provision of Section 73 which allows the levy of a fine in lieu of confiscation not exceeding twice the value of the thing in respect of which confiscation is authorised appears to be unduly harsh. In this connection, a reference may be made to Section 18 of the Wealth Tax Act and the penal provisions contained therein. Under the Wealth Tax Act the penalty in case of failure to furnish the return without reasonable cause is a sum equal to two per cent. of the tax for every month during which the default continues but not exceeding in the aggregate 50 per cent. of the tax. It will be noticed that the fine there is imposed only on failure to pay the tax but in case of gold in respect of which no declaration has been made under Section 16 or the factum of pawn of which has not been communicated in writing to the Administrator the owner ipso facto becomes liable to pay an unconscionably high penalty. Section 71, therefore, appears to place an unreasonable restriction on the right of a person to acquire, hold and dispose of gold articles or gold ornaments. It may be applied indiscriminately and cannot, therefore, be held as saved by Clauses (5) and (6) of Article 19 of the Constitution."

8. Sections 71 and 73 have since been amended by Gold (Control) Amendment Act, 1971 (Act No. 21 of 1971). It will be convenient at this stage to read the two Sections 71 and 73* prior to and after their amendment.

Prior to amendment,

After amendment.

"71. Confiscation of gold.—

- (1) Any gold in respect of which any provision of this Act or any rule or order made thereunder has been, or is being, or is attempted to be, contravened, shall be liable to confiscation.

"71. Confiscation of gold:—

- (1) Any gold in respect of which any provision of this Act or any rule or order made thereunder has been, or is being, or is attempted to be, contravened, together with any package, covering or receptacle in which such

*(Section 73 is not given in this copy—Ed.)

gold is found, shall be liable to confiscation:—

Provided that where it is established to the satisfaction of the officer adjudging the confiscation that such gold or other thing belongs to a person other than the person who has, by any act or omission, rendered it liable to confiscation, and such act or omission was without the knowledge or connivance of the person to whom it belongs, it shall not be ordered to be confiscated but such other action, as is authorised by this Act may be taken against the person who has, by such act or omission, rendered it liable to confiscation.

- (2) Any package, covering or receptacle (including its other contents) in which any gold liable to confiscation under sub-section (1) is found shall also be liable to confiscation.
- (3) Where any gold liable to confiscation under sub-section (1) is mixed with other goods in such manner that such gold cannot be separated from those other goods, the whole of such goods shall be liable to confiscation.
- (4) Any gold which is liable to confiscation under sub-section (1), shall be so liable notwithstanding any change in its form."
- (2) Where any package, covering or receptacle referred to in sub-section (1) contains any goods, such contents shall also be liable to confiscation.
- (3) Where any gold is liable to confiscation under sub-section (1), it shall be so liable notwithstanding any change in its form, and where such gold is mixed with other goods in such manner that it cannot be separated from those other goods, the whole of such goods, including the gold, shall be liable to confiscation.
- (4) On and from the commencement of the Gold (Control) Amendment Act, 1971, the proviso to sub-section (1) shall also apply to any gold or other thing which is liable to confiscation under sub-section (2) or sub-section (3)."

9. The contention on behalf of the petitioners is that even the amendment brought in by Act No. 21 of 1971 does not save the sections and they are still unconstitutional in view of what has been held by the Supreme Court in *Badri Prasad v. Collector of Central Excise*, (AIR 1971 SC 1170) (Supra).

10. Strong reliance was placed by Sri S. N. Kacker on *Badri Prasad v. Collector of Central Excise* (AIR 1971 SC 1170) (Supra). In that case, the Supreme Court did not see any justification for an order of confiscation of the gold under Section 71 of the Gold (Control) Act merely because of failure to comply with Section 16 of the Act relating to declaration and the levy of fine in lieu of confiscation not exceeding twice the value of the thing in respect of which confiscation is authorised under Section 73 of the Act to be unduly harsh. On that basis, it is now sought to be argued that the rigour of the sections has not been taken away even by the respective amendments in those sections and Sections 71, 73, 74 and 75 are unconstitutional for

the reasons given by the Supreme Court in that case.

11. The observations made by the Supreme Court in *Badri Prasad v. Collector of Central Excise*, (AIR 1971 SC 1170) (Supra) must be confined strictly to the factual background in which it was given in that case.

12. In *Badri Singh v. State*, 1973 All WR (HC) 663, a Division Bench of this Court laid down the following proposition regarding the interpretation of law accepted by the Supreme Court:

"An interpretation of law accepted by the Supreme Court is binding on all the courts under Article 141 but circumspection has to be exercised in precisely ascertaining as to whether any such rule or law was actually laid down by the Supreme Court in its decision. The Supreme Court has time and again cautioned against the unwarranted extension of the ratio of one case to a different set of facts which may attract different provisions of law.

The ratio of a decision must be confined strictly to the factual background in

which it was given and surely there is no justification for reading in it some principle or rule relating to a point which did not arise for adjudication in that case. That is why the Supreme Court felt the necessity of striking a note of warning against such misconception as is likely to arise if the background in which a point was actually decided is not taken into consideration."

13. In the reported case, the petitioner had fairly extensive business of money lending. In pursuit of his business, he advanced money to a large number of persons, who pledged ornaments made of gold or containing gold and other precious stones, or silver. It included a seasonal business of agriculturists taking loans from him in the sowing season and repaying the same with interest by redeeming the pledged ornaments. The loans were not always redeemed quickly and there were instances of ornaments lying with the petitioner under pledge for 10 to 15 years. He also owned along with other members of his family substantial quantities of gold ornaments. As he had a strong room for keeping those valuables, his friends and relations also used to keep their gold ornaments and articles with him for safe custody.

14. On a raid by the Inspectors of the Excise Department, under the authority of the Collector of Central Excise, a large number of ornaments and articles of gold were seized from his premises. The validity of the search and seizure was challenged in that case on the ground that inasmuch as the time to furnish declaration under Sec. 18 of the Act had been extended since the commencement of the Act from time to time upto 30th April, 1969, the search, which took place, was unjustified. The vires of various provisions of the Act were challenged on various grounds. The Supreme Court, however, declared Sections 71 and 73 of the Gold (Control) Act to be ultra vires and it was only because under Section 71 of the Act, even the pawned articles in possession of a dealer were to be confiscated, merely because he did not make a declaration, as required under Section 16 of the Act. Thus, for the fault of the licensed dealer with whom the articles had been pawned by the actual owner thereof, the owner's property was to be confiscated. In these circumstances, the Supreme Court held that there was absolutely no justification for confiscating the pawned articles merely for non-compliance of Section 16 of the Act in making the required declaration. The Parliament, in these circumstances, intervened and amended the section and now a Proviso has been added in Section 71 and the proviso contemplates that where it is established to the satisfaction of the officer adjudicating the confiscation that such

gold or other things belong to a person, other than the person, who has, by any act or omission, rendered it liable to confiscation, and such act or omission was without the knowledge or connivance of the person to whom it belonged, it shall not be ordered to be confiscated, but such other action, as is authorised by the Act, may be taken against the person, who has, by such contravention, rendered it liable to confiscation. This Proviso clearly contemplates that for the fault of the pawnee, the property of the pawner shall not be confiscated. Prior to the amendment, even the goods of the pawner in possession of the pawnee could be confiscated for the fault of the pawnee in not making the required declaration under Section 16 of the Act.

15. Likewise, Section 73 of the Gold (Control) Act contemplated levy of fine of twice the amount or the value of the goods sought to be confiscated. That section was found by the Supreme Court to be unduly harsh. In lieu of confiscation of the goods, there was absolutely no justification for imposing a fine of twice the amount of the value and thus it was struck down by the Supreme Court. The Parliament consequently, amended Section 73 of the Act as well and removed the word "twice".

16. Shri S. N. Kacker laid undue emphasis on the observations made by the Supreme Court that the confiscation of the property merely for non-compliance of Section 16 of the Gold (Control) Act in not making a declaration was a general observation and, on that basis, he contended that the confiscation of the property for the defiance of Section 16 of the Act was too harsh a punishment for the offence committed by the licensed dealer. As observed earlier, the observation of the Supreme Court has to be viewed in the background of the facts of the particular case.

17. The vice of smuggling has assumed such a large proportion that the Government has to intervene and punish the smugglers or those abetting smuggling with strong hand and, therefore, the Parliament imposed severe punishment. The confiscation of the property or the imposition of fine in lieu thereof cannot be challenged on the ground of severity. Courts cannot question the wisdom of the Legislature. The Legislature knows the exigency of the situation and can make laws for mitigating the vice. If the smuggling of gold in the country is to be checked by the prevention of the conversion of the smuggled gold into gold articles or ornaments, there is no unreasonableness in prescribing the punishment of confiscation of the gold or gold ornaments or imposing a fine in lieu thereof. The punishment of confiscation or levy of fine

per se cannot be challenged in Court. The observation made by the Supreme Court in that case, therefore, in my opinion, must be viewed in the back-ground of the facts of the particular case. The Supreme Court never sought to declare Section 71 of the Gold (Control) Act as ultra vires on the ground that the confiscation of property merely for non-compliance of Section 16 of the Act was unreasonable. The observations only meant to emphasise that the confiscation of the property of the real owner in the hands of the pawn broker merely for the fault or omission of the pawn broker to make the declaration under Section 16 of the Act was unreasonable and, therefore, it was struck down. But, now the section has been amended, as stated earlier, and the unreasonableness has now been mitigated by adding a proviso to Section 71 and by removing the word "twice" in Section 73 of the Gold (Control) Act. If Section 71, without any amendment, was held to be ultra vires, then the other sections, namely, Sections 73, 74 and 75 could also not have been saved because they are interdependent on Section 71 of the Act and they could not independently stand. In view of the fact that Sections 71 and 73, after amendment, are intra vires, the other sections dependent on Sections 71 and 73 could not be held to be ultra vires.

18. In writ petition No. 563 of 1972, the petitioner has also challenged the seizure of the goods also. Section 55 of the Gold (Control) Act provides:

"55. Accounts.—

(1) Every licensed dealer, every licensed refiner and every certified goldsmith shall keep, in such form and in such manner as may be prescribed, a true and complete account of the gold owned, possessed, held, controlled, bought or otherwise acquired or accepted or otherwise received, or sold, delivered, transferred or otherwise disposed of, by him in his capacity as such licensed dealer or refiner or certified goldsmith, as the case may be, and different forms of accounts may be prescribed for different classes of licensed dealers, refiners or certified goldsmiths.

(2) Every licensed dealer, every licensed refiner and every certified goldsmith shall as and when he buys or otherwise acquires or accepts or otherwise receives, or sells, delivers, transfers or otherwise disposes of, any gold, enter in the accounts referred to in sub-section (1) the prescribed particulars of such gold and the prescribed particulars of the person from whom such gold was bought, acquired, accepted or otherwise received or to whom such gold was sold, delivered, transferred or otherwise disposed of.

(3) No licensed dealer or refiner and no certified goldsmith shall, in his capacity as licensed dealer or refiner, either

own or have in his possession, custody or control any gold which has not been included in the accounts referred to in sub-section (1)."

19. Sub-section (2) of Section 55 of the Gold (Control) Act enjoins on the dealer to make the entries in the register and forms prescribed under the Act when the dealer buys, sells or transfers gold. If that is not done and the entries are left to be made after several days, the very purpose for which the accounts are sought to be maintained shall be defeated and the dealer may not choose to fill in the forms for months together and, in that event, it will be difficult for the authorities to check and verify the business transactions carried on by the dealer. The maintenance of the accounts relating to the transaction of sale and purchase ensures check on the parties on the various transactions. The petitioner, on his own admission, failed to maintain the accounts, as required under the Act and the Rules, for a period of more than a week. He, therefore, contravened the provisions of Section 55 of the Gold (Control) Act.

20. Section 58 of the Gold (Control) Act authorises the Gold Control Officer to make a search if he has reason to suspect that any provision of the Act has been or is being or is about to be contravened, enter and search, at any reasonable time, any refinery or the business premises of a licensed dealer or a certified goldsmith.

21. The seizure of the petitioner's entire stock in trade, including those items of ornaments, which were accounted for in the account books, was wholly illegal and in excess of the powers conferred upon the authorities under Section 66 of the Gold (Control) Act.

22. In the earlier writ petition No. 6429 of 1971, the search and seizure were challenged and this Court allowed the writ petition on the above ground as would be evident from the case of *L. Kashi Nath v. The Collector, Central Excise, Allahabad*, AIR 1972 All 16. The judgment of the learned Single Judge was upheld by the Division Bench in Spl. Appeal. In view of the decision of this Court, only those ornaments and articles of gold could legally be seized which were not accounted for by the petitioner in his account books. The officials of the Excise Department exceeded their power in seizing the entire stock. The seizure of the entire stock was, therefore, illegal and unwarranted.

23. For the reasons given above, writ petition No. 6429 of 1971 must fail and is, accordingly, dismissed. Writ Petition No. 563 of 1972, however, is allowed, in part, to the extent that the seizure of the entire stock of the petitioner by the officials of the Excise Department

40 AIR. [Prs. 1-3A] Nagar Mahapalika, Agra v. Kalawati Devi

A. I. R.

was illegal. The respondents are directed to return back the ornaments to the petitioner forthwith. In the circumstances of the case, the parties will bear their own costs.

Order accordingly.

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P. N. BAKSHI, J.

Nagar Mahapalika, Agra. Appellant v. Kalawati Devi, Respondent.

First Appeal No. 191 of 1966, D/- 12-5-1975.*

(A) Land Acquisition Act (1894) (as amended by Schedule Section 10 (3) U. P. Act 8 of 1919), Section 23 (3) (a) — Provision is ultra vires.

Schedule Section 10 of the U. P. Town Improvement Act, modifying Section 23 (2) of the Land Acquisition Act, 1894, is ultra vires. Hence, potential value of the land to be acquired for town improvement under U. P. Act 8 of 1919 is to be taken into consideration in determining the compensation payable for the land acquired under the U. P. Act. First Appeal No. 139 of 1964, D/- 16-4-1975 (All) and AIR 1973 All 647, Followed; AIR 1975 SC 394, Disting. (Paras 4, 6)

(B) Land Acquisition Act (1894), Section 23 (2) — Plea for solatium — Can be considered in appeal although not raised earlier. (Civil P. C. Order 41, Rule 33).

The claim for 15% solatium on the amount for compensation for compulsory acquisition of property being a pure question of law on admitted facts, can be taken up in appeal, though not raised, earlier.

15 % solatium is a statutory right to additional compensation which an objector can claim for compulsory acquisition. Merely because this question was not taken up earlier would be no ground to deprive the citizen of his statutory right to receive the compensation. Moreover, the provisions of Order 41, Rule 33, Civil P. C. are wide enough for grant of a relief to an objector even though he may not have filed an objection or may not have filed an appeal against the decree. AIR 1933 All 742; S. A. 354 of 1963 decided on 13-5-1968 (All) Followed; AIR 1974 SC 2077, Disting. (Paras 8, 9)

Cases Referred: Chronological Paras
AIR 1975 SC 394 = 1975 UJ (SC) 63 5
(1975) First App. Nos. 139 with 140 of 1964, D/- 16-4-1975 (All) 4
AIR 1974 SC 2077 = (1975) 1 SCR 802 8
AIR 1973 All 647 = 1973 All LJ 656 4
(1968) S. A. No. 354 of 1963, D/- 13-5-1968. (All) 8

* (Against Judgment and decree of Agra, Nagar Mahapalika Tribunal, in Ref. No. 54 of 1960, D/- 26-3-1965).

HS/IS/C889/75/PRK

AIR 1946 PC 132 = (1946) 73 Ind App 134 3A

AIR 1933 All 742 = 145 Ind Cas 526 8

AIR 1928 All 147 = (1928) 26 All LJ 69 (FB) 3A

Lakshman Swarup, for Appellant; B. D. Agarwal, for Respondent.

JUDGMENT:— The Nagar Mahapalika, Agra acquired certain land for North Vijay Nagar Development Scheme. A Notification was issued under Section 36 (2) of the Town Improvement Act and published in the U. P. Gazette on 29-7-1950. Notification under Section 42 (1) of this Act was published in the U. P. Gazette dated 24-11-1951. The plot in dispute bears Khasra No. 1810 situate in village Ghatwasan, Tahsil Agra, District Agra. Its area is one bigha which is equal to 2756 square yards. The Land Acquisition Officer awarded compensation of Rs. 9/8/- to Smt. Kalawati. Objections were filed by Smt. Kalawati claiming this compensation to be most inadequate. The claim by the objector was Rs. 5/- per square yard. The Collector then made a reference under the Land Acquisition Act. The Nagar Mahapalika Tribunal, Agra has decreed the claim of the objector for Rs. 11,014/7/- with interest at 6% per annum from the date of the possession till the date of payment of compensation money vide its judgment dated 26-3-1965.

2. Aggrieved thereby, this first appeal has been filed on behalf of the Nagar Mahapalika Agra.

3. The main ground which has been argued on behalf of the appellant's counsel is that the Tribunal has erred in law in taking into consideration the potential value of the land in question and that under the provisions of the Town Improvement Act, the use of the land as on the date of the Notification was the sole consideration for the assessment of compensation. In support of this contention, I have been referred to Section 10 of the Schedule attached to U. P. Town Improvement Act VIII of 1919 and also to sub-section (3) of Section 10 which runs as follows:—

(3) At the end of Section 23 of the said Act the following shall be deemed to be added namely:—

(a) the market value of the land shall be the market value according to the use to which the land was put at the date with reference to which the market value is to be determined under the clause.

3-A. Counsel for the appellant has also placed reliance upon a Full Bench case reported in (AIR 1928 All 147) (FB) Secretary of State v. Makhan. Das in which it was held that the market value in assessing the compensation under the Town Improvement Act should be decided only with reference to the use to

which the land has been put. Reference has also been made to a decision reported in AIR 1946 PC 132, Babu Kailash Chandra Jain v. Secretary of State. On this basis, counsel for the appellant submits that the impugned order suffers from illegality.

4. Learned counsel for the respondent on the other hand has brought to my notice a decision of the Division Bench of this Court in First Appeal No. 139 of 1964, Sita Ram v. Agra Nagar Mahapalika, Agra connected with First Appeal No. 140 of 1964, Lala Narain Das Jain v. Agra Mahapalika which was decided on 16-4-1975. The point which has been canvassed by the appellants' counsel as narrated above has been dealt with in detail in this Division Bench case. It has been held therein that the potential value of the land was to be taken into consideration in determining the compensation payable under the Town Improvement Act. Schedule Section 10 of the Town Improvement Act has been declared ultra vires by a Division Bench of this Court reported in 1973 All LJ 656 = (AIR 1973 All 647), Prabhu Lal v. Special Land Acquisition Officer. It is not necessary for me to repeat the details given in these cases cited above. Suffice it to say that the Division Bench case of this Court which has set the controversy at rest, is binding upon me. I find no reason to disagree with this Division Bench case.

5. Learned counsel appearing on behalf of the appellant has brought to my notice the decision of the Supreme Court reported in (AIR 1975 SC 394) Sarwan Singh v. The State of Punjab and on its basis he submits that the decision of the Division Bench case as referred to above is erroneous and that the use to which the land was put on the date of the Notification alone should be a determining factor for the assessment of compensation. I am afraid it is not possible for me to agree with this submission. The Supreme Court case relied upon by the learned counsel and cited before the Division Bench has been rightly distinguished in that case. The Supreme Court has not said anything about the invalidity of the provision relating to the fixation of principles of compensation. In my view, therefore, the Supreme Court case can be of little assistance to the appellant's counsel.

6. In the result, therefore, I am of the opinion that potential value of the land has to be taken into consideration in assessing the amount of compensation payable to the objector even though the case may arise for acquisition under the Town Improvement Act.

7. On the merits no substantial argument has been advanced before me. The Land Acquisition Officer has granted

a compensation of Rs. 9/9/- for one Bigha of land which is equivalent to 2756 Sq. yards. To the naked eye this compensation is wholly preposterous. No court of law can uphold such an imaginative and illusory compensation for which there is no justification at all. The Nagar Mahapalika Tribunal took into consideration the oral evidence which has been led by the parties as also the examples by way of sale deeds which were filed before him. I have perused this evidence myself. The rate of compensation awarded in the impugned order is Rs. 4/- per sq. yard. After taking into consideration the statements of the witnesses examined by the claimant and also the examples which have been referred in the impugned order, I am of opinion that the assessment of compensation by the Tribunal concerned is most fair and adequate. In my view, therefore, no interference is called for even on the factual assessment of compensation to the objector-respondent.

8. Learned counsel appearing on behalf of the respondent has filed an application today praying for 15% solatium on the total amount of compensation which has been awarded to the objector. He submits that schedule 10 (2) framed under the Town Improvement Act which modifies S. 23 (2) of the Land Acquisition Act having been held to be ultra vires, he is entitled to solatium on the total amount of compensation awarded. There is no dispute that the provisions of the Land Acquisition Act were applicable under the Town Improvement Act subject to such conditions and modifications which may be made therein. On the other hand counsel appearing on behalf of Nagar Mahapalika has submitted that the respondent should not be allowed to take up this point for the first time in appeal. He has relied upon a decision reported in (AIR 1974 SC 2077), Aflatoon v. Lt. Governor of Delhi in which it has been held that "the plea not raised in High Court cannot be considered in appeal." I am afraid that this ruling has no application to the facts of the present case. The point which has been raised by the counsel for the respondent is a pure question of law on facts which are admitted. He submits that under Section 23 (2) of the Land Acquisition Act it is the statutory duty of the court to grant 15% solatium in addition to the market value of the land in cases of compulsory acquisition of property. In support of this submission reliance has been placed upon an unreported decision of a single Judge of this Court S. A. 354 of 1963 decided on 13-5-1968 (All) by K. B. Asthana, J. (as he then was). His Lordship observed in that case that award of 15% above the compensation for compulsory acquisition is a mandatory provision of law. Even if a party interested does not specially claim a re-

lief in that regard, it becomes the duty of the court to apply the law and direct payment of a further sum of 15% on the compensation. Similar view has been expressed in a Division Bench case of this Court reported in (AIR 1933 All 742), Mohd. Sajjad Ali Khan v. Secretary of State. It has been held that:—

"Award of 15% on market value on compulsory acquisition is a statutory amount of compensation in addition to the market value; and the court has no power to deprive a claimant of that amount on the ground that he has not previously claimed it specifically."

9. I am not only in agreement with the view expressed in both these cases, but I am also bound by the decision of the Division Bench case. 15% solatium is a statutory right to additional compensation which an objector can claim for the compulsory acquisition of his land. Merely because this legal question was not taken up earlier, or it did not strike the counsel at an earlier stage would be no ground to deprive the citizen of his statutory rights to receive compensation provided by law. Moreover, the provisions of Order 41, Rule 33, Civil Procedure Code are wide enough for grant of a relief to an objector even though he may not have filed an objection or may not have filed an appeal against the decree. In that view of the matter, I am of opinion that the objector must be granted solatium at the rate of 15% in addition to the compensation which has already been awarded to him by the Tribunal concerned.

10. For the reasons given above, this appeal has no merit and is hereby dismissed with costs. The respondent-objector shall be entitled to the award of compensation as directed by the Tribunal plus 15% solatium on the market value of the land acquired.

Appeal dismissed.

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A. BANERJI J.

Akhilesh Chand Varshney, Appellant v. Smt. Bhagwati Devi and others, Respondents.

Second Appeal No. 1902 of 1974, D/- 6-5-1975.*

(A) Provincial Small Cause Courts Act (1887), Section 9 — Forum — Part of the suit triable on regular side — Entire suit has necessarily to be tried on the regular side.

*(Against decree of Jaswant Singh, 1st Addl. Civil J., Aligarh, D/- 16-8-1974).

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In the present case three of the reliefs asked for in the suit namely, for ejectment, for arrears of rent and for damages for use and occupation could be tried by the Court of Small Causes but the other relief in respect of the declaration was not triable by the Court of Small Causes. Such a suit has to be tried on the regular side because it is not possible to split such a suit into two parts nor is it permissible for the Court of Small Causes to try the suit in respect of the issue regarding the fixation of annual reasonable rent. Every suit is to be tried on the regular side unless the law specifically barred such a suit from being tried on the regular side. (Para 5)

Cases Referred: Chronological Paras
AIR 1970 All 604 = 1970 All LJ 670 (FB)

B. D. Tripathi, for Appellant; K. M. L. Hajela, for Respondents.

JUDGMENT:— This is an appeal by the defendant-tenant. Learned counsel for the appellant contended that the decree passed by the court below is bad in law for the Court of Munsif Koil, Aligarh, had no jurisdiction to try the suit in view of the provisions of Section 9 of the U. P. Civil Laws (Amendment) Act, 1972. He further contended that the suit could only be tried by a Court of Small Causes or any other court invested with such power. Learned counsel for the respondents, however, contended that the suit was properly tried by the Court of Munsif Koil on the regular side as the entire suit could not be tried by the Court or Judge Small Causes or any court invested with the powers of a Court of Small Causes.

2. The suit in the present case was filed on 1st June, 1971, in the Court of Munsif Koil, Aligarh. In the suit four reliefs were asked for — firstly, for a decree for possession of ejectment from the suit premises; secondly, for recovery of rent and damages amounting to Rupees 1854.95 with pendentie life and future interest; thirdly, for a decree for damages for the use and occupation from the date of the suit till the date of actual delivery of possession at the rate of Rs. 25/- per month and fourthly, for a declaration that the reasonable rent of the accommodation was Rs. 25/- per month. It may be mentioned here that the suit related to a premises which was a pre-1951 construction. The suit was filed on the basis of permission obtained by the plaintiff to sue for the ejectment of the defendant. The defendant resisted the suit on a variety of grounds and claimed that the suit was barred by the U. P. Act III of 1947 and U. P. Act XIII of 1972. It was also claimed that there were no arrears of rent and the defendant was not liable to ejectment. The issues in the suit were framed on the 24th of May, 1973, and the evidence

of the plaintiffs' witness Gopal Krishna was recorded on 14th January, 1974. The evidence of the defendant's witness was recorded on the 15th of January, 1974, and the suit was decreed on the 19th March, 1974.

3. It is not disputed that the suit, when instituted, lay in the court of Munsif and was triable as a regular suit. However, in view of the provisions of the U. P. Civil Laws (Amendment) Act, 1972, hereinafter referred to as the Act, all suits for the ejectment of a tenant and for the recovery of arrears of rent and damages for its use and occupation became cognizable under the provisions of the Provincial Small Cause Courts Act, 1887. Section 9 of the Act reads as follows:—

"Transitory provisions. — Any suit of the nature referred to in the proviso to sub-section (1) and sub-section (2) of Section 25 of the Bengal, Agra and Assam Civil Courts Act, 1887 (whether its value exceeds two thousand rupees, or as the case may be, one thousand rupees, or not) or the proviso to sub-section (3) of Section 15 of the Provincial Small Cause Courts Act, 1887, instituted before the date of commencement of this Act in any court other than a Court of Small Causes or a Court of Civil Judge or Munsif exercising jurisdiction of a Judge of a Court of Small Causes and pending in that Court immediately before the said date, not being a suit in which the recording of oral evidence for any party has commenced or concluded before the said date, shall upon the conferment of jurisdiction or enhanced pecuniary jurisdiction on a Civil Judge, Munsif, District Judge or Additional District Judge or on a Court of Small Causes under the said provisions stand transferred to such Court and shall be decided by that Court."

The aforesaid provision read with amended Section 25 of the Bengal, Agra and Assam Civil Courts Act, 1887 and Section 15 of the Provincial Small Cause Courts Act, 1887, makes it clear that any suit for the ejectment of a tenant from a building and for the recovery of arrears of rent and for the recovery of damages for their use and occupation, which had been instituted prior to the coming in force of the Act but in which the recording of evidence had not commenced or concluded before the 16th September, 1972, stood transferred to a Court mentioned above. Necessary amendments were also made in the Provincial Small Cause Courts Act, 1887 and Item No. 4 of Schedule II was amended. It made a suit for the ejectment of a lessee from a building after termination of a lease and for the recovery from him of compensation for the use and occupation of that building after such determination of lease, cognizable by the Court of Small Causes. Such a

suit was triable as a suit under the Provincial Small Cause Courts Act. Prior to this amendment suits for ejectment and arrears of rent or for the recovery of compensation for use and occupation were not cognizable by a Court of Small Causes. Section 9 of the Act further stipulated that such suits were to be tried as a suit for Small Causes and could also be tried by courts other than the courts of Small Causes on whom such jurisdiction had been invested.

4. It is well settled that the forum of a suit depends on what has been stated in the plaint itself. The relief claimed in the suit indicated that the present suit was not merely a suit for ejectment of the defendant-tenant, and for the recovery of arrears of rent and for the recovery of damages for the use and occupation but also for a declaration in regard to what was the annual reasonable rent of the premises. It will at once be noticed that while the first three reliefs were such which came under the purview of the Small Cause Court or courts invested with the powers of Small Cause Court, but the relief as regards the declaration of the annual reasonable rent of the premises was one which did not come within the ambit and scope of the Provincial Small Cause Courts Act, 1887. A suit in which a relief for a declaration or the fixation of the reasonable annual rent was sought was not triable by a Court of Small Causes, or by a court invested with the powers of a Small Cause Court. So in the present suit three of the reliefs, namely, for ejectment, for arrears of rent and for damages for use and occupation could be tried by the Court of Small Causes but the other relief in respect of the declaration was not triable by the Court of Small Causes.

5. The question, therefore, that arises is what would be the forum of such a suit. Whether such a suit is to be tried in the regular side or as a suit under the Provincial Small Cause Courts Act. In the Full Bench case of Manzoorul Haq v. Hakim Mohsin Ali, 1970 All LJ 670 = (AIR 1970 All 604), it was held that the Court of Small Causes is a court of preferential jurisdiction and not of exclusive jurisdiction. Learned counsel for the appellant contended that in view of the wordings of Section 9 of the Act the Court of Small Causes was now a court of exclusive jurisdiction and not a court of preferential jurisdiction. In my opinion, it is not necessary to go into this question for the purposes of deciding this appeal. The principal question in this appeal is what would be the proper forum for a suit which did not wholly come within the purview of the Court of Small Causes in view of the amended provisions of Item No. 4 of Schedule II of that Act.

The opening words of Section 9 refer to "any suit" of the nature described in the section. It does not refer to "any relief". Thus if a suit of the nature mentioned in Section 9 of the Act had been instituted prior to the date of coming in force of the Act and in which the recording of evidence had not commenced or concluded, it stood transferred to the Court of Small Causes or to other courts to be tried as a suit under the Provincial Small Cause Courts Act. The present suit was not exactly of the nature as has been described in Sec. 9 of the Act. If it was so then certainly the provisions of Section 9 would be applicable to the present case. In that case the suit would only be triable as a suit on the Small Causes side. On the contrary, if it was not a suit wholly of the nature, as has been referred to in Sec. 9 of the Act, then in my opinion such a suit could not be exclusively tried under the provisions of the Provincial Small Cause Courts Act. As indicated above, the present suit called for the determination of several questions. One of the questions namely, the declaration and the fixation of annual reasonable rent, was not cognizable by the Court of Small Causes. This suit had to be tried on the regular side. In my opinion, even if a part of the suit is triable on the regular side then the entire suit had to be tried on the regular side notwithstanding that a part of it could be tried under the provisions of the Provincial Small Cause Courts Act. It is not possible to split such a suit into two parts nor is it permissible for the Court of Small Causes to try the suit in respect of the issue regarding the fixation of annual reasonable rent. It is also well settled that every suit is to be tried on the regular side unless the law specifically barred such a suit from being tried on the regular side. There is nothing in the amended sections of the aforesaid Act which enables a Court of Small Causes or a court invested with the powers of a Court of Small Causes to try also suits in which a relief other than of ejectment and arrears of rent was prayed for. Consequently, in my opinion, the present suit was triable by the Munsif and had been rightly tried as such. I, therefore, do not find any force in the contention raised by the learned counsel for the appellant that the decree passed by the Court is without jurisdiction.

6. No other point was argued.

7. In the result, therefore, the appeal fails and is dismissed with costs.

Appeal dismissed.

AIR 1976 ALLAHABAD 44

(LUCKNOW BENCH)

J. M. LAL, J.

State of U. P., Appellant v. Ram Dass and others, Opposite Parties.

Second Appeal No. 248 of 1964, D/- 17-3-1975.*

(A) U. P. Zamindari Abolition and Land Reforms Act (1 of 1951), Sections 6 (i) (a) and 7 (aa) — Vesting of estate — Under-proprietor having right of fishery granted by decree — Right vests in the State.

The expression 'document' as used in Section 6 includes a decree. It follows that the effect of the notification under Section 4 read with Section 6 (i) (a) is that the fishery right of an under-proprietor granted by a decree also vests in the State. AIR 1957 All 455 and 1959 RD 177 (All), Distinguished. (Para 7)

Moreover, an unrestricted right of fishery for any purpose whatsoever including a commercial purpose cannot be said to be for the beneficial enjoyment of the land so as to get any protection under Section 7 (aa) also. (Para 9)

(B) Custom — Customary right of fishery in pond without any let or hindrance and capable of destroying subject-matter — Custom is bad and unreasonable. AIR 1933 Cal 539 and AIR 1934 Cal 461, Followed. (Para 10)

Cases Referred: Chronological Paras
1959 RD 177 = 1959 All LJ 310 8
AIR 1957 All 455 = 1957 All LJ 275 8
AIR 1956 SC 17 = (1955) 2 SCR 919 6
AIR 1934 Cal 461 = ILR 61 Cal 47 10
AIR 1933 Cal 539 = 37 Cal WN 18 10

K. S. Verma, for Appellant; S. C. Das, for Opposite Parties.

JUDGMENT:— This second appeal has been filed by the State of U. P. against a decree passed against them by the courts below. That decree is for a declaration that the plaintiffs are entitled to catch fish in Plot No. 968 area 314.24 acres which corresponds to Plot No. 1788 of First Settlement. It further restrains the defendants from interfering with the plaintiffs' right to catch fish.

2. The plaintiffs' predecessors Debi Bux Singh and others were formerly proprietors of village Kondar Pargana Mahadewa Tahsil Tarabganj, District Gonda where this pond is situate and is popularly called as Jheel Kondar. They however transferred their proprietary rights in this village to Raja Kishun Dutt Ram. But during the First Settlement Debi Rux Singh and others still claimed

*Against Judgment and decree of G. D. Chaturvedi, Civil J., Gonda, in Civil Appeal No. 102 of 1962, D/- 18-1-1964.

some under-proprietary rights with land as well as in the Jheel in question of which the total area at that time was 467 acres bearing number 1788, and also the groves, the banjar land and Abadi where their own houses and the houses of their servants were situate. The settlement Commissioner under his decree dated November 2, 1874 held that Debi Bux Singh and others (the descendants of the transferors existing at that time) had under-proprietary rights in an area of 218 bighas 9 biswas land which was in their cultivation as Sir on payment of annual quit rent at Rs. 443.73 paise. They were also declared to have under-proprietary rights in 20 bighas and 11 biswas of Banjar land and 17 groves which would be held rent free. They would also have under-proprietary rights in the sites of their own houses and those of their resident servants with right to fish and Khar in the said Jheel as well as the right to realise customary dues on ceremonial occasions like births and marriages from raiyats. This decree of the Settlement Commissioner was upheld in second Appeal by the learned Judicial Commissioner with this modification that a list of all the co-sharers on whom these rights were conferred was attached to the decree and the lands held by them as Sir or grove were specified therein. It is on the basis of that decree that the plaintiffs claim right to catch fish from the said pond even after the abolition of Zamindari without any let or hindrance by the State Government. Alternatively, they base their claim to that right on a customary easement also.

3. The defence of the State Government was that after the abolition of the Zamindari not only proprietary rights but all under-proprietary rights also vested in the State Government under Section 4 read with Section 6 of the U. P. Zamindari Abolition and Land Reforms Act (to be hereinafter called as the Zamindari Abolition Act) except the rights which were specifically saved under Section 7 or any other provision of the Act. About the ponds like the present one with a right of fishery therein there was a specific provision for its vesting in the State Government contained in Section 6 (a) (i) of the Zamindari Abolition Act. The State Government was managing and breeding fish in this pond for commercial purposes through its Fisheries Department. As regards the plea of custom it was alleged that no such custom existed and in any case such a custom was unreasonable which cannot be recognised by law.

4. Both the courts below held that on the basis of the decree dated November 2, 1874 passed by the Commissioner during the First Settlement proceedings, the predecessors of the plaintiffs had acquired a right of fishery in the said

pond and that right was not taken away from them under the provisions of Section 4 read with Section 6 of the Zamindari Abolition Act. The State Government as successor-in-interest of Raja Kishun Dutt Ram would be bound by that decree. This finding has been challenged by the learned Chief Standing Counsel on behalf of the appellant.

5. From a perusal of the judgments of the Assistant Settlement Officer, the Commissioner and the Judicial Commissioner passed in settlement proceedings, which were on settlement record which had been sent for by this Court as it had been sent for by the lower Appellate Court (since copies of those judgments which are on that record are not issued), it is evident that though Debi Bux Singh and others had transferred all their proprietary rights in the village Kondar in favour of Raja Kishun Dutt Ram some under-proprietary rights in favour of these persons including the right to fishery in the pond in question had been conferred on the transferors by the Settlement Authorities. The transferors had claimed the entire Jheel as their under-proprietary property but only the right of fishery was granted to them in this Jheel (pond). The right to receive customary dues on ceremonial occasions of births and deaths from the raiyats was also conceded to the plaintiffs' predecessors.

6. The question that arises in this second appeal is whether after the abolition of the zamindari the right of fishery can still be claimed by the plaintiffs on the basis of that decree. In my opinion, the courts below have been misled by thinking that the State Government is successor-in-interest of Raja Kishun Dutt Ram proprietor against whom that decree was passed in favour of the plaintiffs' predecessors granting them under-proprietary rights in some of the properties. The State Government acquired the estates of the intermediaries in exercise of its right of eminent domain under the provisions of the Act. Section 4 of the Zamindari Abolition Act provides that all such estates shall stand transferred to and vest except as hereinafter provided, in the State free from all encumbrances. The expression "estate" has been defined in clause (8) of Section 3 while "intermediary" has been defined in clause (12) of Section 3 of the Zamindari Abolition Act. Clause (12) provides that 'intermediary' with reference to any estate means a proprietor, under-proprietor, sub-proprietor, Thekadar, permanent lessee in Avadh and permanent tenure-holder of such estate or part thereof. From this definition it is evident that not only the estate of Raja Kishun Dutt Ram's successors who were the proprietors of this vil-

lage but also the estate of the plaintiffs who were the successors of the under-proprietors would vest in the State Government under Section 4 free from all encumbrances except as provided elsewhere under that Act. It cannot be disputed that the right of fishery that was given to Debi Bux Singh and others under that decree against Raja Kishun Dutt Ram and others was in the nature of an encumbrance which would be a hindrance in the full and unrestricted use of that pond by the proprietor in any manner he liked. The pond could not obviously be used by Raja Kishun Dutt Ram in a way so as to exclude the predecessors of the plaintiffs from enjoying their right of fishery in it. The right of fishery that was conferred on the predecessors of the plaintiffs under that decree is itself an immovable property within the meaning of Transfer of Property Act as held by the Supreme Court in *Ananda Behra v. State of Orissa*, (AIR 1956 SC 17). It may be stated that the entire bundle of rights in a property may constitute an immovable property and also a single or some of the rights in it may also constitute an immovable property. When a mortgage is created on an immovable property, the mortgagee's interest is an immovable property and the rest of the rights left with the mortgagor in that property also constitute immovable property.

7. Section 6 of the Zamindari Abolition Act provides that when the notification under Section 4 has been published in the Gazette then, notwithstanding anything contained in any contract or document or in any other law for the time being in force and save as otherwise provided in this Act, the consequences as hereinafter set forth shall, from the beginning of the date of vesting, ensue in the area to which the notification relates. One of these consequences mentioned in sub-clause (i) of clause (a) is that in every estate all rights, title and interest of all the intermediaries in fisheries shall vest in the State Government. The expression "document" as used in Section 6 includes a decree also like the one passed by the Commissioner on 2-11-1874 in First settlement proceedings. From this it follows that in spite of that decree the rights of the plaintiffs as under-proprietors in the fishery in question shall vest in the State Government.

8. In this connection reliance is placed by the learned counsel for the plaintiff-respondents on the decision of this Court in *Rai Krishan Saran v. State of U. P.*, (AIR 1957 All 455) in which the petitioners who filed the writ petition in the High Court maintained and operated a ferry in pursuance of a grant made by the East India Company in 1781. They had no interest in any of the lands. A

notification issued by the U. P. Government under the Zamindari Abolition Act declared that all private ferries except those mentioned therein vested in the State. On these facts it was held that rights of the petitioners to this ferry being independent of any lands which vested in the State by virtue of the notification under the Zamindari Abolition Act, the petitioners' right could not be termed 'the right of an intermediary' and therefore it would not be hit by the provisions of Section 6 (a) (i) of the Act. The ferry in question could not, therefore, vest in the State by virtue of the notification. In my opinion, this decision has no application to the facts of the present case. In this case the right of fishery was specifically conferred on the predecessors of the plaintiffs by virtue of their being under-proprietors after having sold their proprietary rights to Raja Kishun Dutt Ram. The same remarks apply to another decision of this Court in *Rai Prakash Narayan v. The State of U. P.*, (1959 RD 177) in which it was held that under Section 6 of the Zamindari Abolition Act the rights, title and interest of intermediaries in the estates have alone vested. Where, therefore, a particular ferry, as the one in dispute in that case is unconnected with any estate acquired under the Act, it will continue despite the acquisition of the zamindari under Section 4 of the Act, to belong to its previous owner and that sub-clause (i) of clause (a) of Section 6 will not entitle the State to claim that ferry.

9. It is then contended on behalf of the plaintiff-respondents that this right of fishery is saved to them under clause (aa) of Section 7 which provides that nothing contained in this Chapter shall in any way affect the right of any person being a Bhumidhar, Sirdar, Adhivasi, or Asami of any land, to continue to enjoy any easement or any similar right for the more beneficial enjoyment of the land, as he was enjoying on the date immediately preceding the date of vesting. In my opinion, this provision has no application to the facts of the present case. The right of fishery that has been claimed by the plaintiffs is not an easement or similar right for the mere beneficial enjoyment of the land. An unrestricted right to fishery for any purpose whatsoever including commercial purpose is claimed in this case by the plaintiffs. Obviously such a right cannot be said to be for the mere beneficial enjoyment of the land held by the plaintiffs as bhumidhars. This right like the right to realise customary dues on ceremonial occasions such as births and deaths from the raiyats cannot claim protection under Section 7 (aa) of the Zamindari Abolition Act.

10. Lastly it was argued that this right of fishery may be enjoyed by the

plaintiffs as a customary right since there is a mention of it in the *Wajibul-arz*. The *Wajibul-arz* which was prepared in the first Settlement on the basis of the decree passed by the Commissioner on Nov. 2, 1874 does not state that this right of fishery is available to the residents of this village irrespective of their being proprietors, under-proprietors or tenants. On the other hand, the *Wajibul-arz* only mentions the right of fishery of the predecessors of the plaintiffs on whom this right was conferred by the decree by virtue of their being under-proprietors after the sale of their proprietary rights to Raja Kishun Dutt Ram. Moreover, this alternative case based on customary right was definitely given up on behalf of the plaintiffs in the lower appellate court. A customary right, as claimed in this case, of fishery in the pond in question without any let or hindrance is also an unreasonable custom which is capable of destroying the very subject-matter of that right. Such an unreasonable custom cannot be recognised by law. This view finds support from two decisions of the Calcutta High Court in *Brajendra Kishore v. Ishwar Kaibarta*, (AIR 1933 Cal 539) and *Arjun v. Monoranjan De*, (AIR 1934 Cal 461). In the former case it was held that a claim to profits a prendre over the soil of another, such as a right to fish without stint and for commercial purposes, which might lead to the destruction of the subject-matter, is a claim of right unknown to law, and a custom which may be alleged to support it is bad and unreasonable. The same view was expressed in the latter case in which it was held that every custom sanctioned and upheld by the Courts must be reasonable. It is unreasonable when it throws an unusual burden on some for the benefit of others. It is also unreasonable if it would destroy the subject-matter of the right. A profit a prendre cannot therefore be supported on the ground of custom specially in favour of an indefinite and fluctuating body of persons, as it would result in the subject-matter being soon exhausted. It was also a case in which right of fishery was claimed on the basis of a custom.

11. A customary easement under Section 18 of the Easements Act like the right of pasturage in a plot of land in the village available to all the persons or a right to bury the dead bodies on a piece of land or to burn Holi on some land is a customary easement which is available to all the residents of the village irrespective of their being proprietors, under-proprietors, tenants or simply raiyats. Of course, such a right may be saved from being extinguished under Section 6 of the Zamindari Abolition Act and the persons who had been enjoying that right may continue to enjoy it under Section 7 (aa) of that Act. But this cannot be said in

respect of right of fishery as claimed in this case without any stint. The plaintiffs cannot therefore claim the right of fishery in this case as a customary easement or as a customary right also.

12. As a result of the above findings, the appeal is allowed. The decrees passed by the courts below are set aside and the plaintiff's suit is dismissed. But considering the circumstances of the case the parties shall bear their own costs throughout.

Appeal allowed.

AIR 1976 ALLAHABAD 47

(LUCKNOW BENCH)

JAGMOHAN LAL, J.

Ram Harsh Misra, Petitioner v. Sukhad Raj Singh and others, Respondents.

Election Petn. No. 3 of 1974, D/- 25-4-1975.

(A) Representation of the People Act (1951), Section 97 — Petitioner praying for setting aside respondent's election and also for declaring that petitioner himself had been elected — Respondent's failure to file recrimination petition under Section 97 — Effect.

Where an election petitioner prays for recount of votes on ground of breach of election rules, it cannot be said that there is no need for filing recrimination petition under Section 97 by the respondent when the recount has been asked for purpose of obtaining a declaration that successful candidate's election is void and a further declaration that the petitioner himself has been elected. AIR 1973 SC 2077, Followed (Para 26)

Due to non-compliance with Section 97, the successful candidate is precluded from giving evidence against the validity of petitioner's claim and hence, he cannot use the concession made on behalf of election-petitioner himself that some of the votes counted in his (petitioner's) favour are invalid votes, as evidence. The respondent cannot be allowed to challenge any of the ballot papers which have been counted as valid votes in petitioner's favour. AIR 1973 SC 2077, Followed; AIR 1965 All 454 (FB), held impliedly overruled by AIR 1973 SC 2077. (Paras 28, 32)

(B) Representation of the People Act (1951), Section 81 — Election petition — Mode of presentation.

Sub-section (1) of Section 81 as it now stands after repeal of sub-section (2) thereof, does not indicate that an election petition can be presented to the High Court by a candidate or elector in person and not through an authorised agent.

(Para 9E)

IS/JS/D542/75/VSS

The expression 'filing of any paper' in the Vakalatnama includes the presentation of election petition also. (Para 9-G)

Where an election petition has been handed over to the Bench Secretary of the Court under the direction of the Court by the Advocate of the petitioner in the immediate presence of the petitioner,

Held, that the presentation is quite valid. AIR 1969 SC 1024 and AIR 1974 SC 1185, Followed; 1960 All LJ 48 and 1963 All LJ 542, Rel. on. (Para 9-G)

(C) Representation of the People Act (1951), Section 81 (3) — Compliance of — What amounts to—Section 81 (3) does not speak about service of copy of election petition on respondent — Word "copy" — Meaning.

Sub-section (3) of Section 81 in terms only lays down a duty on the petitioner to file requisite number of copies of the election petition attested in the manner provided therein and it does not speak about the service of such copy on the respondent. If the petitioner has filed only as many copies as there are respondents in the election petition and no more and it is further proved that one of copies which had been served on one of the respondents was not attested in the manner provided in Section 81 (3), an inference of fact may be drawn that all the copies filed by the petitioner with his election petition were not attested in the manner required by law and as such compliance of Section 81 (3) had not been made. But if the petitioner has filed not only the requisite number of copies which are all duly attested but also some extra copies which may or may not be so attested, it will not make the election petition invalid under Section 81 (3). The filing of extra copies, whether duly attested or not, is only superfluous. In such a case if the office of the Court sends one of those extra copies to one of the respondents while it retains a duly attested copy of the record, the petitioner cannot be penalised for it by holding that he had not complied with the provisions of Section 81 (3). (Para 9-H)

Rule 6 of Chapter XV-A of the Allahabad High Court Rules provides that notice of election petition shall issue to the respondents by ordinary process and simultaneously by registered post. With each notice a copy of the election petition is also sent. The rule however does not provide as to who would prepare the extra copies which are to be sent to the respondents by registered post in addition to the requisite number of attested copies which a petitioner is under a legal obligation to file under Section 81 (3). The practice however is that those extra copies are also supplied by the petitioner. There is no legal requirement that those extra copies should also be

attested in the same manner as provided in Section 81 (3). (Para 9-I)

The word "copy" in sub-section (3) of Section 81 does not mean an absolutely exact copy, but means that the copy shall be so true that nobody can by any possibility misunderstand it. AIR 1964 SC 1545 and AIR 1964 SC 1027, Relied on. (Para 9-L)

The presence of original signature in the copy was sufficient to indicate that the copy was attested as a true copy even though the words "true copy" were not written above the signature in the copies and service of such a copy amounts to substantial compliance with Section 81 (3). AIR 1965 SC 815, Followed.

Held on facts and circumstances of the case that the election petition does not suffer from non-compliance of Section 81 (3). (Paras 9-H, 9-I, 9-K, 9-L, 9-M)

Cases Referred: Chronological Paras

AIR 1974 SC 1185 = (1974) 3 SCR 20 9-E
AIR 1973 SC 2077 = (1973) 3 SCR 1016

24, 28, 29, 31

AIR 1973 Punj 431 9-E

AIR 1969 SC 1024 = (1969) 3 SCR 392 9-B

AIR 1965 SC 815 = (1965) 1 SCR 38 9-M

AIR 1965 All 454 = 1965 All LJ 25 (FB) 29

AIR 1964 SC 1027 = (1964) 6 SCR 213 9-L, 9-M

AIR 1964 SC 1200 = (1964) 6 SCR 54 25, 29, 31, 32

AIR 1964 SC 1545 = (1964) 3 SCR 573 9-L

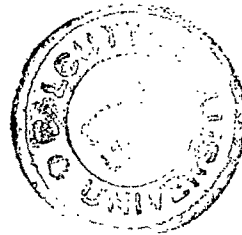
1963 All LJ 542 = ILR (1963) 1 All 619 9-F

(1961) 22 ELR 288 32

1960 All LJ 48 = 1960 All WR (HC) 61 9-D

ORDER:— This election petition has been filed by Ram Harsh Misra to challenge the election to the U. P. Legislative Assembly from Constituency No. 148 known as Mahsi Constituency District Bahraich that was held on 26-2-1974. This election was contested by the petitioner and the respondents Nos 1 to 9. The respondent No. 1 Sukhadraj Singh having secured the largest number of votes i.e., 16486 was declared elected. The petitioner lagged behind him by 33 votes having secured 16455 valid votes.

2. The election has been challenged mainly on the ground that the counting of votes was not done properly. It was alleged that the size of the counting tables was small and when ten counting agents one of each candidate and three members of the counting staff sat around it there was great overcrowding. It was not possible for the counting agents to watch the ballot papers closely and see if they were being properly sorted out and kept correctly in the trays meant for each candidate. The counting was also done



THE All India Reporter

1976

Andhra Pradesh High Court

AIR 1976 ANDHRA PRADESH 1 FULL BENCH

MADHAVA REDDY, GANGADHAEA
RAO AND JAYACHANDRA REDDY, JJ.

P. Venkataseshamma, Petitioner v.
The State of Andhra Pradesh and others,
Respondents.

Writ Petns. Nos. 3381, 3374, 3542,
3444, 3445, 3361 and 3306 of 1975, D/-
22-8-1975.

**(A) Constitution of India, Arts. 352,
226 — Proclamation of emergency cannot
be questioned in a Court of law.**

A proclamation to the effect that a grave emergency exists whereby the security of India or any part thereof is threatened, may be made by the President upon his own satisfaction. Whether or not there is a real emergency and whether the President was justified in making a proclamation under Article 352, is a matter which is not within the purview of the Court. The Proclamation of Emergency under Article 352 enjoys immunity from attack in a Court of law. AIR 1974 SC 306 = 1974 Cri LJ 690. Rel. on.

(Para 17)

**(B) Constitution of India, Arts. 359,
226 — Declaration made under Art. 359
(1) cannot be questioned in a Court of
law.**

A declaration made under Article 359 (1) cannot be questioned on the ground that it violates any of the rights conferred by Part III or on the ground that there is no emergency. When the existence of emergency itself cannot be questioned, the power exercised by the President in making a declaration under Article 359 (1) cannot also be questioned on the ground that the emergency does not exist. AIR 1968 SC 765 = 1968 Cri LJ 972. Rel. on.

(Para 18)

**(C) Constitution of India, Art. 359 —
Scope of power exercisable by President
under the Article and effect of declaration
made thereunder.**

A close reading of Article 359 would disclose that what is suspended is the right to move any Court for the enforcement of the specified rights conferred by Part III and not the rights themselves. The declaration does not empower the State to make any law or to take any executive action which is violative of the rights conferred by Part III of the Constitution. Hence even during the proclamation of emergency, if an enactment were found to be violative of any of the rights conferred by Part III of the Constitution, as are specified in the declaration that law would be void under Article 13 (2) of the Constitution. But even though the law, if permitted to be scrutinised by the Court is found to be void under Article 13 (2) for being in violation of the provisions contained in Part III of the Constitution, the Court cannot declare it to be so because the right of the person who has moved the court has been suspended by a declaration under Article 359 (1) made by the President for the period of Emergency. The distinction, if any, between the various provisions of Part III of the Constitution cannot be declared by any High Court as making any difference with regard to the right of a person to move the Court during the operation of the Proclamation under Article 359 (1) of the Constitution. As the petitioners' right to move the Court during the period when the declaration of the President under Article 359 (1) is in force is taken away, no pronouncement as to the invalidity of the Maintenance of Internal Security (Amendment) Ordinance (1975) and Maintenance of Internal Security (Second Amendment) Ordinance (1975) or the detention orders issued thereunder

could be made by any Court.

(Paras 29, 30, 31, 42, 70)

(D) Constitution of India, Part III — Nature and Contents of provisions in.

Notwithstanding the difference in the language employed in the various classes of articles occurring in Part III entitled Fundamental Rights, they confer rights on persons either positively or by prohibiting the State from taking certain legislative or executive action in violation of those articles. They cannot be construed as mere injunctions. They are "the most valuable rights." The difference in the language employed in conferring the right under the various articles contained in Part III of the Constitution is one of form and does not affect the content of the said right. Some of the rights are expressed in positive terms as conferring benefit on the citizens or persons in general. Some others are couched in language which are in the form of injunctions or admonitions to the State. Whatever may be the form of the various articles, they operate both as rights and injunctions, rights conferred on persons or citizens and injunctions operating against the State. Article 13 (2) declares that any law made in contravention of Part III would be void irrespective of whether it is in positive form conferring a right or in a negative form as injunctions to the State. All the articles in whatever language couched having regard to their content and having regard to Article 13, constitute both "Fundamental Rights and injunctions". So also must be the position with respect to Articles 21 and 22 which are in the form of admonitions to the State. When Articles 14, 21 and 22 address an injunction to the State and impose a duty on it they correspondingly confer rights on the citizen. The forbearance which the State must observe in view of these Articles of the Constitution vests the citizen with rights the object of which is the equal protection of laws and prohibition of preventive detention without service of grounds and affording of an opportunity to represent in accordance with law.

(Paras 49, 51, 52, 53)

(E) Constitution of India, Art. 359 (1) — Order of detention in violation of provisions of statute in question — Effect of declaration under Art. 359.

Where a detention is ordered in purported exercise of power vested under a particular statute and that order is shown to be in violation of the provisions of that statute or is mala fide or constitutes a colourable exercise of power, then notwithstanding the declaration under Article 359 (1) such a detention could be challenged in a Court of law. (Para 65)

(F) Constitution of India, Arts. 123, 368 — Maintenance of Internal Security

(Amendment) Ordinance (1975) and Maintenance of Internal Security (Second Amendment) Ordinance (1975) — Validity — Do not touch basic features of the Constitution.

The two impugned Ordinances do not seek to amend any provision of the Constitution and therefore cannot be said to be amending any basic feature of the Constitution. They only seek to amend the provisions of the Maintenance of Internal Security Act. The impugned Ordinances though violating the fundamental rights guaranteed under Articles 14, 21 and 22 do not amend any provision of Part III of the Constitution. In exercise of his Ordinance making power under Articles 123 (3) of the Constitution the President has only chosen to amend the Maintenance of Internal Security Act and has not touched any provision of the Constitution as such. (Para 66)

(G) Constitution of India, Art. 226 — Maintenance of Internal Security (Amendment) Ordinance (1975) and Maintenance of Internal Security (Second Amendment) Ordinance (1975) — Whether have taken away rights to file petition under Art. 226.

The impugned Ordinances do not expressly bar the jurisdiction of the High Court to entertain a petition under Article 226 of the Constitution challenging the validity of the detention order. It is still open to the detenu to move the Court to question the detention order so long as, in so doing, the detenu does not seek to enforce such of the rights conferred by Part III as are specified in the declaration under Art. 359 of the Constitution. The right to move the Court is taken away only to that limited extent. So long as there is a law authorising the detention and the detention is made in purported exercise of that power, the detenu may challenge the order of detention if such detention is in violation of the provisions of that law. In other words only the grounds of attack on the detention order are now restricted. It cannot be attacked as violative of such of the fundamental rights as are specified in the declaration. But no sooner the disability imposed by the declaration under clause (1) of Article 359 ceases to operate than the Ordinances would be exposed to attack that they are violative of the rights conferred by Part III. Thus the Ordinances by themselves do not wholly take away the right to challenge the order of detention. (Para 67)

Any complaint that a person is detained, although there are no grounds for detention or that the grounds are non-existent or unrelated, is really a complaint that it is an arbitrary exercise of power violative of Articles 14, 21 and 22

of the Constitution and cannot be upheld while a declaration under Article 359 (1) subsists. (Para 69)

(H) Constitution of India, Arts. 19, 21 — Andhra Pradesh Revenue Recovery Act (2 of 1864), Ss. 48, 49 — Validity.

Sections 48 and 49 of A. P. Revenue Recovery Act are neither invalid nor is the challenge to their validity on the ground that they violate Articles 19 and 21 of the Constitution entertainable by the High Court during the period of declaration under Article 359 (1). The warrant of arrest and detention issued in conformity with those provisions is also therefore immune from attack on that ground. AIR 1956 SC 20 = 1956 Cri LJ 129 and AIR 1957 SC 688 = 1957 Cri LJ 1032, Rel. on. (Paras 82, 83)

(I) Andhra Pradesh Revenue Recovery Act (2 of 1864), Ss. 48, 49 — Requirements of.

As to the requirements of Sections 48 and 49, firstly there should be an arrear of land revenue which cannot be liquidated by the sale of the property of the defaulter or of his surety and secondly the Collector should have reason to believe that the defaulter or his surety is wilfully withholding the payment of arrears or has been guilty of fraudulent conduct in order to evade payment. It is necessary that both those conditions be satisfied before the arrest of a defaulter of land revenue could be ordered. Once these two conditions are satisfied then a warrant of arrest may be issued and the defaulter imprisoned for the prescribed period. Even if the petitioners have no property, it follows that the arrears due from them cannot be liquidated by the sale of their property. What the section contemplates is not the existence but the non-existence of property of the defaulter by the sale of which the arrears of revenue can be liquidated. Where either because the defaulters do not have any property or because the defaulters own properties, but they cannot be brought to sale for some reasons, the result is the same that the arrears cannot be liquidated by the sale of the property of the defaulter. The first requirement of Section 48 must therefore be found to have been satisfied. W. P. No. 3802 of 1974, D/- 1-8-1974 (Andh. Pra.), Rel. on. (Paras 80, 90)

(J) Andhra Pradesh Revenue Recovery Act (2 of 1864), S. 48 — Satisfaction of authority.

From the mere fact that one of the two alternatives was not struck off from the prescribed pro forma of the warrant of arrest signed by the District Revenue Officer it cannot be said that the District Revenue Officer did not apply his mind in issuing

the order and has mechanically signed it when apart from signing the warrant of arrest the District Revenue Officer recorded in the order that the defaulters were wilfully withholding the payment of revenue. (Para 91)

(K) Andhra Pradesh Revenue Recovery Act (2 of 1864), Ss. 48, 49 — Notice to defaulter if necessary — Violation of principles of natural justice — (Constitution of India, Arts. 226, 14).

Sections 48 and 49 do not in terms lay down that before issuing a warrant for arrest and detention of a defaulter a notice must be issued to the defaulter. S. 48 is held to be not violative of any provision of the Constitution or otherwise ultra vires for not providing for a notice to the defaulter. When the Collector is enjoined to satisfy himself about the circumstances in which he can reasonably believe that the two conditions in S. 48 are satisfied, it cannot be said that the power vested in the Collector to take action under Sections 48 and 49 of the Act is arbitrary or violates the principles of natural justice merely because the defaulters are not given prior notice of the proposed action. AIR 1957 SC 688 = 1957 Cri LJ 1032, Rel. on. (Paras 92, 93)

Cases Referred: Chronological Paras

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K. G. Kannabhiraman, P. A. Chowdary for A. Panduranga Rao, K. Raghava Rao and C. Padmanabhareddy, for Petitioner; Advocate General and C. Obulpathi Chowdary for Public Prosecutor on behalf of all Respondents.

MADHAVA REDDY, J.:— The maintainability of these petitions under Art. 226 of the Constitution of India during the period in which proclamation of Emergency under Art. 352 and the declaration of the President of India under cl. (1) of Article 359 is in force and the validity of the amendments effected in the Maintenance of Internal Security Act 1971, by the two Amending Ordinances of 1975 arise for consideration in these Writ Petitions. Having regard to the general importance of these questions and the far reaching consequences of these amendments these petitions have been referred to a Full Bench.

2. The first of these writ petitions is for the release of an advocate of this Court, Sri P. Venkateswarlu, who was arrested and detained under the provisions of the Maintenance of Internal Security Act, 1971 hereinafter referred to as the 'Principal Act.'

3. Sri P. Venkateswarlu was arrested on the intervening night of 25/26th June, 1975 at 1-30 A. M. under Section 3 (1) (a) (ii) of the Maintenance of Internal Security Act, 1971. This writ petition was moved on the morning of his arrest along with a petition W. P. M. P. No. 5081 of 1975 praying for a direction to the State of Andhra Pradesh, the Inspector General of Police, Andhra Pradesh and the Commissioner of Police, Hyderabad City, the respondents herein, to permit him to attend to his work between 10-00 A. M. and 5-00 P. M. pending the disposal of the Writ Petition.

4. It was alleged that Sri P. Venkateswarlu was defending "the accused who have been implicated in what is called by the respondents as "Naxalite Movement". He had filed petitions for the issue of a Writ of Habeas Corpus for the release of some of them alleging that the respondents were torturing the arrested persons and the High Court was pleased to order the Inspector General of Police to file a counter with regard to those allegations. It is the case of the petitioner that as a sequel to this, Sri P. Venkateswarlu was arrested along with eleven others, who are all members of the Struggle Committee formed to save the lives of Bhoomaiah and Gista Gowd whose petition questioning the execution of the death sentence passed against them is

pending before this Court. Sri P. Venkateswarlu, who is a member of that Committee and Convenor of the Civil Liberties Committee had convened a national convention of all the opposition parties to be held on 6th July 1975 was arrested in order to prevent him from exercising his freedom and liberty in furtherance of a public cause. It is alleged that in these circumstances the detention of the petitioner is mala fide and a colourable exercise of power.

5. As it was also asserted that no grounds in fact existed and were placed before the detaining authority by the time Sri P. Venkateswarlu was arrested and detained, and as the learned Public Prosecutor was present in the Court to take notice of the petition vehemently asserted that that allegation was not true, the Court directed the Public Prosecutor to furnish a copy of the grounds of detention for the perusal of the Court the next day. The grounds of detention were accordingly placed before the Court. By the time the matter came up before the Court on 1st July, 1975 to which date the petition was adjourned, the President of India issued on 27-6-75 a proclamation of emergency under Article 352 of the Constitution of India. The text of the proclamation is as follows:—

"In the exercise of the powers conferred by clause (one) Article 352 of the Constitution, I, Fakhruddin Ali Ahmed, President of India, by this Proclamation declare that a grave emergency exists, whereby the security of India is threatened by internal disturbances."

6. On 30-6-1975, the President in exercise of the powers conferred on him by Clause (1) of Article 123 of the Constitution, promulgated an Ordinance called "the Maintenance of Internal Security (Amendment) Ordinance, 1975 hereinafter referred to as the "First Amendment Ordinance" under which certain provisions of the Principal Acts were to have effect subject to the amendments specified in the Ordinance and certain new provisions were either substituted or added in the Principal Act. The First Amendment Ordinance reads as follows:—

"The Maintenance of Internal Security (Amendment) Ordinance, 1975.

Promulgated by the President in the 26th year of the Republic of India.

An Ordinance further to amend the Maintenance of Internal Security Act, 1971.

Whereas a grave emergency exists whereby the security of India is threatened by external aggression and internal disturbance:

And whereas Parliament is not in Session and the President is satisfied that

circumstances exist which render it necessary for him to take immediate action.

Now, therefore in exercise of the powers conferred by Clause (1) of Article 123 of the Constitution, the President is pleased to promulgate the following Ordinance:

MISA AMENDMENT ORDINANCE:

1. (1) This Ordinance may be called the Maintenance of Internal Security (Amendment) Ordinance, 1975.

(2) It shall come into force at once.

2. During the period of operation of this Ordinance, the Maintenance of Internal Security Act, 1971 (hereinafter referred to as the Principal Act), shall have effect subject to the amendments specified in Sections 3, 4 and 5.

3. In Section 14 of the Principal Act, for sub-section (2) the following sub-section shall be substituted namely:

(2) The revocation of a detention order shall not bar the making of another detention order under Section 3 against the same person.

4. In Section 15 of the Principal Act after sub-section (5) the following sub-section shall be inserted namely:

"(6) Notwithstanding anything contained in any other law and save as otherwise provided in this section, no person against whom a detention order made under this Act is in force shall be released whether on bail bond or otherwise."

5. After Section 16 of the Principal Act, the following section shall be inserted, namely:

"16-A (1) Notwithstanding anything contained in this Act or any rules of natural justice, the provisions of this section shall have effect during the period of operation of the proclamation of Emergency issued under Clause (1) of Article 352 of the Constitution on the 3rd day of December, 1971 or the proclamation of Emergency issued under that clause on the 25th day of June, 1975 or a period of 12 months from the 25th day of June, 1975 whichever period is the shortest.

(2) The case of every person against whom an order of detention was made on or after the 25th day of June, 1975 but before the commencement of the Maintenance of Internal Security (Amendment) Ordinance, 1975 shall unless such person is sooner released from detention, be reviewed within 15 days from such commencement by the appropriate Government for the purpose of determining whether the detention of such person under this Act is necessary for dealing effectively with Emergency in respect of which the proclamations referred to in sub-section (1) have been issued (hereinafter in this section referred to as the Emergency) and if on such review, the

appropriate Government is satisfied that it is necessary to detain such person for effectively dealing with the Emergency, that Government may make a declaration to that effect and communicate a copy of the declaration to the person concerned.

(3) When making an order of detention under this Act against any person after the commencement of the Maintenance of Internal Security (Amendment) Ordinance, 1975 the Central Government or the State Government or as the case may be, the Officer making the order of detention shall consider whether the detention of such person under this Act is necessary for dealing effectively with the Emergency and if, on such consideration, the Central Government or, as the case may be, the State Government or the officer is satisfied that it is necessary to detain such person for effectively dealing with the Emergency that Government or officer may make a declaration to that effect and communicate a copy of the declaration to the person concerned."

7. The President of India issued another proclamation under Clause (1) of Article 359 of the Constitution of India on 1st July, 1975 which reads as follows:—

"EMERGENCY" - PRESIDENT'S ORDER REGARDING SUSPENSION OF THE RIGHTS UNDER ARTICLES 14, 21, AND 22 OF THE CONSTITUTION OF INDIA.
(G. O. Rt. No. 1650, General Administration (SC. D) 1st July, 1975)

The following order of the President of India, is republished:—

"G. S. R. 361 (E):— In exercise of the powers conferred by clause (1) of Article 359 of the Constitution the President hereby declares that the right of any person (including a foreigner) to move any court for the enforcement of the rights conferred by Article 14, Articles 21 and 22 of the Constitution and all proceedings pending in any court for the enforcement of the above mentioned rights shall remain suspended for the period during which the proclamation of emergency made under clause (1) of Article 352 of the Constitution on the third December, 1971; and on the 25th June, 1975 are both in force.

This order shall extend to the whole of the territory of India except the State of Jammu and Kashmir.

This order shall be in addition to and not in derogation of any order made before the date of this order under clause (1) of Article 359 of the Constitution."

8. At the adjourned date of hearing of the case the respondents stated that the grounds of detention were not served on the detenu who was detained under the provisions of the Principal Act and they took the stand that they are not re-

quired to serve the grounds of detention having regard to the declaration of Emergency and the subsequent change in law. It was also pointed out that the detenu's right to move the Court for enforcement of any of the rights conferred by Articles 14, 19, 21 and 22 of the Constitution was taken away and on that basis a preliminary objection to the maintainability of the Writ Petition in the altered circumstances was raised.

9. Mr. Kannabhiraman, learned counsel for the petitioner, took time and raised additional grounds questioning the validity of the declaration under Cl. (1) of Article 359 of the Constitution and the validity of the First Amendment Ordinance in general and in particular clause (5) thereof by which Section 16-A was introduced in the Principal Act. It is contended that this Amendment Ordinance is ultra vires of the powers vested in the President under Article 123 of the Constitution. This amendment 'tampers with the basic structures or the forms of the Constitution' and is, therefore, void. It is also violative of the right conferred on a person by Article 226 of the Constitution for, in effect the right of the detenu to move the Court is taken away. It was also contended therein that even the provisions of the amended ordinance have not been complied with in detaining the detenu and hence the detention was illegal and void.

10. In the counter-affidavit filed on behalf of the respondents on 8th July, 1975 allegations of mala fides and exercise of the power in arresting and detaining Sri P. Venkateswarlu being in colourable (exercise) was denied. It was further stated that the detention of the petitioner had nothing to do with his entering appearance in Courts for certain accused or with any of his activities relating to the convening of a meeting for protesting against the execution of the death sentences of Bhoomaiah and Kista Gowd. The exercise of the power of detention was said to be based on the satisfaction reached by the Commissioner of Police that Sri P. Venkateswarlu was acting in a manner prejudicial to the maintenance of public order and that his detention was necessary particularly during the Emergency declared by the President of India on 25-6-1975. In view of the declaration, made by the President under clause (1) of Article 359 suspending the right of a person to move for the enforcement of the rights conferred by Articles 14, 21 and 22 the writ petition was not maintainable. The First Amendment Ordinance is not invalid on any ground and that under the provisions of the Principal Act as amended by the Ordinance, the respondents were not bound to serve the grounds for

detention either during the period of review or during the period when the declaration under Section 16-A is in force.

It was also contended that Sec. 16-A does not amend any provisions of the Constitution, much less does it alter its basic structure or form. In any event, the petitioner has no right to move the Court for his release so long as the declaration of the President under Clause (1) of Article 359 of the Constitution suspending the right to move the court for enforcement of the rights conferred under Articles 14, 21 and 22 lasts.

11. Writ Petition No. 3374 of 1975 was filed for the release of Sri Gottipati Murali Mohan, another Advocate, who was also arrested and detained in the Central Jail, Rajahmundry on 25th June, 1975 under Section 3 (1) (a) (ii) of the Principal Act. Writ Petition No. 3642 of 1975 also is a petition for a writ of Habeas Corpus for the release of Tarimella Ramadoss Reddy, an advocate practising at Anantapur who has been detained by an order of the District Magistrate, Anantapur dated 26-6-1975 made under Section 3 (1) (a) (ii) and (iii) of the Maintenance of Internal Security Act, 1971. These writ petitions also raise the same grounds as the first one.

12. By the time these writ petitions came up before the Full Bench the Principal Act was further amended by the President of India in exercise of the powers conferred on him under Article 123 (3) of the Constitution, on 15th July, 1975 by issuing the Maintenance of Internal Security (2nd Amendment) Ordinance, 1975 hereinafter referred to as the Second Amendment Ordinance. In particular this Ordinance declares that Sections 8 to 12 of the Principal Act shall not apply in the case of persons detained under a detention order to which sub-section (2) of Section 16-A of the Act applied. A new section was also introduced declaring that no person detained under the Act shall have any right to personal liberty by virtue of natural law or common law if any. The Second Amendment Ordinance reads as follows:

"1. (1) This Ordinance may be called the Maintenance of Internal Security (Second Amendment) Ordinance, 1975.

(2) Section 6 shall be deemed to have come into force on the 25th day of June, 1975 and the remaining provisions of this Ordinance shall be deemed to have come into force on 29th day of June, 1975.

2. In Section 4 of the Maintenance of Internal Security Act, 1971 (hereinafter referred to as the Principal Act) for the words and figures 'Code of Criminal Procedure, 1898' the words and figures 'Code of Criminal Procedure, 1973' shall be substituted.

3. In Section 7 of the Principal Act—

(a) In clause (A) for sub-section (1) for the words and figures 'Presidency Magistrate or a Magistrate of the First Class having jurisdiction in the place where the said person ordinarily resides and thereupon the provisions of Sections 87, 88 and 89 of the Code of Criminal Procedure, 1898' the words, figures and brackets 'Metropolitan Magistrate or a Judicial Magistrate of the First Class having jurisdiction in the place where the said person ordinarily resides and thereupon the provisions of Sections 82 to 86 (both inclusive) of the Code of the Criminal Procedure 1973, shall be substituted.

(b) In sub-section (2) for the words and figures 'Code of Criminal Procedure 1898, the words and figures 'Code of Criminal Procedure, 1973' shall be substituted.

4. In Section 15 of the Principal Act after sub-section (3) the following sub-section shall be inserted, namely:— (3-A) If the appropriate Government has reason to believe that any person who has failed to surrender himself in the manner specified in sub-section (3) has absconded or is concealing himself that Government may make a report in writing of the fact to a Metropolitan Magistrate or a Judicial Magistrate of the First Class having jurisdiction in the place where the said person ordinarily resides and thereupon the provisions of Sections 82 to 86 (both inclusive) of the Code of Criminal Procedure, 1973 shall apply in relation to such person as they apply in relation to a person who has absconded or is concealing himself so that a warrant issued by the Magistrate cannot be executed.

5. In Section 16-A of the Principal Act inserted therein by the Maintenance of Internal Security (Amendment) Ordinance 1975:—

(a) In sub-section (2) for the words 'every person against whom an order of detention was made' the words and brackets 'Every person (including a foreigner) against whom an order of detention was made under this Act' shall be substituted.

(b) In sub-section (3) after the words "An order of detention under this Act against any person" the brackets and words "(including a foreigner)" shall be inserted.

(6) In the case of every person detained under a detention order to which the provisions of sub-section (2) apply being a person the review of whose case is pending under that sub-section or in respect of whom a declaration has been made in that sub-section:—

(i) Sections 8 to 12 shall not apply and

(ii) Section 13 shall apply subject to the modification that the words and figu-

res which has been confirmed under Section 12 shall be omitted.

(7) In the case of every person detained under a detention order to which the provision of sub-section (3) apply being a person in respect of whom a declaration has been made under that sub-section:

(i) Section 3 shall apply subject to the modification that for sub-sections (3) and (4) thereof the following sub-section shall be substituted, namely:—

(3) When any order of detention is made by a State Government or by an officer subordinate to it the State Government shall within twenty days forward to the Central Government a report in respect of the order."

(ii) Sections 8 to 12 shall not apply and

(iii) Section 13 shall apply subject to the modification that the words and figures 'which has been confirmed under Section 12' shall be omitted.

6. Section 18 of the Principal Act shall be renumbered as Section 19 thereof and before that section as so renumbered the following section shall be inserted namely:—

Exclusion of 18. No person (including a common law or Foreigner) detained under Natural law this Act shall have any Rights, if any, right to personal liberty by virtue of natural law or common law if any.

7. Anything done or any action taken under the Principal Act as amended by the Maintenance of Internal Security (Amendment) Ordinance, 1975 shall be deemed to have been done or taken under the Principal Act as amended by that Ordinance and this Ordinance."

13. The validity of this Ordinance also is impugned on the same grounds as the first one. It was also faintly urged that the proclamation of Emergency under Art. 352 was not warranted and that the declaration under clause (1) of Article 359 is invalid.

14. On behalf of the respondents, the petitioners' right to move the Court and the maintainability of all these petitions is challenged.

15. The preliminary objection raised to the maintainability of these writ petitions require the consideration of the following questions:

(1) Whether the proclamation of Emergency under Cl. (1) of Article 352 of the Constitution can be called in question in a Court of Law?

(2) Whether the declaration made by the President under Clause (1) of Article 359 of the Constitution suspending the right to move a Court for enforcement of the rights conferred by Articles 14, 21

and 22 of the Constitution can be challenged in any court of law?

(3) Whether the Maintenance of Internal Security (Amendment) Ordinance 1975 is valid in law and whether its validity can be questioned during the period of Emergency when the declaration under cl. (1) of Article 359 of the Constitution is in force?

(4) Whether the Maintenance of Internal Security (Second Amendment) Ordinance 1975 is valid in law and can be questioned during the period of Emergency when the declaration under clause (1) of Article 359 of the Constitution is in force?

(5) Whether, during the continuance of the Emergency and declaration under cl. (1) of Article 359, the High Court is precluded from entertaining any petition complaining of illegal arrest and detention and from directing release of such person?

16. Article 352 of the Constitution of India confers powers on the President to declare that a grave Emergency exists whereby the security of India or any part of the territory thereof is threatened by war or external aggression or internal disturbances. Such a declaration may be made by proclamation upon his satisfaction to that effect. Article 352, in so far as it is relevant for the present purpose reads as follows:—

"352 (1) If the President is satisfied that a grave Emergency exists whereby the security of India or of any part of the territory thereof is threatened, by war or external aggression or internal disturbance he may, by proclamation, make a declaration to that effect.

(2) A proclamation issued under clause (1)—

(a) may be revoked by a subsequent proclamation;

(b) shall be laid before each House of Parliament;

(c) shall cease to operate at the expiration of two months..... that period it has been approved by resolutions of both Houses of Parliament:

Provided that if any such Proclamation is issued at a time when the House of the People has been dissolved or the dissolution of the House of the People takes place during the period of two months referred to in sub-clause (c), and if a resolution approving the proclamation has been passed by the Council of States, but no resolution with respect to such Proclamation has been passed by the House of the People before the expiration of that period, the proclamation shall cease to operate at the expiration of thirty days from the date on which the House of the People first sits after its re-constitution unless before the expiration

of the said period of thirty days a resolution approving the Proclamation has been also passed by the House of the People.

(3) Proclamation of Emergency declaring that the security of India or of any part of the territory thereof is threatened by war or by external aggression or by internal disturbance may be made before the actual occurrence of war or of any such aggression or disturbance if the President is satisfied that there is imminent danger thereof."

Upon such a proclamation being made, the provisions of Article 19 of the Constitution stand suspended by virtue of Article 358 of the Constitution. Article 358 reads as follows:

"358. While a Proclamation of Emergency is in operation, nothing in Article 19 shall restrict the power of the State as defined in Part III to make any law or to take any executive action which the State would but for the provisions contained in that Part be competent to make or to take, but any law so made shall, to the extent of the incompetency cease to have effect as soon as the proclamation ceases to operate, except as respects things done or omitted to be done before the law so ceases to have effect."

Under clause (1) of Article 359, further power to suspend the enforcement of all or any of the rights conferred by Part III of the Constitution during the period of Emergency is vested in the President by making a declaration to that effect. Article 359 reads as follows:—

"359 (1) While a Proclamation of Emergency is in operation, the President may by order declare that the right to move any court for the enforcement of such of the rights conferred by Part III as may be mentioned in the order and all proceedings pending in any court for the enforcement of the rights so mentioned shall remain suspended for the period during which the Proclamation is in force or for such shorter period as may be specified in the order.

(2) An order made as aforesaid may extend to the whole or any part of the territory of India.

(3) Every order made under clause (1) shall, as soon as may be after it is made, be laid before each House of Parliament."

17. The Emergency itself may be declared whenever the security of India or any part thereof is threatened either by war or external aggression or by internal disturbances. Thus, the power to declare an Emergency expressly conferred by Art. 352, when exercised, automatically results in the suspension of the provisions of Art. 19 by virtue of what is contained in Article 359. Having regard to the circumstances prevailing within the territory of India, the President may

suspend the enforcement of the rights conferred by Part III of the Constitution or any of the rights mentioned therein. If the President chooses to make a declaration under Article 359 (1) the right to seek enforcement of such other rights as are conferred by Part III of the Constitution and which are referred to in the declaration made under Art. 359 (1) is also taken away either for the whole of the period of Emergency or such shorter period as may be specified in the declaration. But a proclamation to the effect that a grave Emergency exists whereby the security of India or any part thereof is threatened, may be made by the President upon his own satisfaction. Whether or not there is a real emergency and whether the President was justified in making a proclamation under Article 352 is a matter which is not within the purview of the Court. Any proclamation of Emergency made by the President under Article 352 (1) is required to be laid under Art. 352 (2) (b) before each House of Parliament and in view of clause (c) thereof, unless approved by resolution of both Houses of Parliament, it ceases to operate at the expiration of two months.

A declaration made by the President under clause (1) of Art. 359 is also required to be laid, as soon as may be, before each House of Parliament. The declaration under Article 359 (1) lapses on the expiration of the period of Emergency or such shorter period as is specified therein. It cannot outlive the emergency. The intention of the Constitution-makers is thus evident that the right to move a Court for enforcement of the rights conferred by Part III should in no case last a minute beyond the period of Emergency itself. In *Bhut Nath v. State of West Bengal*, AIR 1974 SC 806 = (1974 Cri LJ 690) where it was contended that "the detention of the petitioner therein was arbitrary and may continue indefinitely if the proclamation of emergency becomes a constant fact of constitutional life and must therefore be regarded as unconstitutional", the Supreme Court declared,

"we have to reject summarily the last submission as falling outside the orbit of judicial control and wandering into the para-political sector. It was argued that there was no real emergency and yet the Proclamation remained unretracted with consequential peril to fundamental rights. In our view, this is a political, not justiciable issue and the appeal should be to the polls and not to the courts. The traditional view, sanctified largely by some American decisions, that political questions fall outside the area of judicial review, is not a constitutional taboo but a pragmatic response of the Court to the reality of the inadequacy to decide such

issues and to the scheme of the Constitution which has assigned to each branch of Government in the larger sense a certain jurisdiction. x x x

x x x
True, an emergency puts a broad blanket blind folding of the seven liberties of Article 19 and its baseless prolongation may devalue democracy. That is a political matter de hors our ken, for the validity of the proclamation turns on the subjective satisfaction of the President that a grave emergency, of the kind mentioned in Part XVIII or its imminent danger exists."

It was further observed:

"But this large and sensitive debate about the Court's power hardly arises here because basically it is a matter least fit for adjudication by judicial methods and materials and clearly the onus of establishing the effective end of emergency and absence of any grounds whatever for the subjective satisfaction of the President, heavy as it is, has hardly been discharged. Academic exercises in constitutional law are not for courts but jurists and we decline to hold the continuance of emergency void."

In view of the above pronouncement of the Supreme Court, it is futile to contend before a court of law that the declaration of Emergency under Article 352 of the Constitution is unwarranted in the circumstances. The Proclamation of Emergency under Article 352 enjoys immunity from attack in a Court of law.

18. It was, next submitted that the declaration made by the President under Clause (1) of Article 359 could always be questioned as not warranted in the present situation of the country. Reliance for this contention was placed upon the judgment of the learned Chief Justice Ghulam Sarwar v. Union of India, AIR 1967 SC 1335. In that case, distinguishing what was stated in *Mohan Chowdury v. Chief Commissioner, Union Territory of Tripura*, AIR 1964 SC 173, at p. 177 the Court held that the validity of the President's order issued under Article 359 (1) of the Constitution could be questioned if it infringed the provisions of Article 14 of the Constitution. The position in this behalf however, was reconsidered in *Mohd. Yaqub v. State of J. & K.*, AIR 1968 SC 765 by a later Constitution Bench of the Supreme Court comprising of seven Judges including Hidayatullah, J., who was a party to the earlier decision in *Ghulam Sarwar v. Union of India*, AIR 1967 SC 1335, and the Supreme Court observed at p. 768:—

"It will be seen from the terms of Article 359 that it gives categorical powers to the President during the period when a Proclamation of Emergency is in operation to suspend the enforcement of

any of the fundamental rights conferred by Part III. It is for the President to decide the enforcement of which of the fundamental rights should be suspended during the operation of the Proclamation of Emergency. There is nothing in Art. 359 which in any way limits the power of the President to suspend the enforcement of any of the fundamental rights conferred by Part III. It is to our mind quite clear that the President has the power to suspend the enforcement of any of the fundamental rights conferred by Part III and there is nothing thereunder which makes any distinction between one fundamental right or another. As Article 359 stands, it seems to us, it clearly envisages that once a Proclamation of Emergency has been issued, the security of India or any part of the territory thereof may require that the President should suspend the enforcement of any of the fundamental rights conferred by Part III. There is in our opinion no scope for inquiry into the question whether the fundamental right the enforcement of which the President has suspended under Article 359 has anything to do with the security of India which is threatened whether by war or external aggression or internal disturbance, for Article 359 posits that it may be necessary for the President to suspend any of the fundamental rights in Part III for the sake of the security of India. There is thus a basic assumption in Article 359 that it may be necessary for the President to suspend the enforcement of any of the fundamental rights conferred by Part III in the interest of the security of India. If he considers that necessary, it is unnecessary in the face of that basic assumption to inquire whether enforcement of a particular fundamental right suspended by the President has anything to do with the security of India, for that is implicit in Article 359. It follows therefore that it is open to the President to suspend the enforcement of any of the fundamental rights conferred by Part III by an order under Article 359 and this Article shows that wherever such suspension is made it is in the interest of the security of India and no further proof of it is necessary."

The court then, dealing with the question whether an order made under Article 359 is a law made by a State within the meaning of Article 13 (2) of the Constitution and has therefore to be tested under Part III of the Constitution held:

"If the order is a law within the meaning of Article 13 (2), the result would be that though the order says that the enforcement of a particular fundamental right is suspended during the period of emergency the order can still be tested with the aid of Art. 13 (2) on the anvil of

the same fundamental right, the enforcement of which it suspends. That would, in our opinion, result in making Art. 359 completely nugatory, for then a declaration made thereunder that the enforcement of certain fundamental rights is suspended during the period of Emergency would have no meaning whatsoever. Therefore, applying the principle of harmonious construction we are of opinion that an order passed under Article 359 cannot be law for the purpose of Article 13 (2) assuming it to be law in its widest sense. It follows therefore that an order under Article 359 derives its force from Article 359 itself and takes effect in accordance with its tenor and cannot be affected by Article 13 (2) and cannot be tested under any of the provisions of Part III of the Constitution which it suspends."

Repelling the contention that an order making an unjustified discrimination in suspending the right to move a court under Article 14 would be void at its inception and would be a still-born order, which contention was upheld in *Ghulam Sarwar v. Union of India*, AIR 1967 SC 1335 = (1967 Cri LJ 1204) the Supreme Court in *Mohd. Yaqub v. State of J. & K.*, AIR 1968 SC 765 = (1968 Cri LJ 972) held:

"We must say with greatest respect that it is rather difficult to understand how an order under Article 359 which suspends the enforcement of a fundamental right can be tested under that very fundamental right. x x x

x x x That would in our opinion be arguing in a circle and make Article 359 completely nugatory. It seems that the majority in *Gulam Sarwar's case* (AIR 1967 SC 1335) was also conscious of the fact that the reasoning on which it came to the conclusion that an order made under Article 359 could be tested under Article 14, though it suspended that Article, was open to the criticism that it was an argument in a circle."

The learned Judges then proceeded to observe that it was difficult to appreciate the reasoning and the distinction on which the decision in *Ghulam Sarwar v. Union of India*, AIR 1967 SC 1335 = (1967 Cri LJ 1204) was based, and held:

"It seems to us that if Article 359 is to have any meaning at all, and is not to be wiped out from the Constitution, an order passed thereunder suspending a fundamental right cannot possibly be tested under that very fundamental right which it suspends. If that were permissible no order under Art. 359 could really be passed. If Article 359 is not to be rendered nugatory, it must be held that an order passed thereunder cannot be tested under the very fundamental right the en-

forcement of which it suspends. We must therefore respectfully differ from the view taken in Ghulam Sarwar's case, AIR 1967 SC 1335 = (1967 Cri LJ 1204) and hold that an order passed under Article 359 (1) cannot be tested with the aid of Article 13 (2) under that very fundamental right the enforcement of which it suspends."

Hidayatullah, J. who was a concurring party to the judgment in Ghulam Sarwar's case, AIR 1967 SC 1335 = (1967 Cri LJ 1204) "that the judgment of Subba Rao, C. J. in Ghulam Sarwar's case, AIR 1967 SC 1335 = (1967 Cri LJ 1204), had expressed itself somewhat unhappily on the point on which it had been overruled in the judgment then delivered." But at the same time, he was of the view that the judgment in Mohd. Yaqub v. State of J. & K., AIR 1968 SC 765 = (1968 Cri LJ 972) also suffers from a width of language in the other direction. Be that as it may. The Supreme Court of India has thus authoritatively laid down that a declaration made under Article 359 (1) cannot be questioned on the ground that it violates any of the rights conferred by Part III or on the ground that there is no emergency. When the existence of Emergency itself cannot be questioned, the power exercised by the President in making a declaration under clause (1) of Article 359 cannot also be questioned on the ground that the emergency does not exist. Earlier, in Makhan Singh v. State of Punjab, AIR 1964 SC 381 = (1964-1 Cri LJ 269), the Supreme Court dealing with the Presidential order of 3rd November, 1962 issued under Article 359 (1) observed:

"The power conferred on the President by Article 359 (1) is wide enough to enable him to make an order applicable to all parts of the country and to all citizens and in respect of any of the rights conferred by Part III."

Having regard to the above pronouncements of the Supreme Court, it must be held that neither the proclamation of emergency under Art. 352 (1) of the Constitution nor the declaration of the President that the right to move courts for enforcement of any of the fundamental rights conferred by Part III of the Constitution is suspended, can be questioned in a Court of law. The proclamation of the President dated 25th June, 1975 issued under Art. 352 as well as the declaration of the President made under clause (1) of Article 359 on 30th June, 1975 are, therefore, immune from attack.

19. We may now turn to the principal contentions of the parties as to the invalidity of the Amending Ordinances and the maintainability of these petitions in view of the proclamation of Emergency under Article 352 of the Constitu-

tion and the declaration of the President suspending the right to enforce any of the rights conferred by Articles 14, 21 and 22 of the Constitution.

20. The first three petitions which deal with detentions under the Maintenance of Internal Security Act are preventive detentions. The other petitions are in pursuance of warrants of arrests issued under Sections 48 and 49 of the Andhra Pradesh Revenue Recovery Act, the provisions of which are said to be violative of Articles 19 and 21 of the Constitution. We will first address ourselves to the cases of preventive detentions.

21. Articles 21 and 22 of the Constitution of India provide for protection against arrest and detention in a manner that does not admit of legal justification. Any law authorising preventive detention which violates the provisions of Articles 21 and 22 would be void in view of Article 13 (2) of the Constitution. These articles lay down that no person shall be deprived of his personal liberty except according to the procedure established by law. Any law relating to preventive detention must in addition provide for communicating the grounds for detention and for affording the detenu the earliest opportunity of making a representation against that order. Under Clause 7 of Article 22, the Parliament is empowered to make laws prescribing the circumstances under which and the class or classes of cases in which a person may be detained for a period longer than three months without obtaining the opinion of the Advisory Board and also provide for the maximum period for which any person may be detained under such law.

The Maintenance of Internal Security Act, 1971 is one of the laws providing for preventive detention. It authorises the State and Central Governments to detain any person (including a foreigner) upon their satisfaction with respect to that person that with a view to preventing him from acting in any manner prejudicial to (i) the Defence of India, the relations of India with foreign powers, or the security of India, or (ii) the security of the State or maintenance of public order, or (iii) the maintenance of supplies and services essential to the community. At the same time it provides for various safeguards against arbitrary exercise of the power vested thereunder so that the law is not violative of fundamental rights guaranteed to a citizen under Articles 14, 21 and 22 of the Constitution of India. The Act as it stood, prior to its amendment by the First Amendment Ordinance and the Second Amendment Ordinance which are impugned in these writ petitions inter alia provided for this power of detention being exercised by high officials of the

State like District Magistrates, Additional District Magistrates specially empowered in this behalf by the State Government and Commissioners of Police upon their being satisfied with regard to the necessity of detaining a person to prevent him from acting in a prejudicial manner as specified in Section 3 (1) (a) and (b) of the Act. Sub-section (3) of Section 3 of the Act makes a further provision for reporting the fact of detention of a person to the Government forthwith along with such particulars as have a bearing on the matter. That order would be in force for not more than 12 days unless in the meantime it is upheld by the State Government.

A further safeguard is provided in Section 8 by making it obligatory for the detaining authority to communicate the grounds for detention, ordinarily within five days and in exceptional circumstances and for reasons to be recorded in writing not later than 15 days from the date of detention. The State Government is required to report the fact of detention to the Central Government within seven days together with the grounds on which the order of detention is based. The detenu is required to be afforded the fullest opportunity of making a representation against the order to the appropriate Government.

22. Section 9 of the Act directs constitution of Advisory Boards comprising of persons who are qualified to be appointed as Judges of a High Court and the Chairman of such an Advisory Board is to be a person who is or has been a Judge of a High Court. The cases of all detenus are required to be placed before such an Advisory Board within 30 days from the date of the detention together with a representation made by the person detained and the report of the Officer who has ordered the detention. The Advisory Board is empowered to call for such further information as may be deemed necessary both from the Government and the person detained and if the detenu concerned desires to be heard, hear him and submit a report to the appropriate Government within ten weeks. The Advisory Board is empowered to submit its opinion as to whether or not there is sufficient cause for the detention of the person concerned. If the Advisory Board opines that there is no sufficient cause for detention the appropriate Government is bound to revoke the detention order and cause the person to be released forthwith. In case the detention order is confirmed, Section 13 of the Act stipulates 12 months as the maximum period of detention.

Among others, sub-section (2) of Section 14 of the Act provides for making a fresh detention order under Section 3 on

the revocation or expiry of the previous detention order only upon fresh facts having arisen after the revocation or the expiry of the earlier detention order. Section 15 enables the appropriate Government to temporarily release the persons detained under the Act. In the case of the foreigners detained under the Act certain special provisions are made which it is not necessary to notice for the present purpose. Having regard to these several safeguards, the Maintenance of Internal Security Act which authorises preventive detention is found to be not violative of any of the fundamental rights guaranteed under the Constitution of India and in particular Articles 14, 21 and 22. The two impugned Ordinances make extensive inroads into these safeguards which constitute the bulwark against the arbitrary exercise of the power of preventive detention vested in several authorities subordinate to the State and Central Governments.

23. Clause 2 of the First Amendment Ordinance declares that during the period of operation of this ordinance, Sections 3, 4 and 5 of the Maintenance of Internal Security Act, 1971 shall have effect subject to the amendments specified in the Ordinance. As already noticed, Section 3 of the Act empowers certain persons to make orders of detention upon the satisfaction of certain authorities with respect to the matters mentioned in Section 3 (a) of the Act viz., that with a view to prevent such a person from acting in a manner prejudicial to the defence of India, the relations of India with foreign powers or the security of India or the Security of the State or the maintenance of public order or the maintenance of supplies and services essential to the community, it is necessary to detain such a person. Section 4 of the Act provides for execution of the detention order and Section 5 vests the power to regulate the place and conditions of detention.

24. Amendment to Section 14 of the Principal Act effected by Clause 3 of the Second Amendment Ordinance substitutes sub-section (2) of the Section 14 as follows:—

"The revocation of detention order shall not bar the making of another detention order under Section 3 against the same person."

Thus the bar imposed by sub-section (2) of Section 14 of the Principal Act against the detention of a person on the very same grounds after the expiry or revocation of the earlier detention order unless some fresh facts had arisen after the revocation or expiry of the earlier detention order no longer stands in the way of the Detaining Authority. The amended sub-section (2) empowers the detention of a

person by a fresh detention order on the very same grounds. Section 15 empowers the appropriate Government to direct the release of the persons detained under the Act with or without imposing conditions. This power is taken away by the insertion of sub-section (6) in Section 15 of the Principal Act under the Second Amendment Ordinance which reads as follows:—

"(6) Notwithstanding anything contained in any other law and save as otherwise provided in this section, no person against whom a detention order made under this Act is in force shall be released whether on bail bond or otherwise."

However justified the circumstances may be, no person can now be released on bail or otherwise so long as the detention order subsists. A major change in the Principal Act is introduced by the insertion of Section 16-A after Section 16. This new Section 16-A reads as follows:—

"16-A. (1) Notwithstanding anything contained in this Act or any rules of natural justice, the provisions of this section shall have effect during the period of operation of the proclamation of Emergency issued under Clause (1) of Article 352 of the Constitution on the 3rd day of December, 1971, or the proclamation of Emergency issued under that clause on the 25th day of June, 1975, or a period of 12 months from the 25th day of June, 1975 whichever period is the shortest.

(2) The case of every person against whom an order of detention was made on or after 25th day of June, 1975, but before the commencement of the Maintenance of Internal Security (Amendment) Ordinance, 1975, shall unless such person is sooner released from detention, be reviewed within 15 days from such commencement by the appropriate Government for the purpose of determining whether the detention of such person under this Act is necessary for dealing effectively with the Emergency in respect of which the proclamations referred to in sub-section (1) have been issued (hereinafter in this section referred to as the Emergency) and if on such review, the appropriate Government is satisfied that it is necessary to detain such person for effectively dealing with the Emergency, that Government may make a declaration to that effect and communicate a copy of the declaration to the person concerned:

Provided that where such declaration is made by an officer, it shall be reviewed by the State Government to which such officer is subordinate within 15 days from the date of making of the declaration and such declaration shall cease to have effect unless it is confirmed by the State Government, after such review, within the said period of 15 days.

(4) The question whether the detention of any person in respect of whom a declaration has been made under sub-section (2) or sub-section (1) continues to be necessary for effectively dealing with the Emergency shall be reconsidered by the appropriate Government within four months from the date of such declaration and thereafter at intervals not exceeding four months and if, on such reconsideration, it appears to the appropriate Government that the detention of the person is no longer necessary for effectively dealing with the Emergency that Government may revoke the declaration.

(5) In making any review, consideration or reconsideration under sub-section (2), (3) or (4) the appropriate Government or officer considers it to be against the public interest to do otherwise, act on the basis of the information and materials in its or his possession without disclosing the facts or giving an opportunity to the person concerned.

(6) It shall not be necessary.

(a) to disclose to any person detained under a detention order to which the provisions of sub-section (2) apply, the grounds on which the order has been made during the period with which his case may be reviewed under that sub-section and when on such review, a declaration has been made in respect of such person under that sub-section, also during the period when such declaration is in force.

(b) to disclose to any person detained under a detention order to which the provisions of sub-section (3) apply the grounds on which the order has been made during the period the declaration made in respect of such person under that sub-section is in force, and, accordingly, such periods shall not be taken into account for the purposes of Section 8.

(7) in the case of every person detained under a detention order to which the provisions of sub-section (2) or sub-section (3) apply and in respect of whom a declaration has been made thereunder, the period during which such declaration is in force shall not be taken into account for the purposes of computing the periods mentioned in Section 10 or Section 11."

This provision overrides not only all the other provisions of the Act but also the rules of natural justice that have been held to govern matters relating to the detention of persons without trial for an extensive period. This provision is intended and is declared to be in operation and have effect only during the period of proclamation of Emergency issued under Clause (1) of Article 352 of the Constitution of India on 3-12-1971 or the Proclamation of Emergency issued under that

clause on 25-6-1975 or a period of 12 months from 25-6-1975 whichever period is the shortest. In view of sub-section (2) of Section 16-A which makes a special provision with respect to persons against whom an order of detention was made on or after 25th day of June, 1975, the case of such persons is required to be reviewed by the appropriate Government within a period of 15 days from the commencement of this Ordinance, viz. 25-6-1975. The review is for the purpose of determining whether the detention of such person under the Act is necessary for dealing effectively with the Emergency. If upon such a review, the appropriate Government is satisfied that it is necessary to detain such person for effectively dealing with the Emergency, the Government is empowered to make a declaration to that effect and communicate a copy of the declaration to the person concerned. Sub-section (3) of Section 16-A deals with persons who may be detained after the commencement of the First Amendment Ordinance. For continuing the detention of a person after the commencement of the Ordinance, all that is necessary for the appropriate Government is to make a declaration that it is necessary to detain such person for dealing effectively with the emergency and communicate a copy thereof to the person detained. With respect to the detenus arrested after 25-6-1975 but before the commencement of the Ordinance as well as the detenus detained after the commencement of the First Amendment Ordinance, sub-section (6) of Section 16-A wholly dispenses with the requirement of serving the grounds on which the order of detention is based both before the declaration contemplated by Section 2 or during the period when such a declaration is in force.

Thus it is no longer necessary for the detaining authorities to comply with the requirements of Section 8 of the Principal Act. The detention order which could have been made only subject to Section 8 would no longer be invalid merely because the grounds of detention are not served. It is enough if a declaration is made within 15 days of the commencement of the Ordinance, in case of persons detained prior to the Ordinance and in case of persons detained after the commencement of the Ordinance simultaneously with the order of detention, that the detention of the persons concerned is necessary for dealing with the Emergency. Further for the purpose of Sections 10 and 11 of the Principal Act viz. in the matter of reference to the Advisory Boards and consideration of the same by the Advisory Boards, the period during which the declaration under S. 16-A (2) is in force is not required to be taken into account. In other words, it is no longer

obligatory to refer the case for the consideration of the Advisory Boards within 30 days of the detention order so long as the Emergency continues. These provisions are in the teeth of Article 22 (5) of the Constitution which imposes an obligation upon the detaining authority to communicate to the detenu the grounds of detention as soon as may be and also to afford him the earliest opportunity of making a representation. The amendment Ordinance seeks to discharge the detaining authority from those several constitutional obligations. It wholly dispenses with the service of grounds. When grounds are not served the question of making a representation against them does not arise; nor is there any scope for consideration of the representation. The power to detain thus becomes a naked and arbitrary power vested in several persons serving the State and Central Governments. The power is wholly unbridled and unguided. There is no method or machinery provided to judge whether the satisfaction of the authorities with respect to any person that his detention is necessary with a view to prevent him from acting in a manner prejudicial to any of the matters referred to under Section 3 (a), is reached bona fide or mala fide and in fact whether the satisfaction is reached on relevant grounds or wholly imaginary or non-existing grounds or whether it is a colourable exercise of power with an ulterior motive. That this Amendment Ordinance offends the fundamental rights guaranteed to a citizen under Articles 14, 21 and 22 of the Constitution, is quite patent and would therefore be wholly void under Article 13 (2) of the Constitution in the ordinary circumstances.

25. So too are the provisions of the Second Amendment Ordinance. If at all they vest a much larger and wider power in the detaining authority and deprive the citizen of any vestige of protection against its arbitrary exercise.

26. The Second Amendment Ordinance was promulgated on 15-7-1975. Apart from formal amendments made by clause 5 in Section 16-A of the Principal Act which itself was introduced by the First Amendment Ordinance of 1975 by clause (6) of that Ordinance a new section was inserted as Section 18 and the existing Section 18 was renumbered as Section 19. The new Section 18 reads as follows:—

"18. No person (including a foreigner) detained under this Act shall have any right to personal liberty by virtue of natural law or common law, if any."

Clause (7) of the 2nd Amendment Ordinance declares that

"anything done or any action taken under the principal Act as amended by

the Maintenance of Internal Security (Amendment) Ordinance, 1975 shall be deemed to have been done or taken under the Principal Act as amended by that Ordinance."

The new Section 18 which declares that no person detained under this Act shall have any right to personal liberty by virtue of natural law or common law if any, is deemed to have come into force on 25th day of June, 1975 while the remaining provisions of the Second Amendment Ordinance are deemed to have come into force on 29-6-1975. The result of these amendments is that Sections 8 to 12 of the Principal Act shall not apply to the case of persons who are detained after the proclamation of the emergency. No grounds need be served on these persons within the period prescribed by Section 8 of the Act as laid down by the Principal Act or as amended by the 1st Amendment Ordinance. No advisory boards need be constituted to review the case of such detenus nor the case of the detenus need be referred for the report of the Advisory Board as laid down by Sections 9 to 12 of the Act.

In view of the amendment a detenu may now be detained for the maximum period of 12 months even without the confirmation of the detention by the Government on the report of the Advisory Board. There can be no doubt that a law of detention which does not provide for communication of the grounds of detention on which the order of detention has been made and which does not afford the detenu the earliest opportunity of making a representation against the order would be void under Articles 21 and 22 of the Constitution of India.

27. Just as the learned Attorney General in *Makhan Singh v. State of Punjab*, AIR 1964 SC 381 = (1964-1 Cri LJ 269), the learned Advocate General appearing for the State in these cases also was "not in a position to challenge the contention of the petitioners that the First and the Second Amendment Ordinances contravened Articles 14, 21 and 22 (4), (5) and (7)". He did not contend that the impugned Ordinances authorising detention of a person without trial and without service of grounds and without affording an opportunity to the detenu to make a representation against the detention would ordinarily be valid. But his contention is that in view of the Proclamation of Emergency and the President's declaration under Article 359 (1) of the Constitution, that the right to move any court for the enforcement of the rights conferred by Articles 14, 21 and 22 shall remain suspended for the period during which the proclamation of Emergency is in force, no

court can entertain a petition questioning the validity of any law on that ground and consequently cannot reach the stage of declaring any such law to be void or of quashing the detention order on that ground. In fact he contends that having regard to the broad sweep of the Presidential declaration which is not restricted in its operation with reference to powers exercisable under any particular law, any arrest and detention made during this period even without reference to any statutory power cannot be questioned in any Court of law on any ground whatsoever.

28. Mr. Kannabhiraman for the petitioner, however, contends that a declaration under Article 359 does not authorise the making of laws which are violative of fundamental rights. Such laws are void in view of Article 13 (2) of the Constitution. Neither the Parliament nor any State Legislature nor the President or the Governor in exercise of their power to issue Ordinances make laws which are violative of the rights conferred by Part III of the Constitution. Any law which is violative of the provisions of the Chapter III of the Constitution being void ab initio, any action taken thereunder would be ipso facto void and consequently the declaration made under Article 359 of the Constitution cannot stand in the way of the detenu approaching the Court to declare the detention to be illegal and without jurisdiction and obtain a writ of habeas corpus.

29. This leads us to the question as to the scope of the power exercisable by the President under Article 359 of the Constitution and the effect of the declaration made thereunder. A declaration under Article 359 may be made by the President only where a proclamation of Emergency is in operation. Under that provision he is only empowered to "declare that the right to move any Court for the enforcement of such of the rights conferred by Part III as may be mentioned in the order shall remain suspended for the entire period of Emergency or for a specified shorter period. Such declaration may apply to all proceedings pending in any Court for the enforcement of the rights mentioned in the order. The President has power to suspend the right to move any Court for the enforcement of all or any of the rights conferred by Part III. The declaration so made may extend to the whole or any part of the territory of India. After the declaration every such order is required to be laid before each House of Parliament. If Article 359 is read along with Article 358 it would be apparent that while the proclamation of Emergency is in operation, by virtue of Art. 358 itself without any further decla-

ration by the President the State becomes vested with the authority to make any law or to take any executive action unfettered by anything contained in Article 19.

In other words the operation of Article 19 remains suspended automatically by virtue of proclamation of emergency by the President under Article 352 of the Constitution and the State's power to make any law or to take any executive action is free from the restrictions imposed by Article 19 and correspondingly to that extent the right of a citizen remains suspended. Any law so made will cease to have any effect to the extent it is violative of Article 19 no sooner than the proclamation issued under Article 352 ceases to operate, except as respects things done or omitted to be done during that period. Under Article 358 by the mere proclamation of Emergency the rights conferred by the other provisions contained in Part III do not remain suspended and the State is not empowered to make any law or to take any executive action which is violative of any other provision contained in Part III. Only by virtue of a declaration made by the President under Article 359 the right to move any Court for the enforcement of such of the rights conferred by Part III as are mentioned in the order remain suspended.

A close reading of the Article, would disclose that what is suspended is the right to move any Court for the enforcement of the specified rights conferred by Part III and not the rights themselves. The declaration does not empower the State to make any law or to take any executive action which is violative of the rights conferred by Part III of the Constitution. In other words while the legislature and the executive have not been given the power to make laws or take executive action in violation of any of the provisions contained in Part III of the Constitution, the right to move any Court for the enforcement of such rights as are specified in the order remains suspended during the period of proclamation or such shorter period as is specified in the order. Hence even during the proclamation of Emergency, if an enactment were found to be violative of any of the rights conferred by Part III of the Constitution, as are specified in the declaration that law would be void under Article 13 (2) of the Constitution.

30. The Supreme Court in *Makhan Singh v. State of Punjab*, AIR 1964 SC 381 = (1964-1 Cri LJ 269) pointing out the distinction between Articles 358 and 359 held as under :

"The suspension of Article 19 for which provision is made under Article 358 applies to the whole of the country,

and so, covers all legislatures and also states. On the other hand, the order issued under Article 359 (1) may extend to the whole of India or may be confined to any part of the territory of India..... as soon as a Proclamation of Emergency has been issued under Article 352 and so long as it lasts, Article 19 is suspended and the power of the legislatures as well as the executive is to that extent made wider. The suspension of Article 19 during the pendency of the proclamation emergency removes the fetters created on the legislative and executive powers by Article 19 and if the legislatures make laws or the executive commits acts which are inconsistent with the rights guaranteed by Article 19 their validity is not open to challenge either during the continuance of the emergency or even thereafter. As soon as the proclamation ceases to operate the legislative enactments passed and the executive actions taken during the course of the said emergency shall be inoperative to the extent to which they conflict with the rights guaranteed under Article 19 because as soon as the emergency is lifted, Article 19 which was suspended during the emergency is automatically revived and begins to operate. Article 359, however, makes it clear that things done or omitted to be done during the emergency cannot be challenged even after the emergency is over. In other words, the suspension of Art. 19 is complete during the period in question and legislative and executive action which contravenes Art. 19 cannot be questioned even after the emergency is over. Article 359, on the other hand, does not purport expressly to suspend any of the fundamental rights. It authorises the President to issue an order declaring that the right to move any court for the enforcement of such of the rights in Part III as may be mentioned in the order and all proceedings in any court for the enforcement of the rights so mentioned shall remain suspended for the period during which proclamation is in force or for such shorter period as may be specified in the order. What the Presidential Order purports to do by virtue of the power conferred on the President by Art. 359 (1) is to bar the remedy of the citizens to move any court for the enforcement of the specified rights. The rights are not expressly suspended, but the citizen is deprived of his right to move any Court for their enforcement."

But the Court can examine the provisions of an Act and pronounce upon their validity with reference to the provisions contained in Part III only in properly constituted proceedings initiated by a person having the right to move the Court. Before pronouncing upon the validity of the enactment the Court has to initially

ascertain whether petitioner before it has the right to move the Court, and only then determine whether the provision complained of is violative of any of the provisions of Part III of the Constitution. Any pronouncement as to whether an enactment is valid or void, when it is complained that it is violative of the rights conferred by Part III could be made only when the person who has moved the Court has the right to do so. Every citizen has a right to move the Court for the enforcement of the rights conferred by Part III. Such a right is expressly conferred by Articles 32 and 226 of the Constitution of India. However, under Article 359 (1) the President is vested with the power to declare that the right to move any court for the enforcement of the rights conferred by Part III shall remain suspended during the period of Emergency. That being so at the very threshold any person complaining of the infringement of the rights conferred on him by Part III by any legislative or executive action of the State meets with an insurmountable hurdle. Unless he crosses that and the court finds that he has a right to move the Court complaining of such infringement, the next stage for the court to consider whether in fact the legislative enactment or the executive action is violative of such right as is conferred on him by Part III of the Constitution is not reached. When the Court finds that the right of a person to move the court is taken away, even if the court comes to the conclusion that a particular piece of legislation or a particular executive action is violative of any of those rights, as it cannot entertain such an attack on the legislation, it cannot give such a declaration in favour of the petitioner. In other words, even though the law, if permitted to be scrutinised by the Court is found to be void under Article 13 (2) for being in violation of the provisions contained in Part III of the Constitution, the court cannot declare it to be so because the right of the person who has moved the court has been suspended by a declaration under Article 359 (1) made by the President for the period of Emergency. While the law may be void, there cannot be any declaration to that effect so long as the declaration made by the President under Article 359 (1) subsists.

31. It is true as contended by Mr. Kannabhiraman learned counsel for the petitioners that the legislative power of the President conferred by Article 123 of the Constitution is not wider than the one conferred on the Parliament to make laws. The power of Parliament by an Ordinance vested in the President under Article 123 (1) of the Constitution could be exercised only when both the houses of Parliament are not in session and upon

his satisfaction that the circumstances for taking immediate action, exist. Further as laid down in clause (3) of Article

"if and so far as an Ordinance under Article 123 (1) makes any provision which Parliament would not under this Constitution be competent to enact, it shall be void."

In *Makhan Singh v. State of Punjab*, AIR 1964 SC 381 = (1964-1 Cri LJ 269) it was laid down:

"..... the Presidential order cannot widen the authority of the legislature or the executive, it merely suspends the right to move any court to obtain a relief on the ground that the rights conferred by Part III have been contravened if the said rights are specified in the Order."

Thus the power of the President in this behalf is co-extensive with that of the Parliament, though the conditions for its exercise are defined and limited. Hence, if the Maintenance of Internal Security Act, 1971 were to be amended by the Parliament in the manner now amended by the two impugned Ordinances, they would be violative of the provisions contained in Part III of the Constitution and as the President has no greater or larger legislative power in this behalf than the Parliament, these Ordinances in so far as they are violative of Articles 14, 21 and 22 would be void. There is also no provision in the Constitution similar to the one in Article 358 giving protection to actions taken under such laws. While considering this aspect and declaring that

"the inevitable consequence of this position is that as soon as the Order ceases to be operative, the infringement of the rights made either by the legislative enactment or by executive action can perhaps be challenged by a citizen in a Court of law and the same may have to be tried on the merits on the basis that the rights alleged to have been infringed were in operation during the pendency of the Presidential Order and afford indemnity to the executive in that behalf,"

the Supreme Court left the matter open observing that "the validity and the effect of such legislative action may have to be carefully scrutinised." But nonetheless as during the subsistence of the declaration under Article 359, the right of every person to move the Court complaining about such infringement is taken away, the Court has no occasion to declare the law or the action to be void.

32. Mr. Kannabhiraman, learned counsel for the petitioner stresses that what are suspended by a declaration of the President under Article 359 (1) are not the rights conferred under Part III of the Constitution of India but only the right to

move the Court to enforce the rights conferred by Part III. In other words according to the petitioner's counsel the fundamental right remains intact notwithstanding the declaration under Article 359 (1) therefore the validity of the law on the ground of infringement of fundamental right can be questioned. The law which is void under Article 13 (2) is non est and therefore the executive action purported to be taken thereunder is void ab initio. Having regard to the pronouncement of the Supreme Court in *Makhan Singh v. State of Punjab*, AIR 1964 SC 381 = (1964-1 Cri LJ 269) which is binding on this Court, it is unnecessary for us to examine in detail this contention and give our own reasons.

33. In *Makhan Singh v. State of Punjab*, AIR 1964 SC 381 = (1964-1 Cri LJ 269) the validity of the Presidential Order dated November 3, 1962 issued under Cl. (1) of Art. 359 suspended the right of a person to move any Court for the enforcement of the rights conferred by Articles 21 and 22 of the Constitution, which was subsequently modified to include rights by Article 14 also during the period of Emergency Proclaimed on 26-10-1962, if such persons have been deprived of any right under the Defence of India Ordinance 1962, or any Rule or order made thereunder. While the Defence of India Ordinance 1962 was promulgated on 26-10-1962 the declaration under clause (1) of Article 359 was made on 3-11-1962. Therefore, the question came up for consideration whether the Ordinance was void before the declaration under Article 359 (1) was made and could have been challenged before that date on ground that it contravened Articles 14, 21 and 22 and whether the said Ordinance was a "still born piece of legislation" and whether detentions under a void law could not be protected by the Presidential Order by depriving the detenus of their right to move any Court to challenge the validity of the orders of detention. The Supreme Court turned down the contention that the right to challenge the validity of detentions under a void law cannot be taken away "as wholly mis-conceived" and held "if the petitioners are justified in contending that the Ordinance and the Act which took its place contravene the fundamental rights guaranteed by Articles 14, 21 and 22 the said Ordinance and the Act would be and continue to be invalid, but the effect of the Presidential Order is that their invalidity cannot be decided during the prescribed period. Therefore, the argument that since the Ordinance or the Act is invalid, the Presidential Order cannot preclude a citizen from testing its validity must be rejected."

The court then pointed out that the legality and the propriety of the detentions could however be challenged even during the period of Emergency and the declaration of the President on certain grounds. If the detenu is pleading any right outside the rights specified in the order, his right to move any court in that behalf is not suspended because it is outside Article 359 (1) and consequently outside the Presidential Order itself. In such a case, it may be open to the detenu to contend that his detention is illegal for the reason that the mandatory provisions of the Act have been contravened. If the detention has been ordered mala fide, then also it is not immune from attack. Where a particular provision of law under which a person is detained suffers from the vice of excessive delegation and is therefore invalid, such a plea of the detenu also cannot at the threshold be said to be barred by the Presidential Order. Such an attack on the orders of detention are not relatable to the fundamental rights specified in the said Order. They are independent of the said rights.

The Court then upheld:

"It is quite true that if the Act has contravened the citizens' fundamental rights under Articles 14 and 22, it would be void and the detentions effected under the relevant provisions of the said Act would be equally inoperative; but it must be remembered that it is precisely in this set of circumstances that Art. 359 (1) and the Presidential Order issued under it step in and preclude the citizen from enforcing his fundamental rights in any court. The said article as well as the Presidential Order issued under it indicate that there may be cases in which the specified fundamental rights of citizens have been contravened by executive action and the impugned executive action may be invalid on that account. That is precisely why the said article and Presidential Order impose a ban against the investigation and the impugned executive action may be invalid on that account."

In that view the alternative argument that the impugned provisions of the Act amount to a colourable piece of legislation was also rejected.

The Court then considered the argument, that though the court may not be empowered to direct release of the detenu inasmuch as the detenu's right to move the Court is suspended, the Court may yet grant a declaration that the law under which he is detained is void and upheld "what Article 359 (1) purports to do is to empower the President to make an order by which the right to the detenu to move the Court to challenge the validity of his detention on the ground that any of his fundamental rights specified in the

order have been contravened, is suspended, and so, it would be unreasonable to suggest that what the detenu cannot do in order to secure his release, he should be allowed to do merely for the purpose of obtaining an academic declaration....."

34. The Court laid down that a declaration that the Act authorising the detention is void because it contravenes the fundamental rights specified in the Presidential Order cannot be granted.

35. The Supreme Court posing the question as to what is the nature of the proceedings which are barred by the Presidential Order issued under Article 359 (1) answered thus:—

"They are proceedings taken by citizens for the enforcement of such of the rights conferred by Part II as may be mentioned in the order. If a citizen moves any court to obtain a relief on the ground that his fundamental rights specified in the order have been contravened, that proceeding is barred. In determining the question as to whether a particular proceeding falls within the mischief of the Presidential Order or not, what has to be examined is not so much the form which the proceedings has taken or the words in which the relief is claimed as the substance of the matter and consider whether before granting the relief claimed by the citizen, it would be necessary for the Court to enquire into the question whether any of his specified fundamental rights have been contravened. If any relief cannot be granted to the citizen without determining the question of the alleged infringement of the said specified fundamental rights, that is a proceeding which falls under Article 359 (1) and would, therefore, be hit by the Presidential Order issued under the said Article. The sweep of Article 359 (1) and the Presidential order issued under it is thus wide enough to include all claims made by citizens in any court of competent jurisdiction when it is shown that the said claims cannot be effectively adjudicated upon without examining the question as to whether the citizen is in substance, seeking to enforce any of the said specified fundamental rights. Article 359 (1) and the Presidential Order issued under it may constitute a sort of moratorium or a blanket ban against the institution or continuance of any legal action subject to two important conditions. The first condition relates to the character of the legal action and requires that the said action must seek to obtain a relief on the ground that the claimant's fundamental rights specified in the Presidential Order have been contravened and the second condition relates to the period during which this ban is to operate."

The contention that the law being void, it must be deemed non est and ignored and the executive action based thereon must be struck down was termed by the Supreme Court in *Makhan Singh v. State of Punjab*, AIR 1964 SC 381 = (1964-1 Cri LJ 269) as "arguing in a circle". This view has been followed by the Supreme Court itself in subsequent cases.

36. Under the threat of Chinese Aggression the President of India had issued proclamation of Emergency in exercise of the powers conferred on him by clause (1) of Article 352 of the Constitution declaring that a grave Emergency existed whereby the security of India was threatened by external aggression. Thereafter two orders were issued by the President one on 3-11-1962 and the other on 11-11-1962 in exercise of the powers conferred by clause (1) of Article 359 of the Constitution. The first order as amended by the later order read as follows:—

"In exercise of the powers conferred by clause (1) of Art. 359 of the Constitution the President hereby declares that the right of any person to move any court for the enforcement of the rights conferred by Arts. 14, 21 and 22 of the Constitution shall remain suspended for the period during which the Proclamation of Emergency issued under cl. (1) of Art. 352 thereof on the 26th October 1962, is in force, if such person has been deprived of any such rights under the Defence of India Ordinance, 1962 (4 of 1962) or any rule or order made thereunder."

During the subsistence of this Order, Ananda Nambiyar, then a sitting Member of Parliament was arrested and detained on 29-11-1964 by the Government of Madras in purported exercise of the power conferred under Rule 30 (1) (b) and (4) of the Defence of India Rules, 1962 on its satisfaction that with a view to preventing him from acting in a manner prejudicial to the Defence of India and the Public Safety it was necessary to make an order directing that he be detained. Dealing with the preliminary objection to the maintainability of a petition under Article 32 of the Constitution challenging the validity of the said detention the Supreme Court in *Ananda v. Chief Secretary, Government of Madras*, AIR 1966 SC 657 = (1966 Cri LJ 586) held:

"So long as the Presidential Order remains in force, the validity of the Ordinance, rule or order made thereunder cannot be questioned on the ground that they contravene Arts. 14, 21 and 22; but this limitation will not preclude a citizen from challenging the validity of the Ordinance, rule or order made thereunder on any other ground..... The challenge to the Ordinance, rule or order made thereunder cannot also be raised on the ground

of the contravention of Art. 19, because as soon as a Proclamation of Emergency is issued by the President, under Art. 358 the provisions of Art. 19 are automatically suspended."

So too in the case of the detention of Dr. Ram Manohar Lohia made under Rule 30 (1) (b) of the Defence of India Rules, 1962 during the subsistence of the above Proclamation, the Supreme Court in *Ram Manohar v. State of Bihar*, AIR 1966 SC 740 = (1966 Cri LJ 608), followed the view expressed in *Makhan Singh v. State of Punjab*, AIR 1964 SC 381 = (1964-1 Cri LJ 269) but issued a writ of Habeas Corpus "on the ground that if in challenging the validity of his detention order, the detenu is pleading any right outside the rights specified in the order his right to move any Court in that behalf is not suspended."

37. Having regard to the above pronouncements of the Supreme Court, although the fundamental rights guaranteed under Part III themselves are not suspended and the President is not empowered to suspend them and consequently no legislature, including the President can under Article 123 issue an Ordinance which is violative of the fundamental rights guaranteed by Part III, still no court can declare them to be void as the right to move the Court itself is barred by a declaration under clause (1) of Art. 359 for the entire period during which a proclamation of Emergency is in force or for such shorter period as is specified in the said declaration.

38. The difficulty was sought to be overcome by Mr. P. A. Chowdary, learned counsel for the petitioners in W. P. No. 3774/75 by urging that although the provisions contained in Part III of the Constitution are generally referred to as fundamental rights, all these articles do not confer fundamental rights as such. Some provisions declared fundamental rights while others operate as constitutional injunctions against the legislatures and the executive and do not create any positive fundamental right in favour of any person or citizen. What Article 359 (1) empowers the President is only to suspend the right of a person to move a Court for the enforcement of the rights conferred by Part III; it does not empower the President to suspend the right of a person to move the Court complaining about the violation of the constitutional injunctions contained in Part III against the legislatures and the executive. Any declaration made suspending the right to move the court-complaining about the injunctions contained in Articles 14, 21 and 22 would be violative of Article 359 (1) itself. Although the Court may be debarred from examining the validity of the declaration of Emergency under Arti-

cle 352 of the Constitution, the Courts are not precluded from holding such a declaration to be ultra vires of Article 359 (1) and therefore void. If the legislative or the executive action infringes the injunctions contained in Articles 14, 21 and 22, a person complaining of such infringement is not debarred from approaching the Court, in so complaining, he is not seeking to enforce any fundamental right, which alone may be suspended by the President under Article 359 (1) of the Constitution. This leads us to the necessity of examining the nature and content of the provisions of Part III of the Constitution.

39. Even in *Makhan Singh v. State of Punjab*, AIR 1964 SC 381 = (1964-1 Cri LJ 269) the Supreme Court declared that

"Article 359, on the other hand, does not purport expressly to suspend any of the fundamental rights. It authorises the President to issue an order declaring that the right to move any Court for the enforcement of such of the rights in Part III as may be mentioned in the order and all proceedings in any Court for the enforcement of the rights so mentioned shall remain suspended for the period during which proclamation is in force or for such shorter period as may be specified in the order. What the Presidential Order purports to do by virtue of the power conferred on the President by Art. 359 (1) is to bar the remedy of the citizens to move any Court for the enforcement of the specified rights."

It is true as contended by Mr. P. A. Chowdary, learned counsel for the petitioner that in coming to the conclusion it did, the Supreme Court did not examine whether Articles 14, 21 and 22 of the Constitution declare fundamental rights in favour of a citizen or operate as injunctions against the "State". In that case the argument proceeded on the footing that Articles 14, 21 and 22 conferred fundamental right and it was submitted that the fundamental right itself not having been suspended by virtue of a declaration under Article 359 (1) the Court could examine the validity of the enactments and the executive action thereunder. Considering that limited submission, the Court while stating "We do not propose to decide this question" assumed in favour of the appellants

"that the said rights are, in theory, alive and it is on that assumption that we will deal with the other points raised in the present appeals."

The Court then held that

"if a citizen moves a court to obtain a relief on the ground that his fundamental rights specified in the order have been contravened that proceeding is barred.....

..... if any relief cannot be granted to the citizen without determining the question of the alleged infringement of the specified fundamental rights, that is a proceeding which falls under Article 359 (1) and would therefore be hit by the Presidential Order issued under the said Article. The sweep of Article 359 (1) and the Presidential Order issued under it is thus wide enough to include all claims made by citizens in any court of competent jurisdiction when it is shown that the said claims cannot be effectively adjudicated upon without examining the question as to whether the citizen is in substance seeking to enforce any of the said "specified fundamental rights."

The Court also pointed out that "in determining the question as to whether a particular proceeding falls within the mischief of the Presidential Order or not, what has to be examined is not so much the form which the proceeding has taken or the words in which the relief is claimed as the substance of the matter and consider whether before granting the relief claimed by the citizen, it would be necessary for the Court to enquire into the question whether any of his "specified fundamental rights" have been contravened."

In that view it held that

"proceedings taken by a citizen either under Article 32 (1) or under Article 226 (1) are hit by Article 359 (1) and the Presidential order issued under it."

The Court then proceeded to consider the alternative argument that the proceedings under Section 491 (1) (b) Cr. P. C., are of such a distinctly separate character that they cannot fall under Article 359 (1) and pointed out that

"before the Constitution was adopted, it would not have been open to the detenu to claim that the impugned law was invalid because it contravened his fundamental rights guaranteed by the relevant articles of the Constitution. The right to challenge the validity of a statute on the ground that it contravened the fundamental rights of a citizen has accrued to the citizens of this country only after and as a result of the provisions of the Constitution itself, and so, there can be no doubt that when in the present proceedings the detenus seek to challenge the validity of the impugned statutory provision and the Rules, they are invoking their fundamental rights under the Constitution..... so whenever a detenu relies upon his fundamental rights even in support of his petition made under Section 491 (1) (b) he is really enforcing the said rights and in that sense the proceedings inevitably partake of the character of the proceedings taken by the detenu in enforcing these rights. That is why the argument that

Article 359 (1) and the Presidential Order issued under it do not apply to the proceedings under Section 491 (1) (b) cannot be sustained."

The Court then referred with approval to the decision in *Mohan Choudhury v. Chief Commissioner Tripura*. AIR 1964 SC 173 = (1964-1 Cri LJ 132) wherein the court rejected the detenu's petition as barred by the Presidential Order and refused to entertain the argument that the Ordinance, the Act and the Rules framed thereunder were void for the reason that they contravened Articles 14, 21 and 22 of the Constitution with the observation that the challenge made by the petitioner in that behalf really amounted to arguing in the circle. The Court then held:

"If the Presidential Order precludes a citizen from moving the court for the enforcement of the specified fundamental rights, it would not be open to the citizen to urge that the Act is void for the reason that it offends against the said fundamental rights. It is in order to prevent the citizen from making such a claim that the Presidential Order has been issued, and so during the period of its operation, the challenge to the validity of the Act cannot be entertained."

In the result the Court concluded that "the proceedings taken on behalf of the appellants before the respective High Courts challenging their detention on the ground that the impugned Act and the Rules are void because they contravene Articles 14, 21 and 22 are incompetent for the reason that the fundamental rights which are alleged to have been contravened are specified in the Presidential Order and all citizens are precluded from moving any Court for the enforcement of the said specified rights."

40. Mr. P. A. Chowdary, learned counsel for the petitioner therefore argues that the Supreme Court thus proceeded to declare that during the operation of the Emergency and the declaration under Article 359 (1), the validity of any law or the action taken thereunder cannot be challenged as violative of the specified provisions of Part III of the Constitution, on the assumption that Part III guarantees fundamental rights. If the Supreme Court had kept in view the distinction between fundamental rights in favour of persons and constitutional injunctions against the State, it would not have come to the conclusion it did where the complaint is of the violation of Articles 14, 21 and 22 which according to him are in the nature of Constitutional Injunctions and not Fundamental Rights.

41. Before we proceed to further examine this contention we must not lose

sight of the fact that under Article 141 the law declared by the Supreme Court is binding on all Courts within the territory of India. When the Supreme Court has declared that during the subsistence of a declaration under Article 359 (1) the validity of an enactment or executive action cannot be questioned as violative of the provisions of Part III of the Constitution, no court in India can hold otherwise on the ground that, if only the Supreme Court had kept in view the difference in wording of the various Articles occurring in Part III of the Constitution and found that some confer Fundamental Rights in favour of persons or citizens while other operate as Injunctions against the State, it would not have come to that conclusion. It is precisely in regard to such an argument that found favour with the Bombay High Court in *B. M. Lakhani v. Malkapur Municipality*, AIR 1970 SC 1002 the Supreme Court held:

"The decision (of the Supreme Court) was binding on the High Court and the High Court could not ignore it because they thought that relevant provisions were not brought to the notice of the court."

42. In view of the above pronouncement of the Supreme Court, the distinction, if any, between the various provisions of Part III of the Constitution cannot in our view be declared by any High Court as making any difference with regard to the right of a person to move the Court during the operation of the Proclamation under Article 359 (1) of the Constitution.

43. Now, let us examine if there is really any distinction such as is sought to be made out by Mr. P. A. Chowdary in the several articles occurring in Part III of the Constitution—some only constituting Fundamental Rights and the rest amounting to injunctions.

44. Part III of the Constitution of India is entitled "fundamental rights". Article 12 defines "State" and Article 13 declares that all laws inconsistent with or in contravention of the provisions of Part III to be void to the extent of such inconsistency or contravention. Articles 14, 15, 16, 17 and 18 occur under the heading "Right to Equality". "Right to Freedom" is enshrined in Articles 19, 20, 21 and 22. Articles 23 and 24 occur under the heading "Right against Exploitation". "Right to Freedom of Religion" occur in Articles 25, 26, 27 and 28. Cultural and Educational rights are declared under Articles 29 and 30. Right to property is declared under Articles 31, 31 (a), 31 (b) and 31 (c). Under the heading "Right to Constitutional Remedies" the right to move the Supreme Court is reserved under Article 32 of the Constitution. In enunciating these rights the framers of the Constitu-

tion have employed different phraseology in different articles of that part. Some of these rights such as the "Right to Freedom" guaranteed under Article 19, the "Right to Freedom of Religion" guaranteed by Article 25, the "Right of any section of citizens to conserve distinct script or culture of its own, the Right to Minorities to establishment and administer educational institutions of their choice under Article 30 and the right to move the Supreme Court for enforcement of the rights are declared in positive language to be rights guaranteed to the citizens. But the other relating to "Right to Equality" covered by Articles 14, 15 and 16 "Right to Freedom" as stated under Articles 20, 21 and 22 "Right to Freedom of Religion" as described in Articles 27 and 28 and the "Right to property" as declared under Article 31 are in the form of directions of injunctions against the State. The State action, legislative or executive, controlled by and taken in obedience to these injunctions in effect guarantee these rights to the citizens and persons.

45. Mr. Chowdary vehemently contends that the difference in the language employed in these various articles cannot be brushed aside as of no consequence.

46. In support of his contention, that what is contained in Part III of the Constitution of India is merely a restriction on the executive and legislative powers of the State and not any Fundamental Right guaranteed to a citizen, Mr. P. A. Choudary, learned counsel for the petitioner referred to the observations of Sir Ivor Jennings in Chapter IV (page 38) of "Some Characteristics of the Indian Constitution."

"..... the so-called fundamental rights are restrictions on legislative, executive and, in a few cases judicial powers. They are liberties allowed by English law. Part IV of the Constitution deals with the positive obligation of the State towards its citizens. Part III which is entitled Fundamental Rights, deals with its negative obligations..... It is in fact not a right at all, but a restriction on executive and legislative power..... Articles 14, 19 (1) and 25 (1) are different because they impose limitations on legislative power."

He also placed reliance on what Alan Gledhill in his book "Fundamental Rights in India" said with regard to the provisions contained in Part III of the Indian Constitution. They are

"..... there is no declaration of the rights of the subject, nor guarantee of their enforcement; in fact they are only ascertainable from the remedies available in case of their infringement."

That what is contained in Part III and in particular Articles 14, 21 and 22 are only injunctions is also sought to be fortified by Mr. Chowdary by what was observed in the judgment of the Supreme Court in *Bhadeshwar Nath v. I. T. Commissioner*, AIR 1959 SC 149. In that case their Lordships considered "Whether a breach of the Fundamental Right flowing from Article 14 can be waived" and observed:—

"..... that this article is in form an admonition addressed to the State and does not directly purport to confer any right on any person as some other articles for example Article 19 do..... The command of the article is directed to the State Article 14 therefore is an injunction to both the legislative as well as the executive organs of the State and the other subordinate authorities."

But even in this decision, it would be noticed that their Lordships never held that Article 14 did not confer any right on a person. In fact their Lordships observed:

"the underlying object of this article is undoubtedly to secure to all persons, citizens or non-citizens the equality of status and of opportunity referred to in the glorious preamble of our Constitution."

Their Lordships also recognised that

"the obligation thus imposed on the State no doubt, enures for the benefit of all persons, for, as a necessary result of the operation of this article, they all enjoy equality before law. That is, however, the indirect, though necessary and inevitable, result of the mandate. The command of the article is directed to the State and the reality of the obligation thus imposed on the State is the measure of the fundamental right which every person within the territory of India is to enjoy."

In conclusion the Supreme Court held:

"Whatever breach of other fundamental right a person or a citizen may or may not waive, he cannot certainly give up or waive a breach of the fundamental right that is indirectly conferred on him by this constitutional mandate directed to the State."

In paragraph 26 of the judgment the Supreme Court concluded:—

"..... that under Article 13 (2) an admonition was administered to the State not to enact any law which takes away or abridges the rights conferred by this part and the obligation thus imposed on the State enured for the benefit of all citizens of Bharat alike in respect of all the fundamental rights enacted in Part III of the Constitution. No distinction was made in terms between the fundamental rights said to have been enacted for the benefit of the individual and those enacted in the public interest or on grounds of public policy."

47. In *State of Gujarat v. Shri Ambika Mills*, AIR 1974 SC 1300 it was laid down that

Article 13 (2) is an injunction to the State not to pass any law which takes away or abridges the fundamental rights conferred by Part III and the consequence of the contravention of the injunction is that the law would be void to the extent of the contravention....."

This decision in particular declares rights do not exist in vacuum.

"They must always inhere in some persons whether natural or juridical and, under Part III, they inhere even in fluctuating bodies like a linguistic or religious minorities or denominations."

It is significant to note that this judgment also recognises such injunctions to be conferring rights. Their Lordships declared:

"When Article 13 (2) uses the expression 'void' it can only mean, void as against persons whose fundamental rights are taken away or abridged by a law. The law might be 'still-born' so far as the persons, entities or denominations whose fundamental rights are taken away or abridged....."

Thus none of these decisions relied upon by the learned counsel for the petitioner in fact lays down that what is contained in Chapter III or in particular Articles 14, 21 and 22 are mere injunctions not conferring any right on persons, entities or denominations.

48. In *R. C. Cooper v. Union of India*, AIR 1970 SC 564 the Supreme Court in paragraph 61 of its judgment observed:—

"..... it is necessary to bear in mind the enunciation of the guarantee of fundamental rights which has taken different forms. In some cases it is an express declaration of a guaranteed right; Articles 29 (1), 30 (1), 26, 25 and 32; in others to ensure protection of individual rights they take specific forms of restrictions on State action—legislative or executive—Articles 14, 15, 16, 20, 21, 22 (1), 27 and 28; in some others, it takes the form in a positive declaration and simultaneously enunciates the restriction thereon; Articles 19 (1) and 19 (2) to (6) in some cases, it arises as an implication from the delimitation of the authority of the State e.g. Articles 31 (1) and 31 (2) in still others, it takes the form of a general prohibition against the State as well as others; Articles 17, 23 and 24. The enunciation of rights either express or by implication does not follow a uniform pattern. But one thread runs through them; they seek to protect the rights of the individual or groups of individuals against infringement of those rights within specific limits. Part III of the Constitution

weaves a pattern of guarantees on the texture of basic human rights. The guarantees delimit the protection of those rights in their allotted fields they do not attempt to enunciate distinct rights."

49. Thus notwithstanding the difference in the language employed in the various classes of articles occurring in Part III entitled fundamental rights, the Supreme Court construed them as conferring rights on persons either positively or by prohibiting the State from taking certain legislative or executive action in violation of those articles. They were not construed as mere injunctions.

50. A Full Bench of this Court in Venkatarao v. State of A. P., ILR (1975) Andh Pra 310 = (AIR 1975 Andh Pra 315) considering the validity of the Andhra Pradesh Land Reforms (Ceiling on Agricultural Holdings) Act, 1973 referring to the observations of the Supreme Court, in Basheshar Nath v. Income-tax Commissioner, AIR 1959 SC 149 on which Mr. Choudary placed strong reliance to contend that Article 14 constitutes an injunction and not a fundamental right held that

"Article 14 confers a fundamental right on a person, though in another sense it may amount to an injunction prohibiting the legislative and the executive organs from making any invidious or hostile discrimination."

The Full Bench repelled the contention that Article 14 did not confer a right.

51. Subbarao J. in Makhan Singh v. State of Punjab, AIR 1964 SC 381 = (1964-1 Cri LJ 269) referred to these as "the most valuable rights". The differences in the language employed in conferring the right under the various articles contained in Part III of the Constitution is one of form and does not affect the content of the said right. Some of the rights are expressed in positive terms as conferring benefit on the citizens or persons in general. Some others are couched in language which is in the form of injunctions or admonitions to the State. Whatever form of the various articles, they operate both as rights and injunctions, rights conferred on persons or citizens and injunctions operating against the State. Article 13 (2) declares any law made in contravention of Part III void irrespective of whether it is in positive form conferring a right or in a negative form as injunctions to the State. It is not as if, where a positive right is conferred by one of the articles a law made by the State is valid and only those laws which are in contravention of articles in the form of injunctions are void. In either case they are void. The language employed does not alter the nature of these rights aptly referred to and grouped in

Part III of the Constitution as "Fundamental Rights".

52. The Supreme Court never declared that what is contained in Article 14 was a mere injunction against the State. In fact, it recognised that this injunction indirectly confers a right on a person to equal protection of laws. In our view all the articles in whatever language couched having regard to their content and having regard to Article 13 constitute both "Fundamental Rights and injunctions." So also must be the position with respect to Articles 21 and 22 which are in the form of admonitions to the State.

53. Mr. Choudary vehemently contended that every right must have a holder of a right, and when Articles 14, 21 and 22 prohibit the State from making any law or taking any action, one is unable to postulate who the holder of that right is. These articles of the Constitution, according to him could not be deemed to be conferring or guaranteeing any fundamental rights to any person. In this context the learned counsel referred to a passage in the Text Book of jurisprudence by G. W. Paton (Third Edition) at page 249 which describes

"every legal right is comprised of four elements (1) the holder of the right (2) the act or forbearance to which the right relates (3) the RES concerned (the object of the right) (4) the person bound by duty. Every right, therefore, involves a relationship between two or more legal persons and only legal persons can be bound by duties or be the holders of legal rights."

But it may be noticed that in this very analysis, the learned author states that

"rights and duties are correlatives, that is, we cannot have a right without a corresponding duty or a duty without a corresponding right. When we speak of a right, we are really referring to a right-duty relationship between two persons, and to suppose that one can exist without the other is just meaningless as to suppose that a relationship can exist between father and son unless both father and son have existed."

This also supports our view that when Articles 14, 21 and 22 address an injunction to the State and impose a duty on it they correspondingly confer rights on the citizen. The forbearance which the State must observe in view of these Articles of the Constitution vests the citizen with rights the object of which is the equal protection of laws and prohibition of preventive detention without service of grounds and affording of an opportunity to represent in accordance with law.

54. The same contention of Mr. P. A. Chowdary, learned counsel for the

petitioner may be examined from yet another angle. Article 13 (2) of the Constitution declares that any law which takes away or abridges the rights conferred by Part III shall to the extent of the contravention be void. If Articles 14, 21 and 22 are excluded from the ambit of Article 13 on the ground that they are not fundamental rights but only injunctions against the State, then very undesirable results would follow. Article 32 of the Constitution which guarantees the right to move the Supreme Court for enforcement of the rights conferred by Part III would become wholly otiose if what is contained in Articles 14, 21 and 22 and other provisions in the form of admonitions to the State are not treated as Fundamental Rights and are treated only as injunctions against the State. So also the content of the power of the High Court under Article 226 and the right of the persons thereunder would to a large extent be eroded. The citizens would be deprived of their right to move the Supreme Court and the High Courts complaining about the contravention of Articles 14, 21 and 22. Such could not be the intention of the framers of the Constitution.

This was sought to be met by Mr. P. A. Chowdary, learned counsel for the petitioner by contending that Article 13 (2) is introduced only by way of abundant caution. According to him even without that provision, the injunctions contained in Articles 14, 21 and 22 prohibit the legislature from enacting laws in contravention of those articles for the legislative power vested in the Parliament or the State Legislature under Article 246 is subject to the other provisions of the Constitution are in violation of Articles 14, 21 and 22 would be void on the ground of legislative incompetency and not on the ground of violating any Fundamental Right (sic). Mr. P. A. Chowdary contends that the injunctions against the State such as are contained in Articles 14, 21 and 22 limit the power vested in the Parliament and the State Legislature under Article 245 to enact laws or take executive action in pursuance thereof. In view of Article 245 such of the laws as are in violation of Arts. 14, 21 and 22 would be void on the ground of "legislative incompetency" and not for the reason that they violate any "Fundamental Right". Article 245 of the Constitution reads as follows:—

"245. (1) Subject to the provisions of this Constitution, Parliament may make laws for the whole or any part of the territory of India, and the Legislature of a State may make laws for the whole or any part of the State.

(2) No law made by Parliament shall be deemed to be invalid on the ground

that it would have extra-territorial operation."

55. The power of Parliament and the Legislature of a State to make laws is undoubtedly subject to the other provisions of the Constitution. Having regard to Article 246, Parliament may make laws with regard to matters enumerated in List No. I of the Seventh Schedule referred to as 'Union List'. It shall also have power to make laws with respect to any of the matters enumerated in List No. I or List No. III. But yet the Parliament cannot make any law which takes away or abridges any rights conferred by Part III of the Constitution. Any law so made would be void under Article 13 (2) to the extent of the contravention. But according to Mr. P. A. Chowdary, learned counsel for the petitioner, when a person complains that a particular law is violative of Articles 14, 21 and 22, he is not enforcing any fundamental right guaranteed to him under the Constitution but challenging the validity of the law on the ground of incompetency of the legislatures. A person's right to challenge the validity of the law on such a ground is not taken away by a declaration under Article 359 (1) nor is the President empowered under the said clause to take away such a right.

56. It is true, that the Parliament's power to make laws conferred by Section 245 is subject to the other provisions of the Constitution. When Article 14 enjoins that the State shall not deny to any person equality before law or the equal protection of laws within the territory of India and when Article 21 declares that no person shall be deprived of his life or personal liberty except according to the procedure established by law and when clause (5) of Article 22 declares that any person detained in pursuance of an order made under any law providing for preventive detention the authority making the order shall as soon as may be communicate to such person the grounds on which the order has been made and shall affirm him the earliest opportunity of making a representation against the order, to that extent the power conferred on the Parliament by Article 245 is abridged. Any law made by the Parliament cannot be in derogation of Articles 14, 21 and 22 irrespective of whether what is contained in these articles is a right conferred on the citizens or an injunction against the State. The Parliament would be incompetent to make such law as observed in *Mahendralal v. State of U. P.* AIR 1963 SC 1019:

"the prohibition contained in Article 13 (2) makes the State as such incompetent to make a law taking away or abridging the fundamental rights as it would be where law is made against the distri-

bution of powers contained in the Seventh Schedule to the Constitution between Parliament and the Legislature of a State. Further, Art. 13 (2) provides that the law shall be void to the extent of the contravention. Now contravention in the context takes place only once when the law is made, for the contravention is of the prohibition to make any law which takes away or abridges the fundamental rights. There is no question of the contravention of Art. 13 (2) being a continuing matter. Therefore, where there is a question of a post-Constitution law there is a prohibition against the State from taking away or abridging fundamental rights and there is a further provision that if the prohibition is contravened the law shall be void to the extent of the contravention. In view of this clear provision, it must be held that unlike a law covered by Art. 13 (1) which was valid when made, the law made in contravention of the prohibition contained in Art. 13 (2) is a still-born law....."

But as already discussed above, Articles 14, 21 and 22 though couched as admonitions to the State and prohibit the State from making laws or taking any action in contravention of the said provisions, correspondingly confer valuable rights on the citizens and afford protection from the State action, legislative or executive in contravention thereof. The extent of the injunction is the measure of the right conferred on a citizen. When it is held that Articles 14, 21 and 22 are partly in the nature of injunctions and partly in the nature of fundamental rights conferred on a citizen and one is dependent on the other, any person questioning the validity of any law does so only in exercise of his right. It is a well recognised principle of general law that no person may be allowed to seek an injunction or a declaration that an injunction has been violated, unless it affects the right of the person complaining. This has a greater application in the cases of constitutional injunctions. No court would pronounce upon the constitutional validity of a law unless it is absolutely necessary for the purpose of securing the rights of the petitioner. When the right to move a court is suspended by a declaration under Article 359, the Court cannot examine how far the particular law is violative of Articles 14, 21 and 22 and to what extent the Parliament has transgressed in making a law in exercise of the powers conferred on it under Article 245 (1). In complaining about the violation of an injunction the petitioner may be only seeking a declaration that the law is void on the ground that the Parliament was incompetent to make such law. But a mere declaration cannot be granted unless the law or the action taken thereunder affects the right

of that person. In other words, unless the corresponding right conferred on that person by Articles 14, 21 and 22 is violated, the arrest and detention of a person could not be held to be invalid.

In moving a petition for a writ of Habeas Corpus what the petitioner is in fact complaining of is his right to be not arrested except in conformity with Articles 14, 21 and 22. In other words he is asserting his right to be protected against the arbitrary exercise of power of arrest and detention conferred on him by the enactment in contravention of Articles 14, 21 and 22 which confers equality before law and equal protection of laws and which require the service of grounds of detention and affording of an opportunity to make a representation against the order of detention. It is precisely this right to move any Court that is taken away by the declaration under Article 359 (1) by the President. There is, therefore, no escape from the fact that while the law may be incompetent either for the reason that the Parliament is not empowered to make such a law under Article 245 which is subject to Articles 14, 21 and 22 or for the reason that any law so made is declared to be void under Article 13 (2), the right to move the Court having been taken away the court is precluded from pronouncing the law to be void and consequently holding the arrest and detention under that law to be bad.

57. Mr. P. A. Choudary answers this by saying that such an impossible situation is created because of the basic assumption which according to him is erroneous that Right to Freedom and liberty emanates from the provisions of Chapter III of the Constitution. According to the learned counsel freedom and liberty of a citizen springs not from any provision of the Constitution, but it is a natural right inherent in every human being and a necessary concomitant of the rule of law. Therefore, when a person complains about the arrest and detention under a law which the Parliament is not competent to make, he is not enforcing any right guaranteed by Articles 14, 21 and 22 but is only seeking to enforce a pre-existing right to freedom and liberty.

58. Mr. Choudary in support of this contention relied on the observations of Sir Ivor Jennings in "Some Characteristics of the Indian Constitution."

"What the Indian Constitution seems to do is to prevent encroachment on this liberty, or in other words not to create fundamental rights but to protect fundamental liberties."

He also placed reliance on certain passages in the book "Constitutional and Administrative Law by S. A. de Smith. In Chapter 20 "Personal Freedom" under the

topic "Fundamental Rights" the learned Author observed:

"The traditional legal approach to Civil Liberties in Britain can be summed up in three propositions. First, freedoms are not to be guaranteed by statements of general principles. Secondly, they are residual. Freedom of public assembly, for example, means the liberty to gather wherever one chooses except in so far as others are legally entitled to prevent the assembly from being held or in so far as the holding or conduct of the assembly is a civil wrong or a criminal offence. To define the content of liberty one has merely to subtract from its totality the sum of the legal restraints to which it is subject. Thirdly, for every wrongful encroachment upon one's liberty there is a legal remedy awarded by an independent court of justice."

Reliance was also placed on the statement of A. V. Dicey in "The Law of the Constitution" regarding the "Rule of Law" (at page 202) that 'rule of law', then, which forms a fundamental principle of the Constitution, has three meanings, or may be regarded from three different points of view.

"It means, in the first place the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, of prerogative or even of wide discretionary authority on the part of the Government. Englishmen are ruled by the law, and by the law alone; a man may with us be punished for a breach of laws but it can be punished for nothing else.

It means, again, equality before the law, or the equal subjection of all classes to the ordinary law of the land administered by the ordinary law courts the 'rule of law' in this sense excludes the idea of any exemption of officials or others from the duty of obedience to the law which governs other citizens or from the jurisdiction of the ordinary tribunals; there can be with us nothing really corresponding to the 'administrative law'..... The 'rule of law' lastly, may be used as a formula for expressing the fact which in foreign countries naturally form part of a constitutional code, are not the source but the consequence of the rights of individuals, as defined and enforced by the courts; that, in short, the principles of private law have with us been by the action of the courts and Parliament so extended as to determine the position of the Crown and of its servants; thus the constitution is the result of the ordinary law of the land."

59. Mr. Choudary contends the 'rule of law' is ensured under our Constitution by subjecting the State action to

the judicial review under the Federal structure. He relies in this behalf on the judgment of the Supreme Court in State of M. P. v. Bharat Singh. AIR 1967 SC 1170 at p. 1173 in which the Supreme Court declared:

"All executive action which operates to the prejudice of any person must have the authority of law to support it, and the terms of Art. 358 do not detract from that rule. Article 358 expressly authorises the State to take legislative or executive action provided such action was competent for the State to make or take, but for the provisions contained in Part III of the Constitution. Article 358 does not purport to invest the State with arbitrary authority to take action to the prejudice of citizens and others; it merely provides that so long as the proclamation of emergency subsists laws may be enacted, and executive action may be taken in pursuance of lawful authority, which if the provisions of Art. 19 were operative would have been invalid. Our federal structure is founded on certain fundamental principles: (1) the sovereignty of the people with limited Government authority, i.e., the Government must be conducted in accordance with the will of the majority of the people. The people govern themselves through their representatives, whereas the official agencies of the executive Government possess only such powers as have been conferred upon them by the people; (2) there is distribution of powers between the three organs of the State, legislative, executive and judicial each organ having some check direct or indirect on the other; and (3) the rule of law which includes judicial review of arbitrary executive action."

This decision, however, does not lay down that any right to freedom or liberty springs from or vests in a citizen de hors the Constitution and any law which takes away such right violates this inherent right to freedom. On the other hand the Parliament and the legislatures of the State are conferred unlimited power with respect of matters enumerated in the respective lists of the Seventh Schedule subject to only to the other provisions of the Constitution and in particular provisions of Part III of the Constitution. That is now authoritatively laid down by the Supreme Court in Kesavananda Bharati v. State of Kerala, AIR 1973 SC 1461 in which the Supreme Court dealing with the power of the amendment vested in the Parliament the majority judgment declared that Part III of the Constitution is not a basic structure and that the entire Part II may be amended. All laws emanate from the Constitution and no implied limitation on the power of the Parliament to make laws could be placed. If that be the position, then the law which may be

made by the Parliament with respect to any of the matters referred to in the respective lists of the Seventh Schedule may be questioned only on the ground of being violative of one or the other provisions of the Constitution and any such complaint if made on the ground that it is violative of Articles 14, 21 and 22, the declaration made by the President under Cl. (1) of Article 359 stands in the way so long as the declaration is operative.

60. When a person challenges his arrest and detention as illegal even though such arrest is in accordance with the provisions of particular enactment he really complains of infringement of the provisions of Articles 14, 21 and 22 and not any other natural right or inherent right to liberty and freedom or violation of principles of natural justice dehors these provisions. All rights emanate from the Constitution, and the freedom from arrest and detention, except by authority of law emanates from and is guaranteed by Articles 21 and 22. The arbitrary action of the executive is restricted by Articles 14, 21 and 22. The complaint of the citizen against arrest and detention by any authority in exercise of the power conferred by any law is, therefore, traceable to the right conferred by these articles and the right to move the Court having been suspended by a declaration under Article 359 (1) for the period specified in the proclamation, the Court is precluded from entertaining the same.

61. The learned Advocate General contended that as right to all "freedom and liberty" emanates from the Constitution and all rights under Article 19 have been suspended by virtue of Article 358 during the period of Emergency and the right of a person to enforce the rights conferred by Articles 14, 21 and 22 also have been suspended by a declaration under Cl. (1) of Article 359 not with reference to any particular enactment but in very general terms, so long as the declaration stands, no person is entitled to move any Court complaining about any arrest and detention as illegal even if it is not in purported exercise of a power vested under any statute. Any arrest and detention must have the authority of law otherwise it would be violative of Articles 21 and 22 of the Constitution. But when the arrest and detention is in purported exercise of a power conferred by a statute and so long as the complaint is about the violation of the provisions of that law and not about the infringement of any right conferred by Part III, the right of a person to move the Court is not taken away by a declaration under Article 359 (1) of the Constitution.

In *Dr. Ram Manohar Lohia v. Union of India*, AIR 1966 SC 740 the objection to

the maintainability of the petition for a writ of Habeas Corpus challenging the validity of the detention during the Proclamation of Emergency and declaration under Article 359 (1) came up for consideration. There the declaration of the President was with reference to detention under the Defence of India Rules. Even while following the earlier judgment of that Court in *Makhan Singh v. State of Punjab*, AIR 1964 SC 381 = (1964-1 Cri LJ 269) the Supreme Court held:

"It is not in dispute that the present petition has been made for the enforcement of Dr. Lohia's right to personal liberty under Articles 21 and 22. These articles in substance—and it should suffice for the present purpose to say no more—give people a certain personal liberty. It is said by the respondent State that the President's Order under Article 359 (1) altogether prevents us from entertaining Lohia's petition and, therefore, it should be thrown out at once. This would no doubt, subject to certain exceptions to which a reference is not necessary for the purposes of the present judgment, be correct if the Order of November 3, 1962 took away all rights to personal liberty under Articles 21 and 22. But this, the order does not do. It deprives a person of his right to move a Court for the enforcement of a right to such personal liberty under Articles 21 and 22. But this, the Order does not do. It deprives a person of his right to such personal liberty only when he has been deprived of it by the Defence of India Act—it is not necessary to refer to the Ordinance any more as it has been replaced by the Act—or any rule or order made thereunder. If he has not been so deprived, the order does not take away his right to move a Court. Thus if a person is detained under the Preventive Detention Act, 1950, his right to move the Court for enforcement of his rights under Articles 21 and 22 remain intact. That is not a case in which his right to do so can be said to have been taken away by the President's Order. This Court has in fact heard applications under Article 32 challenging a detention under that Act. See *Rameshwar Shaw v. District Magistrate of Burdwan*, AIR 1964 SC 334 = (1964-1 Cri LJ 257). If any person says as Dr. Lohia does, that he has been deprived of his personal liberty by an order not made under the Act or the Rules, there is nothing in the President's order under Art. 359 (1) to deprive him of his right to move the Court under Art. 32. The Court must examine his contention and decide whether he has been detained, under the Act or the Rules and can only throw out his petition when it finds that he was so detained, but not before then. If it finds that he was not so detained, it must proceed to hear his petition on its merits.

The right under Art. 32 is one of the fundamental rights that the Constitution has guaranteed to all persons and it cannot be taken away except by the methods as provided in the Constitution, one of which is by an order made under Art. 359. The contention that an order under that article has not taken away the constitutional right to personal liberty must be examined."

The Supreme Court in *Ananda Nambiar v. Chief Secretary to Government of Madras*, AIR 1966 SC 657 = (1966 Cri LJ 586) pointed out referring to the decision in *Makhan Singh v. State of Punjab*, AIR 1964 SC 381 = (1964-1 Cri LJ 269) that

"this court, took the precaution of pointing out that as a result of the issue of the Proclamation of Emergency and the Presidential Order, a citizen would not be deprived of his right to move the appropriate Court for a writ of habeas corpus on the ground that his detention has been ordered mala fide. Similarly, it was pointed out that if a detenu contends that the operative provisions of the Defence of India Ordinance under which he is detained suffer from the vice of excessive delegation, the plea thus raised by the detenu cannot, at the threshold, be said to be barred by the Presidential Order, because, in terms, it is not a plea which is relatable to the fundamental rights specified in the said order."

62. Dealing with an attack on the arrest made in purported exercise of the power conferred by Rule 30 (1) (b) of the Defence of India Rules, while the Proclamation of Emergency and the declaration of the President under Article 359 (1) were in force, the Supreme Court in *Durgadas v. Union of India*, AIR 1966 SC 1078 = (1966 Cri LJ 812) pointed out the grounds on which the detention order may be challenged in the following words:

"If the petitioner seeks to challenge the validity of the Ordinance, rule or order made thereunder on any ground other than the contravention of Articles 14, 21 and 22 the Presidential Order cannot come into operation. It is not also open to challenge the Ordinance, rule or order made thereunder on the ground of contravention of Art. 19 because as soon as a Proclamation of Emergency is issued by the President under Article 358 the provisions of Art. 19 are automatically suspended. But a petitioner can challenge the validity of the Ordinance, rule or order made thereunder on a ground other than those covered by Art. 358, or the Presidential Order issued under Art. 359 (1). Such a challenge is outside the purview of the Presidential Order. For instance, a citizen will not be deprived of his right to move an appropriate Court for Writ of Habeas Corpus on the ground that his detention has been ordered mala

fide. Similarly, it will be open to the citizen to challenge the order of detention on the ground that any of the grounds given in the order of detention is irrelevant and there is no real and proximate connection between the ground given and the object which the legislature has in view."

In *District Collector, Hyderabad v. Ibrahim & Co.*, AIR 1970 SC 1275 at page 1278 the Supreme Court struck down the executive action during the period when the proclamation of Emergency under Article 352 was in force resulting in suspension of Article 19. The Supreme Court while holding

"the respondents could not challenge the validity of any law enacted by the State Legislature so long as the proclamation of Emergency is in operation on the ground that it impaired the freedoms guaranteed by Article 19. They could not also challenge any executive action which, but for the provisions contained in Article 19 the State was competent to take"

The Supreme Court declared

"..... executive action of the State Government which is otherwise invalid is not immune from attack merely because a proclamation of Emergency is in operation when it is taken. Since the order of the State Government was plainly contrary to the statutory provisions contained in the Andhra Pradesh Sugar Dealers' Licensing Order and the Sugar Control Order, it was not protected under Article 358 of the Constitution."

In the present writ petition also if the attack on the detention of the petitioners was on the ground that the provisions of the principal Act as amended by the two Ordinances have not been complied with, certainly that aspect could be examined by the Court for the right of a person to challenge any act of the executive without seeking to enforce a fundamental right referred to in the declaration made under Article 359 (1), or the fundamental right guaranteed under Article 19 is not taken away. Even during the Emergency the executive is bound to conform to the laws as are in operation.

63. The learned Advocate-General, however, argued that in the above cases referred to in this behalf, the effect of suspending the right to enforce any of the rights conferred by Articles 14, 21 and 22 did not come up for consideration before the Supreme Court; only the validity of the executive action purported to have been taken in pursuance of a particular enactment but which was outside the scope of that enactment came to be considered while an Emergency was declared and as a consequence, only Article 358 came into operation. We may, however,

notice that in *Durgadas v. Union of India*, AIR 1966 SC 1078 = (1966 Cri LJ 812) the Supreme Court specifically held that

"a petitioner can challenge the validity of an Ordinance, Rule or Order made thereunder on grounds other than those covered by Article 358 or the Presidential Order issued under Article 359 (1). Such a challenge is outside the purview of the Presidential Order"

and gave instances on which the order could be challenged. Further, it would be seen that even though by virtue of Article 358 the Parliament is empowered, while a Proclamation of Emergency is in operation, to make any law or to take any executive action which the State would be competent to make or to take but for Article 19 any executive action taken by the State in contravention of the statutory provisions then in force was struck down by the Supreme Court in a number of cases.

64. In *State of Madhya Pradesh v. Bharat Singh*, AIR 1967 SC 1170 where restrictions were placed upon the movement of the petitioner therein within the territory of India and he was prohibited from entering a particular District and was required to reside within a particular area during the Proclamation of Emergency under Article 352 of the Constitution while only Article 358 was in operation, the Supreme Court declared:

"Article 358, however, does not operate to validate a legislative provision which was invalid because of the constitutional inhibition before the proclamation of emergency..... All executive action which operates to the prejudice of any person must have the authority of law to support it, and the terms of Article 358 do not detract from that rule. Article 358 expressly authorises the State to take legislative or executive action provided such action was competent for the State to make or take, but for the provisions contained in Part III of the Constitution. Article 358 does not purport to invest the State with arbitrary authority to take action to the prejudice of citizens and others: it merely provides that so long as the proclamation of emergency subsists laws may be enacted, and executive action may be taken in pursuance of lawful authority, which if the provisions of Art. 19 were operative would have been invalid."

In this context, the Supreme Court, among others, pointed out in that judgment:

"Our federal structure is founded on certain fundamental principles: (1) the sovereignty of the people with limited Government authority, i.e., the Government must be conducted in accordance with the will of the majority of the peo-

ple. The people govern themselves through their representatives, whereas the official agencies of the executive Government possess only such powers as have been conferred upon them by the people....."

The Supreme Court thus emphasised that even during the period of Emergency any executive action must be supported by some law though during the period of Emergency that law cannot be challenged as violative of the provisions of Article 19. The executive cannot take away the liberty of a citizen unless it is authorised to do so under some law.

65. In *District Collector, Hyderabad v. Ibrahim & Co.*, AIR 1970 SC 1275 G. O. Ms. No. 2976 dated 30-12-1964 which was an executive order issued by the Andhra Pradesh State during the proclamation of emergency was held to be plainly contrary to the provisions of Andhra Pradesh Sugar Dealers' Licensing Order, 1963 and the Sugar Control Order, 1963 issued by the Central Government and it was held to be not protected under Article 358 of the Constitution. The Supreme Court declared that

"the executive Order immune from attack under Article 358 is only that order which the State was competent, but for the provisions contained in Article 19, to make. Executive action of the State Government which is otherwise invalid is not immune from attack, merely because a proclamation of emergency is in operation when it is taken."

The constitutional validity of Section 17-A of the Maintenance of Internal Security Act which began with a non obstante clause and provided for detaining a person for a period longer than three months but not exceeding two years without obtaining the opinion of the Advisory Board, came up for consideration before the Supreme Court in *S. N. Sarkar v. State of West Bengal*, AIR 1973 SC 1425 = (1973 Cri LJ 1155) during the period when a proclamation of Emergency under Article 352 of the Constitution was in operation, but no declaration under Art. 359 (1) was made by the President, the Supreme Court declared disagreeing with the majority view in *Gopalan v. State of Madras*, AIR 1950 SC 27 = (51 Cri LJ 1383)

"That it was void under Articles 14 and 22 (7) (b) of the Constitution and that the subsequent declaration of emergency and the enactment of Section 6 (6) (d) could not breathe life into those provisions which were already void."

These rulings emphasize that even during the period of Emergency all executive action must be supported by authority of law, and though a law violating Article 19 of the Constitution may be made for the period of Emergency, no executive action

under a law which was void even prior to the declaration of Emergency or an executive action unsupported by any law and is violative of Article 19 could be taken merely because the Emergency was in operation. If that be the position, with regard to an executive action taken with reference to Article 358 which specifically authorised the enactment of laws which the Parliament was entitled to enact, irrespective of the restrictions imposed by Article 19, we do not think that merely because of a declaration under Article 359 (1) of the Constitution which did not specifically empower the Parliament or the President to make laws violating the rights conferred by Part III of the Constitution and which merely empowers the President to suspend the right to move a Court for the enforcement of such rights, was ever intended to protect executive action without the authority of any law whatsoever.

Liberty of an individual and freedom of thought and expression and of Association have always been cherished by men and recognised by Courts as valuable rights. Though the security of the State is paramount and the rights of an individual in times of Emergency must give way to the later interests of the security of the State, we do not think that the President who has taken oath to protect the Constitution and the laws ever intended by merely suspending the right of an individual to move a court for the enforcement of the rights conferred by Part III, to empower the executive to take any action to deprive the liberty of an individual even without reference to any law. It is difficult to envisage that the declaration of the President could ever have been intended for the purpose of authorising such patently illegal action of depriving a person of his liberty even without reference to any law on the footing that such a right does not exist independent of Articles 14, 19, 21 and 22. When the executive purports to arrest a person in exercise of a power vested under any particular enactment and such an order of arrest could be challenged on the ground that it is not in conformity with the provisions of that enactment the executive action cannot be immune from attack when it is an unabashed exercise of arbitrary power which is not even pretended to be in pursuance of any law. However, so far as the detentions with which we are concerned in these writ petitions they are in purported exercise of the power vested under a specific provision of law and not independent of it. Hence on this vexed question of law raised by the learned Advocate-General, we do not intend to express any opinion. We would, however, like to make it clear that where a detention is ordered in pursu-

exercise of power vested under a particular statute and that order is shown to be in violation of the provisions of that statute or is mala fide or constitutes a colourable exercise of power, then notwithstanding the declaration under Article 359 (1) such a detention could be challenged in a court of law.

66. Mr. Kannabhiraman, learned counsel for the petitioner next relied on the decision of the Supreme Court in *Bhuti Nath v. State of West Bengal*, AIR 1974 SC 836 = (1974 Cri LJ 690) in which the Court observed:—

"This Court in many weighty pronouncements over two decades has stressed that Article 22 (5) vests a real, not illusory rights, that communication of facts is the corner-stone of the right of representation and orders based on uncommunicated materials are unfair and illegal," and urged that the Ordinance in authorising the executive not to serve the grounds of detention and denying the detenu the right to make a representation against his detention in fact shakes the basic structure of the Constitution. This in effect according to the learned counsel is a device adopted to circumvent the dicta of the Supreme Court in *Kesavananda Bharati v. State of Kerala*, AIR 1973 SC 1461 that the basic features of the Constitution, which includes the right to freedom and liberty cannot be altered even in exercise of the powers of the Parliament to amend the Constitution. What cannot be done by the Parliament, the President cannot do in exercise of the powers vested in him to issue Ordinances under Article 123 (3) of the Constitution. It is undoubtedly true that in view of clause (3) of Article 123 any Ordinance issued by the President in exercise of the powers conferred on him under clause (1) of Article 123 would be void if it contains any provision which Parliament would not under the Constitution be competent to enact. But nonetheless these Ordinances would be void not because they seek to amend the Constitution but because they violate some provisions of the Constitution or are beyond the competence of the Parliament and therefore of the President. The two impugned Ordinances do not seek to amend any provision of the Constitution and therefore cannot be said to be amending any basic feature of the Constitution. They only seek to amend the provisions of the Maintenance of Internal Security Act. It must, however, be remembered that the Supreme Court dealing with the amending power of the Parliament in *Kesavananda Bharati v. State of Kerala*, AIR 1973 SC 1461 declared in unmistakable terms that the fundamental rights enunciated in Part III of the Constitution do not constitute essential features of

basic structure of the Constitution. Khanna J. held:

"The power of amendment under Article 368 does not include the power to abrogate the Constitution nor does it include the power to alter the basic structure or framework of the Constitution. Subject to the retention of the basic structure or framework of the Constitution, the power of amendment is plenary and includes within itself the power to amend the various Articles of the Constitution, including those relating to fundamental rights as well as those which may be said to relate to essential features. No part of a fundamental right can claim immunity from a mandatory process by being described as the essence or core of that right. The power of amendment would also include within itself the power to add, alter or repeal the various Articles."

The impugned Ordinances though violating the fundamental rights guaranteed under Articles 14, 21 and 22 do not amend any provision of Part III of the Constitution, none of which constitute essential features or basic structure of the Constitution. In exercise of his Ordinance making power under Article 123 (3) of the Constitution the President has only chosen to amend the principal Act and has not touched any provision of the Constitution as such.

67. It was next argued by Mr. Kannabhiraman, learned counsel for the petitioner that the power of the High Court under Article 226 to review the executive act of detention is taken away by this Ordinance inasmuch as no grounds of detention are served and the executive is authorised to detain by a mere declaration under Section 16-A of the Act. It would be seen that the impugned Ordinances do not expressly bar the jurisdiction of the High Court to entertain a petition under Article 226 of the Constitution challenging the validity of the detention order. It is still open to the detenu to move the Court to question the detention order so long as, in so doing, the detenu does not seek to enforce such of the rights conferred by Part III as are specified in the declaration. The right to move the Court is taken away only to that limited extent. So long as there is a law authorising the detention and the detention is made in purported exercise of that power, the detenu may challenge the order of detention if such detention is in violation of the provisions of that law. In other words only the grounds of attack on the detention order are now restricted. It cannot be attacked as violative of such of the fundamental rights as are specified in the declaration. But no sooner than the disability imposed by the declaration under clause (1) of Article 359 ceases to op-

erate, the Ordinances would be exposed to attack that they are violative of the rights conferred by Part III. Thus the contention that the Ordinances by themselves wholly take away the right to challenge the order of detention is untenable and must be rejected. The petitioners herein do not state that the orders of detention in any way contravene the provisions of the principal Act as amended by the two impugned Ordinances.

68. It was also argued that inasmuch as the Ordinance now dispenses with the compliance of Sections 8 to 11 of the principal Act, no grounds need be served on the detenu and the detenu has no right of representation. In the absence of the grounds of detention the petitioner cannot make any effective representation and would not be in a position to challenge the same before a Court of law. That may be so, but nonetheless, inasmuch as the law itself authorises such detention and the validity of such a law cannot be questioned on the ground that it is violative of the provisions of Part III of the Constitution during the period of declaration under Cl. (1) of Art. 359 the detenu is deprived of his right to move the Court, unless the declaration under Clause (1) of Article 359 itself is declared void. It has already been held that the courts are precluded from examining whether the circumstances warrant a proclamation of Emergency under Article 352 or a declaration under Article 359 of the Constitution.

69. It was urged that the High Courts have been expressly vested with the power to issue writs of Habeas Corpus not only for the enforcement of any of the rights conferred by Part III but for any other purpose as well. Hence notwithstanding the declaration under clause (1) of Article 359 the Court has power to issue such a writ where it finds that the detention is invalid. The very power to issue a writ of Habeas Corpus, it is stated implies that the Court has power to examine the grounds for detention and therefore that whether the grounds for detention are served upon the detenu or not, they must be stated before the Court, so that the Court may examine the same and be satisfied that the detention order is not based on non-existent or irrelevant ground and is not a colourable exercise of power. Reliance for this proposition is placed by the learned counsel for the petitioners on the following passage in "Remedies of English Law" by F. H. Lawson at page 238.

"The writ of habeas corpus ad subiciendum to give its full title, is employed to bring a person before a court for the court to decide what is to be done with him. The best known use is to test the

legality of the detention of a prisoner and, if it proves to be illegal to secure his release."

The Court can always exercise this power by virtue of Article 226 of the Constitution. That article not having been suspended, the Court can examine the legality of the petitioner's detention. In this context reliance was also placed upon the following passage occurring in the address of Lord Simonds extracted at page 344 of the "Cases and Materials on Constitutional and Administrative Law" (1947 App Cas 573 at p. 591)

"..... It is the right of every citizen to be free from arrest unless there is in some other citizen, whether a constable or not, the right to arrest him. And I would say next that it is the corollary of the right of every citizen to be thus free from arrest that he should be entitled to resist arrest unless that arrest is lawful. How can these rights be reconciled with the proposition that he may be arrested without knowing why he is arrested? It is to be remembered that the right of the constable in or out of uniform is, except for a circumstance irrelevant to the present discussion, the same as that of every other citizen. Is citizen A bound to submit unresistingly to arrest by citizen B in ignorance of the charge made against him? I think, my Lords, that cannot be the law of England. Blind, unquestioning obedience is the law of tyrants and of slaves: it does not yet flourish on English soil. I would, therefore, submit the general proposition that it is a condition of lawful arrest that the man arrested should be entitled to know why he is arrested....."

But it cannot be forgotten that any complaint that a person is detained, although there are no grounds for detention or that the grounds are non-existent or unrelated, is really a contention that it is an arbitrary exercise of power violative of Articles 14, 21 and 22 of the Constitution. Reliance was placed by Mr. Choudary on the judgment of Patanjali Sastri, J. in *Gopalan v. State of Madras*, AIR 1950 SC 27 at p. 79 in which he held:

"An examination of the grounds for these purposes is made impossible by Section 14, and the protection afforded by Article 22 (5) and Article 32 is thereby rendered nugatory. It follows that Section 14 contravenes the provisions of Article 22 (5) and Article 32 in so far as it prohibits the person detained from disclosing to the Court the grounds of his detention communicated to him by the detaining authority or the representation made by him against the order of detention, and prevents the Court from examining them for the purposes aforesaid and to that extent it must be held under Article 13 (2) to be void."

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This decision however does not help the petitioners, for the validity of the Act therein was tested with reference to Articles 14 and 22 (5) of the Constitution at a time when a declaration by the President under Article 359 (1) was not in force. The question whether the Court has any power to require the grounds for detention to be stated before it when a petition for a writ of Habeas Corpus is filed, although the detenu himself need not be shown those grounds, could arise only if the detenu had the right to move the Court and seek the assistance of the Court for requiring the detaining authority to produce the grounds of detention. The right to make such a complaint during the period of the declaration under clause (1) of Article 359 having been expressly taken away the High Court cannot claim to have and proceed to exercise any implied power vested in it merely because it is authorised to issue writs of Habeas Corpus not only for the enforcement of rights conferred by Part III but may issue them for any other purpose.

In *Mohd. Yaqub v. State of J. & K.* AIR 1968 SC 765 at p. 770 = (1968 Cri LJ 972 at p. 977) the Supreme Court considered this position and laid down:

"The sixth contention is that Art. 22 (5) which lays down that grounds of detention must be communicated to the person detained must still be applicable. We have not been able to understand this argument at all. If the President's order is validly made—as we hold it to be—and if it suspends Article 22—as it does—we fail to see how clause (5) continues, for it is only a part of Article 22, which has been suspended. There is no question therefore of furnishing any ground under Article 22 (5) to the detenu if the detention is under the Act or the Rules, for the entire Article 22 has been suspended."

The contention that so long as Article 226 stands, grounds for detention must be furnished to the detenu even while a declaration under Article 359 (1) subsists cannot be upheld.

70. In view of the foregoing discussion as observed by Gajendragadkar, J. who wrote the majority opinion in *Makhan Singh v. State of Punjab*, AIR 1964 SC 381 = (1964-1 Cri LJ 269) that although it appears that the petitioner's challenge to validity of the impugned Ordinances is infeasible, the Court

"would not reach the stage of expressing our opinion on the validity of the Act if we were to uphold the preliminary objection that the applications made by the detenues were incompetent." As declared therein

"if we come to the conclusion that the bar created by the Presidential Order operates against the detenues in the pre-

sent case, the Court cannot pronounce any opinion on the validity of the impugned Act."

That course was adopted in dealing with the case in *Mohan Choudhury v. Chief Commissioner, Tripura*, AIR 1964 SC 173 = (1964-1 Cri LJ 132)

"that is the only course which this Court can logically and with propriety adopt."

As we are of the view that the preliminary objection, that the petitioners' right to move the Court during the period when the declaration of the President under Article 359 (1) is in force, is taken away must be upheld, no pronouncement as to the invalidity of the impugned Ordinances or the detention orders issued thereunder could be made by any Court.

71. Only in W. P. No. 3381 of 1975 there is a further allegation that the order for arrest and detention of Sri Venkateswarlu is vitiated by mala fides and is a colourable exercise of power. It was stated that because Sri Venkateswarlu was defending the accused who were implicated in the "Naxalite Movement" and had filed several writs of Habeas Corpus alleging that the persons arrested and detained without any authority or justification were also being subjected to torture by the respondents, the Court directed the Inspector General of Police to file a counter-affidavit as to whether the allegations were true, he was arrested and detained. It was also averred that Sri Venkateswarlu as Convenor of several Committees concerned in Civil Liberties had filed a petition in the High Court questioning the jurisdiction of the respondents to execute the sentences of death against Bhoomiah and Kistiah Goud and with a view to mobilise public opinion on this issue he had announced a national convention of all the opposition parties to be held at Hyderabad on July 6, 1975. It is alleged that the respondents have arrested Sri Venkateswarlu with a view to prevent him from exercising his freedom of speech and freedom of association for the furtherance of this public cause.

72. These allegations have been denied in the counter-affidavit filed by the Commissioner of Police who has ordered the detention of Sri Venkateswarlu. It is true that Sri Venkateswarlu had moved for commutation of death sentences against Bhoomiah and Kista Goud and had also filed a petition in the High Court in this behalf challenging the jurisdiction of the respondents to execute the sentences of death and it is also admitted that he was also mobilising public opinion against the execution of these death sentences, there is nothing on record to show that the Commissioner of Police who is the Detaining Authority took these facts

into consideration in ordering the detention of Sri Venkateswarlu. In the counter-affidavit, he has categorically stated that these facts did not weigh with him in reaching the satisfaction required for issuing the detention order. He also denied the allegation that Sri Venkateswarlu was arrested because the Inspector-General of Police was directed to file a counter in the petitions for writs of Habeas Corpus moved by him alleging that certain persons were arrested without the authority of law by the Police and were subjected to torture by them. It was asserted that he was detained because of his activities which were prejudicial to the maintenance of 'Public Order' and because the Commissioner of Police was satisfied that it was necessary to detain him for preventing him from acting in that manner particularly in view of the Emergency declared by the President of India.

73. The allegations of mala fides are not supported by any other evidence. There is no allegation against the Commissioner of Police who ordered the detention, that he had caused the arrest of any person without the authority of law and had them subjected to torture. The detention of Sri Venkateswarlu was not ordered by the Inspector-General of Police moreover merely because the Inspector-General of Police was asked to file a counter in a writ petition, it is impossible to believe that he bore any grudge against the Advocate appearing in that case for filing of counter-affidavits in writ petitions by public authorities is a duty performed in the normal discharge of official duties. There are absolutely no grounds to hold that either the Inspector-General of Police or the Commissioner of Police had any oblique motive for detaining Sri Venkateswarlu.

74. The mere fact that the detention deprives the petitioner of the right to freedom of speech and expression and freedom of association, and has thwarted his efforts to hold a convention for mobilising public opinion in favour of the commutation of death sentences against Bhoomiah and Kista Goud cannot be taken as a factor establishing mala fides or colourable exercise of power on the part of the Commissioner of Police. So long as those facts were not taken into account in reaching the satisfaction required for ordering the detention under the Act the order would not be vitiated. The deprivation of the right to freedom of speech and association is a consequence of the order. The allegations of mala fides and colourable exercise of power are not made out by the petitioner.

75. In view of the judgment of the Supreme Court in *Makhan Singh v. State of Punjab*, AIR 1964 SC 381 = (1964-1 Cri LJ 269) we have no option

but to hold that these petitions are not maintainable in so far as the orders of detentions are challenged as violative of such of the rights as are conferred by Part III of the Constitution as are specified in the declaration, so long as the declaration made by the President under clause (1) of Article 359 stands.

76. The only other ground of attack on one of these orders of detention pressed before us was that it is vitiated by mala fides and that has been held by us to be not made out.

77. These three Writ Petitions therefore fail and are accordingly dismissed. No costs. Advocate's fee Rupees 250/- in each.

Writ Petitions Nos. 3361, 3444, 3445 and 3306 of 1975;

78. In these writ petitions, the arrest and detention of the petitioners under the provisions of Sections 48 and 49 of the Andhra Pradesh Revenue Recovery Act is called in question on the grounds (1) that Sections 48 and 49 of the Act violate the Fundamental Rights conferred by Articles 19 and 21 of the Constitution, (2) that the detention is in contravention of the provisions of Sections 48 and 49 of the Act, (3) that the District Revenue Officer is not empowered to order the arrest and detention of the petitioner under the provisions of the Act, and (4) that there was no proper satisfaction on the part of the District Revenue Officer in issuing the warrants for arrest and detention.

79. There is no dispute that there are arrears of revenue outstanding against each of the petitioners and that in spite of demand they have failed to pay the same. Section 5 of the Revenue Recovery Act declares that

"whenever revenue may be in arrear, it shall be lawful for the Collector or other officer empowered by the Collector in that behalf, to proceed to recover the arrear, together with interest and costs of process, by the sale of the defaulter's moveable and immovable property, or by execution against the person of the defaulter in the manner hereinafter provided."

Section 48 vests the power in the Collector to order arrest of the defaulter in certain cases of non-payment of arrears in the following words:

"When arrears of revenue, with interest and other charges as aforesaid cannot be liquidated by the sale of the property of the defaulter, or of his surety, and the Collector shall have reason to believe that the defaulter or his surety is wilfully withholding payment of the arrears, or has been guilty of fraudulent conduct in order to evade payment, it shall be lawful for him to cause the arrest and imprisonment of the defaulter, or his surety, not being a female, as here-

inafter mentioned but no person shall be imprisoned on account of an arrear of revenue for a longer period than two years, or for a longer period than six months, if the arrear does not exceed Rs. 500/- or for a longer period than three months if the arrear does not exceed Rs. 50/- provided that such imprisonment shall not extinguish the debt due to the State Government by the defaulter, or his surety."

Section 49 of the Act which lays down the procedure for arrest reads as follows:—

"The Collector shall issue his warrant for the arrest of the defaulter, or his surety, or both, not being female which shall specify his or their names, the amount of revenue due and the date on which it became payable, and the warrant shall be signed and sealed by the authority by whom it was issued. The Officer charged with the execution of the warrant shall thereupon arrest the defaulter, or his surety, or both and convey him or them to the district gaol and deliver the warrant to the gaoler, which shall be a sufficient authority to him to receive the prisoner or prisoners. A copy of such warrant shall be retained by the gaoler, who shall forthwith despatch the original to the officer in charge of the gaol."

Section 3 of the Andhra Pradesh District Collector's Powers Delegation Act XXXII of 1961 empowers the State Government to authorise by issuing a notification in the Andhra Pradesh Gazette any Joint Collector or any other officer of the Revenue Department not below the rank of a Deputy Collector to exercise all or any of the powers vested by or under any law in the District Collector. In exercise of these powers the Government has issued G. O. Ms. No. 77 Revenue dated 22-1-1968 published in the Andhra Pradesh Gazette dated 15-2-1968 at pages 223 and 224 authorising the District Revenue Officers to exercise all the powers vested in the District Collector by or under the laws mentioned in the annexure relating to matters enumerated in List II or List III in the Seventh Schedule to the Constitution and having the force of law in any part of the State of Andhra Pradesh. In the said annexure, Item 66 is the Andhra Pradesh Revenue Recovery Act II of 1864. The power vested in the District Collector under Sections 48 and 49 to issue a warrant for the arrest of a defaulter or a surety or both in case of wilful or fraudulent non-payment of arrears of revenue is thus vested in and exercisable by the District Revenue Officer by virtue of the above notification. The warrant of arrest issued under the hand of the District Revenue Officer for the arrest of these detenues therefore does not suffer from lack of jurisdiction.

80. In order to determine whether the provisions of Sections 48 and 49 of the Act have been contravened by the District Revenue Officer in ordering the arrest and detention of the petitioners, it is necessary to examine as to what are the requirements of Sections 48 and 49. Firstly there should be an arrear of land revenue which cannot be liquidated by the sale of the property of the defaulter or of his surety and secondly the Collector should have reason to believe that the defaulter or his surety is wilfully withholding the payment of arrears or has been guilty of fraudulent conduct in order to evade payment. It is necessary that both those conditions be satisfied before the arrest of a defaulter of land revenue could be ordered. Once these two conditions are satisfied then a warrant of arrest may be issued and the defaulter imprisoned for the prescribed period. Certain other restrictions are imposed under Section 49 with which we are not concerned in these writ petitions.

81. In *Collector of Malabar v. E. Ebrahim*, AIR 1957 SC 688 = (1957 Cri LJ 1032) dealing with the provisions of Section 48 of the Madras Revenue Recovery Act the Supreme Court observed that before the Collector can proceed to arrest the defaulter not merely the condition that the arrears cannot be liquidated by the sale of the property of the defaulter should be satisfied but the Collector should have reason to believe that the defaulter is wilfully withholding the payment or has been guilty of fraudulent conduct in order to evade the same.

82. It is contended that neither of these conditions are satisfied in the case of the petitioners. We shall examine this aspect with reference to the case of each of the petitioners separately. Before that we may refer to the contention of the petitioners that the provisions of Sections 48 and 49 are violative of the fundamental rights guaranteed under Articles 19 and 21 of the Constitution. For the reasons already recorded above, even if Sections 48 and 49 of the Act violate any such Fundamental Right, the petitioners are proscribed from moving the Court for enforcement of such right or complain of infringement of such right during the period of the declaration under clause (1) of Article 359 of the Constitution. That apart, the vires of these provisions is no longer *res integra*. In *Purushottam Govindji Halaj v. B. M. Desai*, AIR 1956 SC 20 = (1956 Cri LJ 129) the Supreme Court dealing with the question whether there was any violation of Articles 14 and 21 of the Constitution where the detenu had been arrested under Section 13 of the Bombay Land Revenue Act in pursuance of a warrant of arrest issued for recovery of the demand certified under Section 46 (2) of the Indian Income-tax Act held

that, it did not, as Section 13 of the said Act constituted a procedure established by law. Dealing with the provisions of the Madras Recovery Act itself the Supreme Court in *Collector of Malabar v. E. Ebrahim*, AIR 1957 SC 688 = (1957 Cri LJ 1032) held:

"The arrest was not in connection with any allegation or accusation of any actual or suspected or apprehended commission of any offence of a criminal or quasi criminal nature. It was really an arrest for a civil debt in the process or mode prescribed by law for recovery of arrears of land Revenue."

83. Thereafter referring to and having regard to the previous decisions of that Court it declared:

"Neither Section 48 of the Act nor Section 46 (2) of the Indian Income-tax Act violates Articles 14, 19, 21 and 22 of the Constitution."

Thus Sections 48 and 49 of the Act are neither invalid nor is the challenge to their validity on the ground that they violate Articles 19 and 21 of the Constitution entertainable by this Court during the period of declaration under Article 359 (1). The warrant of arrest and detention issued in conformity with those provisions is also therefore immune from attack on that ground.

84. Now turning to the contention that the District Revenue Officer has not applied his mind to the case of each of the detenus to ascertain if the conditions laid down by the provisions of Sections 48 and 49 are satisfied, we find that it is wholly unsustainable.

85. The detenus M/s. Govinda Rao Kamaraju and Paparao have admittedly defaulted in paying the arrears due from them in respect of some Excise contracts. All these three detenus were partners in the arrack contract and each had a 1/3rd share therein. They are jointly and severally liable. It is found that no solvency certificates were obtained from these defaulters at the time of auction of these arrack shops for Excise years 1971 and 1972. It is stated on their behalf that due to illicit distillation and sale of liquor they had suffered loss and that although they had drawn the attention of the Department even during the currency of the lease, the Department Officials did not take any action. The consequent loss suffered by them was so heavy that they had to close down their shops. These objections are, however, entirely beside the point and wholly untenable in these proceedings under Article 226 challenging the proceedings taken by the competent authorities under Sections 48 and 49 of the Revenue Recovery Act. The fact remains that Rs. 27,000/- are due from them to the Government which amount the Respondents are entitled to recover as ar-

rears of land Revenue and all of them being partners, each one of them is jointly and severally liable to repay the entire arrears. The respondents are only seeking to recover that amount proportionately from each of the defaulters.

86. It is stated on behalf of Sri T. Govinda Rao one of the defaulters that he has no income or property to pay the arrears and therefore a warrant for his arrest and detention could not be issued.

87. In the counter-affidavit of the District Revenue Officer, the statement that the defaulter has no income or property is emphatically denied and it is stated that the inquiry revealed that the detenu is having five houses in the name of his wife in Golipet of Borampet Village and that three of his sons are employed drawing Rs. 500/- Rs. 400/- and Rs. 200/- respectively and that the detenu himself is getting pension from the Government. It is further stated that although these houses do not stand in his name, he is the real owner of all these houses and that he is in a position to pay the arrears but wilfully withholding payment.

88. On behalf of the detenu D. Kamaraju a similar plea is raised and it is asserted that he too has no income or property to pay the arrears. But in the counter-affidavit, it is stated that the detenu who is the Sarpanch of the village for the last 8 years has a 1/6th share in the joint family property consisting of Ac. 13.05 cents wet land and Ac. 3.31 cents of dry land and that although he is in a position to pay the arrears he is wilfully withholding payment. In the reply affidavit, the detenu Kamaraju stated that to discharge the debt which he had incurred on account of the loss he suffered by him in the arrack business he had given up his share in his lands in favour of his father which he had got on partition and that at present he had no property. However, no document was produced to substantiate his statement. Rights in immovable property could not be relinquished except under a registered document. This claim of the petitioner is neither true on facts nor tenable in law.

89. On behalf of the other detenu also a similar vague plea that he has no property or income is taken and in the counter-affidavit while denying that statement it was asserted that ever since the detenu became a defaulter, he is doing arrack business as a benami partner in arrack shops of Baruva, Bethala and Pehapatnam villages. In the reply affidavit, this allegation was denied.

90. It is contended on behalf of the detenus that unless it is found that the defaulter has property and that by the sale of such property of the defaulter the arrears cannot be liquidated no arrest

could be ordered for non-payment of the arrears. In our view, even if it be assumed, as asserted by the petitioners, that they have no property, although it is not so established, it follows that the arrears due from them cannot be liquidated by the sale of their property. When there is no property of the defaulter, the question of bringing that property to sale or the Collector being satisfied that the arrears cannot be liquidated by the sale of the defaulters could (not?) arise. A Bench of this Court in W. P. No. 3802 of 1974 dated 1-8-1974 repelled the contention that the possession of property by a defaulter was a condition precedent to action under Section 48 and held:

"What the clause contemplates is not the existence but the non-existence of property of the defaulter by the sale of which the arrears of revenue can be liquidated. That may be either because the defaulter possesses no property at all or because the property is inadequate and the amount realised by any sale of the property cannot liquidate the arrears of revenue. In either case the requirement of Section 48 is fulfilled if the other requirement that the defaulter is either wilfully withholding the payment of arrears or has been guilty of fraudulent conduct in order to evade payment is satisfied."

We are of the opinion that this decision lays down the correct position of law and we are in entire agreement with that view. In these four Writ Petitions either because the defaulters do not have any property as stated by them or because as stated in the counter-affidavit, the defaulters own properties, but they cannot be brought to sale for the reasons stated therein the result is the same that the arrears cannot be liquidated by the sale of the property of the defaulter. The first requirement of Section 48 must therefore be found to have been satisfied in these cases.

91. It was contended before us that the District Revenue Officer has merely signed the warrants for the arrest of the defaulters mechanically without applying his mind. He has not even decided whether the defaulters were wilfully withholding the payment of arrears or guilty of fraudulent misconduct in order to evade payment. That according to the learned counsel for the petitioners, Mr. Panduranga Rao, is evidenced by the fact that in the warrants of arrest out of the two alternatives viz., "wilfully withholding the payment of arrears" or "has been guilty of fraudulent conduct in order to evade payment" none have been struck off and that no separate order was made before issuing the warrant. This argument is based on the assumption of an erroneous premise that apart from signing the warrant of arrest the District

Revenue Officer did not record any order. When the court enquired the learned Public Prosecutor whether or not there is such an order, he stated that there is no such order. However, on a perusal of the file, the Court could trace out the order of the District Revenue Officer in which he categorically found that the defaulters were wilfully withholding the payment of arrears. The mere fact that one of the two alternatives was not struck off from the prescribed pro forma of the warrant of arrest signed by the District Revenue Officer it cannot be said that the District Revenue Officer did not apply his mind in issuing the order and has mechanically signed it. That the District Revenue Officer has considered the facts of the case of each of the defaulters and found that the arrears cannot be liquidated by the sale of the property of the defaulter and that he was wilfully withholding the payment is clear from his order which formed the basis for and which has preceded the issue of the warrant. A perusal of the record shows that the satisfaction reached by the District Revenue Officer cannot be said to be unsupported by any material whatsoever; in fact it appears to be highly appropriate.

92. It was also contended that before issuing a warrant for arrest and detention of a defaulter, under Section 48 a notice must be issued to the defaulter and as the District Revenue Officer has not issued any notice specifying the arrears due and calling upon the petitioner to show cause why he should not be arrested, the warrant is illegal and without jurisdiction. Sections 48 and 49 do not in terms lay down that any such notice should be issued. That provision is held to be not violative of any provision of the Constitution or otherwise ultra vires for not providing for a notice to the defaulter vide, *Collector of Malabar v. E. Ebrahim* AIR 1957 SC 688 = (1957 Cri LJ 1032).

93. It is, however, urged that such a notice should be issued in view of the principles of natural justice. The petitioner, who do not deny the existence (sic) complain of any violation of the principles of natural justice. Section 48 vests the Collector with the power to issue a warrant of arrest of the defaulter only if he has reason to believe that the arrears cannot be liquidated by the sale of the defaulter's property and that he is either withholding the payment of arrears or guilty of fraudulent conduct in order to evade payment. When the Collector is enjoined to satisfy himself about the circumstances in which he can reasonably believe that these two conditions are satisfied, it cannot be said that the power vested in the Collector to take action under Sections 48 and 49 of the Act is arbitrary or violates the principles of natural justice merely because the defaulters

are not given prior notice of the proposed action.

94. In Writ Petition No. 3306 of 1975 in addition to the above points of law, it was averred that the District Revenue Officer had not found that

"the detenu had the necessary means or funds to discharge the arrears of revenue and in spite of the said means or resources, he was wantonly evading payment."

It is the petitioner's case that he was given in adoption to one T. Jagannadhamurthy and that his adoptive father had disowned him and that he has no property. In the counter-affidavit, these averments are denied and a further averment was made that the defaulter was given notice and his statement was recorded. That statement disclosed that the defaulter had entered into an agreement with the Government with the fraudulent intention of deceiving it by concealing the real contractors among whom his father also was one, who had sufficient property. The District Revenue Officer in his counter-affidavit also stated that he was satisfied that the defaulter was wilfully withholding the payment of arrears.

It is seen from the record placed before the Court that the statement of the defaulter was recorded by the Tahsildar during the course of the inquiry. In that statement the defaulter admitted that these arrack shops were obtained by him at a public auction during the year 1970-71 and that he did that business in partnership with ten others and that he did not offer any surety or security. He also admitted that he is managing an Automobile and an Electrical shop. This shop is in the name of his wife. He deposed that there was a settlement between himself and his adoptive father through court and that he received Rs. 10,000/- under that settlement. He has not paid a single pie towards the arrears due from him to the Government. Even that settlement appears to be a fraudulent one arrived at with a view to evade payment of arrears due from him. In view of these several admissions and surrounding circumstances, the District Revenue Officer in our view, rightly came to the conclusion that the defaulter was wilfully withholding payment of Revenue and has also been guilty of fraudulent conduct with a view to evade payment. It may not be out of place to notice that even earlier this defaulter had filed a Writ Petition No. 838 of 1972 disputing the arrears and praying for a direction to restrain the concerned authorities from taking action to recover these very arrears of revenue. That Writ Petition was dismissed on 19-9-1973. In spite of its dismissal, the petitioner did not pay any portion of the amount due. Both in law and on facts the action taken by

the respondents was perfectly justified. Thus writ petition is absolutely without any merit.

95. In view of the foregoing discussion these four writ petitions are also dismissed with costs. Advocate's fee Rs. 250/- in each.

Petitions dismissed.

AIR 1976 ANDHRA PRADESH 34

KONDAIAH AND SHIV SHANKER, JJ.

The Hindusthan Ideal Insurance Co., Ltd., Appellant v. Ainaparthi Vijayalakshmi and others, Respondents.

A. A. O. No. 134 of 1972, D/- 24-12-1974.*

(A) Motor Vehicles Act (1939), Secs. 95 (2) (a), 110-A and 110-B — Quantum of insurer's liability — Accident and death on 25-8-1968 — If quantum should be at enhanced amount stipulated by Amendment Act 56 of 1969.

An amendment of substantive rights unless indicated otherwise expressly or impliedly is normally prospective. The amendment of the section increasing the insurer's liability from Rs. 20,000/- to Rs. 50,000/- is not procedural but is substantive affecting the rights of the insurer as well as the claimants. Therefore that amendment is only prospective. AIR 1956 SC 614 and AIR 1957 SC 540, Referred.

(Para 9)

Further the cause of action for compensation for claimants under Section 110-A against the insurer, owner and driver of the vehicle is date of accident and date of death of the deceased. No cause of action will arise either on the date of application under Section 110-A or on the date of passing of award under Section 110-B. Thus the maximum limit of the insurer's liability under Section 95 (2) when the accident and death took place on 25-8-1968 will be only Rs. 20,000/- as stipulated by that section prior to its amendment in 1969. 1973 Acc CJ 319 (Ori). Followed. (Para 10)

Cases Referred: Chronological Paras
1973 Acc CJ 319 (Ori) 10
AIR 1957 SC 540 = 1957 SCR 488 9
AIR 1956 SC 614 = 1956 SCR 603 9

R. Kondaiiah, for Appellant; M. Jagannadha Rao, for Respondents Nos. 1 to 5.

KONDAIAH, J.:— This Civil Miscellaneous Appeal by the appellant Insurance Company is directed against the award passed by the Motor Accidents

*(Against order of Dist. J. and Motor Accidents Claims Tribunal, West Godavari Eluru in O. P. No. 116 of 1968 D/- 4-12-1970.)

GS/IS/C736/75/JRM

Claims Tribunal (District Judge, West Godavari, Eluru) in Original Petition No. 116 of 1968 directing the appellant as well as the owner and the driver of the motor vehicle to pay a sum of Rs. 22,000/- to the petitioners-claimants towards compensation for the death of one Visweswara Rao.

2. The material facts leading to this appeal may briefly be stated. At about 2.30 P. M. on 25-8-1968 one A. Visweswara Rao accompanied by his wife, Vijayalakshmi, and his brother, Rajagopala Rao, was travelling in the Jatka of Somireddy from Maruteru to Penugonda. When they just came near Maruteru a lorry bearing No. A. P. K. 7269 belonging to one K. Subbarao and driven by Md. Afuzzal dashed against the Jatka as a result of which the said Visweswara Rao received a serious head injury and died at about 7.30 p. m. on the same day in the Government Hospital, Tanuku. The aforesaid lorry, which was involved in the accident, was insured with the appellant which was added as a third respondent before the Tribunal.

The first petitioner is the wife and the petitioners Nos. 2 to 4 are the sons and the 5th petitioner is the daughter of the deceased Visweswara Rao who was working at the time of his death as a Sub-Head in the South Central Railway on a salary of Rs. 475.80 per mensem. Admittedly, the respondents 1 to 5 herein and the applicants before the Tribunal are the only legal representatives of the deceased Visweswara Rao. They filed an application under Section 110-A of the Motor Vehicles Act (hereinafter referred to as 'the Act') claiming compensation of Rs. 50,000/- towards general damages under the head 'compensation' for the loss of earning person, namely, Visweswara Rao, who was the head of the family. The owner and driver of the vehicle and the insurer have been made, before the Tribunal, as respondents 1 to 3 respectively.

The first respondent denied his liability as, according to him, he did not know personally anything and he was at Khammam at the time of the accident. On inquiries he came to know that the accident took place on account of the negligence and inability of the Jatka driver, but not due to the rash and negligent driving of his driver. The second respondent driver, admitting that he was driving the lorry at the relevant time, states that in spite of his driving the lorry slowly and blowing the horn the horse of the Jatka got dazed and turned towards left and the Jatka driver became panicky and could not control the horse and therefore the accident took place, but not on account of any rash and negligent driving of the lorry. As the accident took place due to

the fault of the jatka driver no compensation need be paid.

The appellant also took the stand that the road at the place of the accident was sloppy and narrow and the accident had taken place not due to the rash and negligent driving of the lorry driver but on account of the Jatka driver becoming panicky and moving the jatka towards right and hence no compensation need be paid.

3. The claimants examined the first petitioner as P. W. 3 and the brother of the deceased, Rajagopala Rao, who was accompanying the deceased at the time of the accident as P. W. 4, the driver of the Jatka, P. Somireddi, as P. W. 6 and a passerby called Gudimetla Bulliraju as P. W. 7 in support of their plea that the accident took place on account of the rash and negligent driving of the lorry driver but not due to the Jatka driver becoming panicky. P. W. 1 is the Civil Assistant Surgeon at Tanuku hospital, who conducted the post-mortem on the dead body of the deceased and gave the wound certificate, Ex. A-1, and the post-mortem certificate, Ex. A-2. She also examined the Jatka driver and found him injured and gave Ex. A-3 wound certificate to him. She also examined P. Ws. 3 and 4 who were also injured, and issued them the wound certificates, Exs. A-4 and A-5, respectively.

P. W. 2 is a photographer who has taken the photo, Ex. A-6 relating to the scene of offence. Ex. A-8 is a letter from the Senior Accounts Officer, Secunderabad, evidencing the salary of the deceased as Rs. 475.80 per month at the time of the accident and his age as fortyfour years. The respondents examined the lorry driver as R. W. 1 in support of their defence. The tribunal, accepting the evidence adduced on behalf of the claimants, came to the conclusion that the accident took place on account of the rash and negligent driving by R. W. 1 but not due to the negligence or mistake of Jatka driver. Reliance also was placed on the finding of the Court of the Additional Judicial First Class Magistrate, Tanuku in its judgment in C. C. No. 3154 of 1968, dated 25-8-1968, that the driver was guilty of rash and negligent driving punishable under Section 304-A of the Indian Penal Code. The Magistrate has also sentenced the driver to one year rigorous imprisonment. The judgment in that calendar case has been exhibited as Ex. A-13 and the mediators' report attested by one of the panch witnesses, P. W. 5 is marked as Ex. A-14.

4. With regard to the quantum of compensation, the tribunal was of the view that the deceased who was aged forty-four years at the time of the accident would have continued in service for

a further period of eleven years, if he had survived, and that he could have spent two-fifths of the salary for himself and the other three-fifths for the family. On that basis he found that for each year he could have spent Rs. 3060.00 on his family and calculating the same for a period of eleven years a figure of Rs. 33,660 was arrived at. But, however, taking into consideration the lump sum payment and also uncertainties in life it was reduced to Rs. 26,928/- after deducting 20% for the lump sum payment and uncertainties in life. The figure Rs. 26,928/- was rounded off to Rs. 27,000/-. Out of the sum of Rs. 27,000/- an amount of Rs. 5,000/- (Rs. 3,000/- towards the amount received by P. W. 1 as provident fund after the death of the deceased and Rs. 2,000/- paid by the Insurance Company) was deducted and finally the Tribunal awarded a sum of Rs. 22,000/- towards compensation against the three respondents. Hence this appeal by the Insurance Company. No appeal has been preferred by the respondents 1 and 2. The claimants have preferred a memorandum of cross-objections claiming more compensation.

5. Sri K. Ramagopal and R. Kondaiiah, the learned counsel for the appellant, contend that the finding of the court below that the accident has resulted on account of the rash and negligent driving of the lorry driver is not correct and in any event the liability of his client, as on the date of the accident, can at best be only Rs. 20,000/- and the subsequent amendment of Section 95 (2) (a) of the M. V. Act 1939 enhancing the amount of Rs. 20,000/- to Rs. 50,000/- is only prospective but not retrospective and the court below erred in rejecting the claim of his client that it should be limited to only Rs. 20,000/- in so far as his client is concerned. This claim of the appellant is resisted by Mr. M. Jagannadharao, the learned counsel for the contesting respondents contending inter alia that the finding of the court below with regard to the accident is correct and the amendment is really retrospective in operation and in fact the amount of compensation awarded is inadequate and therefore must be enhanced.

6. We shall first examine the question whether the accident took place on account of the rash and negligent driving by R. W. 1 or due to negligence of the Jatka driver. The answer to this question depends upon the evidence of P. Ws. 3, 4, 6 and 7 who were the eyewitnesses to the occurrence. True as contended by the respondents' learned counsel, P. Ws. 3, and 4 are no other than the wife and brother of the deceased, Visweswara Rao and they were interested in supporting the claim. But, however, their presence at the time of the accident cannot be disputed. They were injured.

They were travelling in the ill-fated Jatka at the time of the accident along with the deceased. They spoke to the fact that the lorry came with a high speed and dashed against the Jatka and the accident has taken place only on account of the rash and negligent driving of the lorry by the driver. Their evidence is corroborated on all material particulars by P. W. 6 the Jatka driver, and P. W. 7 an independent 5 witnesses.

The trial court has accepted the evidence of these witnesses in preference to the version given by R. W. 1. R. W. 1 is the lorry driver. He is certainly interested in saving himself by stating that he was not responsible for the accident. We may add that the criminal court had already found him guilty of the offence of rash and negligent driving and sentenced him to undergo rigorous imprisonment for a period of one year under Section 304-A of the Indian Penal Code. Taking into consideration all the evidence on record, we entirely agree with the court below that the accident was due to the rash and negligent driving by R. W. 1 but not due to the fault of P. W. 6, the Jatka driver.

7. It next fails for decision as to what exactly is the quantum of compensation that has to be awarded to the claimants by the tribunal. The claimants claim a sum of Rs. 50,000/- as proper and reasonable compensation whereas the insurer contends that the sum of Rs. 22,000/- awarded by the tribunal is excessive and, in any event, its liability must be confined to only Rs. 20,000/-.

8. Before examining whether the claimants are entitled to the enhancement of compensation from Rs. 22,000/- to Rs. 50,000/- it is convenient to first advert to the contention of the appellant that under no circumstances, its liability can be fixed higher than Rs. 20,000/-. The basis or foundation for this submission of the appellant is Section 95 (2) of the Motor Vehicles Act, 1939 (hereinafter called the Act). The provisions of subsection (2) to Section 95 of the Act are enacted to safeguard the interests of the insurer. The insurer is at liberty to raise any one or more of the objections permissible to him under Section 95 (2) of the Act and avoid his liability. But however, it is not open to the insurer to raise any fresh grounds not specified in Section 95 (2) of the Act for the purpose of avoiding his liability.

That apart, Section 95 (2) (a) of the Act specifies the quantum of liability of the insurer inclusive of his liability, if any, arising under the Workmen's Compensation Act, 1923, in respect of death or bodily injury to employees (other than the driver) where the vehicle involved is a goods vehicle. On August 25, 1968, when the deceased Visweswara Rao re-

ceived a serious head injury in the accident and died in the same evening at the Government Hospital, Tanuku, the extent of the liability of the insurance company indicated in Section 95 (2) of the Act was limited to a sum of Rs. 20,000/- only. The word "Twenty" in Section 95 (2) was substituted by the word 'fifty' by Section 54 (b) (i) of the Motor Vehicles (Amendment) Act 56 of 1969 (hereinafter called the Amending Act) which came into force on March 2, 1970. Therefore, the maximum limit of the liability of the insurer which was only Rs. 20,000/- on 25-8-1968 was increased to a sum of Rs. 50,000/- by March 2, 1970. Hence, on December 4, 1970, when the tribunal passed the award, the statutory maximum limit of the insurer's liability stood at Rs. 50,000/-. The pertinent question to be determined is whether it is the unamended provisions of Section 95 (2) of the Act fixing the maximum liability of the insurer at Rs. 20,000/- or the amended provision of that section which increased the maximum limit of liability of the insurer to Rs. 50,000/-, that govern the case on hand.

9. The answer to the aforesaid question depends upon the nature and character of the amendment of Section 95 (2) of the Act made by Section 54 (b) (i) of the Amending Act, increasing the maximum liability of the insurance company from Rs. 20,000/- to Rs. 50,000/-. If the amendment is prospective, the unamended provisions of Section 95 (2) would apply to the case on hand. If, on the other hand, the amendment is retrospective, the amended provisions would govern the case. The question whether a particular amendment in a statute is prospective or retrospective was the subject-matter of several decided cases. Suffice it to refer to two leading decisions of the Supreme Court on this aspect in *Shri Ram Narain v. Simla Banking and Industrial Co.*, (AIR 1956 SC 614 at p. 621) *Jagannadhas, J.*, speaking for the court, rules thus:

"It is perfectly true as stated therein that whenever an amended Act has to be applied subsequent to the date of the amendment the various unamended provisions of the Act have to be read along with the amended provisions as though they are part of it. This is for the purpose of determining what the meaning of any particular provision of the Act as amended is, whether it is in the unamended part or in the amended part. But this is not the same thing as saying that the amendment itself must be taken to have been in existence as from the date of the earlier Act. That would be imputing to the amendment retrospective operation which could only be done if such retrospective operation is given by the amending Act either expressly or by necessary implication."

The same view has been reiterated by the Supreme Court in *Garikapati v. Subbiah Choudhary*, AIR 1957 SC 540 at p. 553. Therein, while considering the rule of construction applicable to an amending statute affecting the rights of the parties pending a proceeding, the learned Judge, S. R. Das, C. J., observed thus:—

"The golden rule of construction is that, in the absence of anything in the enactment to show that it is to have retrospective operation, it cannot be so construed as to have the effect of altering the law applicable to a claim in litigation at the time when the Act was passed."

It is, therefore, well settled that an amendment of a statute relating to substantive rights is normally prospective unless it is specifically indicated otherwise in the Amending Act or by necessary implication or intendment. Where the amendment does not affect the rights of the parties but changes or alters the procedure, it must be considered to be retrospective. The amendment or substitution of the word 'fifty' for 'twenty' in Section 95 (2) of the Act is not of a procedural nature but it is of a substantive nature affecting the rights of the insurance companies as well as the claimants or dependants of deceased persons in motor accidents. If the amended provision is applied, the maximum limit of the insurance company's liability would be Rs. 50,000/- whereas if the unamended provision is applied, it would be only Rs. 20,000. We are of the firm view that the amendment in question is only prospective and it has no retrospective effect.

The finding of the tribunal that the amendment pertains to the procedural law and not substantive law and it has a retrospective effect is erroneous and illegal. The tribunal did not apply its mind to the unamended and amended provisions of Section 95 (2) (a) of the Act and has not indicated in its award any reasons much less valid and justified, in support of its conclusion. The tribunal's view in this regard is unwarranted and perverse. The Tribunal failed to notice the well-settled rules of construction applicable to an amending statute affecting the rights of the parties as well as procedure and the decided cases of the Supreme Court.

10. We may approach the problem in another angle which we shall presently indicate. The question whether it is the unamended provision or the amended provision that governs the case on hand depends upon the date on which the right to claim compensation for the death or loss of the earning member, has accrued to the claimants or legal representatives of the deceased. The right to claim compensation from the insurance company as well as the owner and driver of the lorry accrued to the claimants on the date of

the accident as a result of which Visweswara Rao died.

We may add that the cause of the action for the injured workman or the dependants of the deceased workman arises against the employer at the time of the accident and on the date of the death of the deceased even under the Workmen's Compensation Act. Similarly, the cause of action for the claimants claiming compensation under Section 110-A of the Act (i.e. Motor Vehicles Act) against the insurer, owner and driver of the vehicle arises on the date of the accident as well as on the date of death of the deceased person. Hence, the right to claim compensation accrues only on the date of the accident or the death of the deceased. We are of the firm view that no cause of action would accrue or arise to the claimants either on the date of the application under Section 110-A or on the date of the passing of the award by the tribunal under Section 110-B of the Act for payment of compensation. This view of ours gains support or can be gathered from the very language of Section 110-A which provides for the filing of an application for compensation. The words "arising out of an accident of the nature specified in sub-section (1) of Section 110" used in Section 110-A of the Act may be noticed. Section 110 also speaks of claims for compensation in respect of accidents involving the death of or bodily injuries to the persons arising out of the use of the Motor Vehicles.

On a careful reading of the provisions of Chapter VIII of the Act we have no hesitation to hold that the right to claim compensation has, in fact, accrued or arisen to the claimants at the time and on the date of the very accident and the death of the deceased. The quantum of compensation has to be determined in accordance with the procedure prescribed under Chapter VIII of the Act and after affording reasonable opportunity to all the parties concerned. The maximum limit of the insurer's liability indicated in Section 95 (2) of the Act as on the date of the accident as well as on the date of death of the deceased would only govern the rights of the parties.

In other words, the insurer in the present case would be liable in all to the extent of the maximum amount indicated in Section 95 (2) (a) of the Act as it stood on the date of the death of the deceased person but not more. We may add that the same view has been expressed by a Division Bench of the Orissa High Court in *Sabita Pati v. Rameswar Singh*, (1973) Acc CJ 319 at p. 330 (Ori). After noting the amendment of Section 95 (2) (a) of the Act with regard to the limit of Rs. 20,000/- being enhanced to Rs. 50,000/- by the Amending Act, the learned Judges observed thus:—

"In view of the fact that at the time of accident the limit was Rs. 20,000/- the subsequent amendment would not apply to the case and the liability of the insurer would continue to be Rs. 20,000/- only as was provided in the statute at the time of accident."

11. For all the reasons stated, we find that the maximum liability of the appellant-insurance company to pay compensation to the claimants in this case is only Rs. 20,000/- and not more, as specified in the unamended provisions of Sec. 95 (2) (a). In this view, we modify the award in so far as the liability of the appellant insurance company is concerned, by limiting it to Rs. 20,000/- only instead of Rs. 22,000/-. However, we affirm the award of the tribunal in so far as the liability of the respondents 1 and 2, the driver and the owner of the lorry, is concerned. In this view, it is unnecessary for us to go into the merits of the Memorandum of Cross-objections directed against the insurance company alone. The Civil Miscellaneous Appeal is allowed to the extent indicated and dismissed in other respects. There shall be no order as to costs. The cross-objections (at the S. R. stage) are also dismissed but without costs.

Appeal partly allowed.

AIR 1976 ANDHRA PRADESH 43

GANGADHARA RAO, J.

C. Obula Konda Reddy, Appellant v. C. Pedda Venkata Lakshamma, Respondent.

Second Appeal No. 626 of 1973, D/- 14-7-1975.*

(A) Hindu Adoptions and Maintenance Act (1956), Section 18 — Second wife married while first wife was living, if entitled to maintenance.

The words "Hindu wife" in Section 18 cannot be interpreted to mean a wife whose marriage is valid according to the provisions of the Hindu Marriage Act. Such an interpretation would render the provisions of S. 18 of the Hindu Adoptions and Maintenance Act otiose. The 'Hindu wife' contemplated by Section 18 means a Hindu wife whose marriage is solemnised, though void under the Hindu Marriage Act. She will therefore be entitled to claim maintenance from the husband.

(Para 7)

M. N. Narasimha Reddy, for Appellant; R. Subba Rao, for Respondent.

*(Against decree of Dist. J., Cuddapah and passed in Appeal Suit No. 14 of 1972.)

HS/IS/C983/75/KNA

JUDGMENT:— An interesting question of law is raised in this appeal. The 1st defendant is the appellant. The plaintiff is his wife and his father is the 2nd defendant in the suit. The plaintiff filed the suit for maintenance and for recovery of jewels.

2. The plaintiff's case briefly is that the 1st defendant deserted his first wife Balanarasamma and married her in January, 1955. They lived together till 1967 when the 1st defendant began to illtreat her and ultimately drove her out of the house.

3. The 1st defendant denied the marriage with the plaintiff.

4. The learned District Munsif dismissed the suit holding that the 1st defendant married the plaintiff in October, 1955, after Hindu Marriage Act, 1955, came into force on 18-5-1955, and therefore the marriage was void under Sec. 5 read with Section 11 of that Act, and consequently the plaintiff was not the legal wife of the 1st defendant entitled to any maintenance.

5. Against that decree, the plaintiff filed an appeal before the District Judge, Cuddapah. The learned District Judge held that the 1st defendant married the plaintiff in October, 1955. So it was not valid under the Hindu Marriage Act since the 1st defendant was having another wife. He further held that even assuming that the marriage between the plaintiff and the 1st defendant took place in January, 1955, even then the marriage would be invalid under the provisions of Section 5 of the Madras Hindu (Bigamy Prevention and Divorce) Act 1949. So he held that the plaintiff was not entitled to any maintenance as the legally wedded wife of the 1st defendant. A contention was advanced before him that the plaintiff should be treated as Avarudha sthree i.e., a permanently kept concubine of the 1st defendant and so she is entitled for maintenance under Hindu Law. The learned District Judge held that the status of the plaintiff was higher than that of Avarudha Sthree because the marriage was in fact solemnized and, therefore, she was entitled for maintenance. He awarded a sum of Rs. 80/- P. M. maintenance including her residential allowance and expenses towards her clothing. He also directed that the 1st defendant should return 6 Tolas of Gold Chain and 4 tolas of gold nanu or their value of Rs. 2,000/- to the plaintiff.

6. Aggrieved by that decree, the 1st defendant has preferred this appeal. Both the parties have not rightly canvassed before me the findings of the lower courts on questions of fact. The learned counsel for the appellant has raised before me two contentions. First, a permanently kept concubine is not a dependent

within the meaning of Section 21 of the Hindu Adoptions and Maintenance Act, 1956, and therefore, she is not entitled for any maintenance. Secondly, even assuming that the plaintiff is to be treated as an Avarudha Sthree i.e., a permanently kept concubine still she is not entitled to claim any maintenance so long as the paramour is alive and her right is only to claim maintenance after his death. In reply the learned counsel for the respondent has argued that even assuming that the plaintiff was married to the 1st defendant in October, 1955, after the Hindu Marriage Act has come into force still she would be entitled for maintenance under Section 18 of Hindu Adoptions and Maintenance Act, 1956.

7. Section 21 of the Hindu Adoptions and Maintenance Act has no application since it defines the dependants of the deceased who can claim maintenance from his heirs. If the plaintiff is to be treated as an Avarudha Sthree, she would not also be entitled to claim any maintenance during the lifetime of the 1st defendant. The next question is whether the plaintiff would be entitled for maintenance under Section 18 of the Hindu Adoptions and Maintenance Act 1956. Section 18 of that Act to the extent it is relevant reads as follows:—

"Section 18. (1) Subject to the provisions of this section, a Hindu wife, whether married before or after the commencement of this Act, shall be entitled to be maintained by her husband during her lifetime.

(2) A Hindu wife shall be entitled to live separately from her husband without forfeiting her claim to maintenance: Clauses (a) (b) and (c) omitted.

(d) if he has any other wife living." The Act does not define a Hindu wife. Sub-section (1) of Section 18 says that a Hindu wife, whether married before or after the commencement of this Act, shall be entitled to be maintained by her husband. This Act came into operation on 21st December, 1956. Sub-section (2) of Section 18 says that a Hindu wife shall be entitled to live separately from her husband without forfeiting her claim to maintenance if he has any other wife living. Reading these two sub-sections together, it is clear that a Hindu wife whether married before or after the commencement of this Act, is entitled to live separately from her husband without forfeiting her claim to maintenance if he has any other wife living. Both the lower courts have found that the plaintiff was in fact married to the 1st defendant in October, 1955, i.e., before this Act has come into force. It is not also disputed that the 1st defendant has another wife living. Therefore, both the requirements of Section 18 are satisfied and conse-

quently the plaintiff is entitled for maintenance. I am not prepared to interpret the words 'Hindu wife' in Section 18 as a wife whose marriage is valid according to the provisions of Hindu Marriage Act for, the provisions of Hindu Adoptions and Maintenance Act do not warrant such an interpretation. Such an interpretation will render the provisions of Section 18 otiose for, after the Hindu Marriage Act has come into force, there could be no legally wedded wife if another wife is living. So reading Section 18 without any limitations I hold that a Hindu wife contemplated by that section, means a Hindu wife whose marriage is solemnized.

8. The problem can also be viewed in the light of the provisions of Hindu Marriage Act, 1955. Under Section 13 of that Act, any marriage solemnized, whether before or after the commencement of that Act, may on a petition presented by either the husband or the wife, be dissolved by a decree of divorce. A wife may present such a petition on the ground that in the case of any marriage solemnized before the commencement of that Act, that the husband had married again before such commencement or that any other wife of the husband married before such commencement was alive at the time of the solemnization of her marriage provided that in either case the other wife is alive at the time of the presentation of the petition. Under Section 25 of the said Act a Court at the time of passing a decree or at any time subsequent thereto, on application made to it for the purpose by the wife order that the husband shall, while the wife remains unmarried, pay to her for her maintenance and support such gross sum or such monthly or periodical sum for a term not exceeding the life of the wife. Under Section 27 of that Act, the court may make such provisions in the decree as it deems just and proper with respect to any property presented, at or about the time of marriage, which may belong jointly to both the husband and the wife. Thus even under the provisions of Hindu Marriage Act a wife whose marriage was solemnized before the commencement of that Act is entitled to maintenance even if her marriage is void on the ground that her husband was having another wife living by the date of the marriage and on the date of presentation of the petition for divorce.

9. Any other interpretation of Section 18 of the Hindu Adoptions and Maintenance Act will lead to startling results. An unscrupulous married man may beguile an unwary woman into matrimony and thereafter turn her out and say "our marriage is void and I need not maintain you". In fact there could be no better illustration than the present case. The 1st defendant has married the

plaintiff in October, 1955 and has lived with her for nearly 12 years and deserted her. It could not have been the intention of the Legislature that such a woman is not entitled for any maintenance. So I do not agree with the finding of both the lower courts that the plaintiff is not the wife of the 1st defendant. I confirm the decree passed by the learned District Judge, though for a different reason.

10. In the result, this second appeal fails and is dismissed, but in the circumstances of the case without costs. Leave granted.

Appeal dismissed.

AIR 1976 ANDHRA PRADESH 45

ALLADI KUPPUSWAMI AND
SHIV SHANKER, JJ.

Pothula, Appellant v. Pothula alias Gaddeam Seshireddy and others, Respondents.

Appeal No. 129 of 1971 and Memo for Cross Objections and C. M. P. No. 876C of 1974, D/- 21-3-1975.*

(A) Stamp Act (1899), Sch. 1, Art. 40 (A. P.) — Duty on partition deed — Arrangement declaring share of one of parties, granting him limited ownership in one item and allotting two other items valued at Rupees 9,000 absolutely — Total value of properties Rs. 1,96,500 — Duty is payable on separated share of party.

The purpose of the Article is to tax the share divided off and not the residue and the largest share is regarded as residue irrespective of at whose instance the partition is made. When a partition arrangement declaring the share of one of the parties grants him limited ownership in one item and allots absolutely two other items of a value of Rs. 9,000, in view of the Article the value of the separated share alone should be taken for stamp duty. Thus in respect of those properties of a total value of Rupees 1,96,500, duty is payable on Rs. 9,000 alone which is the separated share, the largest share remaining after the partition being of the value of Rs. 1,87,500. AIR 1928 Mad 1181 (FB) and AIR 1934 Mad 204, Followed.

(Para 5)

Cases Referred: Chronological Paras

AIR 1934 Mad 204 = 39 Mad LW 157 5

AIR 1928 Mad 1181 = 55 Mad LJ 551 5
(FB)

C. Sadasiva Reddy for K. Somakonda Reddy, for Appellant; M. S. K. Sastry for Nos. 1, 3, 4, 6 to 9 and 10 to 15) and N. Ramamohana Rao (for No. 5), for Respondents.

* (Against decree of Addl. Sub. J., Kurnool, in O. S. No. 5 of 1968).

SHIV SHANKER, J.:— This matter comes up before us at the instance of the office to decide the quantum of non-judicial stamp depositable by the appellant-plaintiff.

2. The facts in brief are that the appellant-plaintiff on the demise of her husband in 1965 filed O. S. No. 5 of 1968 on the file of the Court of the Additional Subordinate Judge, Kurnool for partition and separate possession of her 7/36th share in the plaint schedule properties. The contesting defendants set up the plea that there was a partition of the joint family properties in 1962 during the lifetime of the plaintiff's husband and that her husband also adopted defendant No. 6 on 22-8-1965.

The learned Subordinate Judge, after trial, arrived at the finding that the partition as set up by the contesting joint family members was false and that defendant No. 6 was duly adopted by the plaintiff's husband. In this view, the plaintiff was held entitled to a 7/144th share in the plaint schedule properties and a preliminary decree was accordingly awarded. Aggrieved by the said decree, the plaintiff preferred A. S. No. 129 of 1971 to this court and during the pendency of the Appeal, the parties filed a memo of compromise with a petition to record it and pass a decree in terms thereof. The matter having come up before us on 4th November, 1974, we passed the decree in terms of the compromise. The question to be resolved is as to what is the value of the non-judicial stamp that has to be deposited by the appellant-plaintiff to engross the decree passed in her favour.

3. Under clause (1) of the compromise memo, the appellant-plaintiff has been allowed to enjoy the properties to the extent of 7/144th share as decreed by the Trial Court as an absolute owner. Under clause (3) of the memo, she has been given a house known as "Ramakrishna Illu" bearing No. 4/11 of Tartur village as a limited owner; while under clause (2) thereof, she has been provided items 2 and 5 of the plaint schedule, the agricultural lands, absolutely as full owner. Clause (7) of the compromise memo treats the memo of compromise as a final decree. Despite this latest clause, the position that emerges is, that clause (1) of the compromise memo entitles the appellant-plaintiff to a 7/144th share which is in the nature of a mere declaration of her right as to share in the family properties. No specific properties having been allotted to her under this clause, this portion of the compromise could not be treated as final decree.

Under clause (3) of the terms of the compromise, only a limited right has been assigned to the appellant-plaintiff in the house property and the value thereof could not be taken into consideration for the purposes of calculating the stamp duty on the partition deed. Items 2 and 5 of the plaint schedule properties, according to clause (2) of the compromise, have been absolutely allotted to

the appellant-plaintiff and the value of the said items is Rs. 9,000/-.

4. According to the office, total value of the plaint schedule properties being Rupees 1,96,500/- the value of items 2 and 5 of the plaint schedule properties have to be deducted therefrom and the appellant-plaintiff should be called upon to pay a stamp duty of Rs. 5,625/- on Rs. 1,87,500/- the remaining value of the plaint schedule properties. This is disputed by Sri C. Sadasiva Reddy the learned counsel for the appellant-plaintiff. While being in agreement with the office that only items 2 and 5 of the plaint schedule properties valuing Rs. 9,000/- have to be reckoned for the purposes of final decree, he argues that his client's liability to pay the stamp duty is only on Rs. 9,000/- but not on the sum of Rs. 1,87,500/-.

5. Section 2 (15) of the Indian Stamp Act defines the instrument of partition as an instrument whereby the co-owners of any property divide or agree to divide such property in severalty including a final order for effecting a partition passed by a Civil Court etc. Article 40 of Schedule I of the Act postulates the stamp duty of partition payable as Bottomry Bond for the amount of the value of the separate share or shares of the property. The note added thereto recites that the largest share remaining after the property is partitioned shall be deemed to be that from which the other shares are separated. Therefore, what follows from reading Article 40 is that it is on the value of the separated share or shares that the stamp has to be calculated and the largest share remaining shall be deemed to be that from which the other shares stand separated. Provisos (a) (b) and (c) of the Article are unnecessary for our present purposes, and therefore, they need no reference.

Thus, the intention behind the Article is to tax the share or the shares divided off and not the residue, and the largest share is treated as residue, regardless of at whose instance the partition is made. It is based on this Article that Mr. Sadasiva Reddy contends that he could only be called upon to pay the stamp duty on the value of items 2 and 5 of the plaint schedule properties. He calls in aid the Full Bench decision in Collector Vizagapatam v. Krishna Chandra, AIR 1928 Mad 1181 to buttress his argument. In this case, Article 45 of the Indian Stamp Act as amended by the State of Madras similar in terms to Article 40 applicable to our State fell for consideration in assessing the stamp duty. The property in that case was to be divided into four shares, one of the shares being twice each of the other three shares. The largest share after the partition therefore was the share which was double the value of the other shares. The entire value of the property having been assessed at Rs. 80,000/-, the largest share worked out to Rs. 32,000/-. On separating the other shares from this share, the party was called upon to pay, the

stamp duty on the separated shares aggregated at Rs. 48,000/-.

A similar view was also taken in the Bench decision of the same Court in Venkatappa v. Musal, AIR 1934 Mad 204, where it was held that the smaller shares should be considered to have been separated from the larger share. Apart from the decisions referred to which are binding on us, on the language of the Article itself we have no hesitation in finding ourselves one with the contention of the learned counsel for the appellant-plaintiff and in this view we overrule the objection of the office and direct that the value of the separated share alone has to be reckoned for the purposes of the stamp duty under Article 40 of the Stamp Act. Thus, in that case, the largest share remaining after the property is partitioned is that valuing Rs. 1,87,500/- while the share separated stands valued at Rs. 9,000/-. The Office would thus collect the non-judicial stamp duty only on this sum

Order accordingly.

AIR 1976 ANDHRA PRADESH 46

A. SAMBASIVA RAO ACTG. C. J. AND RAGHUVIR, J.

B. Yamuna Bai and others, Appellants v. Lade Venkoba Rao, Respondent.

A. A. O. No. 309 of 1972, D/- 6-3-1975.*

(A) Civil P. C. (1908), S. 144 — Person not actually party to appeal — If entitled to restitution.

The suit instituted by the sole legatee for possession of the suit house challenging the alienation made by his mother (2nd defendant) in favour of the 1st defendant (who in the meantime mortgaged it to the 3rd defendant) was decreed. The appeal preferred only by the 3rd defendant against that decree was allowed holding that the suit house was not the self-acquired property of the plaintiff's father and that the alienation was voidable but not void. On the question whether the 1st defendant (who did not carry the matter by way of an appeal) was entitled to restitution.

Held that the 1st defendant was entitled to possession till such time the alienation in his favour was avoided. (AIR 1937 Bom 101 and (1908) 12 Cal WN 642, Rel. on).

(Para 10)

Cases Referred :	Chronological	Paras
AIR 1953 SC 136 =	1953 SCR 559	7
AIR 1937 Bom 101 =	38 Bom LR 1326	9
AIR 1935 PC 12 =	1935 All LJ 251	7
AIR 1922 PC 269 =	49 Ind App 351	7
(1908) 12 Cal WN 642		9
(1871) 3 PC 465 =	4C LJPC 1	7

* (Against order of Principal Sub. J., Kurnool, in I. A. No. 365 of 1971, D/- 13-12-1971).

HS/IS/C998/75/MBR

R. V. Subba Rao, Appellants; P. Babul Reddy and M. V. Ramana Reddy, for Respondent.

RAGHUVIR, J.:— This appeal is directed against the order in I. A. No. 365 of 1971 (in O. S. No. 30 of 1961) filed by the 1st defendant under Section 144, Civil P. C. for restitution of house property, on the file of the Principal Subordinate Judge, Kurnool. The L. Rs. of the 1st defendant are the appellants. O. S. No. 30/61 was decreed on 26-8-1963. The plaintiffs executed the decree in E. P. No. 54/64 and the plaintiff-decree-holder was put in possession of the suit house on 7-10-1963.

2. The facts in the suit for purposes of this appeal in brief are stated hereunder. The plaintiff's father, executed a will on 18-12-1938 and under that will, the plaintiff was the sole legatee. His mother the 2nd defendant, under the will, was appointed as the executrix. One Subramanya Rao is the posthumous son of the testator, who was not a party to the suit in O. S. No. 30/61. Notwithstanding the mandates in the Will, the 2nd defendant alienated the suit house for a sum of Rs. 16,000/- on 27-7-1951 in favour of the 1st defendant who, having paid Rs. 8,000/-, deferred payment of the balance till such time Subramanya Rao ratified the sale transaction, after attaining majority. Meanwhile the 1st defendant mortgaged the suit house on 29-1-1952 to the 3rd defendant. On 17-4-1961 the suit (O. S. No. 30/61) was instituted by the plaintiff for possession of the suit house.

3. The trial court found, the sale in favour of the 1st defendant was a transfer but under the personal law of the parties was son's legal necessity. It held the suit house was Subbarao's (the plaintiff's father) self-acquired property. The Will, dated 18-12-1938 of late Subba Rao was genuine and valid and so holding the trial court decreed the suit. Against this decree, the 3rd defendant preferred an appeal (A. S. 533/63) to this court, which was allowed by Vaidya, J. by his judgment dated 29-2-1968. The learned Judge held, the suit house was coparcenary property and not the self-acquired property of Subba Rao, and therefore, under the Hindu Law, obtaining then the will was inoperative. The alienation by the 2nd defendant in favour of the 1st defendant, was held as voidable but not void. The suit however was dismissed having been filed on 17-4-1961 i.e. beyond three years after the plaintiff attained majority, and stood barred under the Article 44 of the Limitation Act.

4. A further appeal, L. P. A. No. 119/68 was dismissed by Gopalrao Ekbote, J., (as he then was) and Ramchandra Rao, J. on 6-8-70. In their Judgment, they affirmed the finding that the suit house was coparcenary property. The suit for possession, in the absence of Subramanya Rao, was held misconceived, and on ground other than what

was held by the trial judge and Vaidya, J. they dismissed the suit. After the disposal of the L. P. A. a partition suit, it appears, has been filed by the plaintiff in the year 1971, which, it is stated before us, is pending decision.

5. I. A. No. 365/71 was filed by the 1st defendant for restitution, in which it was alleged, on 7-10-1963 the plaintiff-decree-holder in execution was put in possession by dispossessing the applicant. The decree having been reversed by the appellate Court, the applicant prayed for restitution by putting him in possession of the house under Section 144, Civil P. C. He also claimed mesne profits of Rs. 23,675/-. This petition was resisted by the respondents in this appeal.

6. The trial court having stated the facts, held:

"I think it is a fit case to consider the equities arising in the case before automatically ordering restitution The right of the other person to seek for restitution whether it is under a valid title or not may also be gone into in the interests of justice and on equitable principles." Further, regarding the sale in favour of the 1st defendant, the trial court held: "is not valid and he should be treated as a trespasser." "The suit was not contested by the 1st defendant on the ground of prescription of his title by adverse possession." Lastly, "it is not desirable that in the ends of justice that a trespasser should be restored to possession though indirectly he should be said to have succeeded in the suit".

The lower court dismissed the petition stating, it was not a fit case for ordering restitution. The correctness and legality of this order by the appellant is challenged in this appeal.

7. Section 144, Civil P. C. is based upon a doctrine which recognises as one of the highest duties of a court to take care that its acts do not injure any of the suitors and if any injury is caused, it is duty of the court to undo the wrong. An order of restitution, as contemplated under Section 144, Civil P. C. would be consistent with the principles of doctrine of restitution which is that on the reversal of a Judgment the law raises an obligation on the party to the record who received the benefit of the erroneous judgment to make restitution to the other party for what he had lost and it is the duty of the court to enforce that obligation unless restitution would be contrary to the real justice of the case. These principles have been very succinctly laid down by the Supreme Court in the case of Bhagwant Singh v. Sri Kishen Das, AIR 1953 SC 136. Earlier, the Privy Council, in *L. Guran Ditta v. T. R. Ditta*, AIR 1935 PC 12, relying on the decision in *Rodger v. Comptoir D'Escompte De Paris*, (1871) 3 PC 465 Held:

"One of the first and highest duties of all Courts is to take care that the act of the court does no injury to any of the suitors."

This principle was incorporated in Sec. 583 of the Code of Civil Procedure 1882. Section 144 (1) of the present Code (Code of Civil Procedure, 1908) is the corresponding section which incorporates this rule of restitution. The Privy Council in *Jai Berham v. Kedar Nath*, AIR 1922 PC 269 held that such a power is inherent in the general jurisdiction of the court to act rightly and fairly according to the circumstances towards all parties involved. In the case of *Guran Ditta v. T. R. Ditta*, AIR 1935 PC 12, adverting to the powers of the Court, Lord Atkin had stated that the observations in *Rodger v. Comptoir D'Escompte De Paris*, (1871) 3 PC 465 have grounded as "practice in India." Therefore, whether as a matter of practice or as a matter of inherent jurisdiction as a doctrine of restitution, Courts in India have always considered that it is one of the sacred duties of theirs to see that their acts cause no injury to the suitors and while considering the principles of restitution, the Supreme Court in the case referred to earlier, has observed restitution is based upon to cause real justice to the parties."

8. Under Section 144, Civil P. C. before any restitution is ordered, the following conditions must be satisfied (1) That the applicant must be a party to the litigation which has terminated according to law; (2) that he has either lost something or been deprived of something by reason of the decree or order which has been subsequently varied or reversed; (3) that on the final pronouncement of his rights, he is entitled to the benefit or restitution.

9. The argument of Mr. Babulreddy, is that the 1st defendant did not carry the matter by way of an appeal and, therefore, he is not entitled to restitution. In *Gurunath v. Venkatesh*, AIR 1937 Bom 101, a similar argument was advanced before Ranganekar, J. and the learned judge observed:

"Therefore, if there is an appeal from a decree, even though that appeal is made by one party in which some other party equally interested is not joined, but if the appeal is on ground common to both of them, then the reversal or the variation in the decree in favour of the appellant would operate for the benefit of the other party, and in that way, therefore he would be entitled to contend that he was a party to the suit entitled to benefit by way of restitution."

In fact, in 1908, in *Gunga Prasad v. Brojo Nath Das*, (1908) 12 Cal WN 642, a case which arose under 1882, Civil P. C. the Privy Council observed the expression "any party" is not confined to parties to the appeal in which the decree has been reversed or modified:

"It includes every person against whom the decree appealed from was passed, though he was not a party to the appeal, provided the appeal is in effect and substance in favour of such person."

Therefore, in India, since 1871, all along for a period of 100 years as practice and as a matter of inherent jurisdiction, Courts have understood that even if the suitor filed no appeal he is entitled to the benefit for reversal of the decree.

10. In the circumstances, of the case, which we have elaborated earlier, the alienation in favour of the 1st defendant was considered as only voidable and not void, and therefore, he is entitled to the benefit of the reversal of the decree and the 1st defendant should be restituted possession of the property till such time the alienation in his favour is avoided by proceedings known in law. In fact we are informed that such a suit is pending between the parties. Therefore, we have no hesitation in holding that till such time the above transaction is avoided, the 1st defendant is entitled to possession.

11. We, therefore, allow the application I. A. No. 365/71 and it is ordered as prayed for, including the mesne profits. The order of the lower court is set aside. The appeal is, allowed with costs.

Appeal allowed.

AIR 1976 ANDHRA PRADESH 48

RAMACHANDRA RAJU, J.

The Official Receiver, Kurnool, Petitioner v. The South Indian Mining and Slabs Co. and others, Respondents.

Civil Revn. Petn. 331 of 1969, D/- 27-1-1975.*

(A) Provincial Insolvency Act (1920), S. 51 (1) — Pre-petition realisation of assets to remain unaffected — Debtor's property sold in execution — Amount realised before insolvency petition — Claims for payment by decree-holders against same debtor if and when not maintainable — (Civil P. C. (1908), S. 73).

Assets realised by execution sale prior to filing of insolvency petition will be subject to ordinary law as regards the claims on those assets and those claimants will not be affected by the subsequent adjudication of the debtor. Thus such realised amount will be available in accordance with Section 73, Civil P. C. for ratable distribution among the decree-holders who had applied for execution of their decrees against that debtor. AIR 1922 Mad 31; AIR 1943 Mad 118; AIR 1944 Mad 389; AIR 1942 All 263, Distinguished. (Paras 3 and 4)

Cases Referred: Chronological Paras
AIR 1944 Mad 389 = (1944) 1 Mad LJ 333 8
AIR 1943 Mad 118 = (1942) 2 Mad LJ 178 7
AIR 1942 All 263 = 1942 All LJ 437 9

*(To revise order of Sub. J., Kurnool in E. A. No. 149 of 1968, D/- 29-11-1968).

GS/IS/C733/75/JRM

THE All India Reporter

1976

Bombay High Court

AIR 1976 BOMBAY 1

(AT NAGPUR)

DESHMUKH AND SHIMPL, JJ.

Sitaram Deoba Maratha, Petitioner v.
Hawadva Piraji Naobudha and others.
Respondents.

Special Civil Appln. No. 505 of 1972.
D/- 4-3-1975.*

(A) Bombay Tenancy and Agricultural Lands (Vidarbha Region) Act (1958), Ss. 36 (1), 49-A (1), (2) (a), 49-B and 120 — Application under Section 36 (1) — Maintainability — Applicant should not be in physical possession on 1-4-1963 and should be covered under sub-section (2) (a) of Sections 49-A and 49-B. Spl. C. A. No. 14 of 1971, D/- 2-8-1973 (Bom), Overruled.

Reading the provisions of S. 49-A (1), sub-section (2) (a) and 49-B together, it is obvious that an application by a tenant is possible under Section 36 (1) only if he was not in physical possession on the 1st of April 1963 and his case falls either under sub-section (2) (a) of Section 49-A or Section 49-B of the Vidarbha Tenancy Act. Having made such elaborate provisions to safeguard the rights of the tenants, whether in possession or not, the language of Section 36 (1) cannot be stretched so as to permit an ex-tenant who has become owner on and after 1-4-1963 to apply under that section. A sweeping provision has been made in Section 120 of the Vidarbha Tenancy Act where the Collector has been vested with powers of summary eviction if the case falls in any of the clauses (a), (b) and (c) of that section and no specific remedy was provided elsewhere in the Act. The scheme of protecting possession of tenants

and cultivating owners seems to be clear. Whenever there is specific remedy available under the provisions of the Act, that remedy, and where no such specific remedy is indicated but the cases can fall under Section 120, then the provisions of Section 120 will be relevant. This being the total scheme of the Act, there is no scope to imagine that an ex-tenant who became full owner under the provisions of Section 49-A and has been dispossessed from possession after 1-4-1963 can still call himself a tenant for the purpose of taking advantage of sub-section (1) of Section 36 of the Vidarbha Tenancy Act, 1963. Mah LJ (Note) 44 and AIR 1959 SC 459 and AIR 1971 SC 1659, Rel. on; AIR 1969 SC 1190; Dist. Special Civil Appln. No. 452 of 1971, D/- 11-9-1974 (Bom). Approved; Spl. C. A. No. 14 of 1971, D/- 2-8-1973 (Bom), Overruled. (Para 17)

(B) Precedents — Judgment of co-ordinate jurisdiction — Binding nature.

So long as the law of precedents is being observed as the law of this land, judicial discipline requires that when there is a judgment of a co-ordinate jurisdiction, it must normally be followed by the succeeding Bench. If there is a judgment of one Judge in the field and none else, and the subsequent Single Judge feels that that judgment requires reconsideration, he should not merely proceed to take a different view but should place the papers before the learned Chief Justice for referring the matter to a Division Bench so that the earlier view of the learned Single Judge may be reconsidered. In the same manner if a Single Judge were to find that there is a judgment of the Division Bench in the field which requires reconsideration, he can give his reasons and refer the matter to a Division Bench with a request that the Division Bench may consider whether the earlier Division Bench judgment requires re-

* (To set aside order of Maharashtra Revenue Tribunal, Nagpur in R. A. No. Ten-A 388 of 1971, D/- 2-2-1972).

consideration and the matter be referred to a still larger Bench. (Para 29)

Cases Referred: Chronological Paras

1975 Mah LJ 9	28
(1974) Spl. Civil Appln. No. 452 of 1971.	
D/- 11-9-1974 (Bom)	1, 7
(1973) Spl. Civil Appln. No. 14 of 1971.	
D/- 2-8-1973 (Bom)	1, 7
AIR 1971 SC 1659 = 1971 Mah LJ 4	7, 22
AIR 1969 SC 1190 = 1969 Mah LJ 958	26
1963 Mah LJ (Note) 44	7, 18
AIR 1959 SC 459 = 61 Bom LR 811	7, 20

S. N. Kherdekar, for Petitioner; W. N. Pimparkar, for Respondent No. 1.

DESHMUKH, J.:— This writ petition arising out of the proceedings under the Bombay Tenancy and Agricultural Lands (Vidarbha Region) Act, 1958 (hereinafter referred to as the Vidarbha Tenancy Act) had been referred by a learned Single Judge of this Court (Masodkar, J.) to a Division Bench as the learned Judge found that there was a conflict of decisions between his own earlier judgment in Special Civil Application No. 14 of 1971 (Bom), (Madhukar v. Gajanan), decided on August 2, 1973 and a judgment delivered by another learned Single Judge of this Court (Padhve, J.) in Special Civil Application No. 452 of 1971 (Bom), (Dattatraya v. Rama), decided on September 11, 1974.

2. Having heard the learned counsel on both sides and after going through the provisions of the Vidarbha Tenancy Act and the judgments of the Supreme Court as also the Division Bench of this Court, directly and indirectly dealing with these provisions or similar provisions of the Bombay Tenancy and Agricultural Lands Act, 1948 (hereinafter referred to as the Bombay Tenancy Act), we are satisfied that the reference need not have been made. This is a litigation which has commenced with an application under S. 36 (1) of the Vidarbha Tenancy Act by the respondent No. 1 Hawadya, who called himself a tenant of the land in question. The facts alleged and which are found by the Naib Tehsildar are that Howdya, respondent No. 1 was the tenant of survey No. 4/3, measuring 5 acres 10 gunthas of mouza Dapori, Tahsil Washim, district Akola and was in physical possession as such till December of 1963. Even while respondent No. 1 was the tenant in possession, the respondents Nos. 2 and 3, the original owners of the land and the landlords of respondent No. 1, made an agreement of sale in respect of this land dated June 26, 1962. The sale was actually effected in favour of the present petitioner Sitaram on January 16, 1963. The present petitioner before us in this writ petition is the purchaser from the original landlords who are respondents 2

and 3 and who is contesting the litigation against the respondent No. 1 the former tenant of this land.

3. The respondent No. 1 alleged before the Naib Tahsildar that he was in possession till December, 1963 when he was forcibly dispossessed. He, therefore, filed an application under Section 120 (c) of the Vidarbha Tenancy Act for possession by summary eviction of the persons in possession. This was, Revenue Case No. 11/59 of 1965-66. This case was decided and the application of the respondent No. 1 was dismissed on the short ground that the respondent No. 1's status as a tenant was in dispute and it was not possible for the Collector under that section to decide that dispute. The remedy for a tenant was one under Section 36 and not under Section 120 (c). The application then came to be rejected. The respondent No. 1 was perhaps conscious of the opposition he was going to meet and filed the proceedings leading to the present petition on September 7, 1956 for possession under Section 36 (1) by joining the present petitioner and respondents Nos. 2 and 3 as party opponents. The defence taken up was that the respondent No. 1 was never a tenant, but was a partner in cultivation in the year 1959-60. The further defence was that the application was barred by time as the respondent No. 1 was not in possession at all since after 1959-60. The Naib Tahsildar by his order dated 21st July 1970 held that the respondent No. 1 was a tenant of the land and was in possession in the year 1963-64 and that the application filed on 7-9-1966 was within three years which was the limitation provided by Section 36 (1) of the Vidarbha Tenancy Act. The Naib Tahsildar somehow assumed that the sale has taken place on May 4, 1964, though as a matter of fact, it had taken place on January 16, 1963.

4. The present petitioner and respondents 2 and 3 carried an appeal against that order but it was dismissed by the Sub-Divisional Officer by his order dated 26th April 1971. He confirmed all the findings of the Naib Tahsildar. A revision application before the Maharashtra Revenue Tribunal by all of them also failed. Being aggrieved, the purchaser has filed the present writ petition.

5. Before the learned Single Judge, four points were raised by Mr. Kherdekar, the counsel for the petitioner. The first point was that the order under Section 120 (c) refusing to entertain that application, amounts to res judicata and the application by the respondent No. 1 before the Naib Tahsildar was not maintainable. The second point raised was that the findings regarding the tenancy of the respondent No. 1 are perverse and are not

supported by the record. The third point was that the respondent No. 1's application before the Naib Tahsildar filed in September 1966 was hopelessly barred by time as respondent No. 1 was not in possession at all after 1959-60. The fourth point raised, and which mainly led to the present reference was that, assuming that the findings in favour of respondent No. 1 are correct, he is at best a person, who was a tenant but on 1st of April 1961 or 1st of April 1963 at the most on which date he was statutorily declared as the full-owner of this land. If ownership has now vested in respondent No. 1 by the effect of the law passed by the State, he is no more a tenant of the land at any rate after 1st of April 1963. The remedy of claiming possession under Section 36 (1) of the Vidarbha Tenancy Act is available only to a tenant and which obviously means a tenant on the date he applied as such for possession. Since that could not be the status of the respondent No. 1, the present remedy by an application under Section 36 (1) of the Vidarbha Tenancy Act was misconceived and ought not to have been entertained. As we have pointed out, it is this point on which the learned Single Judge found some conflict of decisions regarding the judgments of two learned Single Judges and therefore, this reference was made.

6. In the course of arguments before us, the learned counsel for the petitioner Mr. Kherdekar expressly told us that his client does not want to press the first three points, namely, that the remedy is barred by res judicata that the findings that the respondent No. 1 is a tenant are perverse and that the original application was barred by time. This being so, the arguments were confined only to the last point regarding the nature of remedy available to a person in the position of respondent No. 1. Since the entire petition was referred to us and it is now being confined to the consideration of one point, our decision on that point will dispose of this entire petition.

7. Before we point out how the point raised is expressly covered by the Division Bench judgment of this Court and which judgment relies upon certain observations of the Supreme Court itself arising under the provision of the Bombay Tenancy Act, we might refer to the reference order itself. The learned Judge has taken a contrary view in Special Civil Application No. 14 of 1971 (Bom) that the word 'tenant' under Section 36 (1) has an extended or enlarged meaning and under that enlarged or extended meaning, the tenants who were so upto 1st of April 1963 and who were declared statutorily owners of the property, also continued to be 'tenants for the purpose of availing of

the remedy under Section 36 (1). The learned Judge points out that he relied upon some observations of the Supreme Court in a certain judgment to which we will refer in due course. Long after, that judgment was given by the learned Judge on August 2, 1973, in September 1974, when another Single Judge was considering a similar situation arising in Special Civil Application No. 452 of 1971 (Bom), he took the view that a 'tenant' under Section 36 (1) must have the natural meaning of the word 'tenant' as has been defined by that Act. If by the provisions of certain sections of the Vidarbha Tenancy Act statutory transfer of ownership takes place, which has the effect of not only transferring the title, but vesting it for all practical purposes in the ex-tenants, that ex-tenant obviously becomes the owner of the property and 'is no more a tenant for the purpose of enabling him to resort to the remedy under Section 36 (1). In doing so, the learned Single Judge referred to the Division Bench judgment of this Court in Krishna v. Ganpat, (1963 Mah LJ (Note) 44) and the observations of the Supreme Court in Shriram v. State of Bombay, (61 Bom LR 811 at pp. 824 and 825) = (AIR 1959 SC 459 at p. 472). He also made a pointed reference to the concluding paragraph of the Supreme Court's judgment in Madhavrao v. Shankarsingh (1971 Mah LJ 4) = (AIR 1971 SC 1659).

8. We find that in the reference order the differing learned Judge does refer to judgment of Mr. Justice Padhye and has also referred to the various authorities including the Division Bench judgment which has already concluded the point. As a matter of the normal judicial discipline of the law of precedents, the Division Bench judgment was binding on the learned Single Judge and even if his personal view taken in an earlier judgment was different, he was bound to follow that judgment. If the learned Judge felt that the Division Bench judgment itself required reconsideration, he should have by a brief order indicated how it required reconsideration and referred the matter to the Division Bench for the purposes of making a further reference to a larger Bench if the Division Bench felt that the view taken by the earlier Division Bench requires reconsideration. In our view, a reference without any such reasons would not be a proper one and ought not to have been made.

9. Coming to the merits of the matter and the question raised for our consideration, we find that there is hardly any merit in the view taken by the learned Single Judge. The simple question that we are called upon to consider is, 'Does a tenant who becomes owner

under the provisions of Sections 46 (1) and 49-A (1) of the Vidarbha Tenancy Act, either on the 1st of April 1961 or 1st of April 1963 still continues to be a tenant for the purposes of making an application under Section 36 (1) of the Vidarbha Tenancy Act, if he is dispossessed after the date of vesting of title in him?" Going through the provisions which are relevant we find that the definition of the word "tenant" itself as incorporated in Cl. (32) of Section 2 is that 'tenant' means a person who holds land on lease and includes— (a) a person who is deemed to be a tenant under Sections 6, 7 or 8 and (b) a person who is a protected lessee or occupancy tenant and the definition proceeds to point out that the word 'landlord' shall be construed accordingly.

10. A mere look at this definition will show that either there is an existing contractual relationship of landlord and tenant or there is the fiction of law converting certain lawful possessions into relationship of landlord and tenant. However, the existence of this relationship either by contract or by statutory construction appears to be a sine qua non of a person becoming a tenant. S. 36 (1) says that a tenant or an agricultural labourer or artisan entitled to possession of certain lands or dwelling houses or sites etc. may apply in writing for such possession to the Tahsildar. The application shall be made in such form as may be prescribed and within a period of 3 years from the date on which the right to obtain possession of the land, dwelling house or site is deemed to have accrued to the tenant, agricultural labourer or artisan, as the case may be. The further sub-section deals with the procedure to be adopted by the Tahsildars and order for possession to be made. Sub-section (2) of Sec. 36 gives a similar right to the landlord to claim possession from his tenant and without the order of the Tahsildar a landlord is prevented from entering upon the property, and obtaining possession of agricultural land.

11. The two sections which are now relevant and require construction are Sections 46 (1) and 49-A (1) of the Vidarbha Tenancy Act. Before that we may point out that S. 41 which falls in Chapter III gives a right to the tenant to make offer to the landlord of purchase of land to the extent it is permissible to him to purchase under the provisions of the Vidarbha Tenancy Act that follow that section. An elaborate machinery has been provided for determining the price by the Agricultural Lands Tribunal and bringing about an effective sale. However, where this has not become possible, the Legislature stepped in to transfer statutorily ownership of the agricultural lands in

tenants on and from 1st of April 1961 by sub-section (1) of S. 46. That section is as follows:—

"46 (1). Notwithstanding anything in this Chapter or any law for the time being in force or any custom, usage, decree, contract or grant to the contrary, with effect on and from the first day of April, 1961, the ownership of all lands held by tenants which they are entitled to purchase from their landlords under any of the provisions of this Chapter shall stand transferred to and vest in, such tenants and from such date such tenants shall be deemed to be the full owners of such lands".

The proviso that follows is not relevant for our purpose. This is not a case where either a minor, a widow or serving member of the armed forces or a person subject to any physical or mental disability is involved. The plain language of the above quoted sub-section (1) of Section 46 shows that irrespective of any other things, like customs, decrees, contracts etc. with effect from the 1st of April 1961 the ownership of all lands held by the tenants which they are entitled to purchase from their landlords under any of the provisions of this Chapter shall stand transferred to, and vest in, such tenants and from such date such tenants shall be deemed to be the full owners of such lands. The Legislature with the intention of emphasising its intention has used three different expressions. The first is that the ownership of the land "shall stand transferred to". The second expression used is that it will "vest in" and the third expression used is that such tenants shall be "deemed to be the full owners" of such lands. A mere look at this section leaves no doubt in our mind that the intention of the Legislature was clear and an absolute transfer of title in favour of the tenant was intended as from 1st of April 1961.

12. When Section 46 (1) was in operation, there was another provision of the Vidarbha Tenancy Act contained in clause (c) of Section 42 which had restricted the operation of transfer of title in respect of certain lands. That protection given to small holders was also intended to be revoked. The Legislature, therefore, amended the Vidarbha Tenancy Act by introducing Section 49-A by the Maharashtra Amending Act No. 2 of 1962. The same Amending Act also deleted the provisions of clause (c) of Section 42 from the Vidarbha Tenancy Act. The result was that even in respect of cases which had some protection under cl. (c) of Section 42, the transfer of title has now to take place on the 1st of April, 1963. Section 49-A (1) is as follows:—

"49-A (1) Notwithstanding anything contained in Section 41 or 46, or any cus-

ten, usage, decree contract or grant to the contrary but subject to the provisions of this section, on and from the 1st day of April 1963 the ownership of all land held by a tenant (being land which is not transferred to the tenant under Section 46 or which is not purchased by him under Section 41 or 50) shall stand transferred to and vest in, such tenant who shall, from the date aforesaid, be deemed to be the full owner of such land, if such land is cultivated by him personally..... We have deliberately quoted these sections to show that the Legislature has repeated the language of Section 46 (1), which is an indication of their firm intention to transfer title and vest it in the tenant who was in possession on the 1st of April 1963 and to make him full owner on and from that date. The requirement was that not only the juridical relationship of landlord and tenant must be in existence but the tenant was actually cultivating the land personally. Every tenant who was in personal cultivation or was in cultivating possession was declared owner as and from 1st of April 1963 under the provisions of sub-section (1) of Section 49-A. Under the earlier Section 46 as also under this new added section, a certain procedure is to be thereafter followed. It is not enough to merely declare that the property of A now belongs to B. The price of that land has to be fixed and directions for payment have got to be made. Then again it is not obligatory upon the tenant to purchase the land in spite of the statutory provisions. There may be a tenant who will decline to purchase the land. There may be tenants who are willing to purchase and have paid some instalments, but are ultimately unable to make up the full price as might be fixed by the Agricultural Lands Tribunal. In other words, the cases where the purchase price is declared and cases where the purchase becomes ineffective in the long run had to be provided for along with a procedure to bring about the fixation of price and the handing over of formal document of title at the end of the procedure prescribed. Those provisions are undoubtedly indicated by the Legislature and are a part of the same Scheme.

13. The question, however, is whether by the provisions of this nature which ultimately fix the price and make it payable either in lump sum or by instalments and with the best of intention the tenant is unable to pay and the sale becomes infructuous, is the relationship of landlord and tenant still kept alive by the Legislature during this period? The answer seems to be clearly 'no'. The vesting is complete as on 1st of April 1961 or 1st of April 1963. It is a full title which the tenant gets, but that title is

defeasible if he is unable to fulfil the conditions of retaining that title. Even where the sale becomes ineffective, the landlord does not as of right get the entire land. Provisions of Section 21 are attracted and the Tribunal has to dispose of the land in that manner after deciding the rights and liabilities of the landlord himself.

14. In this scheme of the Vidarbha Tenancy Act, we see no scope to infer that the former tenant who now becomes owner can still be described as a tenant for certain purposes. True, the procedural sections leading to the fixation of price etc. do refer to the erstwhile tenant as tenant and make provision for the payment of price by the tenant to the landlord. The Legislature seems to have resorted to that nomenclature for easy reference and it does not mean that until the last pie is paid the erstwhile tenant still continues to be a tenant and has to face the liabilities of a tenant or to enjoy rights of a tenant.

15. A few references to the other sub-sections of Section 49-A will make the position further clear. Section 49 (2) (a) provides for a case where a tenant who is evicted from the land before the 1st day of April 1963 and is not in possession thereof on that day, and has made or makes an application for possession of the land within the period specified in sub-section (1) of Section 36. If the application is allowed by the Tahsildar or in appeal by the Collector or, as the case may be, in revision by the Maharashtra Revenue Tribunal, he shall be deemed to be the full owner of the land on the date on which the final order allowing the application is made. Pausing here for a minute, it would be obvious that if a tenant was in physical possession or cultivating possession on 1st of April 1963, he at once becomes owner as provided by sub-section (1) of Section 49-A. If he was a tenant before that day and that jural relationship continued, but there was no possession on 1st of April 1963, what should happen to such a tenant? Since he is not in possession, there has been no vesting in him. In law and in fact, he continues to be a tenant because that relationship in respect of the land is still alive. Sub-section (2) (a) of S. 49-A provides for such cases and says that such tenant out of possession on 1st of April 1963 may apply within the statutory period provided by sub-section (1) of Section 36 for possession. Not only he must apply in time, but he must succeed in that application. It is only if he succeeds, if not before the first Tribunal, at least the final Tribunal provided by the Vidarbha Tenancy Act. The moment the success is his and it is declared that he is a tenant entitled to possession and the

direction for possession is given, that date of the decision marks his ownership. The further execution of that order is left to be worked out as a consequence of that order.

16. In the same manner the Legislature felt that there were some tenants in possession on the 'appointed day' which was the '20th August 1958', but somehow they had lost possession of lands. The law of limitation incorporated in sub-section (1) of Section 36 may have worked hardship because the tenant-class is illiterate and ignorant. The Legislature desired that in respect of such tenants whose landlords are still in possession and the land is still agricultural cultivable land, the further facility of obtaining possession and later on vesting title in those tenants should be provided for. With that intention, the Legislature added S. 49-B by Maharashtra Amending Act No. 49 of 1969. This section provides that where a tenant referred to in Section 46 or Section 49-A was in possession on the appointed day, namely, August 20, 1958, but is not in possession of the land held by him on the relevant date on account of his being dispossessed before that date, otherwise than in the manner and by an order of the Tahsildar as provided in Section 36, and the land is in the possession of the landlord or his successor-in-interest on the 31st day of July 1969 and is not put to a non-agricultural use on or before the last mentioned date then, the Tahsildar shall, notwithstanding anything contained in Section 36, either suo motu or on the application of the tenant, hold an enquiry, and direct that such land shall be taken from the possession of the landlord and shall be restored to his possession. It is not enough that such an order is passed, but this order is to be executed and the tenant is to be restored to possession. The concluding portion of the first paragraph of S. 49-A says that such tenant shall be deemed to be the full owner of the land on the date on which the land is restored to him. The explanation below shows that the land has got to be in the possession of the landlord or his successor-in-interest. This 'succession-in-interest' has been defined as either testamentary disposition or devolution on death. In other words if the landlord has in the meanwhile made inter vivos transfer, the tenant has no right to pursue the property in the hand of the transferee.

17. Reading the provisions of Sections 49-A (1), sub-sec. (2) (a) and 49-B together, it is obvious that an application by a tenant is possible under Section 36 (1) only if he was not in physical possession on the 1st of April 1963 and his case falls either under sub-section (2) (a) of Section 49-A or Section 49-B of the Vidarbha

Tenancy Act. Having made such elaborate provisions to safeguard the rights of the tenants, whether in possession or not, it is difficult to imagine why the language of Section 36 (1) is required to be stretched for permitting an ex-tenant who has become owner on and after 1-4-1963 to enable him to apply under that section. A sweeping provision has been made in Section 120 of the Vidarbha Tenancy Act where the Collector has been vested with powers of summary eviction if the case falls in any of the clauses (a), (b) and (c) of that section and no specific remedy was provided elsewhere in the Act. The scheme of protecting possession of tenants and cultivating owners seems to be clear. Whenever there is specific remedy available under the provisions of the Act, that remedy, and where no such specific remedy is indicated but the cases can fall under Section 120, then the provisions of Section 120 will be relevant. This being the total scheme of the Act, we are of the view that there is no scope to imagine that an ex-tenant who became full owner under the provisions of Sec. 49-A and has been dispossessed from possession after 1-4-1963 can still call himself a tenant for the purpose of taking advantage of sub-section (1) of Section 36 of the Vidarbha Tenancy Act.

18. We may now make brief reference to the authorities by which, as pointed out in one of the earlier judgments of a learned Single Judge of this Court, the point seems to be concluded. It would be proper to refer to the Division Bench judgment of this Court in the first instance. Full text of this judgment is not available to us. We have a note at Note 44 in 1963 Mah LJ. It is a decision given by a Division Bench in Special Civil Application No. 33 of 1962 and is delivered on November 21, 1962. The names of the parties are Krishna Babu Chavan v. Ganpat Ramchandra Haldankar. This is a judgment under the provisions of the Bombay Tenancy and Agricultural Lands Act, 1948 namely, the Bombay Tenancy Act. The learned counsel for the petitioner Mr. Kherdekar took us through the provisions of this Act, which are in pari materia with the provision of the Vidarbha Tenancy Act.

19. Section 29 of the Bombay Tenancy Act deals with the procedure for taking possession and is almost identical in words with the provisions of Section 36 of the Vidarbha Tenancy Act. Whereas Section 46 (1) and 49-A (1) of the Vidarbha Tenancy Act speak of a certain date as the date for transfer of title, the language used in the Bombay Tenancy Act is slightly different, but less rigorous than the language used by the Vidarbha Tenancy Act. It will be interesting to find

that in sub-section (1) of Section 32 of the Bombay Tenancy Act, it is laid down that on the first day of April 1957, which is referred to as the 'tillers' day', every tenant shall, subject to the other provisions of this section and the provision; of the next succeeding sections, be deemed to have purchased from his landlord, free of all encumbrances subsisting thereon on the said day, the land held by him as a tenant. This is followed by the several conditions which must be satisfied. However, the main point is that the Legislature has used only one clause, namely the tenant shall be "deemed to have purchased from his landlord" the land held by him as a tenant. This deeming purchase which is a legal fiction was the subject-matter of construction before the Division Bench. The learned Acting Chief Justice pointed out that title of the landlord, barring the Exceptions under Section 52-A or 32, clause (b) of the Tenancy Act, passes from the landlord to the tenant on the tillers' day, and in cases where it so happens, it necessarily follows that the former tenant ceases to be a tenant as and from 1-4-1957. Such a person in the language of Section 29 would not be entitled to file an application under Section 29 when he has been dispossessed after 1-4-1957. Neither he is a tenant on the day on which he filed the application, nor was he a tenant on the day he was dispossessed, by reason of the fact that the title to the land which he was formerly holding as a tenant had passed to him from the landlord.

20. The learned Judges relied for this conclusion upon certain observations of the Supreme Court in the case of *Sitaram Ramnarain Medhi v. State of Bombay*, (61 Bom LR 811 at pp. 824 and 825) = (AIR 1959 SC 459 at p. 472). In that case the Supreme Court was called upon to consider the constitutionality and the legality of the several provisions of the Bombay Tenancy Act. The Supreme Court among other things, was called upon to consider whether the Bombay Tenancy Act, which transferred title to the agricultural lands from the landlord to the tenants was a legislation in respect of "land" so as to bring it within the legislative competence of the Bombay legislature. It is true that the text was slightly different, but the provisions of the Act were construed for the purpose of finding out the real nature of the provisions and, therefore, the real nature of the subject of legislation. In that context, the observations of the Supreme Court are worth noting in the words of their Lordships.

* "The title of the landlord to the land passed immediately to the tenant on the tillers' day and there is a completed purchase or sale thereof as between the land-

lord and the tenant. The tenant is no doubt given a locus paenitentiae and an option of declaring whether he is or is not willing to purchase the land held by him as a tenant. If he fails to appear or makes a statement that he is not willing to purchase the land, the Tribunal shall, by an order in writing, declare that such a tenant is not willing to purchase the land and that the purchase is ineffective. It is only by such a declaration by the Tribunal that the purchase becomes ineffective. If no such declaration is made by the Tribunal, the purchase would stand as statutorily effected on the tillers' day and will continue to be operative, the only obligation on the tenant then being the payment of price in the mode determined by the Tribunal This title is defeasible only in the event of the tenant failing to appear or making a statement that he is not willing to purchase the land or committing default in payment of the price thereof as determined by the Tribunal. The tenant gets a vested interest in the land defeasible only in either of those cases and it cannot, therefore, be said that the title of landlord to the land is suspended for any period definite or indefinite. If that is so, there is an extinguishment or in any event a modification of the landlord's right in the estate well within the meaning of those words as used in Art. 31-A (1) (a)."

21. It is these observations which the learned Judges of the Division Bench relied on in the earlier case discussed and on the basis of this approach of the Supreme Court they found, that there was no intervening period between the transfer of title from the landlord and, the vesting of ownership in them. The title was thus transferred from the landlord and vested in the tenant making him an owner on the 1st of April 1963 at the latest. The obligations were vet to be discharged and there was a right to decline to purchase. But short of that, the title being defeasible on the happening of those events, the vesting was complete and the ex-tenant was to be deemed to be an owner for all practical purposes as the very language of Section 49-A itself points out unmistakably.

22. We may also refer to some observation of the Supreme Court in the case of *Madhorao v. Shankar Singh*, (1971 Mah LJ 4) = (AIR 1971 SC 1659). That was a case where the landlord applied for possession in August 1963 under the provisions of Section 43 (14-A) and Sec. 36 (2) of the Vidarbha Tenancy Act on the ground that the tenant had not taken any steps to purchase the land and the same must be deemed to have been surrendered to the landlord. Negating this contention and rejecting the application of

the landlord under Section 36 (2) as mis-conceived, the observations of the Supreme Court, relevant for our purpose, are as follows:—

"We concur in the view of the Tribunal that the respondent No. 1 became a statutory owner of the land in his tenancy by virtue of Section 46 (1) of the Act with effect from April 1, 1961 even though he did not take steps to purchase that land from the appellant under S. 43."

23. From the reference to observations in the Supreme Court judgments, it is clear that the Supreme Court has accepted the plain meaning of the language used by the Legislature in Section 46 (1) and Section 49-A (1). Depending upon that approach, and independently construing the provisions, the Division Bench of this Court laid down that vesting is complete and transfer of title takes effect either on 1-4-1961 or 1-4-1963, as the case may be. To us, therefore, it appears that the law was well-settled and there was hardly any scope to take a different view. We may emphasise a clause present in Section 46 (1) as well as S. 49-A (1) which must have been advisedly used by the Legislature to remove any doubts. Having pointed out that the land shall stand transferred to and vest in the tenant on the dates mentioned in those sections, the Legislature further adds a clause that the tenant "shall be deemed to be the full owner of such land." This deeming provision obviously means an introduction of a legal fiction. Even if some formalities had remained and were to be performed later and even if due to the inability to comply with those provisions, in some cases, the sale was to be declared ineffective later, until that stage is reached the earlier tenant is to be deemed to be the full owner for all purposes. That is the intention of the Legislature and we find that no other view is possible on the plain reading of these two sections.

24. Considering the approach of the referring Judge in his own judgment where a contrary view is taken, we find that in the earlier decision given by him in August, 1973 there is no reference to the Division Bench judgment or the Supreme Court judgments, which are pointedly considered by the other learned Single Judge. We assume that the learned lawyers who appeared before him did not cite the said Division Bench decision and the learned Judge was not apprised of a view already taken by a larger Bench. In these circumstances, it may be that he took a view which appealed to him. However, when we examine that view on its merits, we do not find any reason which can support the necessity of twisting the Legislature's

language and create a remedy as if to a particular type of litigants. The Tenancy Act is a social legislation and the Legislature was fully aware of the benefits it wanted to confer upon a particular class of society. The very name of that Act is the Bombay Tenancy and Agricultural Lands (Vidarbha Region) Act, initially this legislation started by making the tenants permanent and depriving the landlords of their right to oust the tenants except on certain well-established grounds. In other words, security of tenure was the first step taken in the direction of giving relief to the tenants. The intention also was to give relief to the society at large by augmenting production by making security of tenures available. This is not the place to consider whether that object has been achieved. However, the legislation has aimed at that and progressively steps have been taken. The last step in this direction appears to be that an absentee landlord shall not retain any property in the agricultural lands, but the title and property in such lands will stand transferred to the agricultural tenants.

25. This, the Legislature has achieved by the present legislation. Having once declared them as owners, the Legislature, appears to have stopped at that. The basic concept is that an owner of land must cultivate the land himself. If the owner was absent and the land was in physical possession of a tenant, the tenant was raised to the status of an owner, whether the original landlord wanted to transfer his title or not. Having created this kind of title, the new owner is now left to himself to protect his title and possession as best as he can. We are not deciding, but we are incidentally making an observation that Section 120 (c) seems to have been enacted to enable anyone to get relief provided he is able to satisfy the Collector that the other person falls within the categories mentioned in that section, and is a person in unlawful possession. Short of that, the owner is left to resort to law of the land protecting his rights as an owner. There are no provisions which indicate that a special plea must be made in favour of the ex-tenants who are now owners to enable them to make use of Section 36 for the purpose of regaining possession lost by them after the title was vested in them.

26. The learned referring Judge drew some support from the judgment of the Supreme Court in the case of Vallabh-bhai v. Bai Jivi. (1969 Mah LJ 958 = AIR 1969 SC 1190). A mere look at the facts of that case will show that the situation before the Supreme Court was entirely different and has no relevance at all to

the facts and circumstances before us. In that case which was governed by the Bombay Tenancy Act, a tenant in the Panchmahal district had voluntarily surrendered tenancy of his tenanted lands to his landlord on May 15, 1956. This was an oral surrender. Subsequently after the tillers' day, he applied under Section 84 for the summary eviction of respondent No. 1 who was the landlord. One of the questions raised was that the petitioner was still a tenant as the surrender was invalid and if he was a tenant, he could apply under Section 29 (1) of the Bombay Tenancy Act and he could not take resort to the provisions of Sec. 84. The Supreme Court found, in the first instance, that the surrender dated May 15, 1956 was contrary to the provisions of Section 15 of the Bombay Tenancy Act and the formalities of that section were not gone through. The surrender was thus ineffective. The very logical consequence of that conclusion is that he was a tenant of the land on 1st of April 1957, the tillers' day, but he was not in physical possession of that land. This is, therefore, a case of a tenant who is out of possession on the relevant date and this is not a case of a tenant in physical possession, who is later declared to be the owner, by provisions similar to Section 46 (1) or Section 49-A (1) of the Vidarbha Tenancy Act. The very premise being entirely different, this judgment of the Supreme Court was clearly irrelevant.

27. It may be further noted that having come to the conclusion that the tenant was still a tenant of the land, the Supreme Court says that under Sec. 84, which is comparable to Section 120 of the Vidarbha Tenancy Act the remedy could be pursued against a person in unlawful possession by an applicant for whom no other specific remedy has been provided by the Act. They hold that this was a tenant who should have applied under Section 29 (1) of the Bombay Tenancy Act as a tenant dispossessed is entitled to apply for possession against anybody including the landlord within the statutory period provided by Section 29 (1) of the Act. The Supreme Court, therefore, points out that the petitioner being a tenant was not entitled to the remedy under Section 84. When cases of tenants in possession arose before the Supreme Court they have clearly indicated that vesting on the relevant date is complete or is to be deemed to complete in view of the fictions created by the Tenancy Acts of this State. Not only the reliance placed upon the Supreme Court is misconceived, but we find that no compelling reason are pointed out why it is necessary that the Courts should go out of its way to give a twisted meaning to the plain language of

the Legislature. We do not suggest that the rules of interpretation do not permit the Court to do so, but those are rare occasions. It has been held by Courts that where the Legislative intent is clear, but the language used by the Draftsman is odd, the Court may intervene and so interpret the language even by doing some violence to it, to bring out the Legislature's intent. We do not find any such occasion in this case and, therefore, the manner in which the learned Judge called an ex-tenant who is present owner, a tenant for the purposes of a remedy under Section 36 (1) of the Vidarbha Tenancy Act is clearly unjustified. The earlier decision of the learned Single Judge is, therefore, erroneous and is overruled.

28. We also find that though the ultimate decision in the case of Baswant Motiram Gayki v. Ganpat Dhanaji Gavki, (1975 Mah LJ 9) turns upon different facts a part of the reasoning by another learned Single Judge seems to accept the approach of the decision which we have just overruled. That judgment is not before us, but since it is brought to our notice, we may point out that the law in respect of the rights and title of the former tenants after 1-1-1961 and 1-4-1963 being clear and settled, so far as this Court is concerned, no other view can be countenanced until there is revision by a larger Bench in that behalf.

29. Before we part with this judgment, we are inclined to point out what has already been laid down by the Supreme Court in their reported judgments. We are still following the law of precedents and so long as that law is being observed as the law of this land, judicial discipline requires that when there is a judgment of a coordinate jurisdiction, it must normally be followed by the succeeding Bench. If there is a judgment of one Judge in the field and none else, and the subsequent Single Judge feels that that judgment requires reconsideration, he should not merely proceed to take a different view but should place the papers before the learned Chief Justice for referring the matter to a Division Bench so that the earlier view of the learned Single Judge may be reconsidered. In the same manner if a Single Judge were to find that there is a judgment of the Division Bench in the field which requires reconsideration, he can give his reasons and refer the matter to a Division Bench with a request that the Division Bench may consider whether the earlier Division Bench judgment requires reconsideration and the matter be referred to a still larger Bench. We do not find in the reference order any such reasoning, nor compelling necessity for making a reference to a larger Bench. Ord-

narly, therefore, the learned Single Judge should have disposed of the case on the footing of the judgment of the Division Bench and no reference was called for.

30. At this stage Mr. Pimparkar for respondent No. 1 states that we should pass some orders in the matter of the other petition filed by the respondent No. 1 under Section 120(c) of the Vidarbha Tenancy Act. This he says should be done in the interest of avoiding multiplicity of litigation. We are afraid that it is not possible to pass any such orders. The respondent No. 1 has started two independent proceedings under two different sections of the Tenancy Act. Only one matter has come to us and it would not be proper for this Bench to express any opinion about the merits and demerits of the other matter, which is not before us. We, therefore, reject the prayer of Mr. Pimparkar.

31. This being our view of the matter, the original application before the tenancy authorities by the present respondent No. 1 was clearly misconceived. They could not have entertained it. We, therefore, allow this writ petition and quash the orders of all the tenancy authorities below. In the circumstances of the case, there will be no order as to costs. Petition allowed.

AIR 1976 BOMBAY 10

(NAGUPUR BENCH)

DESHMUKH AND SHIMPI, JJ.

Vinayakrao S/o Ganpatrao Pimpalpure, Petitioner v. The State of Maharashtra through its Secretary, Revenue Department, Sachiwalaya, Bombay-32, Respondent.

Special Civil Application No. 619 of 1969, D/- 19-3-1975.

(A) Bombay Prevention of Fragmentation and Consolidation of Holdings Act (62 of 1947), Sections 9, 31 — Bombay Prevention of Fragmentation and Consolidation of Holdings Rules (1959), Rule 27 — Word "otherwise" as used in Section 31 — Meaning — Under agreement of sale, possession of land transferred after receipt of whole consideration — Document of sale, to be executed after obtaining permission — Transaction held covered by word "otherwise" and as such is void under Section 9 (1) — (Words and Phrases "otherwise").

The word "otherwise" as used in Section 31 cannot be interpreted as a transaction of like nature. The instances of transfer as stated in that section are not exhaustive and for showing that there may be some other transfers besides the

instances of transfers stated therein, the word "otherwise" has been used.

(Para 5)

In view of Section 9 (1) and Section 31 (a) of the Act, once a holding is allotted to an agriculturist after following the provisions of the Act, then that holding cannot be transferred except in accordance with such conditions as may be prescribed in the Act. Where, therefore, under an agreement of sale an agriculturist transfers possession of lands of certain Unit number after receiving the whole consideration from the transferee and what is left to be done is only to execute a document of sale in favour of transferee after obtaining permission from Collector, such a transaction is covered by word "otherwise" in Section 31 and as such is void under Section 9 (1). The word, "otherwise" has been given an extended meaning to include the above mentioned transaction and other transactions which are not covered by either sale, mortgage, lease, gift, exchange but in which there is a transfer of the holding. AIR 1957 SC 521, Applied.

(Paras 6, 8)

Cases Referred: Chronological Paras AIR 1957 SC 521 = 1957 SCJ 557 7

M/s. N. S. Munshi and V. G. Senad, Advocates for Petitioner; Mr. M. M. Qazi, A. G. P., for Respondent.

SHIMPI, J.:— Petitioner by this special civil application prays that the order dated 27-1-1969 passed by the Commissioner, Nagpur Division, Nagpur, in a revision application filed by the petitioner dismissing his petition whereby he confirmed the order of the Collector under which the petitioner was fined Rs. 200/- and he was not granted permission to sell his agricultural lands, be quashed. The facts, in brief, are as under:—

Petitioner held agricultural lands situate at village Mohadara, Tahsil Umrer. The old Survey Nos. being 61/1, admeasuring 65 acres and 65 decimals and 45/2, 45/4 and 46 admeasuring 15.22 assessed at Rs. 21.37. In the year 1966 under the provisions of the Bombay Prevention of Fragmentation and Consolidation of Holdings Act, 1947, consolidation of agricultural holdings took place at the said village and old Survey No. 61/1 was given a new number being Unit No. 97 while the other three lands Nos. 45/2, 45/4 and 46 were given a new number as Unit No. 50.

2. After this consolidation of holdings took place, the petitioner entered into an agreement to sell these lands sometime on 23-5-1966 in favour of certain persons mentioned in the order of the Collector which is Annexure-2 to the petition. He had sold Unit No. 97 admeasuring 65.65 to 7 persons. The total transferred land came to 61.40 acres and

4.25 acres of this Unit remained with him. Though the agreement of sale is not produced along with this petition, it is an admitted fact that the agreement of sale mentions that this Unit was sold to these 7 persons by dividing the holding in between these 7 persons. The total price agreed to be received from each of the transferees was received by the petitioner on the date on which he executed the agreement of sale and on the very day he transferred possession of the land to these transferees. Similarly Unit No. 50 admeasuring 15.22 acres was agreed to be sold to one Raghoba son of Marot for Rs. 22,830/-. In his case also an agreement of sale was executed between the parties under which petitioner received the whole consideration of Rs. 22,830/- and delivered possession of the holding to the transferee, namely, Raghoba s/o Maroti. At the hearing of this petition, the agreement of sale was perused by us and one of the terms which was relied upon by the learned Advocate for the petitioner was that these sales were subject to the permission of the Collector for which an application would be made to the Collector and if permission was refused, then the transferees were to deliver possession of the holding to the petitioner and the petitioner was to return the amount to them. Pursuant to this agreement, the transferees entered into possession and were in possession of the various portions when an application was made to the Collector by the petitioner on 5-7-1966. The Collector on hearing the parties came to the conclusion that the petitioner received the full consideration of the lands in question and he has already transferred his holding to the transferee. Therefore, such a transfer of land was void under Section 9 (1) of the Bombay Prevention of Fragmentation and Consolidation of Holdings Act, 1947, hereinafter would be referred to as the Act. The Collector, therefore, rejected the application for the grant of permission made by the petitioner under Rule 27 of the said Act and fined the petitioner to pay Rs. 200/- as stated above.

3. Aggrieved by this order, revision application was filed. For the same reasons, the order of the Collector was upheld by the Commissioner. The Commissioner further observed that there was lacuna in the order of the Collector in so far as there was no clarification whether the transferees should be evicted from the holdings or not under Section 9 (3) of the Act. The Commissioner's order gave direction to the Collector, Nagpur, to pass proper orders in the said matter under Section 9 (3) of the Act. Aggrieved by this order, the present application is filed.

4. Shri Munshi, who appears for the petitioner submitted that both the Collector and the Commissioner were in

error in holding that this was a transaction akin to sell. It was submitted that though possession was given to the respective transferees it was by way of an arrangement but subject to the permission of the Collector. It was bona fide transaction entered into by the petitioner. It was, therefore, urged that after quashing these orders, permission as required under Rule 27 of the Bombay Prevention of Fragmentation and Consolidation of Holdings Rules, 1959, should be granted to the petitioner to execute valid title deeds in favour of the intending purchasers.

5. In order to appreciate the submission of Shri Munshi, it is necessary to refer to the provisions of the Act specially Section 9 and Section 31 and Rule 27. Section 9 of the Act reads as under:—

"1. The transfer or partition of any land contrary to the provisions of this Act shall be void."

The further sub-sections are not necessary to be considered. Section 31 of the Act runs as under:—

31. Notwithstanding anything contained in any law for the time being in force, no holding allotted under this Act, nor any part thereof, shall be—

(a) transferred whether by way of sale (including sale in execution of a decree of a Civil Court or for recovery of arrears of land revenue or for sums recoverable as arrears of land revenue) or by way of gift, exchange, or lease, or otherwise, except in accordance with such conditions as may be prescribed:—

Rule 27 of the Bombay Prevention of Fragmentation and Consolidation of Holdings Rules, 1959, runs as under:—

"27. Application for permission for transfer of consolidated holding or any part thereof and conditions for such transfer

(1) Any person desiring to transfer or interested in the transfer of any holding allotted under the Act or any part thereof, as provided by clause (a) of Section 31 (such transfer not being a mortgage in favour of a co-operative land development bank, a primary land development bank or a primary co-operative society) may make an application to the Collector in that behalf.

(2) On receipt of an application under sub-rule (1), the Collector may, subject to the provisions of the relevant tenancy law and the provisions of the Maharashtra Agricultural Lands (Ceiling on Holdings) Act, 1961 (in so far as such provisions relate to restriction on the transfer of agricultural land) permit the transfer of the holding or as the case may be, the part thereof."

Thereafter the various conditions are stated in the rule. sub-clause (f) of Rule

27 of the said Rules, is material which runs as under:—

"If the entire land allotted under the Act is to be transferred to an agriculturist or an agricultural labourer." At the hearing of the petition when it was pointed out that sub-division of a holding is not permitted under Section 31 without the permission in writing of the Commissioner (Collector?) subject to the general orders of the State Government, the case in respect of Unit No. 97 which was a transfer in favour of 7 transferees was not pressed by the petitioner. The petitioner mainly pressed his case in respect of Unit No. 50 which he had agreed to sell to one transferor, namely, Raghoba and there was no dispute that he was an agriculturist. Reading Rule 27 of the said Rules, the Collector can grant permission to any person desiring to transfer any holding as provided by clause (a) of Section 31. Therefore, it is necessary to consider the provisions of Section 31 of the Act which we have already reproduced. Section 31 clearly lays down that no holding allotted under this Act or any part thereof shall be transferred whether by way of sale or by way of gift, exchange or lease or otherwise except in accordance with such condition as may be prescribed. It was contended that the agreement of sale which was entered into by the petitioner was neither a sale nor a gift, exchange or lease and, therefore, provisions of Section 31 are not attracted. It was also contended that the word "otherwise" should be interpreted as a transaction of like nature. On that basis it was urged that agreement of sale, even though in the instant case possession was given to the transferee, was not a transaction of a like nature like a sale or by way of gift, exchange or lease. We are unable to accept the submission urged on behalf of the petitioner. The opening part of Section 31 states "Notwithstanding anything contained in any law for the time being in force, no holding allotted under this Act, nor any part thereof, shall be transferred". The instances of transfer are stated in Section 31 of the Act. However, they are not exhaustive and for showing that there may be some other transfers besides the instances of transfers stated, in our opinion, the word "otherwise" has been used.

6. Section 9, sub-clause (1) of the Act which we have reproduced shows that the transfer or partition of any land contrary to the provisions of this Act shall be void. Reading these provisions, it appears to us that once a holding is allotted to an agriculturist after following the provisions of the Bombay Prevention of Fragmentation and Consolidation of Holdings Act, 1947, then that holding cannot be transferred except in accordance with such conditions as may be prescribed

in the Act. In the instant case, it is seen that the petitioner transferred possession of Unit No. 50 to the transferee on the date of the agreement of sale entered into between him and the transferee. On that day, the transferor i.e., the petitioner received the whole consideration from the transferee, namely, Rs. 22,830/-. What was left to be done was only to execute a document of sale in favour of the transferee by the petitioner. This kind of transaction is covered under Section 31 of the Act which prohibits transfer and which, is of "otherwise" nature. In the instant case, the word, "otherwise" in our opinion, has been given an extended meaning to include the above mentioned transaction and other transactions which are not covered by either sale, mortgage, lease, gift, exchange but in which there is a transfer of the holding.

7. The word, "otherwise" has been interpreted by the Supreme Court while construing the provisions of Sections 5 and 6 of the Bombay Land Requisition Act, 1948, in a case reported in Smt. Lila Vati Bai v. State of Bombay, (AIR 1957 SC 521). The facts of that case show that petitioner Shrimati Lilavatibai is the widow of Dharamdas who was a tenant of the premises in question. Dharamdas died in November 1953 leaving behind him surviving his widow and daughter. The petitioner alleged that she had been occupying the premises in question as a member of her husband's family since 1938 and that the tenant aforesaid had at no material date ceased to occupy the premises. She also alleged that one Narottamdas Dharamsay Patel was a mere lodger who was occupying a portion of the premises by leave and licence of her husband and in fact Narottamdas had vacated the portion in his occupation some time in the year 1953. On behalf of the State it was alleged that Dharamdas had vacated the premises in October, 1952 and had handed over the possession of the premises to the said Narottamdas Patel. It was denied that petitioner was residing in the premises at the time of her husband's death in November, 1953. On 27th January, 1954, an order was passed under Section 6 sub-section (4), clause (a) of the Bombay Land Requisition Act, 1948, by the Government of Bombay to requisition the said premises for a public purpose, because on enquiry it was found that the premises had become vacant in the month of October, 1952. The petitioner challenged the validity of the order of requisition stated above. The High Court of Bombay dismissed her petition. The petitioner moved the Supreme Court challenging the vires of the Act as also the legal efficacy of the order impugned.

8. The Supreme Court considered the contention raised on behalf of the

petitioner how the word "otherwise" used in Explanation (a) to Section 6 should be construed. It was observed on page 528 Para. 11 as follows:—

"It was contended on behalf of the petitioner that Explanation (a) to Section 6 quoted above contemplates a vacancy when a tenant (omitting other words not necessary) ceases to be in occupation upon termination of his tenancy, eviction, or assignment or transfer in any other manner. The argument proceeds further to the effect that in the instant case admittedly there was no termination, eviction, assignment or transfer and that the words "or otherwise" must be construed as ejusdem generis with the words immediately preceding them; and that therefore on the facts as admitted even in the affidavit filed on behalf of the Government there was in law no vacancy. In the first place, as already indicated, we cannot go behind the declaration made by the Government, that there was a vacancy. In the second place, the rule of ejusdem generis sought to be pressed in aid of the petitioner can possibly have no application. The Legislature has been cautious and thorough-going enough to bar all avenues of escape by using the words "or otherwise". Those words are not words of limitation but of extension so as to cover all possible ways in which a vacancy may occur. Generally speaking, a tenant's occupation of his premises ceases when his tenancy is terminated by acts of parties or by operation of law or by eviction by the landlord or by assignment or transfer of the tenant's interest. But the Legislature, when it used the words "or otherwise" apparently intended to cover other cases which may not come within the meaning of the preceding clauses, for example, a case where the tenant's occupation has ceased as a result of trespass by a third party. The Legislature, in our opinion, intended to cover all possible cases of vacancy occurring due to any reasons whatsoever. Hence, far from using those words ejusdem generis with the preceding clauses of the explanation, the Legislature used those words in an all inclusive sense."

In our opinion, this interpretation of the word "otherwise" is amply applicable while interpreting Section 31 of the Act. We are, therefore, unable to accept the submissions urged on behalf of the petitioner. We feel that the order passed by the Collector as confirmed by the Commissioner does not require any interference at our hands. In the result, rule discharged with costs.

Application dismissed.

AIR 1976 BOMBAY 13

(AT NAGPUR)

CHANDURKAR AND
DHARMADHIKARI, JJ.

Gangadhar Sadashiorao Watane and others, Petitioners v. The State of Maharashtra and another, Respondents.

Special Civil Appls. Nos. 2123 and 2084 of 1974, D/- 12-2-1975.

(A) Constitution of India, Arts. 358, 360 — Applicability of Art. 358 to legislation based on financial stringency.

Article 358 deals with the suspension of provisions of Article 19 during the emergency. It is not open for the High Court to go behind the proclamation. Only because Article 360 appears in the Statute book after Article 358, it cannot be said that the provisions of Article 358 are not applicable to a legislation providing for the mode of payment of advance price due to financial stringency or paucity of funds. The protection given by Article 358 to a legislation made during the subsistence of emergency is a blanket protection. It is not open for the petitioners during the emergency to challenge a legislation on the ground that it is violative of their fundamental right guaranteed under Article 19. It is not also permissible for them to avail of the same right obliquely or indirectly. 1973 Mah LJ 813, Rel. on.

(Paras 3, 5)

(B) Constitution of India, Art. 31 — Compulsory acquisition — Maharashtra Raw Cotton (Procurement, Processing and Marketing) Act (47 of 1971), S. 25 — Provision in Section 25 whether amounts to compulsory acquisition.

The sale of the cotton by the petitioners under the provisions of the Act at the centres opened by the Government at a price to be determined by the Government in exercise of the power conferred upon it by the Act cannot be termed to be a compulsory acquisition or requisition of the property within the meaning of Article 31 of the Constitution. The legislation merely requires a person to sell the cotton to the Government or its agent as per provisions of the Act and monopoly scheme. It does not empower the Government either to acquire or take possession of property. (Para 5)

(C) Maharashtra Raw Cotton (Procurement, Processing and Marketing) Act (47 of 1971), S. 25 (as amended in 1974) — Order issued by Government under S. 25 not providing for payment of interest — Validity.

If no provision has been made in the Order issued by the Government under Section 25 of the Act for payment of any interest on that count the order is not

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either illegal or beyond the scope of section itself. The proviso to Section 25 itself makes a provision for payment of interest where the payment of the advance price or any part thereof is deferred for any reason. According to the proviso to Section 25, the tenderer is entitled to get interest from the date of tender of the cotton by him till the date of payment of such amount at such a rate which cannot be less than ten per cent per annum. In a given case it can be more if the Government so specifies by general or special order. If the advance price or any part thereof is not paid to the tenderer immediately after the cotton is tendered, it will amount to a deferred payment as contemplated by the proviso to Section 25.

(Para 7)

(D) Interpretation of Statutes — Statement of Objects and Reasons—Value of.

The Statement of Objects and Reasons of a Statute may and does often furnish valuable historical material in ascertaining the reasons which induced the legislature to enact a Statute. It can legitimately be taken into account in ascertaining the intention of the legislature, such as the history of the Statute the reason which led to its being passed, the mischief which it intended to suppress and the remedy provided by the Statute for curing the mischief. It is useful to find out as to what was the law before the Act was passed, what was the mischief or defect for which law had not provided, what remedy legislature has provided and the reason of the remedy AIR 1970 Bom 232 (FB) and AIR 1973 SC 913. Rel. on.

(Para 10)

(E) Maharashtra Raw Cotton (Procurement, Processing and Marketing) Act (47 of 1971), S. 25 (as amended in 1974) — Government resolution dated 28-12-1974 — Validity.

As to whether a person or authority to whom powers have been delegated by the legislature can make an order, rule or regulation or bye-law with retrospective effect or not, will obviously depend upon the statutory provisions. Section 25 of the Act itself contemplates a situation under which the power can be exercised by the Government after the cotton is tendered by the tenderer and the amount remains to be paid or is still payable to him. The order issued by the Government on 28-12-1974 did not operate retrospectively as it did not touch the payments already made. The order regarding payment of the amount either in lump sum or in instalments operated on the amount which was still payable. In this view of the matter the order did not operate retrospectively. Apart from this, by Ordinance No. XXIII of 1974 a fiction had

been created and the amending provisions of the Act deemed to have come into force from 17th November 1974. The fiction created by the Legislature will have to be extended to its logical conclusion. This obviously means that on 17th November, 1974 itself Section 25, as was amended by the Ordinance, was on the Statute book. Hence, it was open to the Government to issue a general or special order at any time determining the mode of payment of the advance price which was still payable to the tenderer. (Paras 10, 11)

(F) Interpretation of Statutes — Duty of Court — Motive of legislature.

The Court in construing and interpreting the provisions of an enactment has to ascertain the meaning and intention of legislature from the language used in the Statute itself and it is not concerned with the motives of the legislature. (Para 13)

(G) Interpretation of Statutes — Policy of legislation — Whether Court can consider.

The policies of the Government which are expressed in the shape of legislation are to be considered by the members of the legislature and not by the Courts of law. A Statute cannot be challenged on the ground that it is the result of some alleged wrong policy of the Government. (Para 13)

Cases Referred: Chronological Paras

AIR 1975 SC 32 = 1975 2 SCR 42 4, 8
AIR 1973 SC 913 = 1973 Cri LJ 902 10, 13

1973 Mah LJ 813 3
AIR 1969 SC 1100 = (1969) 3 SCR 447 13
AIR 1970 SC 385 = (1970) 1 SCR 678 9, 10

AIR 1970 Bom 232 = 1969 Mah LJ 933 (FB) 10
AIR 1963 SC 274 = (1963) 1 SCR 721 10
AIR 1960 Mys 326 10
AIR 1959 Punj 453 = 61 Pun LR 514 (FB) 10

AIR 1956 All 35 = 6 STC 287 10
AIR 1954 SC 92 = 1954 SCR 587 5
AIR 1950 SC 27 = 1950 SCR 88 13
(1870) 40 LJ QB 28 = 6 QB 1 10

In S. C. A. No. 2123 of 1974:—
V. R. Manohar and A. M. Deshmukh, for Petitioners; A. S. Bobde and V. A. Bobde, (for No. 1) and G. V. Patil, (for Nos. 1 and 2), for Respondents.

In S. C. A. No. 2084 of 1974:—
P. V. Holey and A. M. Deshmukh, for Petitioners; A. S. Bobde and V. A. Bobde (for No. 1) and R. V. Patil (for Nos. 1 and 2), for Respondents.

DHARMADHIKARI, J.:— The petitioners in both these petitions are agriculturists and cultivators in the Vidarbha region of the State of Maharashtra and according to them, they solely depend upon agriculture for their maintenance

and livelihood. The petitioners in these cases have tendered their Cotton at the cotton centres as per the provisions of the Maharashtra Raw Cotton (Procurement, Processing and Marketing) Act, 1971 referred to hereinafter as the Act. It is contended by them that they were entitled to receive 80 per cent of the guaranteed price for the quantity of cotton tendered by them and the action of the respondents incorporated in Government resolution dated 28th December, 1974 providing revised mode of payment to the cotton tenderers under the scheme, and the provisions of Sections 25, 26 and 27 of the Act, depriving them of their right to get 80 per cent guaranteed price in lump-sum, is violative of their fundamental right under Article 31 of the Constitution of India. It was also contended by the petitioners that Sections 25 to 27 of the Act, as amended, are also violative of their fundamental right under Articles 14 and 31 of the Constitution of India, as the cotton tendered by them is being acquired by the State without payment of reasonable compensation. It was also faintly argued before us that the said provisions are contrary to the basic objects of the Act itself. A contention was also raised on behalf of the petitioners that the Government's order issued under Section 25 of the amended Act dated 28th December, 1974 is bad in law, it being retrospective in operation. For this purpose a reference was made to clause 4 and clause 7 of the said order. Shri Manohar, the learned counsel for the petitioners in Special Civil Application No. 2123 of 1974, further contended that the order issued by the Government dated 28th December, 1974 is beyond the scope of Section 25 itself as no provision has been made in the said order for payment of interest for an intermittent period, namely, the period between the point of time, the cotton is tendered and the amount is actually deposited in the Bank. For this purpose he has drawn our attention towards the averments made in para. 10 of the return filed on behalf of the respondent No. 1, wherein it was admitted that though the date of tender of cotton was 12th December 1974, the amount was credited in the Bank account on 18th December, 1974. According to Shri Manohar, no provision has been made in the order issued by the Government for payment of any interest for this period, namely, from 12th Dec., 1974 to 18th Dec., 1974, and therefore the petitioners are deprived of their property, namely, the cotton, without any compensation. Therefore, in substance, the petitioners in Special Civil Application No. 2123 of 1974 have challenged the provisions of S. 25 of the Act as well as the order issued thereunder

by the State Government on the ground that it is violative of their fundamental right guaranteed under Article 31 of the Constitution of India. It is also contended that the order issued by the Government under Section 25 of the Act is bad in law, it being retrospective in nature and beyond scope of Section 25 of the Act.

2. Shri Holey, the learned counsel for the petitioners in Special Civil Application No. 2084 of 1974, contended before us that there is no nexus between the emergency declared under Article 352 of the Constitution of India and the present legislation, and therefore, the petitioners are entitled to challenge the present enactment on the ground that it is violative of the petitioners' fundamental right guaranteed under Article 19 of the Constitution of India. It is contended by the learned counsel that under the Constitution two distinct and separate provisions are made for declaration of emergency. Article 352 of the Constitution confers a power upon the President to declare emergency if he is satisfied that a grave emergency exists whereby the security of India or any part of the territory thereof is threatened, whereas Art. 360 confers a power upon the President to declare emergency if he is satisfied that a situation has arisen whereby the financial stability or credit of India or of any part of the territory thereof is threatened. Therefore, according to the learned counsel, to the present legislation the provisions of Article 358 are not applicable. According to the learned counsel as Article 360 appears on the Statute book after Article 358 it is not applicable to a legislation which is based on financial stringency or paucity of funds. He further contended that the present legislation, namely, the Maharashtra Raw Cotton (Procurement, Processing and Marketing) Act, 1971, and in particular Maharashtra Ordinance No. XXIII of 1974 has been promulgated providing a mode of payment of the advance price because of financial stringency or paucity of funds. According to the learned counsel, the present legislation has, therefore, no nexus with the emergency declared under Article 352 of the Constitution and hence it is open for the petitioners to challenge the said legislation on the ground that it is violative of the petitioners' fundamental right guaranteed under Article 19 of the Constitution.

3. In our opinion, the contention raised by Shri Holey needs to be mentioned only for being rejected. Art. 358 of the Constitution deals with the suspension of provisions of Article 19 during the emergency. It is not open for this Court to go behind the proclamation. Only be-

cause Article 360 appears in the Statute book after Article 358, it cannot be said that the provisions of Article 358 are not applicable to a legislation providing for the mode of payment of advance price due to financial stringency or paucity of funds. The protection given by Art. 358 to a legislation made during the subsistence of emergency is a blanket protection. This Court has considered this aspect of the matter in detail in *Rajaram v. State of Maharashtra*, (1973 Mah LJ 813) while dealing with the present legislation itself. In view of this, in our opinion, it is not open for the petitioners to challenge the present legislation on the ground that it is violative of their fundamental right guaranteed under Article 19 of the Constitution of India. In all fairness to Shri Manohar, he has not adopted this part of the argument of Shri Holey.

4. On behalf of the petitioners in Special Civil Application No. 2123 of 1974 it is contended by Shri Manohar that the provisions of Section 25 and the order issued by the State Government in substance amount to acquisition of the cotton of the petitioners without payment of compensation or price therefor. According to him, under common law the petitioners, who are the agriculturists, have a right to sell their cotton anywhere they desire. By the present legislation a monopoly has been created and their right to sell the cotton has been restricted. Under the present legislation it is compulsory for the agriculturist that he must sell the cotton to the State Government or its agent. Under the provisions of Sale of Goods Act an agriculturist is entitled to get price for his goods as soon as they are sold. The postponement of payment of price as has been done in the present case, practically amounts to acquisition of cotton without payment of price or on payment of a meagre price. He further contended before us that 30 per cent of the advance price, which is offered to the agriculturists immediately on sale practically amounts to non-payment of any price for the goods. The petitioners, who are agriculturists, are not able to incur any expenditure on their agriculture from this amount, nor the amount paid to them is enough to meet two ends. In substance, therefore, it is contended by Shri Manohar that the acquisition of raw cotton of the petitioners by the State Government under the provisions of the Act amounts to compulsory acquisition of their property, namely, the cotton, without any authority of law and is, therefore, violative of the petitioners' fundamental right under Article 31 of the Constitution. In support of this contention he sought assistance from the provisions of Article 19(1)(f) of the Constitu-

tion of India and contended that Sec. 25 of the Act and the order issued thereunder are not a reasonable restriction upon the petitioners' right to acquire, hold and dispose of their property. He further contended that no time limit has been prescribed by the Act or the order issued by the Government for payment of 30 per cent of the advance price after the cotton is tendered. According to the learned counsel, no provision has also been made for payment of any interest from the time of tender of cotton till the payment of this 30 per cent of advance price. According to Shri Manohar, postponement of purchase price coupled with non-payment of interest amounts to unreasonable restriction upon the fundamental right of the petitioners under Article 19(1)(f) read with Article 31 of the Constitution of India. For this proposition he has relied upon the decision of the Supreme Court in *Godhra Electric Co. v. State of Gujarat*, (AIR 1975 SC 32).

5. It is not possible for us to accept this contention of Shri Manohar. It cannot be disputed that in view of the provisions of Article 358 of the Constitution, while a proclamation of emergency is in operation, the provisions of Art. 19 are suspended during the pendency of emergency. If this is so, then it is not open for the petitioners to contend during the pendency of emergency that the present legislation violates their fundamental right guaranteed under Article 19 of the Constitution of India. If this is so, in our opinion, it is not also permissible for the petitioners to avail of the same right obliquely or indirectly. The protection given by Article 358 to a legislation made during the subsistence of emergency against an attack on the ground of violation of Article 19 of the Constitution is a blanket protection if the legislation is otherwise legal and constitutionally valid. In this view of the matter, in our opinion, it is not open for the petitioners to take aid of the provisions of Article 19 of the Constitution of India for contending that they are being deprived of their property without authority of the law, meaning thereby that the law, which deprives them of their property, is violative of their fundamental right guaranteed under Article 19 of the Constitution. Apart from this, in our opinion, the sale of the cotton by the petitioners under the provisions of the Act at the centres opened by the Government at a price to be determined by the Government in exercise of the power conferred upon it by the Act cannot be termed to be a compulsory acquisition or requisition of the property within the meaning of Article 31 of the Constitution. The present piece of legislation merely requires a person to sell

the cotton to the Government or its agent as per provisions of the Act and monopoly scheme. It does not empower the Government either to acquire or take possession of property. In this view of the matter, in our opinion, it is not necessary to refer to the decision of the Supreme Court in *State of West Bengal v. Subodh Gopal Bose*. (AIR 1954 SC 92) on which reliance was placed by the learned counsel in support of his contention. Moreover, after the said decision of the Supreme Court, Article 31 of the Constitution of India itself was amended. In the present case if it is not possible for the petitioners to attack the present legislation on the ground that it is violative of their right guaranteed under Art. 13 of the Constitution, then, in our opinion, no argument based on infringement of Article 31 read with Article 19 of the Constitution can be independently set up.

6. It was then contended by Shri Manohar that the order issued by the State Government dated 28th December, 1974 has not made any provision for payment of interest from the date of tender of cotton till the date of actual credit of the amount in the Bank by the respondents.

7. For properly appreciating this contention it will be useful to reproduce Section 25 of the Act, as amended which reads as under:

"25 (1) Every tenderer of cotton at the collection centre shall in the first instance be entitled to receive eighty per cent of the guaranteed price for the quantity of cotton tendered by him, which shall be payable to him in lump sum or in such instalments, not exceeding two, as the State Government may, from time to time, having regard to the availability of the funds, by general or special order determine. The payment of eighty per cent of the guaranteed price in this manner shall be the advance price payable to the tenderer.

(2) The difference between the guaranteed price and the advance price shall be payable to the tenderer within a period of three months after the close of every cotton season:

Provided that, where the payment of the advance price or any part thereof is deferred for any reason or the difference between the guaranteed price and the advance price is not paid immediately after the close of any cotton season, there shall be paid to the tenderer by or on behalf of the State Government interest on the amount which remains unpaid, from the date of tender of cotton by him or from the close of the cotton season, as the case may be, till the date of payment of such amount, at such rate not less than

ten per cent per annum, as the State Government may, from time to time, by general or special order, specify."

It is no doubt true that no provision has been made in the order issued by the State Government dated 28th December, 1974 for payment of interest for the period between the date of tender of cotton till the date of actual credit of the amount in the Bank by the respondents. As already referred to hereinbefore, in the return filed on behalf of the respondent No. 1, it is an admitted position that thirty per cent advance price, which was payable to the tenderer of cotton at the collection centre, was deposited in some cases after more than 6 days. It is also true that no provision has been made in the Order issued by the Government under Section 25 of the Act for payment of any interest for this intervening period. However, in our opinion, on that count it cannot be said that the order issued by the State Government under Section 25 of the Act is either illegal or is beyond the scope of the section itself. The proviso to Section 25 of the Act itself makes a provision for payment of interest where the payment of the advance price or any part thereof is deferred for any reason. According to the proviso to Section 25 of the Act, the tenderer is entitled to get interest from the date of tender of the cotton by him till the date of payment of such amount at such a rate which cannot be less than ten per cent per annum. In a given case it can be more if the Government so specifies by general or special order. In the absence of such a specification by general or special order under the provisions of Section 25 of the Act read with the proviso, the tenderer of the cotton is entitled to get interest at the rate of 10 per cent per annum from the date of the tender of the cotton by him till the date of payment of such amount. In this particular case, the payment of such amount is by the credit in the Bank account. The date on which the amount is credited in the Bank account of the tenderer will be deemed to be the date on which the payment is made to him. If the advance price or any part thereof is not paid to the tenderer immediately after the cotton is tendered, in our opinion, it will amount to a deferred payment as contemplated by the proviso to S. 25 of the Act.

8. Shri A. S. Bobde, the learned counsel for the respondent No. 1, contended before us that the delay in actual credit of the amount in the Bank cannot be termed to be a deferred payment as contemplated by the proviso to Section 25 of the Act. According to him, the delay in crediting the amount in the Bank could be caused due to administrative exigency of the Government or its agent, or in a

given case the delay could be by the Banking authorities. In our opinion, whatever may be the reason for non-payment of the advance price or any part thereof as soon as the cotton is tendered, so far as tenderer is concerned, it will be a deferred payment as contemplated by proviso to Section 25 of the Act. As per provisions of Section 25 of the Act, the tenderer is entitled to get payment of the advance price or any part thereof as soon as the cotton is tendered. Any postponement by the Government or its agent in payment of this price amounts to deferred payment. This being the position, in our opinion, the tenderer will be entitled to get interest at the rate which will not be less than 10 per cent per annum from the Government or its agent from the date of tender to the date of actual payment of the amount. The amount remains unpaid till it is actually paid or credited in the Bank account. As a provision has been made for payment of interest in S. 25 itself, it was not obligatory on the part of the Government to have made any provision in the order issued under S. 25 of the Act, unless Government wanted to prescribe higher rate of interest than the minimum prescribed by the Act itself. Therefore, it is not possible for us to hold that on that count the order issued by the Government is any way bad in law. As a specific provision for payment of interest is already made in the Act, in our opinion, the law laid down by the Supreme Court in the *Godhra Electricity Co. v. The State of Gujarat*, (AIR 1975 SC 32) has no application to the facts and circumstances of the present case, nor it can be said that the present legislation is violative of petitioner's fundamental right guaranteed under Art. 31 of the Constitution of India.

9. It was then contended by Shri Manohar that Section 25 of the Act does not confer any right upon the State Government to issue any general or special order determining the mode of payment of 80 per cent of the guaranteed price with retrospective effect. According to him, the subordinate authority exercising subordinate legislative function cannot issue an order which can operate with retrospective effect. For this proposition Shri Manohar has relied upon a decision of the Supreme Court in the *Income-tax Officer, Alleppey v. I. M. C. Ponnose*, (AIR 1970 SC 385).

10. For properly appreciating the contention it will be useful to refer to the aims and object leading to the promulgation of the Ordinance by which Sections 25, 26 and 27 of the Act are amended. It is no doubt true that the Statement of Objects and Reasons leading to the passing of an enactment cannot be

looked into as a direct aid to construction, yet it can be used for the limited purpose of ascertaining the condition prevailing at the time when Ordinance was issued and the purpose for which amendment was made. The Statement of Objects and Reasons of a Statute may and do often furnish valuable historical material in ascertaining the reasons which induced the legislature to enact a Statute. It can legitimately be taken into account in ascertaining the intention of the legislature, such as the history of the Statute, the reason which led to its being passed, the mischief which it intended to suppress and the remedy provided by the Statute for curing the mischief. It is useful to find out as to what was the law before the Act was passed, what was the mischief or defect for which law had not provided, what remedy legislature has provided and the reason of the remedy. [See *Smt. Radhabai v. State of Maharashtra*, 1969 Mah LJ 933 = (AIR 1970 Bom 232) (FB) and *A. C. Sharma v. Delhi Administration*, (AIR 1973 SC 913)]. The Statement of Objects and Reasons appended to the Ordinance is as follows:

" STATEMENT

1. Consequent upon consistent demand from numerous organisations of cotton cultivators throughout the State, the State Government decided to review the Monopoly Cotton Procurement Scheme from the cotton season beginning on the 1st July 1974. After taking into consideration any action required for solving difficulties experienced in the implementation of the Maharashtra Raw Cotton (Procurement, Processing and Marketing) Act, 1971, during the years 1972-73 and 1973-74, and particularly for minimising hardships experienced by cotton growers in obtaining their due payments expeditiously, suitable amendments were made in certain provisions of that Act, by Maharashtra Act No. XLVIII of 1974.

2. Accordingly, necessary steps for raising adequate funds for procurement, processing and marketing of cotton during the year 1974-75 were inter alia initiated by submitting an application to the Reserve Bank of India, for sanctioning a credit limit upto Rs. 125 crores, having regard to the revised guaranteed prices for various varieties and grades of kapas, which were fixed by the State Government in consultation with the Central Government after taking into consideration various factors involved.

3. It was expected that, as in the years 1972-73 and 1973-74, the Reserve Bank of India would assist the Maharashtra State Co-operative Bank Ltd. in raising necessary finance for the operation of the Scheme with the help of the

nationalised banks. Unfortunately, the Reserve Bank of India has now put severe restrictions on the availability of credit for various purposes, with a view to curbing inflationary pressures on the national economy and controlling the level of rising prices of essential commodities required by the community at large. These credit curbs and the consequent restrictions on the supply of funds by nationalised banks not only hastened the downward trends of cotton prices, but also restricted very considerably the availability of funds for trading and other purposes. Although it appears obligatory on the part of the Reserve Bank of India not only to make available sufficient funds for raising of crops but also for processing and marketing of agricultural produce by the co-operatives, the Reserve Bank of India, in view of the national economic situation, has brought down its own limit of credit from Rs. 25 crores to Rs. 20 crores for the operation of the Scheme during the year 1974-75, and also expressed its inability to persuade the nationalised banks, as in the past, to make available adequate funds for the operation of the Scheme through the agency of the Maharashtra State Co-operative Bank Ltd.

4. The overall situation arising from the factors mentioned in the foregoing paragraphs was examined by the State Government and though several attempts were made to persuade the concerned Ministries of the Central Government and the Reserve Bank of India to re-consider the matter, no hopes could be entertained for obtaining substantial additional credit required for the operation of the Scheme. If the Scheme was, therefore, to be continued, it could be continued only within the total availability of funds to the extent of Rs. 50 crores (consisting of Rs. 20 crores from the Reserve Bank of India; Rs. 20 crores from the Maharashtra State Co-operative Bank and Rs. 10 crores from the funds available with the Maharashtra State Co-operative Marketing Federation Ltd.)

5. Since the decision to revive the Scheme was taken in consultation with the members of Parliament from the State, members of the State Legislature and representatives of various co-operative organisations of agriculturists in the State, it was considered necessary to explain to them the financial position presented by the credit squeeze measures brought into force by the Central Government and the Reserve Bank of India as a part of the national economic policy. Accordingly, a meeting of the representatives of members of Parliament, members of the State Legislature, Presidents and Chairmen of the District Central Co-operative Banks,

the Maharashtra State Co-operative Marketing Federation Ltd., Taluka/Block Level Co-operative Sale and Purchase Societies, and the Agricultural Produce Market Committees in the cotton growing tracts of the State was convened by the Chief Minister at Nagpur, on the 17th November, 1974. This meeting reviewed the entire situation and recommended unanimously that since the Monopoly Cotton Procurement Scheme is in the best interest of the cotton cultivators, it should not under any circumstances be suspended, but it must be implemented and that cotton cultivators would in their own interests whole-heartedly help the Government in over-coming the financial difficulties faced by the Scheme. Accordingly, the meeting recommended that the State Government should adhere to the practice of paying 80 per cent of the guaranteed price as advance price to the tenderers, but this payment should be as under:—

(a) In the first instance, 30 per cent, in cash should be paid to the borrower as well as non-borrower members. However, in the case of borrower members 50 per cent should be deducted towards repayment of the co-operative dues and in the case of non-borrower members 50 per cent should be treated as deposit by them with the scheme, with interest at the rate of 10 per cent, per annum.

(b) The payment of full amount of 80 per cent advance should be made to the tenderers by the end of June and the balance of the guaranteed price as well as final price should be worked out and paid by the end of October 1975.

(c) In the case of any borrower member, if his entire loan is less than 50 per cent of the guaranteed price to be paid to him, the remaining amount should be treated as deposit with the Scheme at the same rate of interest of 10 per cent per annum. The meeting also recommended that monopoly cotton procurement operations should be started forthwith and accordingly all cotton collection centres in the State have already been started and procurement operations are in full-swing.

6. Since the revised mode of payment has no statutory binding and is being questioned in some quarters, it is considered expedient to amend suitably the provisions of Sections 25, 26 and 27 of the Raw Cotton Act to leave no scope of any doubt or challenge.

7. Accordingly, it is considered necessary to make such amendments in the Act immediately, with a view to securing and facilitating the implementation of the Scheme more effectively. The amendments to Sections 25, 26 and 27 would legalise the mode of payment as agreed to by the representatives of the cotton

cultivated with effect from the date on which these decisions were taken, i.e. from the 17th day of November, 1974.

8. As both Houses of the State Legislature are not in session and immediate action is required to be taken to amend the Act for the purposes aforesaid, this Ordinance is promulgated."

After the Ordinance was promulgated the State Government vide Government resolution dated 28th December 1974 passed a resolution prescribing revised mode of payment for cotton tenderers under the Cotton Monopoly Procurement Scheme. It was to take effect from the 17th November 1974. By the said resolution it was directed that 80 per cent of the guaranteed price is to be paid in two instalments and that the said order was to take effect from 17th November 1974, the date on which the Maharashtra Ordinance XXIII of 1974 has come into force. Prior to the present Ordinance every tenderer of the cotton at the collection centre was entitled to receive 80 per cent of the guaranteed price for the quantity of the cotton tendered by him. It seems that thereafter the Government approached the Reserve Bank of India for sanctioning a credit limit upto Rs. 125 crores, having regard to the revised guaranteed prices for various varieties and grades of kapas, which were fixed by the State Government in consultation with the Central Government after taking into consideration the various factors involved. However, the Reserve Bank of India, in view of the national economic situation, instead of granting higher credit facilities, brought down its own limit of credit from Rs. 25 crores to Rs. 20 crores for the operation of the scheme during the year 1974-75. In spite of the best efforts it was not possible for the Government to secure any credit facilities or funds for running the monopoly cotton procurement scheme. In view of the situation created because of the financial stringency a meeting was held on 17th November 1974 in which the representatives of the Bodies who were interested in running the scheme were present and from the statement attached to the Ordinance it seems that the said meeting recommended that the State Government should adhere to the practice of paying 80 per cent of the guaranteed price as advance price to the tenderers, but this payment should be in instalments. In pursuance of the decision taken in this meeting and at the instance of the Government, the Maharashtra State Co-operative Marketing Federation issued a Circular dated 23rd November 1974 prescribing the method of payment to be followed under the Monopoly Cotton Procurement Scheme in respect of season 1974-75. A copy of this circular is at

page 37 of the paper-book of Special Civil Application No. 2123 of 1974 as Annexure A. After this, a letter dated 30th November 1974 was sent by the Government to the Managing Director, Maharashtra State Co-operative Marketing Federation. It is stated in the said letter that the decision taken in the aforesaid meeting dated 17th November 1974 and the statements made thereunder have been approved by the Government and the revised scheme, as mentioned in the said letter, has also been unanimously approved in the meeting of the representatives of the cotton growers, M. L. As., Chairman of the Sales and Purchase Societies and the Market Produce Committees, held at Nagpur on 17th November 1974. It seems from the record that the payment was being made to the tenderers of cotton according to the scheme incorporated in the Circular of the Marketing Federation dated 23rd November 1974 and the Government letter dated 30th November 1974. However, it was noticed by the Government that this revised mode of payment has no statutory binding force and was being questioned in some quarters, and therefore, it was considered expedient to amend suitably the provisions of Sections 25, 26 and 27 of the Act, to leave no scope for any doubt or challenge. Accordingly, the Maharashtra Ordinance No. XXIII of 1974 was issued by the Government, amending Sections 25, 26 and 27 of the Act. By sub-clause (2) of clause 1 of the Ordinance it was declared that the amending Ordinance of 1974 shall be deemed to have come into force on the 17th day of November 1974 itself. Therefore, it is quite clear that the Ordinance was given retrospective effect with effect from 17th November 1974. A legal fiction was created by the said Ordinance and for all practical purposes it was declared that Sections 25, 26 and 27 of the Act, as amended, will be deemed to have come into force from 17th day of November 1974 itself. It is no doubt true that an authority exercising subordinate legislative function cannot make a Rule, Regulation or By-law which can operate with retrospective effect. In this context it has been laid down by the Supreme Court in the *Income-tax Officer, Alleppey v. I. M. C. Ponnose*, AIR 1970 SC 385 (cit supra) as under:—

"Now it is open to a sovereign legislature to enact laws which have retrospective operation. Even when the Parliament enacts retrospective laws such laws are — in the words of Willes, J. in *Phillips v. Eyre*, (1870) 40 LJ QB 28 at p. 37 — 'no doubt prima facie of questionable policy, and contrary to the general principle that legislation by which the conduct of mankind is to be regulated ought, when introduced for the first time, to deal with

future acts, and ought not to change the character of past transactions carried on upon the faith of the then existing law. The Courts will not, therefore, ascribe retrospectivity to new laws affecting rights unless by express words or necessary implication it appears that such was the intention of the legislature. The Parliament can delegate its legislative power within the recognised limits. Where any rule or regulation is made by any person or authority to whom such powers have been delegated by the legislature it may or may not be possible to make the same so as to give retrospective operation. It will depend on the language employed in the statutory provision which may in express terms or by necessary implication empower the authority concerned to make a rule or regulation with retrospective effect. But where no such language is to be found it has been held by the Courts that the person or authority exercising subordinate legislative functions cannot make a rule, regulation or bye-law which can operate with retrospective effect; See Subba Rao, J., in *Dr. Indramani Pyarelal Gupta v. W. R. Nethu*, (1963) 1 SCR 721 = (AIR 1963 SC 274) the majority not having expressed any different opinion on the point; *Modi Food Products Ltd. v. Commr. of Sales Tax, U. P.*, AIR 1956 All 35; *India Sugar Refineries Ltd. v. State of Mysore*, AIR 1960 Mys 326 and *General S. Shivdev Singh v. State of Punjab*, (1959) 61 Punj LR 514 = (AIR 1959 Punj 453) (FB)."

From this decision of the Supreme Court it is quite clear that as to whether a person or authority to whom such powers have been delegated by the legislature can make an order, rule or regulation or bye-law with retrospective effect or not, will obviously depend upon the statutory provisions. However, in our opinion, it is not necessary to decide this question in the present case in view of the specific language used in Section 25 and the Ordinance. As per the provisions of Section 25 of the Act the advance price is made payable to the tenderer of cotton at the collection centre. In the first instance he is entitled to receive 80 per cent of the guaranteed price of the quantity of cotton tendered by him. This amount shall be payable to him in lump sum or in such instalments not exceeding two, as the State Government may, from time to time having regard to the availability of the funds, by general or special order determine. Section 25 of the Act confers a right upon the State Government to determine the mode of payment of the advance price. This determination could be made from time to time, having regard to the availability of the funds. The determination contemplated is with regard to the amount which is payable to the tenderer.

In the case before us, the petitioners were paid 30 per cent of the advance price under the scheme which was framed by the Marketing Federation under its Circular dated 23rd November 1974 and the Government letter dated 30th November 1974. Even assuming that as per the unamended provisions, as it then stood, the tenderer was entitled to receive 80 per cent of the guaranteed price immediately, it cannot be disputed that in the present case only 30 per cent of the guaranteed price was paid to him as an advance price. Rest of the amount which forms part and parcel of the advance price is still payable to him. If this is so, then, in our opinion, it is open for the State Government in exercise of the powers conferred upon it under Section 25 of the Act to issue a general or special order determining the mode of payment of this amount which is still payable. The Government might determine to pay this amount in lump sum or in such instalments not exceeding two. This determination depends upon the availability of the funds. Section 25 of the Act itself contemplates a situation under which the power can be exercised by the Government after the cotton is tendered by the tenderer and the amount remains to be paid or is still payable to him. The order issued by the Government does not operate retrospectively as it does not touch the payments already made. The order regarding payment of the amount either in lump sum or in instalments operates on the amount which is still payable. In this view of the matter, in our opinion, it cannot be said that the order issued by the Government dated 28th December 1974 operates retrospectively. By the order issued by the State Government the mode of payment of the amount which is payable to the tenderer is only altered. This alteration is to take effect prospectively. Section 25 of the Act itself confers a right upon the State Government to issue an order determining the mode of payment regarding the amount which is still payable to the tenderer.

11. Apart from this, it cannot be forgotten that by Ordinance No. XXIII of 1974 a fiction has been created and the amending provisions of the Act are deemed to have come into force from 17th November 1974. The fiction created by the Legislature will have to be extended to its logical conclusion. This obviously means that on 17th November 1974 itself Section 25, as is amended by the Ordinance, was on the Statute book. If this is so, it is open to the Government to issue a general or special order at any time determining the mode of payment of the advance price which is still payable to the tenderer. This is not a case where it could be said that Section 25, as amend-

ed, was itself not on the Statute book on 17th November 1974. From the language of Section 25 of the Act itself it is quite clear that the power given by the said section to the Government in its ambit covers the amount which is still payable to the tenderer and it is open to the Government to issue a general or special order determining the mode of the payment of this amount which has not been paid to the tenderer, but is still payable. The order issued by the Government dated 28th December 1974 in its effect does not touch the amount which is already paid to the tenderer, namely, 30 per cent advance price which was paid to the tenderer under the scheme then existing. The said order does not seek to set at naught the transaction of sale or the amount already paid. The sale transaction remains intact and unaffected and so does the 30 per cent amount already paid. It is only the amount which is still payable that is affected. The total price payable is also not affected. The order operates prospectively on the amount which is still payable. In this view of the matter, in our opinion, there is no substance in the contention raised on behalf of the petitioners that the order issued by the Government dated 28th December 1974 is retrospective in its operation.

12. It was faintly argued by Shri Manohar that the provisions of Ss. 25, 26 and 27 of the Act are contrary to the basic object and the policy behind the legislation.

13. As observed by the Supreme Court in *Municipal Committee, Amritsar v. The State of Punjab*, (AIR 1969 SC 1100):

"The Courts in India have no authority to declare a statute invalid on the ground that it violates the 'due process of law.' Under our Constitution, the test of due process of law cannot be applied to the statutes enacted by the Parliament or the State legislatures. This Court has definitely ruled that the doctrine of 'due process of law' has no place in our constitutional system: *A. K. Gopalan v. The State of Madras*, 1950 SCR 88 = (AIR 1950 SC 27). Kania, C. J. observed (at p. 120 of SCR) = (at p. 42 of AIR):

"There is considerable authority for the statement that the Courts are not at liberty to declare an Act void because in their opinion it is opposed to a spirit supposed to pervade the Constitution but not expressed in words * * * 'it is only in express constitutional provisions limiting legislative power and controlling the temporary will of a majority by a permanent and paramount law settled by the deliberate wisdom of the nation that one can find a safe and solid ground for the au-

thority of Courts of Justice to declare void any legislative enactment.' "

The Court in construing and interpreting the provisions of the enactment has to ascertain the meaning and intention of legislature from the language used in the Statute itself and it is not concerned with the motives of the legislature. As observed by the Supreme Court in *A. C. Sharma v. Delhi Administration*, AIR 1973 SC 913 (cit supra):

"Statement of Objects and Reasons for introducing a Bill in the Legislature is not admissible as an aid to the construction of the statute as enacted: for less can it control the meaning of the actual words used in the Act. It can only be referred to for the limited purpose of ascertaining the circumstances which actuated the sponsor of the Bill to introduce it and the purpose for doing so. The preamble of a statute which is often described as a key to the understanding of it may legitimately be consulted to solve an ambiguity or to ascertain and fix the meaning of words in their context which otherwise bear more meanings than one. It may afford useful assistance as to what the statute intends to reach, but if the enactment is clear and unambiguous in itself then no preamble can vary its meaning. While construing a statute one has also to bear in mind the presumption that the legislature does not intend to make any substantial alteration in the existing law beyond what it expressly declares or beyond the immediate scope and object of the statute."

Further, in our opinion it cannot be said that the present Ordinance is beyond the scope of or is contrary to the object of the Legislation. It is no doubt true that there is some substance in the grievance made by the petitioners that the 30% of the advance price which is being paid to them is not enough to meet the expenses which they are required to incur for the purpose of agriculture as well as their household expenditure. But the policies of the Government which are expressed in the shape of legislation are to be considered by the members of the legislature and not by the Courts of law. A Statute cannot be challenged on the ground that it is the result of some alleged wrong policy of the Government. We are not aware of any authority which has laid down that a provision of a statute can be struck down on the ground that the policy behind the enactment is either wrong or hostile. As already observed a provision of statute can be declared as unconstitutional and void by the Courts of law if it is beyond the competence of legislature or if it contravenes any of the provisions of the Constitution. In this view of the

matter, it is not possible for us to accept this contention also.

14. These were the only contentions argued before us.

15. In the result, therefore, both the petitions fail and are dismissed. However, in the circumstances of the case there will be no order as to costs.

Petitions dismissed.

AIR 1976 BOMBAY 23

(AT NAGPUR BENCH)

CHANDURKAR, J.

Hayatuddin, Appellant v. Abdul Gani and others, Respondents.

Appeal No. 348 of 1964, D/- 1-12-1974.*

(A) Civil P. C. (1908), S. 11, Explanation 10 — Res judicata — Earlier suit filed by donors and donee for declaration that the donee was the owner of the property and for an alternative relief of partition — Property gifted was not divided at the time of gift — Court decreed the suit for partition in favour of the donors only — No finding given as to validity of gift — Subsequent suit by donee for declaration and injunction that he was lawfully in possession of property in pursuance of gift — Finding regarding validity of gift could not be read in previous judgment and it could not operate as res judicata — Explanation IV held was not applicable.

(Para 5)

(B) Mahomedan Law — Gift — Gift of Musha (undivided share) where property divisible — Validity — Gift deed reciting that share of other coparcener M was separated and gift was of donor's share only — Intention to divert property was clear and the donee was in possession of gifted property — Court finding that share of M was not separated and ordering partition — Gift of donor's share held was still valid as there could be gift of undivided share.

(Para 8)

(C) Mahomedan Law — Gift — Gift of Musha (undivided share) — Property divisible — Property partly in occupation of donee and partly of tenant — Donor intimated orally and subsequently by notices to tenant about the gift and delivery of possession to donee — Donors also joining as co-plaintiff in suit filed by donee for declaration that he was in possession of property gifted — Held donors had done everything possible to hand over possession of premises which they wanted

*(Against decision of R. D. Tulpule, Second Extra Asst. J. at Nagpur in C. A. No. 108 of 1963).

to gift to the donee and to make the gift effective — Held it could not be said that possession of undivided share was not transferred by donors to donee — Gift held was valid.

(Para 8)

Cases Referred: Chronological Paras

AIR 1946 All 399 = 1946 All LJ 97 7
AIR 1936 All 473 = 1936 All WR 497 8
AIR 1935 Mad 81 = 1934 Mad WN 910 7
(1888-1889) 16 Ind App 205 = ILR 11 All 460 (PC) 9

V. R. Padhye and S. R. Ahmad, for Appellant; V. G. Hardas, for Respondents.

JUDGMENT:— This is a plaintiff's appeal challenging the dismissal of his suit for a declaration and injunction that he was lawfully in possession of house property in suit in pursuance of a gift deed dated 10-6-1952 executed in his favour by one Rashidbi and Amnabi. The suit was decreed by the trial Court but was dismissed by the first appellate Court. One Lalmiya had admittedly two wives, Rashidbi and Makboolbi. One Mahaboolbi also claimed to be Lalmiya's wife. Lalmiya had a sister Amnabi. He died in 1948 leaving behind the house property in dispute. Amnabi, Rashidbi and Makboolbi admittedly succeeded to the estate of Lalmiya. Amnabi got 12 annas share and the two widows, Rashidbi and Makboolbi, got 2 annas share each. Amnabi and Rashidbi executed a gift deed in favour of Hayatuddin on 10-6-1952. The recitals in the said gift deed (Ex. P-4) show that they were gifting their house property valued at Rs. 1,000/- to Hayatuddin. The description of the property recited in the gift deed shows that according to the donors a part of this property was already separated and handed over to Makboolbi on account of her share in the estate of Lalmiya. The gift deed also recites that the property gifted was in possession of the donee and that possession was handed over to the donee and the donee being the owner was entitled to make use of the property in any manner he liked. It was further recited in the gift deed that Makboolbi's 2 annas share had been separated, that the donors were gifting in favour of the donee their interest in the property of the value of 14 annas and that none of the heirs of the donors would have any interest in the gifted property.

2. In 1955 the two donors as plaintiffs Nos. 1 and 2 and donee Hayatuddin filed Civil Suit No. 227 of 1955 for a declaration that Hayatuddin was the owner of the property and an alternative relief of partition and separate possession was also claimed in the plaint. The main contestants in that suit were Makboolbi who claimed that the gift in favour of the present plaintiff was not binding on her two annas share in the property of de-

ceased Lalmiya and Mahaboolbi who also claimed to be the widow of deceased Lalmiya. The two tenants who were in physical possession of the property in dispute, Sk. Chhotu and Mohd. Gulab, were defendants Nos. 3 and 4 in the suit. The Civil Judge, Class II, Nagpur who decided that suit by his judgment dated 25-1-1956 held that there was no partition in 1950 as alleged by the plaintiff and the house property which was mentioned in the gift deed was not allotted to the plaintiffs Nos. 1 and 2. It however, found that in fact the gift had been made of the portion A B C X Y H I J by the plaintiffs Nos. 1 and 2 to the plaintiff No. 3 on 10-6-1952 but that the said gift did not bind Makboolbi who had 2 annas share in the suit property. It was also found that the plaintiff No. 3 i.e. Hayatuddin, was not placed in possession of the property said to have been gifted under the gift deed. The claim of Mahaboolbi that she was the widow of Lalmiya was negatived. Makboolbi's share to the extent of 2 annas having been upheld in that suit, the trial Court passed a decree in favour of the plaintiffs Nos. 1 and 2 and defendant No. 1 who were found entitled to get 12 annas, 2 annas and 2 annas share respectively in the suit house and the plaintiffs Nos. 1 and 2 were jointly held entitled to get 7/8th share in the said house which was directed to be separated by metes and bounds subject to their payment of the proportionate amount of dower debt within three months' time from the date of decree to the defendant No. 1. A commissioner was appointed. It is not now in dispute that after Mahaboolbi's appeal negativing her status as a widow of Lalmiya came to be dismissed, a final decree for partition was passed allotting to the share of the original plaintiffs Nos. 1 and 2, Amnabi and Rashidbi, the same part of the house property which was gifted by them to Hayatuddin. One intervening event which must be referred to is that during the pendency of the appeal filed by Mahaboolbi, Amnabi died on 18-11-1956 and the present defendants Nos. 1 to 6 were brought on record as her legal representatives in the appeal. While disposing of the civil suit, the trial Court had declined to pass a decree in favour of the plaintiff No. 3 without giving any reasons but the observation made was "Fest of the Plff.'s claim seems to me misconceived in view of the facts pleaded by them and as made clear in my discussion above."

3. The suit out of which this appeal arises then came to be filed by Hayatuddin along with Rashidbi who was original plaintiff No. 2 in the earlier suit for a declaration that Hayatuddin was the exclusive owner of the property described in the schedule which, according to him,

was gifted to him on 10-6-1952 by Rashidbi and Amnabi. The plaintiff alleged that since the date of the gift he has been in possession of the said property and has also introduced tenants therein but that on the strength of the decree passed in Civil Suit No. 227-A of 1955 the defendants who were earlier brought on record in the earlier suit as legal representative of Amnabi tried to dispossess him. The present defendants raised a twofold defence to the suit. They firstly relied on the fact that the claim of the present plaintiff who was plaintiff No. 3 in the earlier suit was rejected and secondly, they contended that the gift was void and the judgment in the earlier suit operated as *res judicata*. The trial Court found that the gift deed dated 10-6-1952 would operate in respect of the separate share in the suit property which is represented by the letters A B C X Y H I J in the plaint map, and that the donors Amnabi and Rashidbi admitted to have gifted the said house property to the plaintiff. It also found that the present defendants did not inherit any property from Amnabi and they were not entitled to possession of the suit property. It further found that the decree in Civil Suit No. 227-A of 1955 did not operate as *res judicata* and the suit filed by the plaintiff was competent. In view of this finding a declaration was granted to the plaintiff Hayatuddin that he was the exclusive owner of the suit house as described in the plaint map and the defendants were restrained permanently from disturbing the plaintiff's possession and enjoyment of the suit house.

4. In the appeal filed by the defendants the lower appellate Court took the view that the decision of the earlier suit operated as *res judicata* and there was no partition between Rashidbi and Amnabi on the one hand and Makboolbi on the other until the decree in Civil Suit No. 227-A of 1955 was passed. It held that the two principal findings in the suit were that there was no partition before the gift deed, and Hayatuddin was not placed in possession of the property mentioned in the gift deed. Even according to the lower appellate Court, there was no finding about the validity of the gift deed, and one of the questions posed for consideration by the lower appellate Court was whether the gift deed in favour of Hayatuddin was valid. It, however, took the view that since delivery of possession was one of the two prerequisites of a valid gift and properties which were enjoyed by tenants-in-common were incapable of being placed in possession and it held that the property which was gifted to Hayatuddin not having been divided at the time when the gift was made it could not be valid. The

question whether the present gift could be considered as one of undivided share was disposed of by the learned Judge by observing:

"A portion of an undivided property may be gifted to a co-owner also under certain circumstances but that is not the case here."

It is, therefore, apparent from the judgment that the validity of the gift considered by the lower appellate Court was only with reference to the fact that the property not having been partitioned prior to the suit of 1955 there could not be delivery of possession by Rashidbi and Amnabi in favour of Hayatuddin. The present appeal has been filed by the plaintiff challenging the judgment of the lower appellate Court.

5. Now, the learned counsel appearing on behalf of the defendants was not in a position to dispute the fact that there was no finding by the Court which decided the earlier suit with regard to the validity of the gift. When it was contended on behalf of the appellant that the gift made by the two donors in favour of the present plaintiff was in respect of an undivided portion i.e. 7/8ths share owned by Rashidbi and Amnabi, it was urged on behalf of the defendants that the trial Court had in the earlier suit found that there was no partition at which the property was divided into two shares, one belonging jointly to Rashidbi and Amnabi and the other to Makboolbi, and that the trial Court had also found that possession was not given and the logical inference from these two findings, therefore, would be that the gift was invalid and even though expressly no finding was arrived at by the learned Judge of the trial Court in the earlier suit, such a finding must be read in the judgment with the result that the validity of the gift deed could not again be adjudicated upon in the present suit. It is difficult to accept the contention that though no finding has been reached by the trial Court in the earlier suit that the gift was invalid, the judgment in that suit must be read as leading to that inference and it must be assumed that that finding was given and consequently the validity of the gift could not be put in issue in the present suit. Such a course would be contrary to the established principles under S. 11 of the Code of Civil Procedure which contemplates primarily an issue which is decided in the earlier suit and an issue on which parties have gone to trial putting certain matters directly and substantially in issue. A reference to Explanation IV to Section 11 would also not be of any assistance to the defendants because Explanation IV refers to a plea which might or ought to have been taken

as a ground of defence or attack in the former suit and which has not been raised. What the learned counsel, however, wants to be done is that the finding is to be read as having been given because that is the natural inference which, according to him, follows from the two findings recorded with regard to partition and possession.

6. There is another difficulty which it will be difficult for the defendants to get over. The finding with regard to the validity of the gift was not a finding which was necessary in order to give relief to any of the three plaintiffs in the earlier suit against the defendants in that suit. The present defendants were the legal representatives of one of the plaintiffs in the earlier suit. If the finding was to be res judicata between the present defendants and the plaintiffs in the earlier suit, namely Hayatuddin and Rashidbi, then it would have to be shown that there was a conflict of interests between the plaintiffs in the earlier suit and that it was necessary to decide that conflict in order to give relief against the defendants. The pleadings in the earlier suit do not leave anyone in doubt that the plaintiff No. 1 Hayatuddin was wholly supported by the original plaintiffs Nos. 1 and 2. In fact, their whole object in joining as plaintiffs Nos. 1 and 2 in the earlier suit was to indicate that they have acted on the gift made in favour of the plaintiff No. 3 and that they wanted to reiterate the fact that their 7/8ths joint interest in the property left by Lalmiya has been gifted by them to the plaintiff No. 3. In other words, they completely stood by the gift they made in 1952 and that is why they firstly prayed for a declaration with regard to the ownership of the plaintiff No. 3 and alternatively, claimed a relief for partition and possession. There was, therefore, no conflict of interest between the plaintiffs Nos. 1 and 2 in the earlier suit and the plaintiff No. 3. The fact that the trial Court did not grant a decree in favour of the plaintiff No. 3 but granted a decree in favour of the first two plaintiffs was wholly immaterial. In any case, the question about the validity of the gift was a question inter se between the three plaintiffs and was not required to be decided for giving any relief to any one of them inter se because the prayer made by all the three of them was common. There was, therefore, to be no question of any finding on the validity of the gift being res judicata even assuming that there was any implied adjudication about the gift between the plaintiffs inter se. The learned Judge of the lower appellate Court was right in going into the question of the validity of the gift though it will

not be possible to agree with the conclusion which he has reached on the issue.

7. The learned counsel appearing on behalf of the respondents has referred to two decisions. In Mohammed Hasan v. Mehdi Hasan, (AIR 1946 All 399) the question was whether a finding with regard to the validity of a will between co-defendants who were all interested in having the will upheld would be res judicata between them in later suit and it was observed that where in a suit to challenge the validity of a will the question of the validity of the will is not one between the plaintiff and one of the defendant but is one in which all the defendants who are beneficiaries under the will are interested, the decision in the suit operates as res judicata between the (parties and) decision is, more or less, like a decision in a partition suit. The main ground on which this decision was reached was that all the defendants were beneficiaries under the will and each one of them was interested in having the will upheld and that finding would bind them. In the second decision in Ayva Pillai v. Ayvadurai, (AIR 1935 Mad 81) the learned single Judge of the Madras High Court referred to the three elements which were required to constitute a decision res judicata between co-defendants. These were: (1) There must be conflict of interest between the defendants concerned; (2) it must be necessary to decide the conflict in order to give plaintiff the relief he claims; and (3) the question between the defendants must have been finally decided. The learned Judge further took the view that there need not be any active contest between the co-defendants and a conflict may exist notwithstanding that one of the concerned defendants does not contest at all. It is difficult to see how this decision is of any assistance to the defendants. What was sought to be emphasised by the learned Judge was that what was necessary was not a contest by the co-defendants but a conflict of interest, and the very fact that one of defendants did not raise any contest did not prevent a decision being res judicata between the co-defendants if there was a conflict of interest between them.

8. It is, therefore, necessary to decide in this case whether the gift is to operate with regard to the 7/8ths interest of Amnabi and Rashidbi, and when in lieu of the interest certain house property has been allotted to the plaintiff in the earlier suit, the plaintiff was entitled to a declaration of ownership in respect of the property which was already in his possession. It is true that the gift deed initially proceeds on the footing that Makboolbi's share has been separated and the property described therein is stated to be

belonging wholly to the two donors. But at the same time the gift deed unequivocally transfers in favour of Hayatuddin the 14 annas joint interest of the two donors Rashidbi and Amnabi. The finding that there was no partition earlier before the gift was made must be accepted for the purposes of the present litigation. But merely on that account it is not possible to hold that there was no transfer of interest of the two donors in favour of the present plaintiff. There is a clear intention on the part of the donors to divest themselves of their 14 annas interest in the property of Lalmiya and vest that property in the donee. It is also not in dispute that the interest which they purported to transfer was in the house left behind by Lalmiya, and in my view, notwithstanding the finding that there was no earlier partition and the partition came to be made for the first time as a result of the decision of the 1955 suit, the gift must operate in respect of the 14 annas share of the two donors in the house in dispute. It is not disputed that there can be a gift of an undivided share under Mahomedan Law. It will not be correct to say that this is not the claim of the plaintiff. In the earlier suit the plaintiff had no doubt claimed primarily a relief of declaration that the present plaintiff was the owner of the suit property but there was also a claim for an alternative relief of partition and separate possession in the earlier suit itself. The alternative claim could not have been made except on the hypothesis that they had an undivided interest which they wanted to be separated and placed in possession of. It is this alternative prayer which has been granted in the earlier suit. The argument, therefore, that at no stage was any claim made that an undivided interest was being transferred cannot be sustained. Even in the present suit the plaintiff's case is that he was the donee of 7/8th interest of Rashidbi and Amnabi and that the house property which is mentioned in the gift deed formed 7/8th interest; it is that of which he is in possession, and that possession is under the gift deed, now and, therefore, he was entitled to peaceful possession and enjoyment of that property. There was hardly any defence to such a suit in the face of the gift deed except the validity of the gift and the technical plea of res judicata. Now, the learned Judge of the lower appellate Court has merely considered the case of the plaintiff on the footing that the gifted property could not be put in possession as separate property. The law relating to the gift of undivided property under Mohammedan Law is put in two parts in paragraphs 159 and 160 of the Principles of Mahammedan Law by Mulla 17th Edition. It is stated:

"159. Gift of mushaa where property indivisible. A valid gift may be made of an undivided share (mushaa) in property which is not capable of partition.

160. Gift of mushaa where property divisible. A gift of an undivided share (mushaa) in property which is capable of division is irregular (fasid) but not void (batil). The gift being irregular, and not void, it may be perfected and rendered valid by subsequent partition and delivery to the donee of the share given to him. If possession is once taken the gift is validated."

How delivery of possession of immovable property can be given is explained in paragraph 152. It contemplates three kinds of cases (1) where donor is in possession (2) where property is in the occupation of tenants; and (3) where donor and donee both reside in the property. There is evidence in this case to show that part of the property was in the occupation of tenants and plaintiff Hayatuddin was already residing in a part of the property. A gift of immovable property which is in the occupation of tenants may be completed by a request by the donor to the tenants to attorn to the donee; and where the donor and the donees both reside in the property no physical departure or formal entry is necessary in the case of a gift of immovable property in which the donor and the donee are both residing at the time of the gift and in such a case, according to Mulla, the gift may be completed by some overt act by the donor indicating a clear intention on his part to transfer possession and to divest himself of all control over the subject of the gift. We have in this case three documents Exts. P-1, P-2 and P-3 which indicate the steps taken by the two donors to divest themselves of this property after they had made a gift in favour of Hayatuddin. All these three notices have been issued by Shri Munwarbhai, Advocate, on behalf of the two donors and the donee. Shri Munwarbhai has been examined as P. W. 1 and he has proved these three notices. Ex. P-1 is a notice given by Makboolbi and Mahabooobi and it clearly stated that Amnabi and Rashidbi, vide registered gift deed dated 10-6-1952, had gifted their shares in the suit house to Hayatuddin and also delivered possession thereof. This notice is dated 8-2-1954 and it is also stated therein that the donors and the donee desired 1/8th share of Makboolbi to be separated by metes and bounds and the remaining portion of the house to be allotted to Hayatuddin exclusively. Exhibit P-2 is a notice dated 19-2-1954, again from the donors and the donee to Mahabooobi whose status was in dispute. She had been intimated about the gift deed and delivery of possession to the donee

and an allegation was made that in December 1953 she had wrongfully and unauthorisedly entered the house on the western side and forcibly and illegally occupied a portion of the suit house in which she had no interest. Damages were, therefore, claimed by Hayatuddin alone. Ex. P-3 is a notice dated 8-3-1954 on behalf of Hayatuddin alone to the two tenants and they have been intimated that the property which they were occupying had come to Hayatuddin by way of gift from Amnabi and Rashidbi. It appears that These two tenants were put in possession of two parts of property by Mahabooobi. They were, therefore asked to vacate and damages were claimed. There is then the evidence of Yakubmiya (P. W. 3) who was one of the tenants and who admitted that he had been living in the house for the last ten to eleven years. He was paying rent to plaintiff Hayatuddin and he says that Amnabi and Rashidbi had told him that they had made the plaintiff the owner of the house, and the rent was to be paid to him. According to him, there were two other tenants, Chhotumiya and Gulabbhai. They were also called and told similarly. This part of the evidence does not seem to have been seriously challenged in cross-examination. The defendant No. 1 examined himself as D. W. 2 and he has to admit that plaintiff Hayatuddin had been residing in the suit property since his childhood and according to him, there were tenants in the suit house. This evidence, therefore, shows that in a part of the suit property the plaintiff was living and the recitals in the gift deed also show that it was deceased Lalmiya who had brought up the plaintiff as a child and he was looking after Rashidbi. The property was thus in possession of the tenants and partly in possession of the donee himself. The declaration in the gift deed that possession was handed over to the donee and the intimations given to the tenants orally and subsequently by notices through counsel were sufficient evidence to show that the donors have done everything that was possible in the circumstances to hand over possession of the premises which they wanted to gift to the present plaintiff. In addition to this there is their conduct in joining with Hayatuddin as co-plaintiffs to have their share separated and delivered possession of. This conduct also shows that the donors had done everything possible to make the gift effective, and to divest themselves of possession and to transfer to Hayatuddin said possession of the undivided portion of the property as the donors themselves had. What was necessary to make a gift of an undivided portion capable of partition valid was discussed at some length by a Division Bench of the Allahabad High Court in Hamid

Ullah v. Ahmad Ullah, (AIR 1936 All 473). In that case the property consisted of six houses and three parcels of land and the donor who was not in physical but constructive possession of the property, executed a deed of gift and got it registered. The document recited that the donor was in proprietary possession of the property and was conveying to the donee the same sort of possession which she possessed, that she had given up all proprietary rights in the subject-matter of the gift and that the donee was at liberty to make transfers of the property in any way he chose. The Division Bench held that the gift was valid as the donor had done practically all that she was able to do in the way of divesting herself of possession and giving to the donee the same possession as she had herself. In view of the speaking conduct of the donors it is difficult to hold in this case that possession of undivided share of the donors was not transferred by them to the present plaintiff.

9. I might refer with advantage to the observations made by the Privy Council indicating how the doctrine relating to invalidity of gift of mushaa was unadapted to a progressive state of society. In Sheikh Muhammad Mumtaz Ahmad v. Zubaida Jan, ((1888-1889) 16 Ind App 205) (PC) Sir Barnes Peacock, speaking on behalf of the Board, has observed:

"The authorities relating to gifts of mushaa have been collected and commented upon with great ability by Syed Ameer Ali in his Tagore Lectures of 1884. Their Lordships do not refer to those lectures as an authority, but the authorities referred to show that possession taken under an invalid gift of mushaa transfers the property according to the doctrine of both the Shiah and Soonee Schools, see pages 79 and 85. The doctrine relating to the invalidity of gifts of mushaa is wholly unadapted to a progressive state of society and ought to be confined within the strictest rules."

Unless therefore, there are compelling reasons it will not be possible for me to invalidate a gift as in the instance case, a gift which has been reiterated by the donors at all possible times whenever occasion arose. In any case it is difficult to entertain a challenge to the gift deed by Amnabi and Rashidbi at the instance of the heirs of Amnabi who really had no estate to inherit as Amnabi had clearly divested herself of her 3/4th share in the estate of Lalmiya by making a gift in favour of the present plaintiff. In my view, the learned Judge of the lower appellate Court was in error in dismissing the plaintiff's suit on the ground that the gift was invalid.

10. In the result, the judgment and decree of the lower appellate Court

are set aside and the decree passed by the trial Court restored. The plaintiff's appeal is allowed with costs.

Appeal allowed.

AIR 1976 BOMBAY 28
KANTAWALA. C. J. AND
TULZAPURKAR. J.

National Textile Corporation, Appellant v. State of Maharashtra and others, Respondents.

Appeal No. 106 of 1969 (Misc. Petn. No. 320 of 1964), D/- 22-1-1975.

(A) Sick Textile Undertakings (Nationalisation) Act (1974), Ss. 4 (2), 3 — "All other encumbrances" — Connotation — Notifications under Sections 4 and 6 of Land Acquisition Act for acquisition of land belonging to Company — Undertaking of such Company vesting in National Textile Corporation under Section 3 — Notifications whether cease to operate on such vesting.

The general words "all other encumbrances" occurring in first part of S. 4 (2) of the Sick Textile Undertakings (Nationalisation) Act, 1974 follow specific words such as "any trust, obligation, mortgage, charge, lien" and secondly the specific words that precede the general words speak of types of encumbrances having a common genus and therefore the general words "all other encumbrances" will have to be construed ejusdem generis and as such the said phrase will include only such encumbrances that partake the nature of the types of encumbrances specified earlier. (Para 9)

The notifications under Sections 4 and 6 of the Land Acquisition Act do not create any liability which is required to be satisfied from out of the property to which the said notifications relate and, therefore, the notifications cannot be regarded as creating any encumbrance falling within the phrase "all other encumbrances" occurring in Section 4 (2). It is true that by reason of the notifications the land in question is subjected to the liability of being compulsorily acquired under the provisions of the Land Acquisition Act but that is not the liability contemplated by the phrase "all other encumbrances". The matter cannot fall under the second part of sub-section (2). (Para 9)

Every burden or liability which runs with the property will not be an encumbrance. The question whether a particular burden or a liability which attaches to the property will amount to an encumbrance thereon or not will depend

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upon the facts and circumstances of each case. (Para 10)

In view of this, the notifications issued under Ss. 4 and 6 of the Land Acquisition Act, 1894, do not cease to operate or cease to be effective qua the land in question on coming into operation of the Sick Textile Undertakings (Nationalisation) Act, 1974. (Para 12)

Cases Referred: Chronological Paras

AIR 1968 SC 1223 = (1968) 3 SCR 207	2
AIR 1967 SC 1081 = (1967) 1 SCR 373	2
AIR 1963 SC 151 = (1963) 2 SCR 774	2
AIR 1935 Bom 16 = 36 Bom LR 1041	8

R. L. Dalal with B. N. Shambhu, for Appellant; M. S. Sanghavi (for Nos. 1 and 2) and C. J. Shah, (for No. 3), for Respondents.

TULZAPURKAR, J.:— This appeal has been preferred by National Textile Corporation (a Company incorporated under the Companies Act, 1956 which has been allowed to be substituted in place of the original appellant who was The Ahmedabad Jupiter Spg. Wvg. & Mfg. Co. Ltd.) against the judgment and order passed by Vimadlal J. on 11th August, 1969 whereby the learned Judge dismissed the writ petition filed by the Original appellant being Misc. Petition No. 32C of 1964 with costs.

2. The few facts giving rise to the filing of Misc. Petition No. 320 of 1964 may be stated. The original appellant-petitioner, The Ahmedabad Jupiter Spg. Wvg. & Mfg. Co. Ltd., owned the land in question as a part of the Mill premises situate at Parel, Bombay. By a Notification dated 19-6-1961 issued under Section 4 of the Land Acquisition Act the State Government notified that the said land admeasuring 5900 sq. yds. was likely to be needed for public purpose viz. for a Municipal School and Play Ground and it was notified that if the Government was satisfied that the said land was needed for the aforesaid purpose, the final notification to that effect under Section 6 of the Land Acquisition Act would be published in due course and the Deputy Collector of Bombay was appointed as an Officer to perform the functions of the Collector under Section 5-A of the said Act in respect of the said land. Objections were invited and the original petitioner-Company lodged its objections and after a hearing was given a report was submitted by the Deputy Collector to the State Government and on a consideration of the report and after being satisfied that the said land was needed to be acquired at the public expense of the Bombay Municipal Corporation for the public purpose mentioned above the State Government issued a notification under Section 6 of the Act on 29-5-1964 and the Special Land Acquisition Officer (7), Bombay was appointed

under Section 3 (c) of the said Act to perform the functions of a Collector for all proceedings thereafter to be taken in respect of the said land. The schedule to the notification gave particulars of the land in respect whereof the same was issued and also stated the public purpose for which the said land was being acquired viz. for 'Municipal School and Play Ground'. Notice under S. 9 of the Act was issued on 27-6-1964 and served upon the original petitioner-company. On 22-8-1964 the original petitioner-Company filed Misc. Petition No. 320 of 1964 challenging the said acquisition. The acquisition was challenged on two grounds: (1) that the procedure of direct negotiation under Section 90 of the Bombay Municipal Corporation Act had not been followed in the case and therefore the action taken under Section 91 of that Act was bad; and (2) that the impugned notification had been issued mala fide inasmuch as the area which was sought to be acquired was far in excess and beyond the reasonable requirements of a Municipal School and play ground. The learned Judge negatived both the grounds on which the acquisition was sought to be challenged before him. Relying upon an unreported judgment delivered on 11-8-1967 in Misc. Petition No. 463 of 1964 as well as another unreported judgment delivered in Misc. Petition No. 132 of 1965 he took the view that negotiations for acquisition of land by private agreement were not a condition precedent to the exercise of powers conferred upon the State Government under Section 4 of the Land Acquisition Act. It may be stated that this view taken by the learned single Judges in these aforesaid two Misc. Petitions has been upheld by the Supreme Court in the case of Ambalal Purshottam v. Ahmedabad Municipal Corporation reported in AIR 1968 SC 1223. On the other question as to whether the area which was sought to be acquired was far in excess of reasonable needs of a Municipal School and play ground, he took the view again relying upon the two Supreme Court's judgments — one in the case of Smt. Somawanti v. State of Punjab reported in AIR 1963 SC 151 and the other in the case of Raja Anand Brahma Shah v. State of Uttar Pradesh reported in AIR 1967 SC 1081 — that unless the petitioner-Company was in a position to point out that this acquisition, which it said was far in excess of the real need, was being done under colourable exercise of power or was mala fide, the petitioner-Company could not succeed in their challenge to the impugned notification. He further took the view that the question whether the land that was sought to be required was really needed or not or was far in

excess of the real need or not was the matter which the Government had to decide before issuing the notification under Section 6 of the Act and that therefore unless it was shown that the area which was sought to be acquired was so excessive as to lead the Court to come to a conclusion that the proposed acquisition constituted a colourable exercise of power or was mala fide, the petitioner-Company could not succeed before him and on the facts of the case he further took the view that the petitioner-Company had failed to establish that the area sought to be acquired was so much far in excess of the real need as to constitute the purported acquisition mala fide. An application was made on behalf of the petitioner-Company before the learned Judge at a subsequent stage of hearing for permission to lead oral evidence to establish their contention that the area sought to be acquired was far in excess of the real need of the Corporation for a Municipal School and play ground. Since the application was made at a late stage the learned Judge rejected that application. On the materials that were placed before him he took the view that the petitioner-company had failed to establish its case. He, therefore, dismissed the petition with costs. It is this order passed by the learned Judge that is challenged in the present appeal before us.

3. It appears that since the textile undertaking of the original petitioner-Company had become a sick textile undertaking, on 8-10-1971 the management thereof had been taken over by the Central Government under the Industries (Development and Regulation) Act, 1951. On 21st September, 1974 an Ordinance called the Sick Textile Undertakings (Nationalisation) Ordinance, 1974 was promulgated whereunder with effect from the appointed day i.e. 1st April 1974 the sick textile undertaking of the petitioner-Company became vested in the Central Government and immediately it further stood transferred and vested in the National Textile Corporation. On 21st December 1974 the Ordinance was replaced by an enactment called The Sick Textile Undertakings (Nationalisation) Act, 1974 and under sub-section (2) of Section 1 of the said Act the provisions of Sections 32 and 33 of the said Act came into force at once, that is to say, on the date when the enactment was brought on the Statute Book and the remaining provisions of the Act were declared to have come into force on 1st April 1974 and the Ordinance was repealed. In view of Section 3 of the said Act the National Textile Corporation made an application to us for being substituted in place of the original appellant in this appeal and the

Corporation also sought permission to amend the petition by incorporating certain additional grounds on which it wanted to challenge the purported acquisition. That application was granted and that is how the National Textile Corporation appears as the appellant before us in the appeal.

4. Mr. Dalal appearing for the appellant-Corporation has raised two contentions with a view to challenge the purported acquisition. In the first place, he had contended that under Sections 3 and 4 of the Sick Textile Undertakings (Nationalisation) Act, 1974, being Act No. 57 of 1974 on and from the appointed day viz. 1st April 1974 the sick textile undertaking of the original petitioner-Company, which has been included in the list of sick textile undertakings in the First Schedule, has stood transferred to and vested absolutely in the Central Government and immediately thereupon the same has further stood transferred and vested in the National Textile Corporation free from all encumbrances and since the two notifications issued under Sections 4 and 6 of the Land Acquisition Act under which the appellant's landed property is sought to be acquired amount to an encumbrance, the two notifications have ceased to operate or be effective qua the land in question and as such the purported acquisition deserves to be quashed or set aside. Secondly, he contended that the learned Judge was in error in not granting permission to the original petitioner-Company to lead oral evidence in support of its plea that the purported acquisition was by way of colourable exercise of power vested in the Government or mala fide, inasmuch as, the area sought to be acquired was far in excess of the real need of the Municipal Corporation for a Municipal school and play ground. We shall consider these contentions of Mr. Dalal presently.

5. In order to appreciate the contention that was urged by Mr. Dalal on the basis of the provisions contained in Act No. 57 of 1974 it will be necessary to set out the relevant provisions of Ss. 3 and 4 of the Act:

"3. (1) On the appointed day, every sick textile undertaking and the right, title and interest of the owner in relation to every such sick textile undertaking shall stand transferred to, and shall vest absolutely in, the Central Government.

(2) Every sick textile undertaking which stands vested in the Central Government by virtue of sub-section (1) shall, immediately after it has so vested stand transferred to, and vested in, the National Textile Corporation.

4. (1) The sick textile undertaking referred to in Section 3 shall be deemed to

include all assets, rights, lease-holds, powers, authorities and privileges and all property, moveable and immovable, including lands, buildings, workshops, stores, instruments, machinery and equipment, cash balances, cash on hand, reserve funds, investments and book debts and all other rights and interests in, or arising out of, such property as were immediately before the appointed day in the ownership, possession, power or control of the owner of the sick textile undertaking, whether within or outside India, and all books of account, registers and all other documents of whatever nature relating thereto and shall also be deemed to include the liabilities and obligations specified in sub-section (2) of Section 5.

(2) All property as aforesaid which have vested in the Central Government under sub-section (1) of Section 3 shall, by force of such vesting, be freed and discharged from any trust, obligation, mortgage, charge, lien and all other encumbrances affecting it, and any attachment, injunction or decree or order of any Court restricting the use of such property in any manner shall be deemed to have been withdrawn."

Mr. Dalal has invited our attention to the provision of Section 5 (1) of the said Act where it has been enacted that every liability, other than the liability specified in sub-section (2) thereof, of the owner of a sick textile undertaking, in respect of any period prior to the appointed day, has been declared to be the liability of such owner and that the same shall be enforceable against him and not against the Central Government or the National Textile Corporation, while under sub-section (2) of Section 5 it has been provided that the liabilities specified therein alone in respect of sick textile undertaking shall be that of the National Textile Corporation. He also pointed out that under Section 8 of the said Act it has been provided that the owner of every sick textile undertaking shall be given by the Central Government, in cash and in the manner specified in Chapter VI, for the transfer to, and vesting in it, under sub-section (1) of Section 3 of such sick textile undertaking and the right, title and interest of the owner in relation to such sick textile undertaking, an amount specified in the First Schedule and further under sub-section (4) of Section 4 of the said Act it has been provided that every mortgage of any property which has vested under the said Act in the Central Government and every person holding any charge, lien or other interest in or in relation to any such property shall be required to give, within such time, and in such manner as may be prescribed, an intimation to the Commissioner of such mortgage, charge, lien or

other interest and the mortgage or any other person holding such charge, lien or other interest in or in relation to any such property has been declared to be entitled to claim in accordance with his rights and interests, payment of the mortgage money or other dues, in whole or in part, out of the amount specified in relation to such property in the First Schedule and that no such mortgage, charge, lien or other interest shall be enforceable against any property which has vested in the Central Government. Thus the aforesaid provisions undoubtedly show that the owner of a sick textile undertaking which is vested in the Central Government under the said Act, as well as any other person who may have any monetary claim by way of mortgage, charge, lien or other interest in any manner whatsoever will have to look to the amount specified in the first Schedule as being the only fund out of which he has to satisfy his claim and that such claim shall not be enforceable against the Central Government or the National Textile Corporation or the property so vested in the Central Government or the National Textile Corporation.

6. It is true that under Section 3, read with Section 4 (1), of the said Act on and from the appointed day the concerned sick textile undertakings together with all assets, property, movable and immovable, etc. and all rights, title and interest of the owners in relation thereto vest absolutely in the Central Government and immediately upon such vesting the same also vest in the National Textile Corporation. It is also true that under sub-s. (2) of Section 4 of the said Act all such property vested in the Central Government freed and discharged from all encumbrances affecting it. But the question that arises for our consideration is whether the two notifications that were issued under Sections 4 and 6 of the Land Acquisition Act in this case in relation to the land belonging to the original petitioner-Company amount to "encumbrance" within the meaning of Section 4 (2), for, unless the said two notifications amount to such an encumbrance within the meaning of Section 4 (2) the land in question cannot be said to have vested in the Central Government freed from the liability of being acquired under the Land Acquisition Act. Mr. Dalal for the appellant has strongly relied upon the expression "shall vest absolutely in" occurring in Section 3 (1) of the said Act and has further relied upon sub-section (2) of Section 4 for the purpose of contending that the land has so vested in the Central Government freed from liability of being acquired under the provisions of the Land Acquisition Act. There is no doubt that the expression "shall vest absolutely in" has been used

in sub-section (1) of Section 3. But that by itself will not show that the land in question has vested in the Central Government free from liability of being acquired under the provisions of the Land Acquisition Act. In other words, it is essential that the notifications in question must amount to or fall within the phrase "all other encumbrances" occurring in sub-sec. (2) of Section 4 and unless the notifications do fall within the purview of that expression occurring in sub-sec. (2) of Section 4 the contention of Mr. Dalal cannot obviously be accepted. In other words, the real question that falls for determination in this case is: What is the exact connotation of the phrase "all other encumbrances" occurring in sub-sec. (2) of Section 4?

7. Mr. Dalal pointed out that in Wharton Law Lexicon the expression "Encumbrance" is explained as meaning "A claim, lien or liability attached to property". He has also relied upon the dictionary meaning of the expression "Encumbrance" as given in Murray's Oxford Dictionary which is to the effect: "A burden on property; a claim, lien, liability attached to property as a mortgage, a registered Judgment etc." Reliance was also placed upon the meaning of the expression "Encumbrance" given in Law Lexicon by Iyer to the effect: "Encumbrance" means "a burdensome and troublesome load; a burden, obstruction and impediment, anything that impedes motion or action, or renders it difficult or laborious; clog; hindrance; anything that impairs the use or transfer of property". He contended that the two notifications in question constituted a burden or impediment on the appellant's property, diminished the value of the said property and subjected the same to a liability of being acquired under the provisions of the Land Acquisition Act. He also pointed out that by reason of the notifications the appellant's right to use or transfer the said land could be said to have been impaired and therefore the notifications in question constituted an "encumbrance" on the said land and therefore under Section 4 (2) of the said Act the said land must be held to have vested in the Central Government and thereafter in the appellant-Corporation freed from the effect of the said notifications and as such the purported acquisition must be quashed.

8. There is no doubt that by reason of the two notifications issued under the Land Acquisition Act, particularly the second notification under Section 6 a declaration is finally made that the land is needed for the public purpose mentioned therein and the issuance of such notifications undoubtedly has so far as is mate-

rial, a three-fold effect: (a) the price of the land is frozen as at the date of such notification; (b) any outlay or improvements on or disposal of the land acquired, commenced, made or effected without the sanction of the Collector after the publication of Section 4 notification will not, under Section 24, be taken into account while determining the compensation payable for such acquisition; and (c) title of the owner to the land is rendered unmarketable and cannot be forced upon an unwilling purchaser. In other words, the issuance of these notifications casts a cloud on the owner's title so far as future transfers are concerned and to a limited extent affects his use and enjoyment of the land. But the question still remains as to whether by reason of issuance of such notifications under Sections 4 and 6 of the Land Acquisition Act any encumbrance is created over the land within the meaning of that expression as used in Section 4 (2) of the Act No. 57 of 1974. Relying on a Division Bench decision of this Court in Lallubhai Rupchand v. Mohanlal Sakarchand reported in 36 Bom LR 1041 = (AIR 1935 Bom 16) Mr. Dalal urged that this Court has clearly taken the view that issuance of such notifications has the effect of rendering the owner's title unmarketable so much so that the prospective purchaser under a contract for sale is entitled to repudiate the contract and this is so because the property is subjected to the liability of being compulsorily acquired by the Government even in the hands of the transferee and as such an unwilling purchaser cannot be forced to accept such defective title. The real question that is required to be determined therefore is whether the liability of being compulsorily acquired that gets attached to the property by reason of issuance of these notifications under Section 4 and Section 6 of the Land Acquisition Act amounts to any encumbrance thereon within the meaning of Section 4 (2) of the Act No. 57 of 1974 and for that purpose we will have to consider what should be the proper construction of the phrase "all other encumbrances" occurring in sub-section (2) of Section 4 of the Act.

9. Sub-section (2) of Section 4 of the Act consists of two parts; the first part provides that all property of sick textile undertaking as has been referred to in Section 4 (1) shall, by force of such vesting, be freed and discharged from any trust, obligation, mortgage, charge, lien and all other incumbrances affecting it; the second part provides that any attachment, injunction or decree or order of any Court restricting the use of such property in any manner shall be deemed to have been withdrawn. A close analysis of the first part shows two things: first that

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Calcutta High Court

AIR 1976 CALCUTTA 1

SHANKAR PRASAD MITRA, C. J. AND
SALIL KUMAR DATTA, J.

Sushil Kumar Ghosh and others, Appellants v. Revenue Officer, Balurghat and others, Respondents.

A. F. O. O. Nos. 367-375 of 1975 D/-16-9-1975.

(A) Civil P. C. (1908), S. 11 — West Bengal Estates Acquisition Act (1 of 1954), S. 5-A — Decision in former proceeding under S. 5-A, whether operates as res judicata in subsequent proceeding under same section?

A decision on jurisdiction does not operate as res judicata in courts. This principle is all the more applicable to administrative authorities exercising quasi-judicial functions. Where in a proceeding under S. 5-A, W. B. Estates Acquisition Act, the Revenue Officer having come to the conclusion that he has no jurisdiction to decide upon the bona fides of the transfers by unregistered deeds inasmuch as they were effected before 5th May, 1953, made observations on merits of the transfers to the effect that they were bona fide, his decision cannot operate as res judicata in a subsequent proceeding under S. 5-A. AIR 1971 SC 2355, Foll.

(Paras 3, 7)

Cases Referred : Chronological Paras
AIR 1971 SC 2355 = (1970) 3 SCR 83C 6
(1966) ILR (1966) 1 Cal 495 4
(1960) Civil Revn. Case No. 4658 of 1960 4
(Cal.)

Manindra Nath Ghosh and Sourendra Prasad Ghosh, for Appellants; Sushil Kumar Biswas and Moni Bhusan Sarker, for Respondents.

SANKAR PRASAD MITRA, C. J. :—
By this judgment we propose to deal with nine appeals. These are First Miscellaneous Appeals Nos. 367 to 375 of 1975. These

appeals arise out of Civil Revision Cases Nos. 6927 (W) to 6935 (W) of 1969.

2. Two brothers, Srikanta Ghosh and Purna Chandra Ghosh, held extensive lands in West Dinajpore. It is alleged that these two brothers by unregistered deeds executed between January 31, 1953 and February 8, 1953 had transferred certain lands in favour of their sons and daughters individually. It is further alleged that these transfers by unregistered deeds were subsequently confirmed by registered deeds in or about October, 1954. The respondents sought to apply the provisions of Section 5-A of the West Bengal Estates Acquisition Act, 1953 to these transfers. Now, in order to attract the said provisions, it is necessary to show that the intermediary transferred lands between the 5th May, 1953 and the date of vesting, that is, the 15th April, 1955. The registered deeds, in the instant case, were executed within the said period.

3. In or about 1958 a number of proceedings under Section 5-A were initiated in respect of the aforesaid transfers. The Revenue Officer took the view that the transfers were bona fide inasmuch as they were effected before the prohibited period by unregistered documents which were subsequently confirmed by registered documents. The Revenue Officer obviously overlooked the legal position that there could be no transfer by unregistered documents irrespective of whether the transfers were bona fide or mala fide. No appeal was preferred against the decisions of the said Revenue Officer but his successor in 1969 initiated the impugned proceedings once more disputing the bona fides of the transfers under Section 5-A of the Act. The subsequent proceedings instituted in 1969 were challenged in writ applications before this Court. Mr. Justice Anil K. Sen by his Lordship's judgment delivered on the 13th

August, 1974 has discharged the Rules. These appeals are directed against the discharge of the Rules.

4. Mr. Manindra Nath Ghosh, learned Advocate for the appellants, has canvassed before us only one point, namely, whether the decisions in the former proceedings made by the Revenue Officer under Section 5-A operate as *res judicata* in subsequent proceedings under the same section. Our attention has been drawn to *Ambujakhya Mukherjee v. The State*, ILR 1966 (1) Cal 495 at p. 612 and to the judgment in Civil Revn. Case No. 4658 of 1960 (Cal.) (*Haripada Mondal v. The State*).

5. On the facts and in the circumstances of this case it is unnecessary to refer to the authorities to which reference has been made. We have examined the order passed by the previous Revenue Officer. In the concluding portion of his order the Revenue Officer states:

"As the actual transfer of lands took place before the mischief of Section 5-A of E. A. Act came into force and the possession of lands were delivered then and there: the transaction of later date cannot come into the way of dispossessing. The transferees, I am of opinion, (are entitled) to the benefit of the unregistered deeds of gift..... Hence, I come to (the) decision that there is no reason to believe that the transfers were not *bona fide*."

अतएव आदेस देऊ वा होईते छे जे रेकाँर्ड
पूहितदेर नाम बाहाल थाकिबे । रेकाँर्डे सोलो कालम
ज : मो आईनेर एचि कां धारा दूष्टम्ब । बाकीटा
काटा जाईबे ।

6. It seems to us that the Revenue Officer was of opinion that he had no jurisdiction to decide upon the *bona fides* of the transfers by unregistered deeds inasmuch as these transfers were effected before the 5th May, 1953. It is well known that a decision on jurisdiction cannot operate as *res judicata*. The Supreme Court in *Mathura Prosad v. Dossibai*, AIR 1971 SC 2355 has said that

"a question relating to jurisdiction of a Court cannot be deemed to have been finally determined by an erroneous decision by that Court. If by erroneous interpretation of the statute the Court holds that it has no jurisdiction, the question would not operate as *res judicata*. Similarly by an erroneous decision if the Court assumes jurisdiction which it does not possess under the statute, the question cannot operate as *res judicata* between the same parties whether the cause of action in the subsequent litigation is the same or otherwise, because, if those decisions are considered as conclusive, it

will assume the status of a special rule of law applicable to the parties relating to the jurisdiction of the Court in derogation of the rule by the legislature."

7. If, therefore, a decision on jurisdiction does not operate as *res judicata* in Courts the principle is all the more applicable to administrative authorities exercising quasi-judicial functions. Mr. Ghosh for the appellants has submitted to us that not only has the previous Revenue Officer said that the unregistered transfers were made before the 5th May, 1953 he has also held on merits that the transfers were *bona fide*. And even if his decision on merits be wrong, this Court cannot substitute its own views for the views of the Revenue Officer. We are unable to agree with this contention of Mr. Ghosh. It is true that the previous Revenue Officer has made certain observations on merits. But before he makes those observations he reaches the conclusion that he had no jurisdiction to go into the question inasmuch as the transfers were effected before the 5th May, 1953.

8. In the result, these appeals are dismissed. There will be no order for costs. All interim orders, if any, are vacated.

9. Mr. Ghose has orally applied for a certificate for leave to appeal to the Supreme Court. As we are of opinion that these appeals do not raise any substantial question of law of general importance, the prayers for certificates are refused.

SALIL KUMAR DATTA, J.:— I agree.

Appeals dismissed.

AIR 1976 CALCUTTA 2

KUMARJYOTI SENGUPTA AND
MANASH NATH ROY, JJ.

Calcutta State Transport Corporation,
Calcutta-13, Appellant v. Kamal Prakash
De, Respondent.

A. F. O. O. No. 457 of 1969, D/- 26-6-1975.

(A) Motor Vehicles Act (1939), Section 110-B — Negligence — Onus of proof.

To succeed in an action against the owner or driver of the vehicle, the claimant has to establish some negligence or a breach of duty by the defendant towards him and its causal connection with the injuries sustained by the claimant.

Where the accident occurs due to bursting of tyre, as in the instant case, the duty of the injured or the heirs of the deceased is initially to allege and prove facts leading to negligence of the owner or driver of the vehicle. Then the duty of the driver and the owner arises to show

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whether there was absence of negligence and all possible care and precaution was taken to avert the accident. The plea of inevitable accident can certainly be raised. (Paras 13, 14)

(B) Motor Vehicles Act (1939), Section 110-B — Compensation — Third party meeting expenses — Such expenses can be claimed as damages.

The owner of the offending vehicle is liable to compensate the injured person for the sum he was required to spend on account of his sufferings due to the accident, though such sum was received by the injured person in the shape of help, assistance and charities from others. It is of immaterial consideration whether such amount was repaid by the person or even repayment of the same was demanded. (Para 16)

(C) Motor Vehicles Act (1939), Section 110-B — Negligence — Res ipsa loquitur — Meaning of.

The maxim *res ipsa loquitur* means that the accident talks or the things speak for themselves. There may be certain accidents which are so patent and self-speaking that they will shift the burden of proof on the defendant. It is no doubt, a rebuttable presumption. (Para 13)

(D) Motor Vehicles Act (1939), Section 110-B — Negligence — Elements of.

In investigating the matter of negligence, the elements and principles of tort have to be invoked and the defence open in the case of tort is open in the case of negligence. What is negligence depends upon determination of various factors. There are three basic elements of tort: (1) an act or omission on the part of the defendant (2) intention or negligence or the breach of a strict duty on the part of the defendant and (3) damages resulting to plaintiff from the wrongful act of the defendant which is not too remote. (Para 14)

(E) Motor Vehicles Act (1939), Section 110-B — Compensation — Quantum for permanent disability.

The damages to be awarded in the case of injuries resulting in permanent physical disabilities, ought to be such as to set off the disability suffered for the rest of the life. As regards the other injuries not resulting in permanent physical disability, lesser damages commensurate with injuries and suffering might be awarded in suitable case. (Para 15)

Cases Referred: Chronological Paras

AIR 1975 Cal 218 = 79 Cal WN 517 11
(1969) 3 All ER 756 = (1969) 3 WLR 732 10
(1969) 2 QBD 188 = (1969) 1 All ER 401 9
AIR 1968 Madh Pra. 47 = 1967 Jab LJ 534 12, 15
(1948) 1 All ER 779 = 64 TLR 269 11

Somendra Chandra Bose and Bhagabati Prosad Banerjee, for Appellant; Faindra Kumar Sanyal, Krishna Chandra Basu and Suchit Kumar Banerjee, for Respondent.

M. N. ROY, J.:— The respondent, an Architectural Draftsman in the services of Planning Division, Housing Directorate under the State of West Bengal, boarded double decker bus No. WBS 920 of route No. 10 belonging to the appellant Calcutta State Transport Corporation, which plies from Ballygunge to Howrah, on May 11, 1966. After boarding the said bus he occupied a seat just over the rear left wheels on the lower deck. The inner tyre of the said rear left wheel had a burst, as a result whereof he received bleeding injuries with comminuted fracture over both the bones of his left leg.

2. On the happening of the said accident, due to the bursting of the tyre, he on July 7, 1966 filed an application for compensation under Section 110 of the Motor Vehicles Act, 1939, in the Court of the Additional District Judge, Alipore, 24-Parganas, who incidentally is the Motor Accidents Claims Compensation Tribunal for Calcutta and 24-Parganas. The said application was registered as M.A.C. Case No. 36 of 1966.

3. In his application, the respondent alleged that at the relevant time he was drawing a salary of Rs. 451 per month which was inclusive of all allowances. He alleged that his normal place of residence is at Uttarpara and at the relevant time he was attending his office at New Secretariat Buildings, Calcutta-1 as a daily passenger by train and by bus. He has further alleged that on the material date he left office early in the afternoon for the purpose of attending to some private business at Koreya. He has stated that after finishing the said business, he boarded the bus in question for the purpose of going back to his residence at Uttarpara via Howrah. He has alleged that the said bus safely reached in front of Prachi Cinema. Opposite Nilratan Sarkar Hospital at about 5-30 P. M. and all the time ever since he boarded the said bus, he was sitting on the left hand side Ladies' seat which incidentally is just on the rear left side wheels of the bus. He has alleged that the said bus was overloaded and the passengers had duly alighted and boarded at the said Prachi Cinema stoppage and after it had just started and had proceeded some distance, the left side rear inner tyre of the same had burst, as a result whereof he received serious bleeding and fracture injuries on his left leg and was removed to the Nilratan Sarkar Hospital, Emergency Block.

4. He has further alleged that he received 3 days treatment at the said

Hospital and thereafter his relatives obtained his discharge from the said Hospital and had his treatment continued for some time at his residence. Thereafter, he was again admitted to the R. G. Kar Medical College and Hospital and remained confined for about 2 months. In his application it has been alleged by the respondent that on subsequent partial recovery, he had to attend his office by hiring Taxi from Bally Bridge for about 3 or 4 months but soon thereafter he had to take rest at his home for occasional flare-ups. He has alleged that such flare-ups still continue and he, as a result of such accident, has acquired a permanent limp in his left leg. The respondent has further alleged that because of the said accident he has practically lost his zest and pleasure of life and that sometimes he intends to commit suicide for his continued ill health. He has also alleged that he has spent a sum of about Rs. 3,000 out of his own resources towards his treatment and thereafter his relations came to his aid during the subsequent period of treatment and in fact the expenses for special diet which was continued for some time, had to be borne out from charities by the said relations. Taking into consideration the total impact and the loss, the respondent in his application had claimed a sum of Rupees 75,000 by way of compensation against the appellant herein.

5. The Calcutta State Transport Corporation viz., the appellant herein contested the said application and in their written objection they contended inter alia amongst others that the accident in question was an act of God or Vis major. They contended that the accident could not be foreseen and that the driver of the bus had no control over the same. They further alleged that the compensation as claimed was excessive and arbitrary. They however did not dispute the fact of bursting of the tyre.

6. On the pleadings as aforesaid, the parties to the proceeding went in trial on the following issues:—

(1) Can the Calcutta State Transport Corporation repudiate its liability on the ground that the accident was an act of God or Vis major?

(2) Is the petitioner entitled to claim any compensation? If so, for what amount?

7. On the question of repudiation of the liability by the Calcutta State Transport Corporation as mentioned in issue No. 1 above, the learned Tribunal, on consideration of the oral evidence of the respondent himself, who deposed as P.W. 3 and one Sri Sudhir Kumar Mitra, O.P.W. 1, who is the tyre examiner of Calcutta State Transport Corporation, Howrah Depot, and other documentary

evidence, came to the conclusion that the accident in question had happened due to lack of proper maintenance of the bus and as such the said issue was decided in favour of the respondent. On the next question about the petitioner's right to claim compensation, after considering the evidence of P.W. 1, Dr. M. L. Chatterjee, Orthopaedic Surgeon, Associate Professor and Head of the Department of Orthopaedic Surgery, Calcutta National Medical College, P.W. 7, Dr. Sailendra Bhattacharjee, Assistant Professor of Orthopaedic Surgery, R. G. Kar Medical College and Hospital, Calcutta, and that of P.W. 3, the learned Tribunal found that the petitioner was entitled to get a compensation of Rs. 13,739.85 P. from the Calcutta State Transport Corporation and he awarded accordingly. From the determination, the break-ups of the said amount of compensation appears to be a sum of Rs. 7,000 on account of medical expenses and diet, Rs. 1,000 on account of transport charges, Rs. 739.85 P. on account of loss of salaries and Rs. 5,000 on account of future pain and sufferings.

8. From the said determination, the Calcutta State Transport Corporation presented this Miscellaneous Appeal on February 10, 1969 and at the time of the hearing of the same Mr. Bose, the learned Advocate appearing for the appellant, in his usual fairness, contended that he will not dispute the award of Rs. 3,000 which was made by the Tribunal on account of medical expenses incurred by the respondent. But he made it clear that he would contest the award in so far as the same relates to an amount of Rs. 4,000, which the respondent has alleged to have received in the shape of charities from his relatives and he would also submit that the Calcutta State Transport Corporation, in the instant case has no liability to pay any amount to the respondent on account of compensation, as there was no laches on their part and the more so when the Calcutta State Transport Corporation in the instant case has taken due and proper care in maintaining and running the services including the Bus in question and also because there is no evidence of actual repayment of the said sum by the respondent or any demand for the same from him by the donors.

9. On the question of the amount of care which was required to be taken by the Calcutta State Transport Corporation in the instant case, for the purpose of finding out its liability in the matter of compensation and the tests required, Mr. Bose first relied on the case of Handerson v. Jenkins & Sons (C. A.) reported in (1969) 2 QBD 188 = 1969 (1) All ER 401, and more particularly to the determination by Sachs L. J. viz., where an acci-

dent results from a latent defect the burden of proof is on the defendants to show that it occurred without fault on their part and that such defect could not be discovered by reasonable care. Standard practice is not conclusive in a type of case in which risks of great magnitude may result. In such a case it is essential for the Court not to be bound by the views of experts as to practice or as to what risks may be disregarded; the Court should form its own opinion on the facts. It is for the Court to decide whether the owner of the offending vehicle had taken all reasonable precautions for the safety of the public.

10. It appears that from the above determination by the Court of Appeal, a further appeal was taken to the House of Lords in the case of *Handerson v. Henry E. Jenkins & Sons* reported in 1969 (3) All ER 756 = ((1969) 3 WLR 732), wherein it has been held that the respondent viz., the owners could not rely on the defence of a latent defect not discoverable by the exercise of reasonable care unless they showed that they had taken all reasonable care in the circumstances of the case and to do so they are required to show that there were no special circumstances in the past use of the vehicle to indicate that the vehicle might have been subjected to a corrosive agent resulting in the corrosion of the pipe. As the respondents had not adduced evidence of the past history of the vehicle, they could not rely on the defence of a latent defect and as such they had not discharged the inference that they had been negligent. Thus the views which were taken by Sachs L. J. in *Handerson v. Jenkins & Sons* (supra) has been reversed and they are no longer good law. It may be mentioned further that in the later judgment it has been held that the plea of "latent defect" made by the respondent in the given case had to be made good by them. It was for them to show that they had taken all reasonable care and despite this, the defect remained hidden.

11. On the next question of the amount of Rs. 4,000 which was received by the respondent in the shape of charities from his relatives and which was included for the purpose of awarding special damages to him on the allegation that he was under the moral and not legal duty to refund that sum, Mr. Bose submitted that since there was no obligation of the respondent to refund the said sum to the persons from whom such charities were received and when no specific averment was there to prove that the respondent had actually refunded the said sum, the Tribunal should not have made the award for the said sum of Rs. 4,000. In

support of his argument and for the principles, Mr. Bose first relied on the case of *Dennis v. London Passenger Transport Board*, reported in 1948 (1) All ER 779. In that case the plaintiff, who was injured due to the negligence of the defendant, received no wages during the period of his disability, but the Minister of Pensions and his employers paid to him, in pension and sick pay, amounts which together equalled his wages. It further appears that in the said case which was an action for damages for negligence, liability was admitted and the sole question for determination was the amount of damages and it was held that the amount of wages lost by the plaintiff should be included in the special damages awarded to him although he was under only a moral, and not legal duty to refund that sum. The argument advanced by Mr. Bose on the question of charities as mentioned hereinabove appears to us to be of no effect or avail in view of the Bench decision of this Court in the case of the *Motor Owners' Insurance Co. Ltd. v. Hrishikesh Das*, reported in AIR 1975 Cal 218 = (79 Cal WN 517). In that case two appeals were preferred from two applications, one by the husband and the other by the wife, for the recovery of compensation based on the same accident, when the bus in question knocked down both of them causing serious injuries. The husband preferred a claim for Rs. 10,000 and the wife laid her claim at Rs. 35,000. Both the applications were heard analogously on the same set of evidence by the Tribunal which ultimately awarded a sum of Rs. 5,600 towards the compensation of the husband and a sum of Rs. 13,681 for the wife. Against the said award and decree, two appeals as mentioned hereinbefore were preferred and there were cross objections. In that decision a point arose as to the interpretation of Section 110 of the Motor Vehicles Act and it has been held that the compensation under the said section will include all the amounts inclusive of payments made by a third party. There is no legal obligation of any third party to pay the amount. The cardinal principle to be followed in such cases is that the wrong doer must pay, whether the third pays or not.

12. On the next question of the amount of care, due diligence and onus, apart from relying on the English Cases as mentioned hereinbefore, Mr. Bose also relied on the case of *Madhya Pradesh State Road Transport Corporation, Bairagarh, Bhopal v. Sudhakar*, reported in AIR 1968 Madh Pra 47. In that case the question of rash and negligent driving resulting in accident and the manner of proof thereof, the presumption of negligence and the applicability of the doctrine of *res ipsa loquitur* came up for conside-

ration. In that case a bus was going on a clear and visible road at high speed and there was no traffic near the place of accident. The bus took a turn to the left for no apparent cause, went off the road and after dashing against two trees overturned. As a result of that some passengers died and others received severe injuries. The appellants in that case contended that the doctrine of *res ipsa loquitur* could not be applied. It has been held in that case that the doctrine of *res ipsa loquitur* only means that an accident by its nature be more consistent with its being caused by negligence for which the defendant is responsible than by other causes. In such a case the mere fact of the accident will be *prima facie* evidence of such negligence. The burden is on the defendant to explain and to show that the accident occurred without any fault on his part. Thus, the applicability of the doctrine to such cases is merely a rule of evidence relating to proof and nothing more. The doctrine is not a rule of law but no more than a rule of evidence affecting onus. It is based on common sense, and its purpose is to enable justice to be done when the facts bearing on causation and on the care exercised by defendant are at the outset unknown to the plaintiff and are or ought to be within the knowledge of the defendant. Thus, the doctrine does not apply when the cause of the accident is known. In that case it was also held that there was no apparent reason for the accident nor was the reason extraneous or patent. The circumstances and apparent facts relating to the accident were only consistent with the theory of rash and negligent driving on the part of the driver. In such a case the doctrine of *res ipsa loquitur* would be applicable and hence, in the absence of any explanation on the part of the appellant to disprove negligence, the Court could infer negligence on his part.

13. The maxim *res ipsa loquitur* means that the accident talks or the things speak for themselves. There may be certain accidents which are patent and self-speaking that they will shift the burden of proof on the defendant. It is no doubt, a rebuttable presumption. Before a Tribunal to succeed in an action against the owner or driver of the vehicle, the claimant has to establish some negligence or a breach of duty by the defendant towards him and its causal connection with the injuries sustained by the claimant.

14. Where the accident occurs due to bursting of tyre, as in the instant case, the duty of the injured or the heirs of the deceased is initially to allege and prove facts leading to negligence of the owner or driver of the vehicle. Then the duty of the driver and the owner arises to show

whether there was absence of negligence and all possible care and precaution was taken to avert the accident. The plea of inevitable accident can certainly be raised. Bursting of tyres generally does not take place in new tyres. Old tyres beyond a maximum capacity should not be used and a driver should be vigilant when he runs the vehicle and see if any impediment is on the way. Every case requires the care of a prudent and reasonable man. Before starting, machinery has to be tested. An owner guarantees the soundness of the vehicle to his passengers as in the case of trains. Thus in all cases of enquiry before the Tribunal or the Court, as the case may be, in investigating the matter of negligence, the elements and principles of tort have to be invoked and the defence open in the cases of tort is open in the case of negligence. What is negligence depends upon determination of various factors. There are three basic elements of tort (1) an act or omission on the part of the defendant (2) intention or negligence or the breach of a strict duty on the part of the defendant and (3) damages resulting to plaintiff from the wrongful act of the defendant which is not too remote. An act would mean doing of a positive act and omission means breach of duty. In each case it will be duty of the plaintiff to connect the wrongful act with the damages accruing and show that the defendant was negligent. Inevitable accident is an accident such as that the defendant could not have avoided by the use of the kind and degree of care necessary to the exigency and in the circumstances he was placed.

15. Applying the aforesaid tests in the facts and circumstances of the case and more particularly after scanning the evidence, it appears that the award as was made was due, proper and reasonable. P. W. 1 Dr. M. L. Chatterjee has established that there was a comminuted fracture over both bones of the left leg of the respondent with an evidence of old operation, upper fractured tibia having united but the lower fracture remained un-united and in his opinion the respondent has suffered a permanent partial disablement to the extent of 40%. He has further opined that the respondent who was an Architectural Draftsman and who is required to perform his duty mostly standing would not be in a position to discharge his normal functioning because of the accident in question. He has further opined that the movement of the left ankle joint of the respondent was 50% of the normal i.e. about 40° instead of 90° which would mean that there would be restriction in sitting and squatting by the injured and furthermore there would also be some limping. He has further proved that the

respondent was very much mentally depressed and he will have considerable difficulties in discharging his duties of Architectural Draftsman, who as mentioned hereinbefore is required to perform his work standing, because of the shortness of his leg due to the accident. He has further established that because of these difficulties there may be occasional flare-ups of the respondent and his life shortened due to repeated flare-ups which may cause pain and pus formation leading to amyloid degeneration of the liver and anaemia. It further appears that the respondent herein has also established by cogent and reliable evidence about the expenses which he has incurred in the instant case. The learned Tribunal has found that the respondent has succeeded in establishing the expenses on account of Doctor's fees and medicines to the tune of Rs. 3,000 which was spent by himself and a further sum of Rs. 4,000 which he received as charities from his relatives. The main evidence of the Calcutta State Transport Corporation, for the purpose of establishing the fact that all due diligence and reasonable care was taken, was sought to be led through O. P. W. 1, Sri Sudhir Kumar Mitra the tyre examiner of Calcutta State Transport Corporation, Howrah. His evidence is that he was employed with the appellant for about 12 years and he took special training in Messrs. Dunlop & Co. He has deposed that the offending vehicle W. B. S. 920 was a double decker Leyland bus and the rear tyres of the same are of smaller size than those of the front wheels. He has further deposed that reasonable expected life of a new tyre is about 80,000 K. M. of running service in the streets of Calcutta and the history of each of the tyres as are used in the vehicles of the Calcutta State Transport Corporation, are maintained. He produced a chart Ext. A for the purpose of proving that the tyre in question on the material date had done only 48,594 k.m. and he himself had checked its pressure and the condition before the same was fitted in the offending vehicle on 2nd April, 1966. He has further deposed with reference to the chart in Ext. A that the said tyre was first fitted in vehicle No. W.B.S. 1514 on June 1, 1965. It further appears from his evidence that this witness, who claims to be an expert in the matter of examination of tyres, is only a Matriculate and took his training with Messrs. Dunlop & Co., as to manufacture, repairs and maintenance of tyres and such training lasted for 5 days only. The chart Ext. 'A' according to us has not been duly proved because the said O.P.W. 1 has not, as it appears from the record, been able to testify to all the entries in the said chart to be made and prepared and maintained by him. The other

evidence of the driver and conductor of the offending vehicle, who are O.P.Ws. 2 and 3 respectively were also placed before us by Mr. Bose. Their evidence shows that at the time when the tyre had a burst, the bus was not overloaded, the vehicle was not in a high speed and the condition of the road at the relevant time, as usual with Calcutta streets of the present day, was precarious. Be that as it may, the evidence of the said two witnesses could not be of much help and assistance in the facts and circumstances of the instant case. The bursting of the tyre has been conceded by the appellant and it is also an admitted fact that the respondent concerned, had received multiple injuries including fractures in his left leg as a result whereof he has suffered and is bound to suffer in future. It has been found in the case of Madhya Pradesh State Road Transport Corporation v. Sudhakar, (AIR 1968 Madh Pra 47) (supra) that where the deceased is an earning member of the family, on whom other members might be dependent, the basis for calculating the pecuniary loss to the dependants may depend upon data which may not be ascertained accurately, but must necessarily be an estimate, or even partly a conjecture. The pecuniary loss can be ascertained only by balancing on the one hand the loss to the claimants of the future pecuniary benefits and on the other any pecuniary advantage which from whatever source comes to them by reason of the death. Thus, the loss and the gain have to be ascertained and to be adjusted against each other. The burden will certainly be on the claimant to establish the extent of the loss. But it will not be sufficient for him to prove that by the death of the deceased he lost a mere speculative possibility of pecuniary benefit. To succeed, he must prove a reasonable probability of pecuniary advantage. Thus, in a case of fatal accident it is the loss of benefit to be balanced by the loss of gain that has to be assessed as damages. Where merely bodily injury is caused resulting in permanent physical disability, the pecuniary loss might be assessed on the disadvantages suffered by the person for the rest of the life. In the case of a child, the loss of probable benefit that the child might have been able to render may be in the region of conjecture, but some nominal damages ought to be given even in the case of death of a young child. Where a non-earning member of the family is killed, the trend of decisions has been to award only nominal damages. But the damages to be awarded in the case of injuries resulting in permanent physical disabilities ought to be based on the consideration so as to set off the disability suffered for the rest of the life. As regards the other injuries not resulting in

permanent physical disability, lesser damages commensurate with injuries and suffering might be awarded in suitable cases.

16. In the instant case we are of the view that the onus to disprove the claim of the respondent has not been duly discharged by the appellant Calcutta State Transport Corporation authorities and admittedly the respondent herein has suffered some loss and damages. In fact on the evidence as available, it is clear that he will have to suffer such loss and damages for life. Since compensation has been assessed and awarded by Tribunal concerned after duly taking into consideration the evidence on record and the tests as mentioned in the Madhya Pradesh judgment, we are not inclined to interfere with such findings in this jurisdiction. On the existing materials we however find that the appellant could not rely on any latent defect, which as sought to be argued by Mr. Bose could not be discovered by the exercise of reasonable care, as the evidence of due care as has been alleged to be taken and sought to be proved, is unsatisfactory and unreliable. It is the duty and obligation of the owner in a case like this to prove and establish by reliable evidence that all the necessary precaution and due care was taken for maintaining and offering proper and efficient services to the travelling public, here the respondent, but they have signally failed to discharge the said onus. Furthermore, on the facts of the case it has also been duly established that apart from spending Rs. 3,000 the respondent was required to spend another sum of Rs. 4,000 on account of his sufferings due to the accident, which sum was received by him in the shape of help, assistance and charities from others and it is of immaterial consideration in the facts of the case whether such amount was repaid or even repayment of the same was demanded. When the appellant in the instant case is the owner of the offending vehicle then they must be held to be liable to make the payment even in the absence of any evidence of repayment or any demand for the same.

17. In view of the above the points as raised and urged by Mr. Bose fail, consequently the appeal also fails and as such the same is dismissed with costs assessed at 20 Gold mohurs.

Let the records be sent down at an early date.

K. J. SEN GUPTA, J.:— I agree.
Appeal dismissed.

AIR 1976 CALCUTTA 8

SABYASACHI MUKHARJI, J.

Gour Gopal Dutt and others, Applicants v. Satyendra Nath Mitra, Opposite Party.

Landlord & Tenant Suit No. 1833 of 1955, D/- 16-5-1975.

(A) Houses and Rents — W. B. Premises Tenancy Act (12 of 1956), S. 17-D — Application under — Limitation — Tenant cannot rely on independent suit filed by him for declaration that decree for possession was not executable. (Limitation Act (1963), S. 5).

The landlord obtained a decree for possession in 1958. In 1967 the tenant filed a separate suit for declaration that the decree was void and not executable. The tenant's suit was decreed in 1969 but was dismissed in appeal in 1974 and his petition for special leave was also dismissed by the Supreme Court early in 1975. The tenant had also obtained stay of execution of the decree obtained by the landlord from time to time. The question was whether his application under S. 17-D to set aside the decree filed in 1975 was maintainable. Held, in order to obtain relief under S. 17-D a tenant was obliged to act strictly within the period of 60 days from the commencement of the W. B. Premises Tenancy (Second Amendment) Act, 1969. If the tenant chose not to apply under S. 17-D but to rely on an earlier proceeding he had taken for a declaration that the decree was not executable, for such a tenant double relief under S. 17-D was not envisaged. In this case the relief was available only upto sixty days from 14th November, 1969. The fact that thereafter and upto 1974 the tenant obtained relief against that decree by an independent proceeding to avoid the decree which held that the decree was not executable was not relevant for determination of the question whether sufficient cause was shown or not. In any event, after the decree in the appeal on 11th October, 1974 whereby it was held that the decree was executable, the tenant has not shown sufficient cause for not prosecuting his remedy under S. 17-D. The fact that there was a stay of execution of the decree did not affect the tenant's right to apply under S. 17-D. In the premises, the tenant was not entitled to any relief under Section 17-D. Case law discussed. (Para 3)

(B) Houses and Rents — W. B. Premises Tenancy Act (12 of 1956), S. 17-D — Application under — Application by even one of heirs of deceased tenant is maintainable.

In view of the definition of 'tenant' under S. 2 (h) and in view of the fact that the expression 'tenant' is inclusive defi-

niton, it is not necessary that all the heirs of a deceased tenant should join in an application under S. 17-D. The application is not bad merely because it is made by only one of the heirs. (Para 4)

Cases Referred :- Chronological Paras

AIR 1974 SC 1380 = (1975) 1 SCR 394 3
 AIR 1974 Cal 326 = 78 Cal WN 719 3
 AIR 1972 Cal 255 3
 AIR 1972 Cal 430 = 76 Cal WN 486 3
 AIR 1953 Cal 335 = 56 Cal WN 296 3
 AIR 1949 Cal 674 = 53 Cal WN 855 3
 AIR 1936 Rang 183 = ILR 14 Rang 155 3
 (1913) 17 Cal LJ 596 = 20 Ind Cas 513 3

ORDER :— This is an application under Section 17-D of the West Bengal Premises Tenancy Act, 1956. In order to appreciate the controversy in this case it would be necessary to refer to certain facts. On the 20th September, 1952, there was a sub-lease executed by the plaintiffs in this suit who are lessees under the wakf property in favour of one Satyendra Nath Mitra, sub-lessee, since deceased, of the cinema house with the land at No. 38, Upper Circular Road, Calcutta, now known as Acharya Prafulla Chandra Road for a term of 8 years with option for renewal for another two years at a monthly rent of Rs. 1,400 for the cinema house and monthly rent of Rs. 600 for the furnitures and fittings. On the 11th April, 1955, the plaintiffs through their solicitor Mr. R. C. Kar served a notice to quit on the said Satyendra Nath Mitra on the ground of default in payment of rent. On the 5th July, 1955, the present suit being Suit No. 1833 of 1955 was instituted by the plaintiffs against Satyendra Nath Mitra for, inter alia, recovery of possession of the said premises on the ground of default in payment of rent within the meaning of S. 14 (3) of the W. Bengal Premises Rent Control (Temporary Provisions) Act, 1950. Satyendra Nath Mitra filed his written statement on the 12th August, 1955. On the application of the plaintiffs on the 20th January, 1956, an order was made without prejudice to the rights and contentions of the parties, inter alia directing Satyendra Nath Mitra, since deceased, to deposit the arrears of rent and in default the defence in so far as the same related to ejectment was directed to be struck off. On the 10th July, 1958, consent decree was passed in the instant suit No. 1833 of 1955 in accordance with the terms of settlement. It, inter alia, provided that Satyendra Nath Mitra would deliver up possession on the expiry of the period covered by the option as provided in the lease. On the 18th January, 1961, Satyendra Nath Mitra died leaving him surviving the petitioners and Sabita Ghosh as heirs and legal representatives. On the 25th September, 1962, the period covered by the option as provided in the

lease expired. On the 19th November, 1962, an application was made by the plaintiffs for execution of the said consent decree dated 10th July, 1958 against the heirs of Satyendra Nath Mitra. Consent order was passed by the learned Master in accordance with the terms of settlement filed in the said execution proceeding. The terms, inter alia, recorded the death of Satyendra Nath Mitra and time to deliver vacant possession was extended till the 30th of December, 1965. On the 14th January, 1966, second application for execution of the said consent decree dated 10th July, 1958, was made by the plaintiffs against the heirs of Satyendra Nath Mitra. Consent order was passed on the 15th February, 1966 in accordance with the terms of settlement filed in the 2nd execution proceeding. Time to deliver vacant possession was extended till the 31st July, 1967 and an undertaking was given to court by the heirs of Satyendra Nath Mitra to vacate the said premises within the said period. On the 7th June, 1967, the heirs and legal representatives of Satyendra Nath Mitra made an application in the instant Suit No. 1833/55 for, inter alia, a declaration that the consent order dated the 15th February, 1966, was invalid, void and not binding on them and for discharge and release from the undertaking given by them in the said consent order. On the 26th June, 1967, order was made on the application of the defendant relegating the parties to a suit. The defendants filed the second suit being Suit No. 1554 of 1967 in this Court. On the 10th July, 1967, an application was made in the said suit and an ad interim order was granted. On the 18th August, 1967, the said application of the defendants in the said suit was dismissed. There was an appeal filed being Appeal No. 192 of 1967. An order of injunction was passed on the 4th September, 1967, restraining the plaintiffs from executing or enforcing the consent decree dated 10th July, 1958 and the orders dated 19th November, 1962 and 15th February, 1966. On the 19th February, 1968 the plaintiffs obtained a rule for contempt against the Mitras for alleged breach of the undertaking. On the 21st February, 1968, the Appeal No. 192 was disposed of by consent of the parties. The order dated 18th August, 1967, was set aside. The hearing of the 2nd suit was expedited and the plaintiffs were restrained from executing the said decree and the order dated the 19th November, 1962 and the order dated 15th February, 1966 and certain directions were given. On the 21st April, 1969, the 2nd Suit No. 1554 of 1967, was decreed in favour of Mitras. It was, inter alia, held that the said consent decree dated 10th July, 1958 was not a decree for possession. The plaintiffs pre-

ferred an appeal on the 18th June, 1969, being Appeal No. 110 of 1969 from the said decree dated 21st April, 1969. There was no application made for stay of operation of the said decree by the plaintiffs. On the 14th November, 1969, Section 17-D of the West Bengal Premises Tenancy Act, 1956, came into force, and this is a relevant date which I will have to consider later. The Appeal No. 110 of 1969 was allowed on the 11th October, 1974 and the decree dated the 21st April, 1969 in Suit No. 1554 of 1967 was set aside. I was a member of the Bench which heard the said appeal. It was, *inter alia*, held that the said consent decree dated 10th July, 1958, was a decree for possession. On the prayer of Mitras, however, the operation of the appellate decree was unconditionally stayed till the 16th December, 1974. On the 14th December, 1974, the Mitras filed a petition under Article 133 (1) of the Constitution of India against the decree dated 11th October, 1974, made in the 2nd suit. On the 16th December, 1974, directions were given for filing of the affidavits and *ad interim* stay for operation or execution of the decree was granted till the disposal of the application under Article 133 (1). On the 10th January, 1975, the application of the Mitras under Article 133 (1) was dismissed and the interim order was vacated. It was ordered that the plaintiffs would not execute the decree dated 11th October, 1974, for a period of three weeks, namely, upto the 31st January, 1975. On the 22nd January, 1975, the petitioner No. 2, it is stated, left for Delhi with his solicitor by train for the purpose of moving the Supreme Court. On the 24th January, 1975, the petitioner No. 2 reached New Delhi. Counsel was briefed to draw and settle the proposed application under Article 136 of the Constitution and stay petition. The draft of the proposed application as settled was received from counsel for typing on the 28th January, 1975. On the 29th January, 1975, the petitioners' application under Article 136 of the Constitution along with the petition for stay of operation of the decree dated 11th October, 1974, was filed before the Supreme Court. On the 3rd February, 1975, the petitioners' application under Article 136 of the Constitution of India was dismissed by the Supreme Court. On the 5th February, 1975, it is stated that the petitioner No. 2 who was conducting the case on behalf of all the petitioners left New Delhi for Calcutta as no railway booking was available earlier. On the 6th February, 1975, the petitioner No. 2 reached Calcutta. He has stated that he had caught chill while he was in Delhi and he became ill in Calcutta. He was confined to bed from 6th February, 1975 to 24th February, 1975. During this period he was

under the treatment of one Dr. P. K. Goswamy who has sworn an affidavit. Thereafter, on the 20th February, 1975, certified copy of the Supreme Court's order of the 3rd February, 1975, was received by the petitioners' solicitor in Calcutta. The petitioner instructed his solicitor to prepare an application under Section 17-D of the West Bengal Premises Tenancy Act, 1956 and counsel was briefed and ultimately the application was made on the 1st March, 1975.

2. Section 17-D of the West Bengal Premises Tenancy Act which came into effect on the 14th November, 1969, is in the following terms:—

"17-D. (1) Where before the commencement of the West Bengal Premises Tenancy (Amendment) Act, 1968, a decree for the recovery of possession of any premises was passed—

(a) in a suit under this Act, in which no order had been made under sub-section (3) of Section 17 striking out defence against delivery of possession, only on the ground referred to in clause (i) of sub-section (1) of Section 13, or

(b) in a suit under the West Bengal Premises Rent Control (Temporary Provisions) Act, 1950, by reason only of clause (i) of the proviso to sub-section (1) of Section 12 of that Act:

but the possession of such premises had not been recovered from the tenant by the execution of the decree, the tenant may within a period of sixty days from the date of commencement of the West Bengal Premises Tenancy (Second Amendment) Act, 1969, make an application to the Court which passed the decree to set aside the decree:

Explanation:— Where the decree was passed in the exercise of appellate jurisdiction, an application under this sub-section shall be made to the Court of first instance.

(2) Where an application has been made under sub-section (1) for setting aside a decree, all proceedings in execution of the decree shall remain stayed until the application is disposed of.

(3) On receipt of an application under sub-section (1) the Court shall cause a notice thereof to be served on the landlord and after hearing such evidence as the parties may adduce, determine—

(a) (i) Where the decree was passed in a suit under this Act the total amount that the tenant was liable to deposit or pay in accordance with the provisions of sub-section (1) or sub-section (2) of Section 17 during the period ending with the date of the decree, after giving credit for every deposit or payment made by the

tenant in accordance with such provisions during such period, or

(ii) where the decree was passed in a suit under the West Bengal Premises Rent Control (Temporary Provisions) Act, 1950, the total amount that the tenant would have been liable to deposit on account of rent including the arrears of rent during the period ending with the date of the decree had an order been made in the suit by the Court under sub-section (1) of Section 14 of that Act for deposit of rent at the rate at which it was last paid and the arrears of rent, if any, after giving credit for every deposit made by the tenant for such rent or arrears during such period, and

(b) in either case, the total amount that the tenant remained liable to pay if he had to pay for the period commencing from the date of the decree and ending with the date of the order to be made under this sub-section, a monthly sum equivalent to the rent at which it was last paid, after giving credit for all such sums that the tenant might have deposited in the Court or with the Controller or paid to the landlord for such period, and direct the tenant, by order, to deposit in Court the aggregate of the amounts referred to in clauses (a) and (b), together with such further amount as the Court may allow as Costs of the suit within such time, not exceeding sixty days from the date of the order as the Court may fix.

(4) If the tenant deposits the amounts ordered by the Court within the time fixed by it the Court shall allow the application under sub-section (1) and set aside the decree for the recovery of possession passed in the suit and dismiss the suit.

(5) If the tenant fails to deposit the amounts ordered by the Court within the time fixed by it, his application under sub-section (1) shall be dismissed with such costs as the Court may award to the landlord."

The first question, therefore, that requires consideration is whether before the relevant date, namely, 14th November, 1969, a decree for recovery of possession was passed in a suit under the provisions of the West Bengal Premises Rent Control (Temporary Provisions) Act by reason only of clause (i) of the proviso to sub-section (1) of Section 12 of the Act. In this case in view of the notice to quit upon which the decree was passed and the judgment upon which the Division Bench proceeded, it appears to me, that this was a decree for recovery of possession which was passed in a suit under the West Bengal Premises Rent Control Act. Such a decree was passed long before the coming into operation of the West Bengal Premises Tenancy (Amendment) Act, 1963. But

the possession of the premises had not been recovered from the tenant by the execution of the decree. The question is whether the present applicants are entitled to any benefit of Section 17-D of the Act. In order to be entitled to such a benefit the tenant has to apply within a period of sixty days from the date of the commencement of the West Bengal Premises Tenancy (2nd Amendment) Act, 1969. This application was obviously long after that period. The point urged in support of this application, is, that on the 21st April, 1969, in Suit No. 1554/67 it was held by the trial Court that the decree dated 30th July, 1958, was not a decree for possession and was not executable and it was only on the 11th October, 1974, that in the judgment in the Appeal No. 110/69, that the decree of the 21st April, 1969, was set aside. Therefore, it was urged that for the period between April, 1969 to 13th January, 1974, according to the court's decision there was no decree for possession. In the premises, there was no occasion for the tenant to apply. It is further urged that on the 11th October, 1974, the operation of the appellate decree was stayed till the 16th December, 1974 and thereafter it was further stayed upto the 31st January, 1974 and upto the 3rd February, 1975, when the Supreme Court dismissed the petition for leave to appeal under Article 133 of the Constitution the tenant was pursuing a legal remedy which he was entitled to and there was sufficient cause thereafter shown because of the illness of the petitioner No. 2 which was supported by the affidavit of the doctor. In those circumstances, it was urged that the petitioner was entitled to extension of time. It was urged that under Section 39 of the West Bengal Premises Tenancy Act, 1956, the provisions relating to the limitation in the Limitation Act, 1908 would apply to the suits, appeals and proceedings under the Act. It may be mentioned incidentally that though Section 39 of the Act refers to the provisions of Indian Limitation Act, 1908, in my opinion, that reference in view of the provisions of General Clauses Act must read as to the Indian Limitation Act, 1963, inasmuch as the Indian Limitation Act, 1908, has been repealed.

3. In the case of M/s. Pokarmal Gurudayal v. Sagarmal Bengani, 76 Cal WN 486 = (AIR 1972 Cal 430) it was held by the Division Bench of this Court that in an application under Section 17-B (1) of the West Bengal Premises Tenancy Act provisions of Section 5 of the Limitation Act, 1963 would be applicable if sufficient cause was shown, and inasmuch as the language used in Section 17-B (1) of the West Bengal Premises Tenancy Act and the language used in Section 17-D of the West Bengal Premises Tenancy Act,

is the same, I am of the opinion, on the ratio of the aforesaid Division Bench judgment it must be held that the provisions of Section 5 of the Limitation Act will be applicable provided sufficient cause was shown in an application under Section 17-D of the Act. Counsel for the landlord, however contended that this was not the correct position of law. But the main question is when the tenant was required to apply. It was urged on behalf of the tenant-defendants in this case that the decree was not capable of execution until the stay was vacated on the 31st December, 1974. Therefore, sufficient cause was required to be shown for the period subsequent thereto. In this connection reference may be made to the decision of the Supreme Court in the case of *M/s. Gojer Brothers (P.) Ltd. v. Ratan Lal Singh*, AIR 1974 SC 1380. There the Supreme Court held that the benefit of Section 17-D was available to a tenant if the decree for possession could be said to have been passed against him before the commencement of the West Bengal Premises Tenancy (Amendment) Act of 1968 which came into force with retrospective effect from the 26th August, 1967. The Supreme Court further observed that Section 17-D conferred power on the Court to set aside a decree which was operative and was capable of execution. The Supreme Court held that where the decree of the trial court was carried in appeal and the appellate court had disposed of the appeal after a contested hearing, the decree to be executed was the decree of the appellate court and not of the trial court. The reason for this rule was that in such cases the decree of the trial court merged in the decree of the appellate court. In that case the decree for possession of the premises was passed by the trial court in 1958 but the decree was taken up in the first appeal when it was confirmed and in the second appeal the High Court after a contested hearing dismissed the appeal and confirmed the decree of the first appellate court in 1969, that is, after and not before the commencement of the 1968 Act, the decree of the trial Court was held by the Supreme Court to have merged in the decree of the High Court and it was the decree of the High Court which was the only decree executable and, therefore, it was not liable to be set aside under Section 17-D of the Act. In the instant case before me there was no appeal as such from the decree for possession which was passed by consent of the parties. That decree is sought to be interfered with by this application under Section 17-D of the Act. The fact that subsequent to the decree steps were taken by filing independent suit in which relief was sought to be obtained from the trial court that the de-

creed was not executed does not in my opinion affect the position that the order in this case in respect of which relief against possession can be given, was passed on the 10th July, 1958. It is true that the applicant obtained a declaration from the trial court that the decree was not executable and which was modified on the 11th October, 1974. In my opinion, in order to obtain relief under Section 17-D of the Act a tenant was obliged to act strictly within the period of 60 days from the commencement of the West Bengal Premises Tenancy (Second Amendment) Act, 1969. On that day there was a decree passed for possession prior to coming into operation of the Act. The tenant chose not to apply under Section 17-D of the Act but to rely on an earlier proceeding he had taken for a declaration that the decree was not executable by an independent suit. For such a tenant, in my opinion, double relief under Section 17-D was not envisaged. In any event, after the decree in the appeal on 11th October, 1974 whereby it was held that the decree was executable, the tenant has not shown sufficient cause for not prosecuting his remedy under Section 17-D of the Act. The fact that there was a stay of execution of the decree does not, in my opinion, affect the tenant's right to apply under Section 17-D of the Act. In this connection, reliance may be placed on the decision in the case of *Chunilal Basu v. Hon'ble Chief Justice, High Court, Calcutta*, AIR 1974 Cal 326. Though facts were not quite similar, reliance may also be placed on the observations of this Court in the case of *Dund Bahadur Singh v. Deo Nandan Prosad*, (1913) 17 Cal LJ 596. I may mention here that if the view could be taken that there was sufficient cause for not applying, then the period during which the application was delayed for illness of petitioner No. 2 could have been extended on the basis of affidavit of such illness. I may mention, in this connection, that counsel for the applicant referred to the decision in the case of *S. M. Ally v. Maung San Nyein*, AIR 1936 Rang 183 in support of the proposition that illness was good and sufficient cause. It may incidentally be mentioned that in respect of a consent decree relief under Section 17-D was available. Reliance may be placed on the decisions in the case of *Tarini Gupta Chowdhuri v. Manumatha Nath Ghatak*, 53 Cal WN 855 = (AIR 1949 Cal 674), in the case of *Tarakdas Dutta v. Sarat Chandra Paul*, 56 Cal WN 296 = (AIR 1953 Cal 335), and in the case of *Sm. Pratima Baul v. Indu Bhusan Banerjee*, AIR 1972 Cal 255. In my opinion, in view of the terms of Section 17-D relief was available only to the tenant upto the period of 60 days from the date of commencement of the West Bengal Pre-

mices Tenancy (Second Amendment) Act, 1969. Therefore, in this case the relief was available only upto sixty days from 14th November, 1969. The fact that thereafter and upto 1974 the petitioner obtained relief against that decree by an independent proceeding to avoid the decree which held that the decree was not executable, in my opinion, is not relevant for determination of the question whether sufficient cause was shown or not. In the premises, in my opinion, the petitioners are not entitled to any relief under Section 17-D of the Act.

4. Another point was that the petition was not maintainable because one of the heirs had not been made a party. In view of the definition of 'tenant' under Section 2 (h) of the Act and in view of the fact that the expression 'tenant' is inclusive definition, in my opinion, it was not necessary that all the heirs of Satyendra Nath Mitra should have joined. Therefore, the application was not bad on this ground. It was further contended that in any event Sabita Ghosh was not residing with Satyendra Nath Mitra. That in my opinion is not relevant in deciding the question at this stage. In the view I have taken this application fails and is dismissed accordingly.

5. There will be no order as to cost.

6. There will be a stay of operation of this order for a period of six weeks.

Application dismissed

AIR 1976 CALCUTTA 13 SALIL KUMAR DATTA, J.

Bagal Tanti and others, Appellants v. Ram Ranjan Laha and others, Respondents.

A. F. A. D. No. 327 of 1959, D/- 13-1-1975.*

(A) Tenancy Laws — Bengal Tenancy Act (1885), S. 103-B (5) — Suit for declaration of sthitiban raiyati right — Entries in record of rights recording plaintiff as sthitiban raiyat — Shifting of onus.

The plaintiffs claimed sthitiban raiyati right in respect of the suit lands. The entries in the record of rights regarding the plaintiffs' title were recorded as sthitiban raiyat under S. 103-B (5) of the Bengal Tenancy Act.

Held, the said entries were to be presumed correct unless rebutted. On the

* (Against decree of S. K. Sen, Addl. Dist. J. 2nd Court Zillah Burdwan in Title Appeal No 59/4 of 1956, D/- 13-9-1958.)

face of these entries, the onus had shifted on the defendants to disprove the correctness of the entries if they intended to do so. (Para 7)

(B) Tenancy Laws — Bengal Tenancy Act (1885), S. 3 (17) (as amended by Act of 1928) — S. 3 (17) has no retrospective effect. (Para 8)

(C) Civil P. C. (1908), O. 1, R. 9 — Misjoinder of parties — Suit for declaration of title to tenanted land — Landlord not made party — Maintainability.

The suit was for declaration of title and also confirmation of possession in respect of the tenanted land. The landlords were not made parties in the proceeding. The plaintiffs had no grievance against the landlords who had not interfered with their possession in any way. The defendants were directly interfering with the plaintiffs' possession and disputing their title.

Held that the landlords were not necessary parties in the suit and that the suit was not bad for misjoinder of parties or causes of action. (Para 9)

(D) Tenancy Laws — West Bengal Land Reforms Amendment Act (33 of 1974), S. 18 (1) — Dispute between person claiming as bargadar and third party — Reference of dispute to authority mentioned in S. 18 (1).

Section 18 (1) of the West Bengal Land Reforms Amendment Act, 1974, clearly indicates that the conflict which is amenable to the decision under S. 18 (1) is between a bargadar and the person whose land he cultivates. It is not concerned with the dispute between a person claiming as a bargadar and a third party who claims his title independently of the person under whom the bargadar holds.

In the present case the plaintiffs claimed to be bargadars in a suit for declaration of title and possession. The suit was not against the landlords but against the persons who claimed to have taken the suit land under bhag system from such landlords.

Held, the provision of Amendment Act did not stand in the way of a decision by Civil Court in regard to the suit land. (Para 10)

Mukti Prasanna Mukherjee, for Appellants; Balai Chandra Roy, for Respondents.

JUDGMENT:— This is an appeal against the judgment of affirmance. The plaintiffs instituted the suit for declaration of their title in respect of various plots of land in different khatians situate in the district of Burdwan and for confirmation of their possession therein.

2. The relevant facts as stated in the plaint are as follows. The plaintiffs' predecessor, Prahlad was an occupancy raiyat in respect of the five plots being

the suit lands and the rent in respect of the plots was share of produce inclusive of cess. After the death of Prahlad his four sons, plaintiffs Nos. 1 and 3, the father of plaintiff No. 4 and deceased plaintiff No. 2, continued to possess the disputed lands on payment of rent till 1356 B.S. In 1357 B.S. they grew crops in the disputed lands but the defendants out of enmity tried to dispossess the plaintiffs from the disputed lands. The plaintiffs accordingly brought the suit for declaration of their sthitibhan raiyati right in respect of the suit lands and also for recovery of possession in case they were dispossessed during the pendency of the suit and also for permanent injunction.

3. The defendants Nos. 1, 2, 3, 5 and 6 only contested the suit by filing a written statement. The defence was that Prahlad Laha had no occupancy right in respect of the disputed plots but that he was a mere bargadar in respect of those plots under the two groups of landlords, viz. Mitra Babus and Mukherjee Babus. It was further stated that in Chaitra, 1346 B.S. the heirs of Prahlad Laha and Chandra Gorai in whose names the disputed plots were recorded, surrendered the disputed lands in favour of the landlords and thereafter the landlords took khas possession of the same and got them cultivated by defendant No. 2 as their bhag chasi and they also similarly let out different defendants. They contended that they were bargadars accordingly in respect of the suit lands at the time of the institution of the suit. The defendants denied the right, title and interest of the plaintiffs in the suit lands. The further defence was that the suit was barred by limitation and bad for misjoinder of parties and causes of action.

4. The learned Additional Subordinate Judge on a trial on evidence held that the plaintiffs were sthitibhan raiyats and continued to be so till the date of the suit. It was further found that the defence case was not true. It was also held that the suit was not barred by limitation and nor bad for misjoinder of parties and causes of action. The suit was accordingly decreed and the defendant No. 1, who was appointed Receiver, was directed to make over possession of the suit lands in favour of the plaintiff and in default the plaintiffs were made entitled to recover possession through execution of decree.

5. An appeal was preferred against this decision and the appellate court agreed with the findings of the trial court and dismissed the appeal. The present appeal is against this decision.

6. The first contention raised by Mr. Mukti Prasanna Mukherjee, learned Advocate for the appellants, is that the plaintiffs in support of their case have not

been able to rely on any document except the record-of-rights. According to him the record-of-rights is not a document of title but merely of possession and there is no presumptive value regarding title. In the c. s. record-of-rights, which was prepared sometime in 1936, the plaintiffs' predecessors are recorded as occupancy raiyats and in the column of Khajna a share of produce is mentioned. Under Section 103-B (5) of the Bengal Tenancy Act, every entry in a record-of-rights, finally published, shall be evidence of the matter referred to in such entry and shall be presumed to be correct until it is proved by evidence to be incorrect. The record-of-rights contains the entries of the plaintiffs' predecessor as sthitibhan raiyat subject to a khajna of a share of produce. These are entries in the record-of-rights finally published and about this there is no dispute. That being the position, these entries are presumed to be correct in respect of matters referred to therein unless proved by evidence to be incorrect. No evidence has been adduced on behalf of the defendants to show that these entries are incorrect although certain documents showing transactions about some of the suit lands appear to be produced in court and exhibited. In these documents the plaintiffs' or their predecessors are not parties and the statements made therein are not binding on them. It must accordingly be held that the defendants have failed to rebut the presumption of correctness of the entries in the record-of-rights.

7. Mr. Mukherjee's further grievance is that the onus has been shifted on the defendants to prove their title although under the laws of procedure it is the plaintiffs who are required to prove their title before they are made entitled to a decree. It however appears to me that under the provisions of Section 103-B (5), the entries regarding plaintiffs' title are recorded as sthitibhan raiyat which right the plaintiffs had claimed and the said entries according to the said section, are to be presumed correct unless rebutted. On the face of these entries the onus certainly lay on the defendants to disprove the correctness of the entries if they intended to do so and accordingly there is no wrong shifting of onus on them as contended.

8. Mr. Mukherjee further contended that under the amended Bengal Tenancy Act, under Section 3 (17) a tenant means a person who holds land under another person and would be liable to pay rent to that person. Under the system known as Adhi Barga or Bhag a person cultivating the land of another person on condition of delivering the share of the produce to that person is not a tenant unless he has been expressly admitted to be

a tenant by his landlord in any document executed by him or executed in his favour and accepted by him or he has been or is held by a civil court to be a tenant. We have seen that the c. s. record records that the plaintiffs' predecessor was a tenant under two zamindars noted above and it is also their case that the settlement was taken as far back as in 1315 or 1317 and this commencement of the settlement was more or less admitted by the defendants while the evidence of a co-sharer landlord also does not say that the plaintiffs' predecessor had no tenancy right in respect of the disputed land. It is not shown that this section had any retrospective effect. So on the facts as found by the appellate court it appears that the plaintiffs' predecessors were tenants of the suit land even before the promulgation of the Bengal Tenancy (Amendment) Act of 1928 whereby the definition of tenant was amended. For that reason, in my opinion, the amendment does not assist the defendants-appellants in this case.

9. About the contention of mis-joinder of parties and causes of action it is said that the landlords should have been made parties in the proceeding which is a suit for declaration of title in respect of the tenanted land and accordingly in their absence the suit is not maintainable in law. It further appears to me that the plaintiffs have no grievance against the landlords who had not interfered with their possession in any way. Their grievance is against the person who claimed to have taken the land under bhag system from such landlords or owners of the land. As the defendants were directly interfering with the plaintiffs' possession and disputing their title, I do not think that the owners of the land should be made parties in these proceedings which only want a declaration against these defendants and also confirmation of possession or recovery of possession in the event they are dispossessed. Accordingly I do not think that the said owners are necessary parties in the suit or that the suit is bad for mis-joinder of parties or causes of action.

10. Mr. Mukherjee further contended that the entries in the record-of-rights do not support the plaintiffs' case inasmuch as against the plaintiffs' title the words 'bhag' has been entered. It is to be noted that the word 'bhag' or share of crop is entered in the column of Khajna or rent and there can be no dispute that the share of crop can be rent of a settlement. I, therefore, find that there is no inconsistency in the entries of the record-of-rights. It is further submitted relying on the provisions of the West Bengal Land Reforms Amendment

Act, 1974 (West Bengal Act XXXIII of 1974) that in view of the fact that the question in this proceeding is as to whether a person is or is not a bargadar the matter should have been left to the officer or authority mentioned in paragraph 18 (1) of the said Act. It may be mentioned here that by the said Amendment Act sub-section (3) containing the above provisions has been inserted after sub-section (2) of Section 18. Relying on this provision Mr. Mukherjee contended that the proceedings should be stayed in this Court and the matter should be referred for a decision to the officer or authority mentioned in sub-section (1) of Section 18. Sub-section (1) of Section 18 concerns itself with a dispute between a bargadar and the person whose land he cultivates in respect of some matters viz., division or delivery of the produce, recovery of produce under Section 16-A, termination of cultivation by the bargadar and place of storing or threshing the produce. This provision thus clearly indicates that the conflict which is amenable to the decision under Section 18 (1) is between a bargadar and the person whose land he cultivates. It is not concerned with the dispute between a person claiming as a bargadar and a third party who claims his title independently of the person under whom the bargadar holds. I, therefore, think that the provision of Amendment Act does not stand in the way of a decision by a Civil Court in regard to the suit lands.

11. For all these reasons this appeal fails and is dismissed.

12. There will be no order for costs.

13. Leave under clause 15 of the Letters Patent is asked for and is granted.
Appeal dismissed.

AIR 1976 CALCUTTA 15

ALAK CHANDRA GUPTA AND
SAMARENDRA CHANDRA DEB, JJ.

Mt. Chabiran Bibi, Petitioner v. The
State of West Bengal and others, Opposite Parties.

C. R. 2575 of 1973, D/- 27-8-1974.

(A) West Bengal Estates Acquisition Act (1 of 1954), Ss. 44 (2a) (As amended by W. B. Act 31 of 1969); 39 — Earlier amending Act 9 of 1967 not assented to by the President — Effect of — S. 44 (2a) has no bearing on acquisition of estate or rights of intermediaries or raiyats — Not invalid because earlier Amending Act was not assented to.

An order under Section 39 of the Estates Acquisition Act directing that a
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record-of-rights be prepared in respect of any district or part of a district is made only after the vesting of the estates. Preparation of record-of-rights follows vesting and reflects the position after vesting. The revision of an entry in the record-of-rights under Section 44 (2a) is permissible only to correct an existing error in the record so that the true position resulting from the acquisition of estates is reflected in the record-of-rights.

Section 44 (2a) not being thus inextricably connected with the object of the Act nor is an integral part of the machinery of acquisition, is not invalid simply because the Amending Act 9 of 1967 was not assented to by the President (Para 4)

(B) Constitution of India, Art. 226 — New point — Objection not raised in proceedings before lower authority — Cannot be permitted to be raised at argument stage. (Para 4)

Nirendra Krishna Mitra, Robin Dutta and Uday Sankar Chatterjee, for Petitioner; S. C. Dasgupta and Tapan Sengupta, for the State.

GUPTA, J.:— In this Rule which arises on application under Article 227 of the Constitution, the validity of a proceeding under Section 44 (2a) of the West Bengal Estates Acquisition Act is in question. The proceeding was started on January 22, 1970 by an Assistant Settlement Officer apparently on his own motion. The time limit for initiating a proceeding under Section 44 (2a) by an Officer of its own motion was at the relevant time 15 years from the date of final publication of the record-of-rights. West Bengal Estates Acquisition Act originally did not contain Section 44 (2a). This provision was introduced in 1958 by West Bengal Estates Acquisition (2nd Amendment) Act, 1957 (West Bengal Act XXV of 1957) when the time limit for initiating a proceeding under the Act was six months. Thereafter this time limit was extended by different Acts amending the section. In the year 1963 the time for starting a suo motu proceeding was extended upto nine years by the West Bengal Estates Acquisition (Amendment) Act, 1963 (West Bengal Act XXII of 1963). Till then all the amending Acts extending the time limit had received the assent of the President. In 1967 by the West Bengal Estates Acquisition Act (Amendment Act of 1967) (West Bengal Act IX of 1967) the time for starting a proceeding under the section by the officer of its own motion was extended upto 12 years. It appears that the amending Act of 1967 did not receive the assent of the President. Thereafter time was again extended to 15 years by the West Bengal Estates Acquisition (Amendment) Act 1969 (West Bengal Act XXXI of 1969). This

Amendment Act, however, received the assent of President. As stated already, the impugned proceeding was started when Section 44 (2a) stood as amended by the Amendment Act of 1969.

2. The West Bengal Estates Acquisition Act was included in the Ninth Schedule and as such the provisions of the Act, as they stood on the date the Act was included in the schedule, enjoy immunity from attack on the ground that they are inconsistent with or take away or abridge any of the fundamental rights under Article 31-B of the Constitution. The amending Acts of 1967 and 1969 were passed after the parent Act was introduced in the Ninth Schedule.

3. On behalf of the petitioner Mr. Nirendra Krishna Mitra, learned advocate, contended that the Amendment Act of 1967 not having received the assent of the President was open to challenge on the ground that it abridged the rights conferred by Article 19 and Article 31 of the Constitution in view of the first proviso to Article 31-A of the Constitution. He argued that though the Amendment Act of 1969 had received the assent of President, it was not possible to give effect to the provisions of the Amendment Act of 1969 as the earlier Act which it sought to amend, viz., Amendment Act of 1967, had not received the assent of the President and was void as it infringed the fundamental right to hold property. This argument was built on the first proviso to Article 31-A. Article 31-A so far as it is relevant for the present purpose is as follows:—

"(1) Notwithstanding anything contained in Article 13, no law providing for—

(a) the acquisition by the State of any estate or of any rights therein or the extinguishment or modification of any such rights, or

(b) **	**	**
(c) **	**	**
(d) **	**	**
(e) **	**	**

shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by Article 14, Article 19 or Article 31:

Provided that where such law is a law made by the Legislature of a State, the provisions of this Article shall not apply thereto unless such law, having been reserved for the consideration of the President, has received his assent....."

4. Art. 31-A (1) speaks of a law providing for the acquisition by the State of any estate or of any rights therein or the extinguishment or modification of any such rights. The first proviso says that where such law is one made by the Legislature of a State, Article 31-A would not apply unless such law had received the

assent of the President. Mr. Mitra contended that the Amendment Acts of 1967 and 1969 offended Article 19 (1) (f) and Article 31 of the Constitution. This argument would be available only if Section 44 (2a) could be called a law providing for the acquisition of any estate or of any rights therein or the extinguishment or modification of any such rights. Section 44 (2a) is in Chapter V of the Act which includes Section 39 to Section 48. It appears from Section 39 that the record-of-rights is prepared for carrying out the purposes of the Act. The West Bengal Estates Acquisition Act is an Act providing for the acquisition of estates or the rights of intermediaries therein and of certain rights of raiyats and under raiyats and the rights of certain other persons in lands comprised in an estate. But it is obvious that when Section 39 speaks of record-of-rights being prepared for carrying out the purposes of the West Bengal Estates Acquisition Act it does not mean that the record of rights is prepared for the purpose of acquisition of the estates or of the rights of intermediaries, raiyats, under raiyats or other persons. The provisions for the acquisition of estates are contained in Section 4 of the Act. An order under Section 39 of the Act directing that a record-of-rights be prepared in respect of any district or part of a district is made only after the vesting of the estates. Preparation of record-of-rights follows vesting and reflects the position after vesting. This would appear from Rule 26 of the West Bengal Estates Acquisition Rules, 1954 which sets out the particulars to be recorded in the record-of-rights. The revision of an entry in the record-of-rights under Section 44 (2a) is permissible only to correct an existing error in the record so that the true position resulting from the acquisition of estates is reflected in the record-of-rights. We cannot therefore agree with Mr. Mitra that the preparation of record-of-rights is inextricably connected with or is integral part of the machinery of acquisition. Mr. Mitra also sought to argue that the notice initiating the proceeding was not valid. It appears, however, that the petitioner took part in the proceeding without any objection and never complained that the proceeding was not validly instituted. We cannot, therefore, allow Mr. Mitra to raise this objection at this stage.

5. The Rule is accordingly discharged but in the facts and circumstances of the case without any order as to costs.

6. We wish to record our appreciation of the very able manner in which Mr. Mitra presented the case for the petitioner.

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DEB, J.:— I agree.

Rule discharged.

AIR 1976 CALCUTTA 17

SABYASACHI MUKHARJI, J.

Jagadish Ch. Agarwal, Petitioner v. Union of India and others, Respondents.

Civil Revn. Case No. 3684 (W) of 1973, D/- 22-8-1975.

(A) Constitution of India, Art. 359, Cl. 1 — Proclamation of the President published in Gazette dated 27-6-75 — Matters involving Art. 14 — President's Proclamation bars courts from even disturbing interim stay granted against Governmental bodies. AIR 1964 SC 381, Referred. (Paras 1 and 2)

Cases Referred: Chronological Paras AIR 1964 SC 381 = (1964) 1 Cri LJ 269 1

A. P. Roy Chowdhury and Sudhindra Kumar Kar, for Petitioner; G. Mitter, Advocate-General, Ajit Kumar Sen Gupta and Sailendra Nath Dutta, for Respondents.

ORDER:— It appears that on the 14th of June, 1973 a notice under Section 269 (1) of the Income-tax Act, 1961 was issued in respect of a property purchased by the petitioner. Being aggrieved by the said notice the petitioner moved this Court under Article 226 of the Constitution on the 20th of September, 1973 and obtained a Rule nisi. The petitioner in his grounds challenging the notice, contends that Sections 269-C to 269-I and Section 269-R are ultra vires Article 19 (1) (f), Article 14 and Article 31 of the Constitution. A Rule nisi was issued by this Court. This Court also granted an injunction restraining the respondents, the Income-tax Authorities, from taking any proceeding pursuant to the notice dated the 14th of June, 1973. The respondents have shown cause by counter-affidavits and counsel on behalf of the revenue submitted that the order of injunction should be vacated and the application dismissed. The order of injunction is continuing when this application came up for hearing before me last week, my attention was drawn to the proclamation issued by the President and published in the Gazette on the 27th of June, 1975. The said proclamation reads as follows:

"In exercise of the powers conferred by clause (1) of Art. 359 of the Constitution, the President hereby declares that the right of any person (including a foreigner) to move any court for the enforcement of the rights conferred by Art. 14, Art. 21 and Art. 22 of the Con-

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stitution and all proceedings pending in any Court for the enforcement of the above mentioned rights shall remain suspended, for the period during which the proclamation of emergency made under clause (1) of Art. 352 of the Constitution on the 3rd December, 1971 and on the 25th June, 1975 are both in force.

This order shall extend to the whole of the territory of India except the State of Jammu and Kashmir.

This order shall be in addition to and not in derogation of any order made before the date of this order under clause (1) of Art. 359 of the Constitution."

In view of the aforesaid proclamation it was contended that inasmuch as in this case the enforcement of the rights conferred under Article 14 of the Constitution was involved, the proceeding should remain suspended and in the premises the interim order must necessarily continue. The position seems to be rather unfortunate because in this case there was an interim order and the effect would be that the interim order would continue so long as the emergency continues or until the proclamation is revoked, though the examination of the question which was possible because the matter is ready for hearing, might have revealed that the proceedings under the notice were valid. In numerous cases (sic) under Art. 14 are involved and while new applications or cases where Article 14 is resorted to are no longer possible during the continuance of the emergency, the persons who have obtained Rules or orders of injunction prior to the 27th of June, 1975 would continue to enjoy those injunctions without the Courts having the opportunity to examine the validity or the propriety of the said orders simply because the questions under Article 14 are involved in those applications. My attention was drawn to the observations of the Supreme Court in the case of *Makhan Singh Tarsikka v. The State of Punjab*, AIR 1964 SC 381, at p. 393. In this view of the matter I direct that the application will remain adjourned sine die with liberty to the parties to mention for hearing after the aforesaid proclamation is revoked.

2. In order to facilitate the disposal of these orders of injunctions obtained against the fiscal authorities, the authorities should consider whether it is desirable that Article 359 (1) of the Constitution should be amended. The result of the proclamation made under Article 359 of the Constitution and the order issued by the President seem to be that the orders of injunction would continue until the emergency is revoked. That might not be what was desired.

3. Let a plain copy of these observations be handed over to the learned advocate for the respondents.

Ordered accordingly.

AIR 1976 CALCUTTA 18

SABYASACHI MUKHARJI, J.

Jokai (Assam) Tea Co. Ltd. and another, Appellants v. Bhawani Shankar Bagaria, Respondent.

Suit No. 20 of 1975, D/- 17-6-1975.

(A) Civil P. C. (1908), S. 151 — Ends of justice — Place of suit — Choice causing grave injustice to defendant only — Court can stay suit.

A suit to recover moneys advanced under contracts for supply of food grains, coins and currency notes of required denominations instituted in Calcutta on the only ground that letters terminating the contracts were sent from Calcutta, was stayed for the reason that the place of suit chosen caused grave injustice to the defendant at Dibrugarh in Assam, where all the documents and witnesses for defence were available. Clause "Subject to Dibrugarh Jurisdiction" in the first agreement was also taken note of. Suit was stayed notwithstanding that the Court had jurisdiction to try it and that there was rapid expansion of transport facilities. (1906) 1 KB 141; (1908) 1 Ch D 471 and AIR 1956 Cal 33, Followed.

(Paras 6, 7 and 8)

Cases Referred: Chronological Paras

AIR 1956 Cal 33 = 59 Cal WN 1044	5
(1908) 1 Ch D 471 = 77 LJ Ch 312	5
(1906) 1 KB 141 = 75 LJ KB 218	4

ORDER:— This is a suit by two plaintiffs Jokai (Assam) Tea Company Limited and the British India Tea Company Limited both of whom are English Companies having their registered offices in London and also carrying on business by branch office at 21 Netaji Subhash Road, Calcutta, within the jurisdiction of this Court. The defendant is Bhawani Sankar Bagaria who for self and Karta representing a Hindu undivided family carries on business under the name and style of Girdharilal Sardarmall at Dibrugarh outside the jurisdiction of this Court, and also has a place of business at Commerce House, 3rd floor, Room No. 4-A of No. 2, Ganesh Chandra Avenue in the town of Calcutta. It is alleged that the plaintiffs were each owners of tea gardens. It is further alleged that by an agreement contained in or evidenced by a writing the defendant was appointed the agent of the plaintiffs to supply foodgrains allotted from the Government sources for consumption by the workers of the plaintiffs.

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tea estates. The agreement is dated 1st August, 1972. The terms and conditions of the agreement have been set out in the petition. It is stated that thereafter pursuant to the said agreement the plaintiffs from time to time advanced sums of money to the defendant for procuring foodgrains in the manner agreed. It is alleged that by two letters both dated 15th July, 1974 written at and sent from 21, Netaji Subhas Road the plaintiffs terminated the aforesaid agreement on the ground that the supply of foodgrains had become irregular from May, 1974. It is stated that at that time the defendant was in possession of Rs. 7,80,802 advanced by the first plaintiff to the defendant and Rs. 1,35,261 advanced to the defendant by the second plaintiff for procurement of foodgrains which the defendant did not procure and did not supply. There was another agreement evidenced by writing dated 20th July, 1970 between the first plaintiff and the defendant whereby the defendant had agreed to make available on account of the first plaintiff cash, coins and notes of denominations required by the Manager of the said tea estate in exchange of cheques given in advance by the first plaintiff for an all inclusive charge of 44 paise per Rs. 100. It is alleged that by a further agreement contained in or evidenced in writing dated 1st April, 1974 the first plaintiff had agreed to maintain and did subsequently maintain a cash reserve of Rs. 2,00,000 with the defendant in connection with the aforesaid agreement. Interest at the rate of 11 per cent. per annum was payable on the said Rs. 2,00,000. It is then alleged that by a writing dated 24th June, 1974 written at and sent from 21, Netaji Subhas Road the first plaintiff terminated the aforesaid agreement. At that time it is claimed that a sum of Rs. 3,79,464 belonging to the first plaintiff was in possession of the defendant pursuant to the aforesaid agreement dated 20th July, 1970 and 1st April, 1974. It is stated that the defendant has refused to pay the sum of Rs. 11,60,267 to the first plaintiff and Rs. 1,35,261 to the second plaintiff. The first plaintiff claims the sum of Rs. 11,60,267/20 and the second plaintiff claims Rs. 1,35,261/20 as money had and received by the defendant. There is also an alternative claim. There are some further additional claims. The suit was filed at Calcutta after having obtained leave under Clause 12 of the Letters Patent.

2. Leave under Clause 12 of the Letters Patent was obtained by averments made in paragraphs 5, 7 and 10 of the plaint. In paragraph 5 it is alleged that that the letter dated 15th July, 1974 was written and sent from Calcutta. In paragraph 7 it is similarly stated that the letter dated 24th June, 1974 was written and

sent from Calcutta within jurisdiction of this Court but none of these letters was received at Calcutta, or the communication did not become effective until the recipient received the letters in question. In paragraph 10 it is alleged that payments were made from Netaji Subhas Road in the town of Calcutta within the jurisdiction of this court. The defendant asks for a stay of the suit on various grounds but mainly on the ground of balance of convenience. The averments upon which the stay is asked for have been set out in paragraph 12 of the petition and it would be material to set out the said paragraph in extenso:

"On the other hand your petitioner states that the alleged cause of action of the plaintiffs arose entirely in Dibrugarh in the State of Assam and each and every fact or circumstance relating to the disputes and differences between the parties took place in Assam as will appear, inter alia, from the following facts:—

(a) All the agreements referred to in the plaint were signed and/or executed at Dibrugarh in Assam.

(b) All the agreements were wholly and entirely performed and/or given effect to at Dibrugarh in Assam.

(c) All supplies of foodgrains, sales or delivery of coins etc., were made at and from Dibrugarh in Assam.

(d) All moneys were paid and/or received at Dibrugarh in Assam.

(e) The Tea Estates to which the food grains were supplied as also the coins are situate in the district of Dibrugarh in Assam.

(f) Your petitioner and/or his predecessors-in-interest have been carrying on business at Dibrugarh for over one hundred years and 99.5 per cent. of your petitioner's business is in Assam. The said Calcutta office of your petitioner merely looks after tea sales from your petitioner's tea gardens in Assam and does nothing else, and such tea sales have nothing whatever to do with the present suit.

(g) All books, papers, documents, letters etc., which are in any way relevant to the disputes and differences between the parties hereto are located in Dibrugarh in Assam. The whole of the correspondences between the parties took place and/or passed in Assam.

(h) The witnesses that will be necessary to substantiate your petitioner's defence and/or prove your petitioner's counter-claim are all in Assam. It is impossible to secure the attendance of such witnesses in this Hon'ble Court. In order to substantiate your petitioner's defence as also to establish your petitioner's counter-claim against the plaintiffs the following persons at least would be required to

give evidence and all of them are in Assam and they cannot be brought down to Calcutta without incurring expenditure of such a large amount that it would be wholly disproportionate to the relief that your petitioner might obtain:—

(i) Sri S. L. Saraogi of Dibrugarh being the Accountant of your petitioner's Assam business which handled the foodgrains and coins supply under the contracts in suit.

(ii) Sri R. K. Varma of Dibrugarh being the departmental in-charge of your petitioner's said Assam business referred to in clause (i) hereof.

(iii) Several Transport Contractors and/or lorry owners and/or lorry drivers who delivered the foodgrains to the tea estate belonging to the plaintiffs in Assam. In addition there are the stores and godown keepers relating to the foodgrains supply who are all in Assam.

(iv) The Grain Distributing Officer, Assam Branch, Indian Tea Association (A.B.I.T.A.) Dibrugarh Circle in the district of Dibrugarh in Assam is a very vital witness because all the dealings and transactions took place through him as will appear from the said agreement dated 1st August, 1972. The records of the said Grain Distributing Officer, his books, papers and documents are absolutely essential to establish your petitioner's defence and/or counter-claim against the plaintiffs and all such books, papers and documents are in Assam and cannot be brought down to Calcutta. The procedure was that the said Grain Distributing Officer gave instructions with regard to the supply of foodgrains to the particular tea gardens to your petitioner, and after such supplies were effected by your petitioner statements with regard thereto were submitted by your petitioner to the Grain Distributing Officer who in his turn prepared the bills and submitted the same to the plaintiffs. Payments were thereupon made by the plaintiffs to the Grain Distributing Officer who forwarded the same to your petitioner. In the circumstances, the Grain Distributing Officer and his records are absolutely essential to establish your petitioner's defence in the above suit. It is impossible to get G.D.O. in Calcutta.

(i) Your petitioner is a permanent resident of Dibrugarh in Assam and he does not or the members of the joint family do not reside in Calcutta. Your petitioner's entire business is in Assam and it will be extremely costly and wasteful if your petitioner has to come down to Calcutta and contest the suit from day to day. The disputes between the parties in this suit are entirely Assam based and in fact the plaintiffs themselves do the whole of their business in Assam so far as is re-

levant or material for the purpose of this suit. Nothing at all took place in Calcutta and even the plaintiffs' letter of termination was sent to your petitioner at Assam. A true copy of the said letter is annexed hereto and marked with the letter 'B'.

(j) Every other material fact which is in any way connected with the disputes and differences between the parties hereto arose and/or took place in Assam. Your petitioner has nothing to do with the Calcutta offices of the plaintiffs."

3. In the affidavit-in-opposition the said averments are denied vaguely but it is not stated in what way it would be inconvenient for the plaintiff to have the suit tried at Dibrugarh. The plaintiffs have their offices at Dibrugarh, the transactions took place in Dibrugarh in Assam. It is nobody's case that any material evidence or document is in Calcutta within the jurisdiction of this Court.

4. The principles upon which courts should exercise the power of staying a suit are well settled. In this connection, reliance may be placed on the decision in the case of *Logan v. Bank of Scotland*, (1906) 1 KB 141 at p. 145 where it was observed that the court would stay an action brought within the jurisdiction in respect of a cause of action arising out of the jurisdiction if satisfied that no injustice would be done thereby to the plaintiff and that the defendant would be subjected to such injustice in defending the action as would amount to vexation and oppression to which he would not be subject to if an action had been brought in another accessible court, where cause of action arose.

5. The same principle was reiterated in the decision in re: *Norton's Settlement*, *Norton v. Norton*, reported in (1908) 1 Ch D 471. This court also in the case of *Hansraj Bajaj v. The Indian Overseas Bank Ltd.*, AIR 1956 Cal 33 had the occasion to consider this question. The court observed that under Section 151 of the Code of Civil Procedure jurisdiction to stay an otherwise competent suit was to be sparingly exercised and only for the ends of justice or to prevent abuse of the process of the court and within the strict limit of rigorous conditions. The court had evolved certain principles in this regard. The first principle was that a mere balance of convenience was not a sufficient ground for depriving a plaintiff of his right of prosecuting his action in or his right of access to the competent courts of law. The second principle was that the court stayed an action brought within the jurisdiction in respect of a cause of action arising entirely out of the jurisdiction when it was satisfied that the plaintiff would thereby suffer no injustice whereas if the action was continu-

ed the defendant would, in defending the action, be the victim of such injustice as to amount to vexation and oppression would not be caused to the plaintiff if the action was brought in another accessible court where the cause of action arose. In that case, the court had also indicated that the onus was upon the defendant to satisfy the court, first that the continuance of the action would work an injustice because it would be oppressive or vexatious for him or would be an abuse of the process of the court and, secondly also that the stay would not cause any injustice to the plaintiff. In that case it was held that the defendant had discharged his onus.

6. Counsel for the plaintiffs contended before me that those were cases where question of convenience arose between different countries. In the first case, it was between Scotland and England; in the second case, it was between India and England and in the third case, it was between Malaysia and India. He further submitted that with the rapid growth of transport facilities, distance was no longer a problem and distance was no longer of such importance as to deprive the plaintiff's right to chose the forum. It is true that the plaintiff has right to chose its forum and such choice of forum would not normally be interfered with unless it is clearly established that by exercise of the choice of forum grave injustice would be caused to the defendant and the suit would not cause any injustice to the plaintiff. Within this limited principle in my opinion, the courts still retain its inherent jurisdiction for staying the suit, even with the rapid expansion of transport facilities and even if the action is brought in a competent court having jurisdiction to try the case. Furthermore no inconvenience to the plaintiff will be caused by staying the suit. It has not been clearly stated that any of the witnesses or documents are in Calcutta, so that the stay of the suit in this court will cause any injustice to the plaintiff. Counsel for the plaintiffs further contended that the plaintiffs had to pay a heavy court-fees and in the event they have to file a fresh suit after the present suit is stayed the plaintiffs would lose that amount of money and would suffer financial consequences. On behalf of the defendant it was stated that if as a result of this stay the plaintiffs have to institute proceedings in other forum or in other court or in arbitration proceedings, then the defendant is willing to give the plaintiff credit for Rs. 10,000 which is the total amount of court-fees paid in respect of filing of this suit.

7. The other aspect of the matter upon which reliance was placed was based

on the contract dated 1st August, 1972, which contained, inter alia, as follows:

"Cl. 12. The agreement shall be subject to Dibrugarh Jurisdiction."

This was the first agreement for supply of the foodgrains. The entire cause of action of course was in respect of three contracts and the other two contracts do not contain the similar clause. It must be noted that this was the main contract and it is a factor, which though not decisive in this case is a factor which, in my opinion should be taken into consideration by the court in staying a suit.

8. In the premises aforesaid and having regard to the facts and circumstances of this case, in my opinion this suit ought to be stayed. But this will not prejudice the plaintiffs' right to institute proceedings for establishing their claims in proper forum, if otherwise they are entitled to. It is made clear that if as a result of the stay, the plaintiffs institute proceedings in other forum or in other courts of arbitration, the defendant will give the plaintiffs credit for the sum of Rs. 10,000 as conceded by the counsel for the defendant. In the facts and circumstances of this case each party to pay and bear their own costs. There will be orders in terms of prayers (a), (b) and (c), subject to aforesaid direction.

Suit stayed.

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SANKAR PRASAD MITRA, C. J. AND
SALIL KUMAR DATTA, J.

The Assistant Collector of Customs, Special Section, Calcutta and others, Appellants v. United India Minerals Ltd., Respondent.

Appeal No. 309 of 1971, D/- 12-6-1975.

(A) Customs Act (1962), S. 114 — Attempt to export goods improperly — Is punishable irrespective of the fact that exportation has already taken place.

(Para 13)

(For detailed reasons see para 12 of the judgment.)

(B) Customs Act (1962), Ss. 114 and 51 — Attempt to export goods without a valid licence — Clearance under S. 51 cannot exonerate party from penal proceedings under S. 114.

The law prohibits export of goods except under a valid licence. If export has been made contrary to the provisions of the licence, the export is illegal and to the extent the export is illegal the respondent has failed to obey the law. Clearance under Sec 51 does not prevent the authorities from taking other steps open to them under the statute. AIR 1937 PC 114. Relied on.

(Para 19)

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(C) Customs Act (1962), S. 2 (34) — "Proper officer" — Meaning of.

"Proper officer", in relation to any function to be performed under the Act means the Officer of Customs who is assigned those functions by the Board of the Collector of Customs. These proper Officers are inferior to Officers who conduct adjudication proceedings under Section 122, and exercise powers given to them by Chapter 14. These superior officers cannot be bound by any decision taken by Officers inferior in rank. An order under Sec. 51 cannot be an impediment to adjudication under the provisions of Chapter 14. (Para 21)

Cases Referred: Chronological Paras
 AIR 1975 Cal 368 = 79 Cal WN 648 17
 (1973) 77 Cal WN 501 16
 AIR 1970 SC 1597 = (1969) 2 SCR 727 5
 (1969) Appeal No. 122 of 1969 (Cal.) 12
 (1969) Appeal No. 29 of 1969 (Cal.) 12
 AIR 1937 PC 114 = 1937 AC 610 18

B. Das, A. K. Banerjee and D. Shome, for Appellants; R. N. Bajoria and D. K. Dhar, for Respondent.

SANKAR PRASAD MITRA, C. J. :-

This is an appeal from a judgment of Sabyasachi Mukharji, J. delivered on January 20, 1971.* In an application under Art. 226 of the Constitution the petitioner, United India Minerals Ltd., which is the respondent in this appeal challenged a show-cause notice dated March 8, 1967 issued by the Assistant Collector of Customs, Special Section, Calcutta, the appellant No. 1 herein. The petitioner also challenged the proceedings under the said notice.

2. The United India Minerals Ltd. is a company which carries on business of mining and exporting mica. In July and August, 1964, the company exported several cases of "No. 6 Black Spotted Loose Mica Splittings" of the 1st and 2nd qualities to Italy by S. S. "Malacca". The goods were exported under four separate shipping bills. On February 4, 1964 the Joint Chief Controller of Imports and Exports issued a Trade Notice whereby exports of some varieties of Mica were prohibited and some varieties were allowed to be exported subject to a minimum F.O.B. price per k. g. as specified in the Trade Notice. The export of Mica of varieties other than those specified in the Trade Notice could be exported without any restriction as to the minimum f.o.b. prices. "No. 6 Black Spotted Loose Mica Splittings" of the 1st and 2nd qualities were not specified in the Trade Notice. The same could be exported without any restriction as to the minimum f.o.b. price. The export of the several cases of "No. 6 Black Spotted Loose Mica Splittings" of the 1st and 2nd qua-

lities were authorised by the Joint Chief Controller of Exports, Calcutta, by endorsements made on the respective shipping bills. At the instance of the Appraiser, Customs House, Calcutta, some of the cases of the goods selected at random were checked before permitting export. It was found that the goods so selected were in conformity with the declaration made in the shipping bills, namely, that they were 'No. 6 Black Spotted Loose Mica Splittings' of the 1st and 2nd qualities. And the appraiser made endorsements on the shipping bills testifying the above fact.

3. On 8-3-1967 the Company was served with a show-cause notice. By this notice the Company was asked to show-cause why penal action should not be taken against it under S. 114 (i) of the Customs Act, 1962. The notice has referred to various correspondence that passed between the company and the foreign buyers and thereafter, it is alleged that export of Mica from India was governed by the provisions and/or conditions stipulated in the Trade Notice dated February 4, 1964. On reasonable belief that the documents useful for or relevant for the provisions of the Customs Act and goods liable to be confiscated were secreted therein, the office premises of the company and other connected places were searched by the Officers of the Customs House in October, 1964. In course of the search certain documents were seized. It was alleged in the show-cause notice that in order to circumvent or by-pass the provisions or stipulations contained in the Trade Notice of February 4, 1964 and in the Export Trade Control Restrictions, deliberate plans and arrangements were drawn up and implemented by the company in collaboration with Italian buyers whereby the goods covered by the statements contained in the show-cause notice were exported as a result being misdescribed and misdeclared as Black Spotted Mica Splittings. The goods were not Black Spotted Mica Splittings of the 1st and 2nd qualities. It is further alleged in the show-cause notice that the declaration was made to make it appear to the concerned authorities in India that the goods belonged to a variety for which no floor prices were applicable. In the premises, the goods in question were exported and declarations to the concerned authorities were made on the basis of prices lower than the floor prices applicable to the actual goods exported. It is alleged further in the show-cause notice that there had been no declaration of the full export value that was required to be paid; and Section 12 (1) of the Foreign Exchange Regulation Act, 1947 and the Notifications issued thereunder under Clause (3) of the Export Control Order, 1958 had

*Reported in 1971 Cri LJ 1370 (Cal.)

been violated. The show-cause notice says that inasmuch as the goods which had been exported were prohibited goods, they had been exported in violation of the law and as such under the provisions of Section 113 (d) read with Section 114 (i) of the Customs Act the goods were liable to be confiscated and the company was asked to show cause why penal action should not be taken against the petitioner.

4. In the show-cause notice two charges were, therefore, levelled against the company. The first charge was contravention of Foreign Exchange Regulation Act, 1947. The second charge was that the prohibited goods had been exported without a valid order permitting the export and as such there was contravention of the relevant provisions of Sec- (Contd. on Col. 2)

tion 113 read with Section 114 of the Customs Act, 1962.

5. So far as contravention of Section 12 (1) of the Foreign Exchange Regulation Act is concerned, in view of the decision of the Supreme Court in (Union of India v. Shreeram Durgaprasad) AIR 1970 SC 1597, the learned trial Judge has held that the notice is without jurisdiction. No arguments have been advanced before us disputing this decision of Sabyasachi Mukharji, J. The contentions before us were confined to Sections 113, 114 and other relevant sections of the Customs Act, 1962.

6. Mr. Bajoria, appearing for the respondent company, has drawn our attention to Section 167 (8) of the Sea Customs Act, 1878. The provisions ran thus:

Offences	Section of this Act to which the offence has reference	Penalties
(1) If any goods, the importation or exportation of which is for the time being prohibited or restricted by or under Chapter IV of this Act be imported into or exported from India contrary to such provision or restriction, or if any attempt be made so to import or export any such goods;	13 and 19	Such goods shall be liable to confiscation; and any person concerned with any such offence shall be liable to a penalty not exceeding three times the value of the goods or not exceeding one thousand rupees,

7. The above provisions have created, inter alia four offences for violation of relevant laws viz.,

(i) importation of prohibited or restricted goods,

(ii) exportation of prohibited or restricted goods,

(iii) attempt to import prohibited or restricted goods and

(iv) attempt to export prohibited or restricted goods.

These provisions with alterations, we shall presently notice, have been introduced into the Customs Act of 1962. The relevant provisions of the latter Act are as follows:—

"Sec. 111. Confiscation of improperly imported goods, etc.— The following goods brought from a place outside India shall be liable to confiscation:—

(d) any goods which are imported or attempted to be imported or are brought within the Indian Customs waters for the purpose of being imported, contrary to any prohibition imposed by or under this Act or any other law for the time being in force;"

(Sec. 112 provides for penalty for improper importation of goods, etc. We are not setting out the provisions of this section as they are not relevant for this appeal).

"Sec. 113. Confiscation of goods attempted to be improperly exported, etc.— The following export goods shall be liable to confiscation:—

(d) any goods attempted to be exported or brought within the limits of any customs area for the purpose of being exported, contrary to any prohibition imposed by or under this Act or any other law for the time being in force;"

"Sec. 114. Penalty for attempt to export goods improperly, etc.— Any person who, in relation to any goods, does or omits to do any act which act or omission would render such goods liable to confiscation under Section 113, or abets the doing or omission of such act shall be liable,—

(i) in the case of goods in respect of which any prohibition is in force under this Act or any other law for the time being in force, to a penalty not exceeding five times the value of the goods or one

thousand rupees whichever is the greater;"

3. "Export goods" referred to in Section 113 has been defined in Section 2 (19) of the Act. "Export goods" means any goods which are to be taken out of India to a place outside India."

9. Comparing the relevant provisions of the Sea Customs Act 1878 with those of the Customs Act of 1962, Mr. Bajoria has argued that the latter Act makes a distinction between attempt to import or export and the actual importation or exportation. The scheme of the old Act is continued in the new Act so far as the import aspect is concerned, but while dealing with export, actual exportation which was provided for in the old Act was omitted in the new Act. The intention to leave out actual exportation is clear from the opening words of Section 113 as contrasted with those of Sec. 111 read with the definition of "Export goods" in Section 2 (19). Section 111 (d) speaks of goods imported or attempted to be imported. Section 113 (d) merely speaks of goods attempted to be exported and deliberately drops out goods actually exported. A comparison of the two sections, according to the learned counsel, leads to the conclusion that the words "attempt to export" contemplate a case in which exportation has not taken place. In other words, it contemplates a case of unsuccessful attempt—an attempt which has not resulted in actual exportation. A successful attempt cannot be brought within the scope of Section 113 (d). Lastly, Mr. Bajoria submitted that the Customs Act being a penal Statute and the proceedings thereunder being quasi-criminal, an interpretation favourable to the subject based on strict construction should be adopted. In this view of the matter, according to the learned counsel for the respondent, since the exportation in instant case had already taken place, no proceedings under Section 113 read with Section 114 of the Customs Act, 1962 could be taken against the respondent.

10. The show-cause notice was issued under Section 124 of the Customs Act, 1962. The relevant portions of the section run thus:

"Sec. 124. Issue of show-cause notice before confiscation of goods, etc.—No order confiscating any goods or imposing any penalty on any person shall be made under this Chapter unless the owner of the goods or such person—

(a) is given a notice in writing informing him of the grounds on which it is proposed to confiscate the goods or to impose a penalty;

(b) is given an opportunity of making a representation in writing within such reasonable time as may be specified

in the notice against the grounds of confiscation or imposition of penalty mentioned therein; and

(c) is given a reasonable opportunity of being heard in the matter:

Provided that the notice referred to in clause (a) and the representation referred to in clause (b) may, at the request of the person concerned, be oral."

11. As we have seen, penalty for attempt to export goods improperly is imposed under Section 114. By Section 122, the adjudicating officers have been empowered to order confiscation of goods and also to impose penalties. The charge levelled against the respondent is that the respondent has exported goods of one quality misdescribing it as goods of another quality. In other words, the goods exported were not covered by the export licence referred to in the shipping bills. (Vide, paragraphs 9, 11 and 12 of the show-cause notice at pages 84 and 85 of the Paper Book).

12. Now, the proposition that the Customs Authorities have no jurisdiction to inflict personal penalty in a case where the goods have already been exported from the country, does not appear to us to be tenable on the following grounds:—

(i) Under Section 114, it is the doing of or an omission to do any act which is relevant for the purpose of penalty and not the existence or non-existence of the goods at the time the show-cause notice is issued or the adjudication is made.

(ii) The offence contemplated in Section 114 is an offence which arises under Section 113 and which are the ingredients of Section 114.

(iii) Section 113 applies to export goods as defined in Section 2 (19). An offence is committed under Section 113 (d) before the export.

(iv) It is not the intention of the Act to pursue the goods after export. The Act contemplates punishment of the offender for the offence committed before the export. From this point of view the omission of actual exportation in the new Act is understandable. A liability to confiscation must be distinguished from physical possibility of confiscation. Goods already exported cannot be physically confiscated.

(v) If the offence is committed before the export, the actual export of the goods cannot wipe out the offence. According to the Act the offence under Section 113 (d) can be committed only when the goods are within the country. This is in accord with the definition of "export goods" in Section 2 (19). Therefore, if the offence of "attempt to export" is complete when the goods are within the country, subsequent exportation cannot put an end to that offence or make any difference to the personal liability of the exporter. The

question, therefore, to be considered is whether the goods would be liable to confiscation for offence committed if the goods were within the country and had not been exported. Incidentally in Appeal No. 29 of 1969 (I. J. Rao v. Bibhuti Bhushan Bag), a Division Bench of this Court observed:—

"Mr. Banerji contended that even if the findings of Mr. Justice Ghose are correct his order quashing the entire proceedings against the respondent is wrong. He argued that for many of the offences under the Customs Act, the Customs Authorities can proceed against the goods as well as against the persons who have contravened Customs laws. Thus the Customs Authorities often impose a penalty and at the same time order confiscation of the goods. In the present proceedings even if the detention of the goods by the Customs authorities be found illegal and if the petitioners get an order for return of the goods to them, there is no reason why the entire proceedings should be quashed. The Customs Authorities still have jurisdiction to initiate proceedings against the petitioners and impose upon them personal liability by way of the fine. This contention of Mr. Banerji is quite correct."

This view of the Division Bench was supported by another Division Bench of this Court in Appeal No. 122 of 1969 (Shaikh Mohammed Sayeed v. Assistant Collector of Customs for Preventive (I)).

(vi) The words "would render such goods liable to confiscation" in Section 114 have been used in a notional or hypothetical sense. The expression "would render" refers to the time when the goods are brought into the Customs area for export or an attempt is made to export. In this sense the words "would render liable" do not seem to be inappropriate as export of goods always include an attempt to export goods; whether the attempt is successful or unsuccessful makes, in our opinion, no difference.

(vii) Unless we construe Section 113 (d) in this manner, we shall land in absurdities. For instance, let us take a case in which goods are brought within the Customs area in an attempt to export illegally and the exporter faced with the possibility of detection tries to escape with the goods and while he is escaping, the goods fall into the river or the sea. Can it be said that the exporter cannot be punished for attempt to export? Obviously answer is in the negative.

13. For all the reasons aforesaid we are of the view that an attempt to export is punishable under Section 114 irrespective of the fact that exportation has already taken place. Moreover the notice in the instant case is a notice both

under Section 113 (d) as well as under Section 113 (i), which is as follows:—

"Sec. 113. Confiscation of goods attempted to be improperly exported, etc.—The following export goods shall be liable to confiscation:—

** (i) any dutiable or prohibited goods which do not correspond in any material particular with the entry made under this Act....."

14. The case of the Customs Authorities in the instant appeal is that the respondent has committed an offence under Section 113 (i) also. And in view of what we have stated above, it seems to us that it is possible to bring this case within Section 113 (i).

15. Mr. Bajoria then invited our attention to Section 51 of the Customs Act, 1952. Section 51 is in the following terms:—

"Clearance of goods for exportation.—Where the proper Officer is satisfied that any goods entered for export are not prohibited goods and the exporter has paid the duty, if any, assessed thereon and any charges payable under this Act in respect of the same, the proper officer may make an order permitting clearance and leading of the goods for exportation."

16. Mr. Bajoria says that in the present case the proper Officer has permitted clearance of the goods and loading of the goods for exportation. Under Section 130 of the Act the Central Board of Revenue had powers of revision of the order of the 'proper officer' but that power had to be exercised within two years under sub-section (2) of Sec. 130, which had expired. In this view of the matter Mr. Bajoria contends that no other penal action can be taken against the respondent. Secondly, the goods which have already been exported pursuant to an order made under Section 51 cannot be deemed to be "export goods" within the meaning of Section 2 (19); vide Jute Investment Co. v. S. K. Srivastava (1973) 77 Cal. W. N. 501.

17. Similar arguments were advanced before us in Appeal No. 47 of 1973 = (Reported in AIR 1975 Cal 368) (Collector of Customs and Central Excise, West Bengal v. Hindusthan Motors Ltd.) with reference to S. 47 of the Customs Act 1962. The language of Sec. 47 is similar to that of Sec. 51. Sec. 47 is as follows:—

"Clearance of goods for home consumption — Where the proper officer is satisfied that any goods entered for home consumption are not prohibited goods and the importer has paid the import duty, if any, assessed thereon and any charges payable under this Act in respect of the same the proper officer may make an

order permitting clearance of the goods for home consumption."

18. It was argued before us that once the proper officer has permitted clearance of the goods for home consumption no other penal proceedings could be taken against the party concerned. We have negatived this contention relying especially on a judgment of the Privy Council in *Maritime Elec. Co. Ltd. v. General Dairies Ltd.* (1937) AC 610 — (AIR 1937 PC 114): The New Brunswick Public Utilities Act prohibited any public utility company from making any greater or less charge for its services than that prescribed for the time being under the Act. By the negligence of its servants the Electricity Company rendered an account and was paid an amount based upon erroneous meter reading so that the consumers were charged for only one-tenth of the electricity actually used. In an action to recover the balance of nine-tenths the Privy Council rejected a plea of estoppel. Lord Maugham delivering the judgment of the Privy Council has observed:

".....Where, as here, the statute imposes a duty of a positive kind, not avoidable by the performance of any formality, for the doing of the very act which the plaintiff seeks to do, it is not open to the defendant to set up an estoppel to prevent it. This conclusion must follow from the circumstances that an estoppel is only a rule of evidence which, in certain special circumstances, can be invoked by a party to an action; it cannot, therefore, avail, in such a case to release the plaintiff from an obligation to obey such a Statute, nor can it enable the defendant to escape from a statutory obligation of such a kind on his part. It is immaterial whether the obligation is onerous or otherwise to the party suing. The duty of each party is to obey the law."

19. It may be that the Customs Authorities failed to perform their statutory duties by allowing goods not covered by a valid licence to be exported relying on the respondents representations as to quality and the result of the random checking they had carried out. But that did not exonerate the respondent from doing its duty under the law. The law prohibited export of goods except under a valid licence. If export has been made contrary to the provisions of the licence, the export is illegal and to the extent the export is illegal the respondent has failed to obey the law. Clearance under Sec. 51 does not, in our opinion, prevent the authorities from taking other steps open to them under the statute.

20. Secondly, the contention that the goods had ceased to be "export goods"

cannot be upheld inasmuch as the offence in question was committed before the goods were exported away.

21. Thirdly, the order under Sec. 51 is passed by "a proper officer." In Sec. 2 (34) of the Act "proper officer" has been defined. "Proper Officer," in relation to any function to be performed under this Act means the Officer of Customs who is assigned those functions by the Board or the Collector of Customs. These proper Officers are inferior to Officer who conduct adjudication proceedings under Sec. 122 of the Act, and exercise powers given to them by Chapter 14 of the Act. These superior officers cannot be bound by any decision taken by Officers inferior in rank. From this point of view as well, an order under Sec. 51 cannot be an impediment to adjudication under the provisions of Chapter 14 of the Act.

22. In the result, we are of opinion that the notice to show-cause dated March 8, 1967 in so far as it alleges contravention of Sec. 113 read with Sec. 114 (i) of the Customs Act, 1962 is valid, and the appeal is allowed to this extent. The Rule issued by the learned trial Judge in respect of contravention of Sec. 113 read with Sec. 114 (i) is discharged and all interim orders in respect thereto are vacated. There will be no order as to costs. There will be a stay of operation of this order for six weeks.

S. K. DATTA, J.:— I agree.

Order accordingly.

AIR 1976 CALCUTTA 20

B. C. RAY, J.

Krishna Kumar Modi, Petitioner v. Union of India and others, Opposite Parties.

C. R. No. 8058 (W) of 1975, D/- 24-7-1975.

(A) Constitution of India, Arts. 352 (1), 359 — Proclamation of emergency under S. 352 (1) — Effect.

It is now well settled that during the continuance of the proclamation of emergency under Article 352 (1) of the Constitution the validity of an order made under Art. 359 of the Constitution suspending the right to move any court for enforcement of any of the fundamental rights cannot be challenged as it is a power vested in the President by Art. 359 of the Constitution. AIR 1968 SC 765, Followed.

(Para 6)

It is also well settled that the question that there is no rule of emergency justifying the continuance of the proclamation of Emergency cannot be agitated

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in the writ court as it is entirely to the subjective satisfaction of the President. AIR 1974 SC 806, Followed.

But nonetheless this suspension of the right to move for enforcement of certain fundamental rights in court by the Presidential order does not create any embargo on the right to challenge the validity of the order of detention on other grounds. AIR 1945 PC 156 and AIF 1967 SC 483, Relied on. (Para 7)

(B) Conservation of Foreign Exchange and Prevention of Smuggling Activities Act (1974), S. 3 — Purpose of detention. (Interpretation of Statutes — Punitive and preventive statutes — Difference between their purpose and scope).

The law of Preventive Detention is designed to prevent a person from indulging in acts prejudicial to the security of the State whereas the punitive laws are designed to prosecute a person for commission or omission of acts which makes him liable for punishment under the said law. Thus the primary objective of punitive law is to launch a prosecution to impose punishment on a person for his committing offences. Hence order of detention under S. 3 cannot be challenged on the ground that the person to be detained could have been dealt with under the punitive laws of the country. AIF 1974 SC 2154, Relied on. (Para 9)

(C) Constitution of India, Art. 226 — Petitioner (against whom detention order was already passed) obtaining interim order of injunction against threat of preventive detention — Detention order not before the Court — Extension of interim order refused.

Held in this case the detention order had not been challenged and the same being not before the court it was not possible for the court to hold on surmises that the petitioner if he were to challenge that order of detention would have succeeded. Hence interim order could not be extended. (Para 10)

Cases Referred: Chronological Paras

AIR 1975 SC 1165 = 1975 Cri LJ 933	9
(1975) 1 Cal LJ 532	5, 10
AIR 1974 SC 806 = 1974 Cri LJ 690	7
AIR 1974 SC 2154 = 1974 Cri LJ 1479	9
AIR 1971 SC 1731	10
AIR 1968 SC 765 = 1968 Cri LJ 772 = 1968 Lab IC 872	6
AIR 1967 SC 483 = 1967 Cri LJ 521	7
AIR 1945 PC 156 = 72 Ind App 241	7

S. D. Banerjee and Ashoke Ganguly, for Petitioner; Nani Coomer Chakraborty and Bhagawati Banerjee, for Union of India; P. R. Roy and Mrs. Uma Sanyal, for the State.

ORDER:— This is an application for vacating the interim order of injunction issued on March 20, 1975 at the time of

issuance of the said rule. The interim order has been issued in terms of prayer of the petition i.e. injunction restraining the respondents and/or their subordinates and/or servants and each one of them from passing any order of detention against the petitioner or from arresting or detaining the petitioner under the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act (Act 52 of 1974) or any order that may be passed under any provision of any other statute having the force of preventive detention against the petitioner on the basis of search and seizure dated October 15, 1974 for a period of eight weeks with liberty to the petitioner to apply for extension of the said interim order upon notice to the respondents Nos. 2, 4 and 6. Pursuant to the leave granted the petitioner also filed an application for extension of the interim order of injunction.

2. In paragraph 2 of the application for vacating the interim injunction it has been averred that on October 15, 1974 on the basis of an information the officers of the Customs, Preventive and Intelligence Branch, West Bengal, Calcutta visited the General Post Office, Calcutta and apprehended two persons—the petitioner and Sri Nanik Sahani and found in their possession postal insured parcels bearing Nos. 620 and 622 Kalba Devi Road, Bombay 564, 565, 566, 609 and 611 of Ram Wady Bombay in presence of two independent witnesses. The said parcels were found to have been despatched by one Sri S. K. Haralalka of 78 Dadi Sethi, Bombay — addressed to Sri S. S. Kedia, C/o. Rubi General Insurance Co. Ltd. of 8, India Exchange Place, Calcutta-1. It has been further averred that on examination of the contents of the said parcels in presence of the petitioner and Sri Nanik Sahani and two independent witnesses, the said parcels were found to contain synthetic fabrics of Japan origin measuring 184.60 metres valued at Rupees 14,768. The said goods were seized on the reasonable belief that they were smuggled goods imported into India in violation of Customs Act and other laws. It has been further stated that the petitioner admitted his guilt and could not produce any evidence to prove his bona fide possession and legal importation of synthetic fabrics of foreign origin. It has also been stated that after due investigation by the officers of the Customs and Central Excise Department the petitioner was found to have been acting in an organised manner in smuggling synthetic fabric from Bombay through his associates S. S. Kedia and O. P. Lara alias Om Prakash Lara and has been doing business in Calcutta. It has been stated that the Customs and Central Excise Department have placed the said materials before the detaining

authority for their consideration whereon an order of detention under Section 3 of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 has been made on Feb. 24, 1975 for preventing the petitioner from indulging in transporting smuggled goods. The petitioner has absconded and has been avoiding arrest. As such the order of detention could not be served on the petitioner by the State Government. It has been submitted that after the passing of the order of detention the petitioner cannot get any relief unless the said order of detention is challenged before the appropriate forum. It has further been submitted that the petitioner is not entitled as a matter of right to get the interim bail and the court's discretion in the matter of granting bail is regulated by well established principle that the party should establish prima facie that the case is bound to succeed. The petitioner is not entitled to get any extension of the interim order nor he is entitled to get any interim order in the form in which it has been obtained.

3. In the application for extension of interim order it has been stated that the said postal parcels were with Nanik Sahani who had carried the same which were consigned to Shyam Sundar Kedia who took delivery of the same. It has been stated that on opening the said parcels only a few pieces measuring about 3 metres each in item No. 3 bore foreign markings while the rest did not have any such foreign markings at all. It is stated that such types of fabrics are manufactured in India and are available in abundance in the market. The investigation has not yet been completed and it is yet to be established that the textile in question is of foreign origin and not manufactured in India. It has been stated that the petitioner with whom there was no material had been arrested with deliberate motive of implicating him and there is no evidence to justify his arrest. It has been stated that the officers of the Customs Department were found roaming in the vicinity of the petitioner's residence and they are giving out that the petitioner will be arrested and detained under the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974. It has been submitted that the petitioner is entitled to invoke the writ jurisdiction of this Court against any purported threat of his fundamental right and he need not wait till the threat is actually put into action. It has been submitted further that the antecedents of the petitioner are absolutely clean and above board and he is in no way connected with any foreign exchange and/or smuggling racket and as such there is not the remotest possibility of his indulging in any act of smuggling.

It has also been submitted that there cannot be any valid satisfaction of the authorities concerned for passing an order of detention under the said Act. Petitioner has also filed an affidavit-in-opposition denying the statements and allegations in the application for vacating interim order and reiterating the statements and contentions made in the application for extension of interim order. The respondents have also filed a counter to the application for extension of interim order reiterating the statements and contentions made in the application for vacating interim order and denying the statements and contentions made in the application for extension of interim order.

4. Mr. Sankar Das Banerjee, learned Advocate appearing on behalf of the petitioner in support of the application for extension of the interim order submitted that the parcels containing the said textiles were addressed to Shyam Sundar Kedia who took delivery of the same from the General Post Office and the same were in possession of Nanik Sahani. The petitioner was never in possession of the said parcels nor he had any connection with the said parcels and as such there cannot be made any order of detention against the petitioner under the said Act. In furtherance of his aforesaid contention Mr. Banerjee has submitted that the petitioner has never indulged in any smuggling activities nor has he previously dealt with any smuggled goods and the antecedents of the petitioner are absolutely clean and above board. Mr. Banerjee has submitted that the criminal case started at the instance of the Customs Authorities is still under investigation by the Customs Authorities and the said investigation has not been finalised and no final opinion has been formed by the investigating authorities in this matter that the textiles in question are of foreign origin and as such no order of detention under the said Act can be made now inasmuch as the prerequisite for the passing of such an order i.e. the satisfaction of the detaining authority has not been nor can be made nor there is any formation of opinion. It has also been submitted that a criminal case is pending over the same matter. So an order of detention under the said Act cannot be made in respect of the self-same acts of commission or omission which are subject-matter of the said criminal proceedings and such an order of detention, if made, will be bad. He submitted further that if an order of detention is made it will in effect prevent the adjudication of the pending criminal case for the specific offences alleged in accordance with the law. Mr. Banerjee has also contended that the petitioner is competent to move the writ jurisdiction against any purported threat of his fundamental right and as

such the interim order issued is not at all bad and the same should be extended till the disposal of the rule in consideration of the balance of convenience and inconvenience of the parties.

5. Mr. Nani Kumar Chakraborty, learned Advocate appearing on behalf of the respondents Nos. 1, 4, 5, 6 and 7 has submitted that the textiles seized are found to be of foreign origin and the petitioner also admitted his guilt in smuggling those goods. The detaining authority on due consideration of the materials placed before him by the officers of the Customs and Central Excise Department and on being duly satisfied and after proper application of mind had passed an order of detention on 24-2-1975 against the petitioner in order to prevent the petitioner from indulging in smuggling goods and as such the said order of detention is a valid order. Mr. Chakraborty further submitted that after the passing of the order of detention the petitioner could not get any relief unless and until he challenges that order in the proper forum. It is therefore submitted that the interim order of injunction should be vacated and should not be extended at all. Mr. Chakraborty has also submitted that the order of detention of the petitioner was passed long before the issue of this rule and the petitioner by suppressing those facts obtained this rule and interim order and as such this interim order of injunction is liable to be vacated on the ground of suppression of material facts. Mr. Chakraborty also submitted that the order of detention has been passed by the appropriate authority after proper application of mind and after subjective satisfaction. In such a case the only remedy for the petitioner is to challenge the said detention order by way of a writ of Habeas Corpus and the interim order of injunction cannot be issued unless and until it is established prima facie that the case is bound to succeed. In support of his aforesaid contention Mr. Chakraborty referred to a decision pronounced by Chittosh Mukherjee, J. in Civil Rule No. 2102 (W) of 1975 made on March 24th, 1975.* Mr. Chakraborty has further submitted that Art. 21 of the Constitution having been suspended the writ application for enforcement of fundamental rights under Arts. 14, 19 and 22 is not maintainable.

6. The President of India on December 3, 1971 made a proclamation of Emergency under Art. 352 (1) of the Constitution. The said proclamation of emergency is in force and has not been revoked. Thereafter on December 23, 1971 the President has made an order under Art. 359 (1) of the Constitution declaring that

the right to move any court for orders of detention which have already been made or which may hereafter be made under the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (Act 52 of 1974) or with respect to any other action (including the making of any declaration under Section 9 of the said Act) which has already been or may hereafter be taken or omitted to be taken in respect of detention under such orders for the enforcement of the rights conferred by Article 21 and clause (4), clause (5) read with clause (6) and clause (7) of Article 22 of the Constitution and all proceedings pending in any court for the enforcement of any of the aforesaid rights with respect to orders of detention made under the said Act or any other action taken or omitted to be taken in respect of detention under such orders shall remain suspended for a period of six months from the date of issue of this order or the period during which the proclamation of emergency is in force, whichever period expires earlier. This order thus had spent its force after expiry of six months i.e. on 22nd June, 1975. Thereafter an order has been made by the President under Article 359 of the Constitution suspending the right to move any court for enforcement of the fundamental rights guaranteed by Articles 14, 21 and 22 of the Constitution. It is now well settled that during the continuance of the proclamation of emergency under Article 352 (1) of the Constitution the validity of an order made under Article 359 of the Constitution suspending the right to move any court for enforcement of any of the fundamental rights cannot be challenged as it is a power vested in the President by Article 359 of the Constitution. In this connection reference may be made to decision of the Supreme Court in AIR 1968 SC 765 Mohd. Yaqub v. State of Jammu and Kashmir where it has been held:

"There is nothing in Article 359 which in any way limits the power of the President to suspend the enforcement of any of the fundamental rights conferred by Part III. It is to our mind quite clear that the President has the power to suspend the enforcement of any of the fundamental rights conferred by Part III and there is nothing thereunder which makes a distinction between one fundamental right or another. As Article 359 stands, it seems to us, it clearly envisages that once a proclamation of emergency has been issued, the security of India or any part of the territory thereof may require that the President should suspend the enforcement of any of the fundamental rights conferred by Part III. There is in our opinion no scope for inquiry into the question whether the fundamental right the enforcement of which the President

*Reported in (1975) 1 Cal LJ 532

has suspended under Article 359 has anything to do with the security of India which is threatened whether by war or external aggression or internal disturbance, for Article 359 posits that it may be necessary for the President to suspend any of the fundamental rights in Part III for the sake of the security of India. There is thus a basic assumption in Article 359 that it may be necessary for the President to suspend the enforcement of any of the fundamental rights conferred by Part III in the interest of the security of India. If he considers that necessary, it is unnecessary in the face of that basic assumption to inquire whether enforcement of a particular fundamental right suspended by the President has anything to do with the security of India, for that is implicit in Article 359. It follows therefore that it is open to the President to suspend the enforcement of any of the fundamental rights conferred by Part III by an order under Article 359 and this Article shows that wherever such suspension is made it is in the interest of the security of India and no further proof of it is necessary."

7. It is also well settled that the question that there is no rule of emergency justifying the continuance of the proclamation of Emergency cannot be agitated in the writ court as it is entirely to the subjective satisfaction of the President. In AIR 1974 SC 806 (807), *Bhuth Nath Mate v. The State of West Bengal* it has been held by the Supreme Court:

"It was argued that there was no rule of emergency and yet the proclamation remains unretracted with consequential peril to fundamental rights. In our view this is a political, not justiciable issue and the appeal should be to the polls and not to the courts."

It has further been held:—

"Academic exercises in constitutional law are not for courts but jurists and we decline to hold the continuance of emergency void."

But nonetheless this suspension of the right to move for enforcement of certain fundamental rights in court by the Presidential order does not create any embargo on the right to challenge the validity of the order of detention on other grounds. In *Emperor v. Sibnath Banerjee*, AIR 1945 PC 156 the respondent who had been detained under the Defence of India Rules 1939 moved this Court for a writ of Habeas Corpus under Section 491 of the Code of Criminal Procedure. Repelling the contention on behalf of the Crown that the court has no jurisdiction to investigate the validity of the orders it was observed

"It is quite a different thing to question the accuracy of a recital contained in

a duly authenticated order, particularly where that recital purports to state as a fact the carrying out of a condition necessary to the validity of making of that order. In the normal case, the existence of such a recital in a duly authenticated order will, in the absence of any evidence as to inaccuracy be accepted by a court as establishing that the necessary condition was fulfilled. The presence of the recital in the order will place a difficult burden on the detenu to produce admissible evidence sufficient to establish a prima facie case that the recital is not accurate. Hence the Court had jurisdiction to investigate the validity of the order."

The observation of *Sibnath Banerjee's* case AIR 1945 PC 156 by the Privy Council was approved by the Supreme Court in *Jaichand Lal Sethia v. The State of West Bengal*, AIR 1967 SC 483 where it has been held:—

"During the pendency of the Presidential order the validity of the Ordinance or any rule or order made thereunder cannot be questioned on the ground that it contravenes Arts. 14, 21 and 22. But this limitation cannot preclude a citizen from challenging the validity of the Ordinance or any rule or order made thereunder on any other ground. If a citizen seeks to challenge the validity of the Ordinance, rule or order made thereunder on any ground other than the contravention of Arts. 14, 21 and 22 the Presidential Order cannot come into operation. It is not also open to a citizen to challenge the order on the ground of contravention of Art. 19, because as soon as a Proclamation of Emergency is issued by the President, under Art. 358 the provisions of Art. 19 are automatically suspended. But a citizen can challenge the validity of the order on a ground other than those covered by Art. 358, or the Presidential Order issued under Article 359 (1)."

8. The Conservation of Foreign Exchange and Prevention of Smuggling Activities Act 1974 (Act 52 of 1974) has been made to provide for preventive detention in certain cases for the purpose of conservation and augmentation of Foreign Exchange and Prevention of Smuggling Activities and for matters connected therewith. Section 3 of the said Act empowers the Central Government or the State Government or any officer of the Central Government not below the rank of a Joint Secretary to that Government specially empowered for the purpose of this section by that Government or any officer of the State Government not below the rank of the Secretary to the State Government specially empowered for the purpose of this section by that Government to make an order for detention of a

person in order to prevent him from indulging in smuggling goods or engaging in transporting or cancelling or keeping smuggled goods. On December 18, 1974, the Chief Secretary to the Government of West Bengal issued an order No. 21846 H.S., which is quoted below:—

"In exercise of the powers conferred by sub-section (1) of Section 3 of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (Act 52 of 1974) the Governor is pleased hereby to specially empower the Secretary to the Government of West Bengal, Home Department, for the purpose of the said Section.

This order shall come into force on the 19th day of Dec. 1974."

9. The contention of Mr. Banerjee, learned Advocate appearing on behalf of the petitioner that the law of Preventive Detention cannot be applied in respect of acts for which punitive laws are adequate and sufficient and which can be adequately dealt with under the punitive laws is based on a misconception of the purpose and scope of the punitive law as well as of the law of Preventive Detention. The law of Preventive Detention is designed to prevent a person from indulging in acts prejudicial to the security of the State whereas the punitive laws are designed to prosecute a person for commission or omission of acts which makes him liable for punishment under the said law. Thus the primary objective of punitive law is to launch a prosecution to impose punishment on a person for his committing offences. It is pertinent to refer in this connection the observation of the Supreme Court in *Haradhan Saha v. State of West Bengal*, AIR 1974 SC 2154. It has been held in the said case that the essential concept of preventive detention is that the detention of a person is not to punish him for something he has done but to prevent him from doing it the basis is the satisfaction of the Executive of a reasonable probability of the likelihood of the detenu acting in a manner similar to his past acts and preventing him by detention from doing the same. The criminal conviction on the other hand is for an act already done which can only be possible by trial and legal evidence. It has also been held in the said case:—

"The power of preventive detention is qualitatively different from punitive detention. The power of preventive detention is a precautionary power exercised in reasonable anticipation. It may or may not relate to an offence. It is not a parallel proceeding. It does not overlap with prosecution even if it relies on certain facts for which prosecution may be launched or may have been launched. An order of preventive detention may be

made before or during prosecution. An order of preventive detention may be made with or without prosecution and in anticipation or after discharge or even acquittal. The pendency of prosecution is no bar to an order of preventive detention. An order of preventive detention is also not a bar to prosecution."

The said decision has been relied upon in the case reported in AIR 1975 SC 1165 *Samir Chatterjee v. The State of West Bengal* and it has been observed as follows:—

"A criminal case needs evidence to establish the guilt of the accused beyond reasonable doubt. The fact that such evidence was not available does not mean that the detaining authority had not before him evidence on which he can be satisfied. This would not show that in asking for discharge of the petitioner from the criminal cases the authorities were taking the easier course of preventive detention rather than prosecuting him under the ordinary law of the land."

In view of the premises aforesaid this contention of the learned Advocate for the petitioner is not sustainable and so fails.

10. In this case it appears from the averments made in the application for vacating interim order that an order of detention has been passed already on February 24, 1974 that is long before the issuance of the rule wherein the said interim order is issued. As such the petitioner cannot get any relief without challenging the said order of detention. The petitioner, of course, can challenge the purported threat of his legal or fundamental right in a writ court when the alleged threat is per se illegal and without jurisdiction and when there has been, in fact, no order made at the time of moving the court against such purported threat of his right. In this connection reference may be made to the decision reported in AIR 1971 SC 1731 *D. A. V. College, Bhatinda v. The State of Punjab* where it has been held by the Supreme Court that the petition under Art. 32 of the Constitution in which the petitioners have made out the prima facie case that their fundamental rights are either threatened or violated will be entertained by this court and that it is not necessary for any person who considers himself to be aggrieved to wait till the actual threat has taken place. In this case there has already been made an order of detention long before the issuance of the said rule. Furthermore, there has been no challenge that the respondents have no power to make an order of preventive detention under Section 3 of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (Act 52

of 1974) nor there is nor can there be any challenge that the said Act is ultra vires Articles 14, 19, 21 and 22 of the Constitution in view of the Proclamation of Emergency as well as of the Presidential Order made under Art. 359 of the Constitution. With regard to the contention that the petitioner was not in possession of the alleged textiles of foreign origin nor he is a dealer in textiles goods and that he never indulged in smuggling in the past and there was no application of the mind of the detaining authority are questions which can only be agitated before the proper forum in an application for a writ of Habeas Corpus against the order of detention made against the petitioner. Moreover, it has been held by Chittosh Mukherjee, J. in Civil Rule No. 2102 (W) of 1975* that in an application for writ of Habeas Corpus against detention made under a law of preventive detention the detenu is not entitled as of right to get interim bail and the court's discretion in the matter of granting bail is regulated by the well settled principle that the detenu should establish that prima facie his case is bound to succeed. In this case as the detention order has not been challenged and the same being not before the court it is not possible for this court to hold on surmises that the petitioner if challenges that order of detention will succeed.

11. In the premises aforesaid it is not just and proper that the interim order issued on March 20, 1975 should be extended any further. I, therefore, vacate the interim order. The application for vacating the interim order thus succeeds and the application for extension of the interim order is dismissed. I make it clear that I do not make any finding on the rival contentions of the parties in the main rule.

12. There will be no order as to costs.

13. The operation of this order is stayed for a period of seven days.

14. Let a plain copy of this order be handed over to the learned Advocate for the petitioner.

Order accordingly.

*Reported in (1975) 1 Cal LJ 532

AIR 1976 CALCUTTA 32

AMIYA KUMAR MOOKERJI, J.

Sushan Chandra Pal and others, Petitioners v. State of West Bengal and others, Respondents.

C. R. Nos. 7105 (W) and 8335 (W) of 1974; 7295 (W)-7296 (W), 3873 (W) of 1975, D/- 21-7-1975.

IS/IS/D221/75/VSS

(A) Tolls Act (1851), S. 2 — Notification dated 21-10-1974 issued by Government of West Bengal levying tolls with regard to certain bridges — Failure to mention actual costs of their construction or repairs will not render notification ultra vires S. 2.

By merely using the expression 'tolls' and by further saying that the tolls shall be levied on roads and bridges made or repaired by the Government the Legislature in Section 2 of the Act clearly laid down for the guidance of the Government the principle that the rate of levy should be such as to meet the cost of repair of the roads and bridges and also for liquidating actual expenses incurred in their construction within a reasonable time. The element which distinguishes fees from taxes is also implied in the expression "toll" and though it may not be a "fee" as ordinarily understood it will clearly come within the scope of a compensatory tax. (Para 6)

It is not necessary for the State Government to state in the notification dated 21-10-1974 by which tolls were levied with regard to seven bridges, the actual costs of construction or repairs of each of the seven bridges mentioned therein. Powers to levy tolls can be validly exercised under S. 2 for the purpose of creating "Fund" for construction of new bridges and roads in future and maintenance of the existing roads and bridges. AIR 1966 Pat 462 and AIR 1967 All 24, Ref. (Para 8)

(B) Tolls Act (1851), S. 2 — Notification under, dated 21-11-1974 levying tolls with regard to certain bridges — Not necessary that toll must be correlated to actual expenses of construction or maintenance of a particular bridge upon which it is levied. AIR 1967 All 24 (26), Explained. (Para 15)

(C) Tolls Act (1851), S. 2 — Section if suffers from vice of excessive delegation of legislative powers after the schedule fixing maximum rate of toll has been repealed. (Constitution of India, Art. 245).

The Act has furnished definite guidelines for the Government under S. 2 to fix the rate of toll to be levied. AIR 1967 All 24 and AIR 1958 SC 909 and AIR 1965 SC 1107 and AIR 1967 SC 1895 and AIR 1973 SC 1374 and AIR 1975 SC 1007, Rel. on. (Para 25)

In the preamble of the Act, it is stated that it is an Act enabling Government to levy tolls in public roads and bridges. So, the policy of the Act has clearly stated the purpose for which the tolls should be collected and spent. The guidance for fixing the rate can be found in the amount of expenditure for the purpose of repairs as well as for construction of future roads and bridges and the rate should be fixed

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Delhi High Court

AIR 1976 DELHI 1

S. N. SHANKAR AND H. L. ANAND, JJ.
New Delhi Municipal Committee,
Petitioner v. The State of Andhra Pradesh,
Respondent.

S. C. A. Nos. 56, 55 and 57 of 1975,
D/- 1-8-1975.

(A) Constitution of India, Article 133

(1) — Leave to appeal — Grant of —
Relevant considerations.

Expression "need" connotes something more than a mere wish and introduces an element of necessity. While it is neither necessary nor desirable to encase the expression "need" within the strait-jacket of any judicially evolved definition where Parliament in its wisdom has thought it fit to leave it undefined or to attempt to lay down exhaustively the circumstances in which the High Court may be justified in granting leave, broadly a matter would appear to need a decision of the Supreme Court either where the examination of the question by the Courts discloses a conflict of judicial opinion or the decision of the question involved turns on an application of the first principles and the decided cases do not provide a guide and even otherwise where two views were clearly possible on a question, one of which had been taken by the High Court. (Para 11)

Where the question involved in an appeal appears to the High Court to be settled by a decision of the Supreme Court directly on the question, it would be difficult for the High Court to say that the question still survives so as to need a consideration of and a decision by the Supreme Court. (Para 11)

In the instant case having regard to the importance of the question, its revenue implications for the various States and the local bodies in the Union Terri-

tories and the likelihood of such questions recurring in relation to other States or local bodies other than the New Delhi Municipal Committee and the need for an authoritative decision of the Supreme Court touching the various facets of the question, leave to appeal granted in respect of the question whether the properties of the States situated in the Union Territory of Delhi would be exempt from house-tax leviable under the Punjab Municipal Act, 1911 by virtue of exemption granted to such properties by Article 289 (1) of the Constitution of India from Union taxation. (Para 15)

Cases Referred: Chronological Paras
AIR 1970 SC 1126 = (1970) 3 SCR 881 7
AIR 1970 SC 2097 = (1971) 2 SCR 197 7
AIR 1968 SC 637 = (1968) 2 SCR 103

7, 14
AIR 1963 SC 1760 = (1964) 3 SCR 787

6, 10, 12
Bikramjit Nayyar, for Petitioner; P.
P. Rao, with A. K. Gangoli, for Respondent.

H. L. ANAND, J.:— This judgment would dispose of S. C. A. Nos. 55/75, 56/75 and 57/75.

2. By these applications under Article 133 (1) of the Constitution of India, the New Delhi Municipal Committee seeks leave to appeal to the Supreme Court against our judgment accepting the petitions of the States of Andhra Pradesh, Jammu and Kashmir and Punjab under Articles 226 and 227 of the Constitution of India challenging the validity of the imposition of house-tax by the Committee on the immovable properties belonging to the States within its territorial limits.

3. The principal question that these petitions raised for our consideration was whether the immovable properties belonging to the States situated in New Delhi were immune from house-tax leviable under the provisions of the Punjab Municipal Act, 1911, as applicable to

Delhi, by virtue of the exemption granted to the property of a State from "Union taxation" by Article 289 (1) of the Constitution of India. The subsidiary question that arose for consideration was as to whether the expression "State" in clause (4) of Article 246 of the Constitution of India meant and included the Union Territories or not.

4. On the principal question, it was contended on behalf of the various states that by virtue of Article 289 (1) of the Constitution of India, the property of a State was exempt from Union taxation; that the expression "Union taxation" would mean taxation which the Union was empowered to impose; that by virtue of Article 265 of the Constitution of India, Union taxation must be co-extensive with the laws which Parliament was competent to make; that by virtue of Article 246 (4) of the Constitution of India, the power of Parliament to make laws extends not only to subjects enumerated in the Union List and the Concurrent List but also to matters included in the State List in relation to the Union Territories; that any taxation which has its genesis in any law made by Parliament or which is deemed to have been made by Parliament would be Union taxation; that the agency through which taxes were collected or the funds to which the proceeds may go or the entity to which the funds are ultimately allocated was wholly irrelevant for the determination of the question as to whether a particular tax was part of Union taxation; that tax on property leviable in the Union Territory of Delhi by virtue of the provisions of the Punjab Municipal Act, as extended to Delhi, though relating to a matter that falls within the State List, would nevertheless be deemed to be Union taxation because by virtue of the application of the Act to the Union Territory of Delhi, it would be deemed to have been incorporated in law made by Parliament and, therefore, be treated as law made by Parliament by virtue of its power under clause (4) of Article 246 of the Constitution of India and that the properties of the various States situated in the Union Territory of Delhi would, therefore, be exempt from tax on property.

5. On the other hand, it was contended on behalf of the Committee that the test to determine if a tax formed part of Union taxation within the meaning of Article 289 (1) was if the proceeds from it formed part of the Consolidated Fund of India under Article 266 (1) of the Constitution of India, that the proceeds of tax on property under the Act did not form part of the Consolidated Fund of India but were kept by the Committee for its own purpose; that the tax on property was enumerated as one of the subjects in the State List; that the Act was a piece of State legislation and did not, by virtue

of its application to the Union Territory of Delhi, become a piece of Central legislation; that by virtue of Article 246 of the Constitution of India the Union legislation and the State legislation are two different fields of legislative action and taxation which has its genesis in any of the matters enumerated in List I or List III alone would form part of Union taxation; that the Act was not made by Parliament by virtue of power under Article 246 (4) of the Constitution of India; that Union had no power to impose tax on property and that the property of the various States in the Union Territory would, therefore, not be exempt from this tax.

6. On an examination of the legislative history of the Punjab Municipal Act, 1911, its extension to the Union Territory of Delhi by virtue of central enactments from time to time, the scheme of the Constitution of India with regard to the distribution of legislative powers between the States and the Union and provisions of Articles 246 (4) and 289 (1) of the Constitution of India, we came to the conclusion that by virtue of the extension of the said Act to Delhi in exercise of the power conferred by the Central enactments, the Punjab Municipal Act, 1911 had become a Central Act as if made by Parliament under clause (4) of Article 246 of the Constitution of India; that Union taxation would be co-extensive with the power of Parliament to make laws; that by virtue of clause (4) of Article 246 of the Constitution of India, Parliament was competent to make laws with regard to the Union Territories irrespective of whether the law related to any subject which was enumerated in the State List because in case of Union Territories, under the scheme of the Constitution, Parliament becomes repository of all legislative powers and that the tax leviable under the Punjab Municipal Act in the Union Territory of Delhi would be part of Union taxation and the property of the States would, therefore, be exempt from such taxation by virtue of the provisions of Article 289 (1) of the Constitution of India. In support of the aforesaid conclusion, we sought re-enforcement from the decision of the Supreme Court in the case of *Re: The Bill to Amend Section 20 of the Sea Customs Act, 1878 and Section 3 of the Central Excises and Salt Act, 1944*, 1964 (3) SCR 787 = (AIR 1963 SC 1760).

7. On the subsidiary question, whether the expression "State" in clause (4) of Article 246 of the Constitution of India included the Union Territory of Delhi, we found that prior to its amendment by the Constitution (Seventh Amendment) Act, 1956, clause (4) of Article 246 of the Constitution of India empowered Parliament to make laws with

respect to any matter for any part of the territory of India not included in Part A, or Part B of the First Schedule; that under the scheme of the Constitution, prior to the said Act, Union territories did not figure in the Constitution. clause (4) of Art. 246 as then worded, therefore, empowered Parliament to make laws with respect to the territories of India comprised among others in Part C States; that the expression "State" is not defined by the Constitution of India but the definition of the expression in the General Clauses Act, as it stood before the constitutional amendment, meant, "a Part A State, a Part B State or a Part C State", that after the aforesaid constitutional amendment, Section 3 (58) of the General Clauses Act was also modified pursuant to the Adaptation of Laws Order, 1956 issued by virtue of the provisions of Article 372-A of the Constitution of India and according to the amended definition, the term "State" in relation to the period after the said amendment meant "a State specified in the First Schedule to the Constitution and shall include a Union Territory". We further found that there was an apparent conflict between the two decisions of the Supreme Court in the case of *Management of Advance Insurance Co. Ltd. v. Shri Gurudasmal*, AIR 1970 SC 1126 and *Shiv Kirpal Singh v. V. V. Giri*, AIR 1971 SC 2097 on the question if the amended definition of the expression "State" in the General Clauses Act would apply to the interpretation of the Constitution of India notwithstanding that Article 367 of the Constitution of India permitted the use of the General Clauses Act for the purpose of interpretation of the Constitution of India as adapted under Article 372 of the Constitution of India only; and that the adaptation under Article 372-A of the Constitution of India could not enure for the purpose of interpretation of the Constitution. It was, however, unnecessary for us to pursue the question any further because we held, following the decision of the Supreme Court in *T. M. Kanniyen v. Income-tax Officer*, AIR 1968 SC 637, that the definition of the expression "State" in the adapted Section 3 (58) of the General Clauses Act was repugnant to the subject and context of Article 246 (e) of the Constitution of India and that the amended definition would not, therefore, regulate the provisions of Article 246 of the Constitution of India and that in interpreting clause (4) of Article 246 of the Constitution of India, the distinction between the States and the Union Territories could not be lost sight of.

8. Leave to appeal against the judgment is sought to be justified on behalf of the Committee on the ground that both the principal and the subsidiary questions are questions of considerable importance which not only involve an interpretation

of Arts. 246 and 289 of the Constitution of India, as indeed the scheme of the Constitution with regard to the distribution of legislative powers between the Union and the States but is a question of general importance having revenue implications for the various States as well as the Committee and similarly situated in other local bodies.

9. On behalf of the various States it is not disputed that the questions before us were substantial questions as to the interpretation of the Constitution and were of general public importance but leave was nevertheless opposed on the ground that inasmuch as both the questions were answered by us on the basis of the decisions of the Supreme Court, it could not be said that the questions still needed to be decided by it.

10. On behalf of the Committee it was, however, contended that the decision of the Supreme Court in *Re: The Bill to Amend Section 20 of the Sea Customs Act, 1878 and Section 3 of the Central Excises and Salt Act, 1944*, 1964 (3) SCR 787 = (AIR 1963 SC 1760) even while containing weighty observations which could support the conclusion arrived at by us on the principal question did not nevertheless directly involve the question before us nor was the Supreme Court called upon in that case to consider the various facets of the question, and that it could not, therefore, be said that with the aforesaid decision, no question survived which needed to be considered and decided by the Supreme Court.

11. Article 133 (1) of the Constitution of India empowers the High Court to grant a certificate of fitness if, inter alia, the High Court is satisfied that the question which the appeal involves needs to be decided by the Supreme Court. The expression "need" connotes something more than a mere wish and introduces an element of necessity. While it is neither necessary nor desirable to encase the expression "need" within the strait-jacket of any judicially evolved definition where Parliament in its wisdom has thought it fit to leave it undefined or to attempt to lay down exhaustively the circumstances in which the High Court may be justified in granting leave, broadly a matter would appear to us to need a decision of the Supreme Court either where the examination of the question by the Courts discloses a conflict of judicial opinion or the decision of the question involved turns on an application of the first principles and the decided cases do not provide a guide and even otherwise where two views were clearly possible on a question, one of which had been taken by the High Court. Whatever be limits of the powers of the High Court under the aforesaid Article, it appears to us to be obvious that

where the question involved in an appeal appears to the High Court to be settled by a decision of the Supreme Court directly on the question, it would be difficult for the High Court to say that the question still survives so as to need a consideration of and a decision by the Supreme Court.

12. In *Re: The Bill to amend Section 20 of the Sea Customs Act, 1878 and Section 3 of the Central Excises and Salt Act, 1944*, 1964 (3) SCR 787 = (AIR 1963 SC 1760), the provisions of Article 289 (1) of the Constitution of India fell for consideration before the Supreme Court as a result of a proposal to introduce in Parliament a bill to amend Section 20 of the Sea Customs Act and Section 3 of the Central Excises and Salt Act with a view to applying provision of the said two Acts to goods belonging to the States in regard to which certain doubts arose as to whether the provisions of the Bill were inconsistent with Article 289 of the Constitution of India, as a result of which the matter came before the Supreme Court on a Presidential reference under Article 143 of the Constitution of India. The contention on behalf of the States was that in interpreting Article 289 of the Constitution, it must be held that the immunity extended to all Union taxation, whether "on" property or "in relation" to property while it was contended on behalf of the Union that the immunity from taxation granted by the Article was confined to tax on property and on income and that the immunity did not extend to all taxes and should not be interpreted to include taxation "in relation to property". The contention of the Union prevailed and it was held that the property of the State would be exempt from all taxes "on property" which may be leviable by the Union. In the course of the arguments, a contention was raised that inasmuch as List I did not empower Parliament to make laws with respect to tax on property, the expression "property" in Article 289 (1) of the Constitution of India must be construed as meaning taxes in relation to property. This contention was negatived by Sinha, C. J., as he then was and who spoke for the Court, on the ground that by virtue of cl. (4) of Article 246 of the Constitution of India, Parliament would have power to make laws with respect to the Union Territories even in respect of matters enumerated in the State List including taxation on property.

13. While the aforesaid decision is an authority for the proposition that Union taxation would be taxation imposed by laws which Parliament was competent to make and that by virtue of Article 246 (4) of the Constitution of India, Parliament would be competent to make laws in respect of the Union Territories

with reference to even subjects enumerated in the State List including laws imposing tax on property, the Supreme Court was not directly concerned with the question if having regard to the legislative history of the Punjab Municipal Act, 1911, it could be said to partake the character of a central enactment or be deemed to have been made by Parliament by virtue of power conferred on it by clause (4) of Art. 246 of the Constitution of India and if the house tax leviable under the said provision would be Union taxation in relation to the Union Territories notwithstanding that the proceeds from the State tax never formed part of the Consolidated Fund of India but were retained by the Committee for its own purpose.

14. The decision on the subsidiary question, however, appears to us to be fully covered by the decision of the Supreme Court in the case of *T. M. Kannian v. Income-tax Officer*, AIR 1968 SC 637 and could not, therefore, be said to survive so as to need a consideration and a further decision by the Supreme Court.

15. Having regard, therefore, to the importance of the principal question, its revenue implications for the various States and the local bodies in the Union Territories and the likelihood of such questions recurring in relation to other States or local bodies other than the Committee and the need for an authoritative decision of the Supreme Court touching the various facets of the question, we grant leave to the Committee to appeal against the aforesaid judgment but would, in the circumstances, confine the leave to the principal question, that is, whether the properties of the States situated in the Union Territory of Delhi would be exempt from house-tax leviable under the Punjab Municipal Act, 1911 by virtue of exemption granted to such properties by Article 289 (1) of the Constitution of India from Union taxation.

16. In the circumstances, there would be no costs.

S. N. SHANKAR, J.:— I agree.

Ordered accordingly.

AIR 1976 DELHI 4

V. S. DESHPANDE AND
YOGESHWAR DAYAL, JJ.

Indo Foreign Commercial Agency
(Produce) Pvt. Ltd., Petitioner v. Union
of India and others, Respondents.

Civil Writ No. 175 of 1974, D/- 31-7-1975.

(A) Imports and Exports (Control)
Act (1947), Section 3 — Scheme for cash
assistance against exports and additional
incentive assistance for 3 years — With-
IS/KS/D572/75/KNA

drawal of scheme after one year — Validity — Promissory estoppel and estoppel distinction. (Evidence Act (1872), S. 15).

A scheme under the Imports and Exports (Control) Act for cash assistance was withdrawn after one year because the prices of the goods to be exported had shot up, the exporters would not suffer any loss and therefore no cash assistance was necessary. The exporters challenged the validity of the withdrawal of the scheme before 3 years on the ground that they had entered into commitments on the basis of the scheme and that the Government could not, on the doctrine of promissory estoppel withdraw the scheme before the expiry of 3 years.

Held: (a) As distinguished from estoppel as a rule of evidence embodied in Section 115 of the Evidence Act which relates to a representation as to an existing fact, the doctrine of promissory estoppel relates to a representation of a future intention. Broadly speaking the conditions necessary for the application of the doctrine of promissory estoppel are the same as those for the ordinary estoppel with the difference that the former would apply even when the representation is as to the future while the latter applies when it relates to the present. (Para 8)

(b) When the petitioners have not changed their position to their detriment by acting upon the representation made, the principle of promissory estoppel will not apply. (Para 10)

(c) Further the principle of promissory estoppel will not apply to policy actions by Government. While ordinary administrative action is fully subject to judicial review, the greater the element of policy involved in Government action, the more difficult it is for the Courts to review such action. The Regulation of imports and exports and the question whether the export of a certain commodity should be encouraged by cash assistance are questions of policy.

The promulgation and the withdrawal of the policy of cash assistance were both policy actions and not ordinary administrative acts. (Para 11)

Representations of policy made by Government would also be subject to such implied terms. (Para 15)

A representation, even if acted upon, would not estop the maker of the representation if the implied condition on which the representation was based no longer continues to exist. (Para 16)

(d) The incentive to increase the exports was connected with the normal cash assistance to offset losses. Since the losses turned into profits and the volume of exports also increased, the Government was justified in withdrawing the normal cash assistance to offset losses as also the in-

centive cash assistance for increase of exports. (Para 23)

Cases Referred: Chronological Paras
AIR 1975 SC 1967 = C. A. Nos. 1652 to 1654 of 1974. D/- 23-7-1975. 12

AIR 1973 SC 2641 = (1973) 2 SCC 650 20

AIR 1972 SC 1126 = (1972) 1 SCC 492 19

AIR 1972 SC 1311 = (1972) 1 SCC 857 8

AIR 1968 SC 718 = (1968) 2 SCR 366

14, 17

AIR 1963 SC 563 = (1962) 3 SCR 72 14

(1960) 2 QB 274 = (1960) 3 WLR 446 15

1951 AC 837 = (1951) 2 All ER 278- 13

(1949) 1 KB 227 = (1948) 2 All ER 767 13

(1921) 3 KB 500 = 91 LJKE 75 12, 13

(1866) 1 HL 129 = 149 RR 543 10, 11

Anoop Singh, for Petitioner; A. B. Saharya, Central Govt. Counsel with K. B. Soni, for Respondents.

V. S. DESHPANDE, J.:— Can equity or promissory estoppel bar the Government from changing a scheme or policy before the expiry of its period and if so under what circumstances? This question has come up for consideration in this and the connected writ petition (No. 183 of 1974) in the background of law and facts stated below.

2. The Imports and Exports (Control) Act, 1947 enables the Central Government to regulate in various ways the imports and exports of commodities into and out of India. This may be done by the issue of orders under Section 3 of the Act. Such orders may be legislative or executive. Walnut in shell and also its kernel mainly grown in Jammu and Kashmir is exported from India mainly to the Western Countries. With a view to encourage this export, a scheme was announced by the Government on 2nd February, 1973, to be effective for three years from 1st October 1972 to 30th September, 1975. The first paragraph of the scheme stated the decision of the Government to allow cash assistance against exports of walnut kernel as well as in shell at 5 per cent. of the F. O. B. value to the registered exporters on exports made during the period from 1st October, 1972, to 30th September, 1975. Over and above this normal cash assistance of 5 per cent. an additional incentive assistance was also announced in the second paragraph of the scheme as follows:—

(1) 2 1/2 per cent. of the F. O. B. value if the exports of a registered exporter during 1-10-1972 to 30-9-1973 exceed by at least 10 per cent. of their exports during 1-10-1971 to 30-9-1972.

(2) 2 1/2 per cent. of the F. O. B. value on the exports made during 1-10-1973 to 30-9-1974 if they exceed by at least 10 per cent. of the exports for the year 1-10-1972 to 30-9-1973, and

(3) 2 1/2 per cent. of the F. O. B. value of the exports made during 1-10-1974 to 30-9-1975 if the exports exceed by

at least 10 per cent. of the exports during the previous year, namely, 1-10-1973 to 30-9-1974.

The third paragraph of the scheme stated that application in the prescribed form may be submitted for the purpose of obtaining both kinds of cash assistance, namely,

(a) the normal cash assistance of 5 per cent. and

(b) the additional incentive assistance of 2 1/2 per cent. within three months of the end of the relevant 12 months period supported by the prescribed documents.

3. On 20th August, 1973, the Government wrote to the Secretary, Upper India Exporters Association of which both the petitioners are members as follows:—

"There has been a world failure in production of many kinds of edible nuts this year as a result of which prices of all kinds of edible nuts including walnuts have shot up considerably. In this context it is felt that there should be no losses in the export of walnuts this year, and there is, therefore, ample justification for review of the decision to grant cash subsidy on walnut exports. Before a final decision in this regard is taken you are requested to represent your position in writing within 10 days from the date of issue of this letter together with detailed justification, if any, for the continued grant of cash subsidy on walnut exports."

The Association replied to this letter on 29th August, 1973, as follows:—

"The matter will be discussed in a regular meeting shortly and considered views of the members and justification for continuity of the Cash subsidy on walnuts exports will be advised to you very soon latest by 10-9-1973."

The Association, however, did not give any reply by 10-9-1973 and on the other hand wrote a second letter to the Government on that date as follows:—

"A meeting of the trade was ordered but it could not be held since some of the important members are presently out of India on business. After holding a meeting of the Association, the findings will be conveyed to you in due course." The Government thereafter withdrew the scheme dated 2nd February 1973 with effect from 30th September 1973 by a letter issued on 28th September 1973 on a review of the various developments which had taken place.

4. The cash assistance scheme thus lasted for only one year instead of three years. The validity of the order dated 28th September 1973 is challenged in these writ petitions. Though various grounds were urged in support of the writ petitions in their oral arguments, the learned counsel for the petitioners, namely, Shri Anoop Singh and Shri P. C.

Khanna, confined themselves in urging only the following grounds, namely:—

(1) The Government by the promulgation of the scheme dated 2nd February, 1973, made a representation that the scheme would operate for three years from 1-10-1972. Relying upon this representation the petitioners changed their position to their detriment by investing and spending a lot of money on the urbanisation of their trade and by entering into contracts for the purchase of walnut to be exported to foreign countries. The walnut season ends with September each year. The purchase of the walnut in the season and its transport from Jammu and Kashmir to the Ports and its export outside can be completed only after September. Due to the action of the Government in winding up the scheme from 30th September, 1973, the petitioners could not take advantage of the cash assistance even for the year 1972-73. Further, the Government was estopped from withdrawing the scheme before the end of the promised three years both by promissory estoppel as also by equity.

(2) The justification for the withdrawing of the scheme was based on the rise in foreign prices in the year 1972-73. No account was taken as to what the prices would be in the subsequent two years. There was no justification, therefore, for withdrawing the scheme for the subsequent years, and

(3) The scheme was divisible into two independent parts, namely, (a) the normal cash assistance of 5 per cent. for all exports, and (b) the incentive cash assistance for increasing exports each year at least by 10 per cent. over the exports of the previous year. The reason for withdrawing the scheme was that the walnut exporters would not suffer any loss in view of the rise in the world prices. This reason could apply to the withdrawal of the normal cash assistance but it would not apply to the withdrawal of the incentive cash assistance. In regard to the latter, therefore, at any rate, the withdrawal was invalid.

5. The defence of the Government was that the scheme was announced on 2nd February, 1973 on the assumption that the cash assistance for covering the actual loss to the exporters of walnut would be required for some considerable time, that is, for three years. The principle on which the scheme was based was to offset the loss which the exporters, would otherwise incur. The scheme was not intended to be a source of profit to the exporters. In July-August, 1973, due to worldwide shortage of edible nuts there was a spurt in the international prices for walnuts resulting in considerable increase in unit value realisation on exports. Accordingly the Government felt that there was no longer any likelihood of any losses

being incurred on exports and therefore hardly any justification for continuing the scheme of cash assistance. An opportunity was given to the exporters to justify the continuation of the cash assistance scheme but the exporters did not avail themselves of the opportunity. This was in reply to the first contention of the petitioners. As to the second contention, the writ petitions were filed in February, 1974. There was neither any pleading nor any material put forward by the petitioners regarding years 1973-74 and 1974-75 from which it could be argued that the scheme could not have been withdrawn in respect of the second and the third years. As to the last contention, it was pointed out that the scheme was one and indivisible. If the normal cash assistance itself could be withdrawn, the incentives also had to be withdrawn.

6. In the rejoinders filed by the petitioners, there was no denial of the averment of the Government that world prices had risen in 1972-73 after the promulgation of the scheme and that the exporters were, therefore, not likely to suffer any loss. The petitioners evaded the issue by denying that the cash assistance had been announced by the Government with the object of off-setting the losses to the exporters. The petitioners said that the question of actual loss having been suffered or not by the exporters was irrelevant. The petitioner in the present writ petition, however, admitted that it may be correct that the cash incentive was not intended to be given as a source of profit to the exporters but it was given to reduce losses which the trade was suffering in competition with China and the United States and the uncertainty for booking orders in advance by foreign buyers. The petitioners pointed out that the contracts with foreign buyers had been entered into by them long before the cash assistance scheme was withdrawn. The petitioners would have to fulfil these contracts. Had the Government withdrawn the cash assistance before the petitioners entered into these contracts, the petitioners may not have entered into some of these contracts.

7. The principal ground urged by the petitioners is that the Government must be held bound by the representation made on 2nd February, 1973, that the scheme of cash assistance would operate for three years. Since the representation by the Government to the public at large and to the exporters of walnut in particular was made in respect of a future period, the petitioners would have to show that the Government was estopped from withdrawing the representation before the expiry of three years either by the principle of promissory estoppel or by some equity.

Promissory estoppel:—

8. As distinguished from the estoppel as a rule of evidence embodied in Section 115 of the Evidence Act which relates to a representation as to an existing fact, the doctrine of promissory estoppel relates to a representation of a future intention. The doctrine is still evolving and there is considerable uncertainty as to the conditions which must be fulfilled before it can be applied. This has been pointed out in Chapter XIV of *Spencer-Bower and Turner on Estoppel by Representation*, Second Edition. As between two private parties, the doctrine of promissory estoppel was applied by the Supreme Court in *Turner Morrison and Co. Ltd. v. Hungerford Investment Trust Ltd.*, (1972) 1 SCC 857 = (AIR 1972 SC 1311). Broadly speaking the conditions necessary for the application of the doctrine of promissory estoppel are the same as those for the ordinary estoppel with the difference that the former would apply even when the representation is as to the future while the latter applies when it relates to the present.

9. We have, therefore, to inquire firstly whether the circumstances of the case are such as to raise the bar of promissory estoppel or an analogous equity and secondly whether such a bar can be raised against the Government in respect of a policy decision and its withdrawal.

10. On the first aspect of the question, the petitioners have to prove that relying on the representation of the Government, they have changed their position to their detriment. The petitioners were already exporters of walnut before the scheme of cash assistance was announced. They have continued to be such exporters even after the scheme has been withdrawn. They did not either start exporting walnut because they relied upon the scheme nor have they discontinued the exports after they found they could not rely on the scheme. It was urged for them that they were encouraged to expand their trade by relying upon the scheme. It may be assumed for the sake of argument that some of the expansion would not have occurred but for the scheme. But the expansion of the trade cannot be said to be an act which caused any detriment to the petitioners. Therefore, even considering the principle of promissory estoppel or some principle of equity analogous to the equity in *Ramsden v. Dyson*, (1866) 1 HL 129 (170) which has been applied in India, it cannot be said that the petitioners have changed their position to their detriment by acting upon the representation made by the Government.

11. The application of the principle of promissory estoppel for an analogous principle of equity is rendered

more difficult in relation to the Government as distinguished from a private person. The executive action of the Government may be of two distinct kinds. Firstly, the Government may act like a private person under the rules of private law. When, for example, the Government purchases property or enters into contracts in such transactions, the Government is subject to the rules of the private law including the doctrines of estoppel, promissory estoppel and the equity in *Ramsden v. Dyson*, (1866) 1 HL 129. But there is a totally different kind of action which the Government may take. This relates to enunciation of policy and action thereunder. The difference between an ordinary administrative act and policy action is well known in administrative law. While ordinary administrative action is fully subject to judicial review, the greater the element of policy involved in Government action, the more difficult it is for the Courts to review such action. Between which of these two categories does the promulgation of the scheme of 2nd February, 1973 fall? The power to regulate imports and exports is given to the Government by statute and the promulgation of the scheme is a method of implementing the statutory policy. The regulation of imports and exports and the question whether the export of a certain commodity should be encouraged by cash assistance are questions of policy. For, these decisions are taken by the Government in the light of overall national interest. The balance of trade and the position of the foreign exchange reserves have to be guiding considerations in taking these decisions. These considerations do not relate to any individual such as the particular exporters or the petitioners. They relate to the country as a whole. It is clear, therefore, that the promulgation and the withdrawal of the policy of cash assistance were both policy actions and not ordinary administrative acts.

12. Both an ordinary representation as also a policy declaration may be subject to an implied condition. Such a condition may not be expressed but may be implied in the circumstances of the particular case. In the well known case of *Rederiaktiebolaget Amphitrite v. The King*, (1921) 3 KB 500, the British Government had given an undertaking to the petitioners who are ship owners that their ship may be sent to London and that it would not be detained there. On the faith of that undertaking the owners sent the ship to London. The British Government thereafter withdrew the undertaking and detained the ship. Nevertheless, the claim for damages for breach of contract was turned down by the Court with the following observation:—

"No doubt the Government can bind itself through its officers by a commercial

contract, and if it does so it must perform it like anybody else or pay damages for the breach. But this was not a commercial contract, it was an arrangement whereby the Government purported to give an assurance as to what its executive action would be in the future in relation to a particular ship in the event of her coming to this country with a particular kind of cargo. And that is, to my mind, not a contract for the breach of which damages can be sued for in a Court of law. It was merely an expression of intention to act in a particular way in a certain event. My main reason for so thinking is that it is not competent for the Government to fetter its future executive action, which must necessarily be determined by the needs of the community when the question arises. It cannot by contract hamper its freedom of action in matters which concern the welfare of the State." The latest refinement of this doctrine is to be found in the recent decision of the Supreme Court in the *Indian Aluminium Company v. State of Kerala*, announced on 23rd July, 1975, (Reported in AIR 1975 SC 1967). The Electricity Board had entered into a contract with the company to charge lower rates for the supply of electricity for a long period. The Board later on raised the rates of electricity supplied to the company on the ground that the statute under which the Board functioned required that, as far as possible, the Board shall not carry out its operations at a loss. It was argued for the Board that the statutory discretion of the Board could not be fettered for a future period by a stipulation in an agreement. The Court observed that while this principle was unexceptionable, it could not be applied to the case before the Court. The private contract entered in general terms could not fetter the statutory discretion of the Board but a contract entered into in exercise of a statutory power could not be said to fetter the statutory discretion of the Board and could not, therefore, be ignored by the Board. In the present case, there is no contract between the parties which could fetter the discretion of the Government in changing or withdrawing the policy.

13. In *Robertson v. Minister of Pensions*, (1949) 1 KB 227, Denning, J., applied the principle of estoppel against the Government. This decision was later expressly disapproved by the House of Lords in *Howell v. Falmouth Boat Construction Co. Ltd.*, 1951 AC 837. But even Denning, J., in *Robertson's* case had observed regarding the decision in *Rederiaktiebolaget Amphitrite* case (1921) 3 KB 500 as follows:—

"In my opinion the defence of executive necessity is of limited scope. It only avails the Crown where there is an im-

plied term to that effect or that is the true meaning of the contract."

14. As in a contract so also in a representation, there may be an implied term. The policy of the Government in the imports and exports matters is based on ever changing international circumstances in the field of international trade and the balance of foreign exchange. The declaration of a policy by the Government on 2nd February, 1973, was therefore subject to the implied condition that the policy was likely to change if these circumstances altered. In *Union of India v. Anglo Afghan Agencies*, (1968) 2 SCR 366 = (AIR 1968 SC 718), a decision relied upon by the petitioners also the Supreme Court observed at page 379-F that "the Controller could impose restrictions if special considerations such as difficult foreign exchange position or other matters which have a bearing on the general interest of the State warranted." In *M/s. Ramchand Jagadish Chand v. Union of India*, (1962) 3 SCR 72 = (AIR 1963 SC 563), also the Supreme Court had observed that though the licensing authority would normally issue an import licence for 100 per cent. of the goods exported "having regard to special considerations such as difficult foreign exchange position or other matters which have a bearing on the general interest of the State, import licences for a smaller percentage may be granted to the exporters". These decisions recognise the power of the Government to change its policy due to general circumstances. Even if a concluded contract cannot fetter this discretion of the Government muchless can a mere representation do so.

15. Courts have recognised such implied terms even in contracts entered into by Government. On the same principle, representations of policy made by Government would also be subject to such implied terms. In *Crown Lands Commissioners v. Page*, (1960) 2 QB 274, the Court refused to imply a covenant for quiet enjoyment in a Crown lease so as to exclude the Crown from exercising the statutory exclusion powers. Professor S. A. de Smith in his *Judicial Review of Administrative Action*, 3rd Edition, page 279, has, therefore, summarised the law on this point as follows:—

"Contracts and covenants entered into by the Crown are not to be construed as being subject to implied terms that would exclude the exercise of general discretionary powers for the public good; on the contrary, they are to be construed as incorporating an implied term that such powers remain exercisable."

The petitioners contended that in the declaration of 2nd February, 1973, no mention was made that the cash assistance was being granted to the exporters of

walnut to offset the losses. But the Government has sworn an affidavit that it was this consideration which formed the basis of the issue of this policy. This averment has not been controverted in the rejoinder. As requested by the petitioners, we called for the relevant Government files and found that the notings of the 10th and 12th of January, 1973, which form the basis of the issue of the policy on 2nd February 1973 (of which a copy has been taken on record) support the defence taken by the Government. In the noting of 10th January, 1973, it was stated that:—

"The flat rate of first 5% is to compensate for the loss being incurred by the Trade on exports of walnuts. Trade has furnished detailed break-up of its costs and realisation which has been scrutinized by the Ministry of Finance (P. T. & T. Division) to prove the uneconomic nature of this Trade. Higher rate of cash assistance was suggested to provide for an incentive to the Trade to appreciably increase foreign exchange earnings from the exports of this commodity."

16. It is settled law that a contract itself may be frustrated if an implied condition on which it was based disappears or cannot be fulfilled. Similarly, a representation, even if acted upon, would not estop the maker of the representation if the implied condition on which the representation was based no longer continues to exist.

17. In *Union of India v. Anglo-Afghan Agencies*, (AIR 1968 SC 718), the Supreme Court recognised that the change of circumstances would lead to change of policy. The change should, however, be made for good reasons and should not be arbitrary and capricious. In the present case, the change of circumstances took away the basis of the policy, namely, the implied condition that cash subsidy was necessary to offset the trade losses of walnut exporters. Further, an opportunity was given by the Government to the Trade to show cause why the policy should not be changed. It is the trade which failed to take advantage of the opportunity probably because the traders were aware that the change of policy was justified. As they had no cause to show why the policy should not be changed, they did not attempt to do so.

18. At the time of declaring the policy, the Government may not anticipate that the circumstances on which the policy is based, would change. The declaration of policy may not also be expressly based on the existence of circumstances. But it is always implicit in the promulgation of the policy that it is based on the existence of circumstances and is made with a view to achieve certain objects. If the circumstances change and

the achievement of objects become either impossible or unnecessary, then a change in policy would be justified. Further, instances of reasons which would justify the change of policy by the Government are furnished by two subsequent decisions of the Supreme Court.

19. In *State of Tamil Nadu v. S. K. Krishnamurti*, (1972) 1 SCC 492 = (AIR 1972 SC 1126), the State Government had prescribed text books for the schools for a period of three years. Relying on this declaration, the petitioners and others incurred heavy expenditure on the publication of text books for the schools. But the State Government later decided to nationalise the publication of school text books and prescribed new text books in place of the old ones. The publishers contended that the State Government was estopped from going back on the representation which was acted upon by the publishers to their detriment. This contention failed. The representation that the text books once prescribed would remain in force for three years was not necessarily addressed to the publishers. It was more an injunction to the managers of the schools. The prescribing of the text books does not, therefore, confer any rights on the publishers that the period of three years for which they are prescribed must be adhered to by the Government. There is no holding out by the Government that the text books once prescribed would not be changed before the expiry of three years.

20. In *M. Ramanatha Pillai v. State of Kerala*, (1973) 2 SCC 650 = (AIR 1973 SC 2641), the petitioner was appointed as Vigilance Commissioner for a period of five years or till he reaches the age of sixty. But the post was abolished before either of the two events happened. The contention of the petitioner that the Government was estopped from abolishing the post earlier was negatived because the power to abolish post was an incident of sovereign Government power. Such discretion could not be fettered by a contract with the petitioner.

21. We are of the view, therefore, that the mere fact that the implied term was not expressed in the declaration of 2nd February, 1973, does not mean that the said declaration was not based on the implied term that the object of the scheme was to offset losses of the trade. The Government was, therefore, entitled to withdraw the scheme when the implied term ceased to exist. The Government have made a specific pleading about the world prices for 1972-73. In replying to para. 9 of the writ petition, Government stated that the price of Indian Light Halves in May 1972, was £ 755 per tonne while the price in May 1973 was £ 795 per tonne and in August 1973 £ 850-860

per tonne. In the case of Indian Light Broken, the price went up from £435-440 in May 1972 to £ 805-815 in May 1973 and to £ 825-835 in August 1973. The unit value realisation during the period 1-4-1973 to 31-8-1973 had also gone up to Rs. 8.09 per Kg. in the case of walnuts in shell and Rs. 10.88 per kg. in the case of walnut kernels as against Rs. 3.83 and Rs. 8.29 per kg. respectively during the corresponding period of the previous year. This assertion of fact was not denied by the petitioners. The petitioners, on the other hand, argued that the question of loss was irrelevant. We are of the view that the offsetting of losses of the trade was the basic consideration for the grant of the cash assistance. It is well known that subsidy is not granted merely to enrich the exporters. We believe the Government affidavit that it was granted to offset the losses. The petitioners have not rebutted the figures given by the Government from which it would appear that with the increase in the world prices the unit realisation of the exporters went up. The exporters, therefore, made profit instead of incurring any losses. The figures filed by the petitioners in Civil Writ No. 183 of 1974 at Annexure A-2 (page 264 of the paperbook) are based on the petitioners' calculation regarding the expenses incurred by them in purchasing and exporting the walnuts. These figures themselves show that the expenses incurred by the petitioners were less than the price which would have been realised by them at the increased foreign prices. This would be so even if the Indian Prices have been correspondingly increasing. We hold, therefore, that the Government was justified in law and on facts in withdrawing the scheme with effect from 1st October 1973, namely, after the expiry of the first year.

Contention No. 2:—

22. Since the scheme was for three years, it is presumed that the Government would consider for each of the three years whether the export of walnut was not in danger of resulting in losses. In respect of each of these years, the Government should be able to take a separate decision as to whether the scheme should be continued or not. If, for instance, the circumstances in 1973-74 or 1974-75 changed and the walnut export trade resulted in losses then the Government would not be justified in withdrawing the scheme. The burden of proof was, however, on the petitioners to show any such adverse change of circumstances. They have not done so. They are, however, free to make any representation to the Government if there is any such change and the Government should be willing to consider any such representation. This disposes of the second contention of the petitioners.

Contention No. 3:—

23. The scheme has been treated by the Government as a whole. Had it not been necessary to grant the normal cash subsidy to offset losses, the Government would not have thought of granting any incentives for increasing the exports. It is difficult to read the scheme as consisting of two schemes independent of each other. It stands to reason also that incentive to exports is also necessary when the exports are languishing. The increase in the world prices not only led to the increase in the export unit realisation of the walnut trade but also to an increase in the volume of exports. The two are connected with each other. It would appear, therefore, that the incentive to increase the exports was connected with the normal cash assistance to offset losses. Since the losses turned into profits and the volume of exports also increased, the Government was justified in withdrawing the normal cash assistance to offset losses as also the incentive cash assistance for increase of exports. This contention also, therefore, fails.

24. Learned counsel for the petitioners have stated that an administrative practice by the Government in respect of some other exports has been that whenever a scheme subsidising exports is withdrawn before running its full period, the Government considers the representation of the exporters for some ex gratia compensation. It is open to the petitioners to make such representation to the Government and if the analogy is applicable, the Government should be able to deal with the petitioners in the same way as they have dealt with the exporters of other commodities who were deprived of cash assistance before the expiry of the period of the schemes.

25. For the above reasons, the writ petitions are dismissed but without any order as to costs.

Petitions dismissed.

AIR 1976 DELHI 11

AVADH BEHARI ROHATGI J.

Kanwar Sain and others. Appellants
v. State and others. Respondents.

F. A. O. 135 of 1968, D/- 30-7-1975.*

(A) Succession Act (1925), Section 272
— Application for probate or in the alternative for Letters of Administration — Execution of Will — Undue influence — Burden of proof — Sound "disposing state of mind".

In order to avoid a will, it is not enough that there was influence. It must

*(Against order of G. C. Suri, Dist J., Delhi, D/- 3-6-1968).

IS/JS/D324/75/KNA

also be shown that the influence destroyed the free agency of the testator. Persuasion, appeals to the affections or ties of kindred, to a sentiment of gratitude to past services, or pity for future destitution or the like—these are all legitimate and may fairly be pressed on the testator. (1857) 6 HLC 2, Relied on. (Para 18)

While the overall burden of proving a will lies on those who propound it, such burden is, in general, discharged by showing that the will was duly executed and that the testator had testamentary capacity. On these matters being shown, those alleging undue influence must prove it. Undue influence cannot be presumed. It is not sufficient to show that the circumstances attending the execution are consistent with its having been procured by undue influence, it must be shown that they are inconsistent with any other hypothesis. There is no undue influence unless the testator if he could speak his wishes would say "this is not my wish but I must do it." Williams and Mortimer — Executors and Administrators and Probate, P. 162 (1970) ed., Rel. on. (Para 19)

The degree of mental capacity that must be retained by the testator for making a valid will is not that he must have highest qualities of mind, but such mind as is able to clearly discern and discreetly judge of all those things which enter into the nature of a rational, fair and just testament. (Para 22)

On the evidence it was held that the will was genuine and valid. (Para 23)

Cases Referred: Chronological Paras
AIR 1948 Cal 351 18
(1870) 5 QB 549 = 39 LJQB 237 22
(1868) 1 P & D 481 = 18 LT 152 18
(1857) 6 HLC 2 = 10 ER 1192 19
2 Southard 600 22

R. K. Makhija, for Appellants; Kapil Sibal, for Respondents No. 1 and 2.

JUDGMENT:— One Jawahar Devi was an old lady. She was 83 years of age. She was the owner of two houses Nos. 3755 and 3756 situated in Kucha Parma Nand, Delhi. These properties had been let to the tenants. She was getting rental income. This was her main source of sustenance.

Jawahar Devi was a widow. She was issueless. Her husband Sardari Lal died in 1939.

Sardari Lal had a sister Thakurani Devi by name. She died in 1963. She had three sons and a daughter. Their names are Kanwar Sain Kapoor, Suraj Singh Kapoor and Bahadur Singh Kapoor and Bachhi Rani.

2. Jawahar Devi had a sister. Her name was Rela Devi. She is dead. She had a son Naval Kishore. Jagdish Narain Tandon is the son of Naval Kishore. Jagdish Narain's son is Deepak Tandon. He is a minor.

3. Deepak Tandon son of Jagdish Narain through his father made an application to the District Court under Section 272 of the Indian Succession Act for grant of probate or letters of administration. He said that Jawahar Devi made a will on 6th of June, 1963 and that he was a beneficiary under the will.

4. Under the will Deepak gets one house — House No. 3756. Deepak was two years old at the time of the making of the will. As regards the other house No. 3755 the testatrix gave a direction that that house should be used for the purpose of a Dharamshala, for the benefit of the general public. She constituted a board of trustees to manage the Dharamshala. The following trustees were appointed by her:—

1. Kailash Nath Mehra S/o Ambika Prasad.

2. Raj Kishore Tandon.

3. Bahadur Singh.

5. This will dated 6th June, 1963 was presented for registration to the sub-registrar on the same day. It was duly registered. Just after one year of the execution of the will Jawahar Devi died. She died on 6th of June, 1964.

6. Deepak made the application to the District Court on 5th of September, 1964. Citation was issued. Kanwar Sain, Suraj Singh, Bahadur Singh and Bachhi Ranj sons and daughter of the sister of Sardari Lal opposed the grant. They said that Jawahar Devi did not make any will in favour of Deepak Tandon. The will was forged, it was said. It was then said that Jawahar Devi did not have sound disposing mind at the time of the execution of the will.

7. Witnesses were examined on both sides. The District Judge came to the conclusion that the will propounded before him was duly executed by Jawahar Devi. She had a sound disposing mind when she made the will. He pronounced for the will. He granted Letters of Administration with the will annexed to Deepak Tandon. He dismissed the objections. This order was made on 3rd June, 1968. Kanwar Sain, Suraj Singh, Bahadur Singh sons of Thakurni Devi and Kailash Nath S/o Ambika Prasad now appeal to this Court against the order of grant.

8. The evidence of Deepak Tandon the propounder of the will establishes these facts. The will was drafted by a lawyer Mr. Narinder Dutt, Advocate. He appeared in the witness-box. He prepared a draft of the will. He got it typed at the instance of Jawahar Devi. She attended his office. She gave instructions to the lawyer. She was with him for about an hour on the first occasion. This was in May, 1963. Again she went to him to collect the will. The lawyer explained the contents of the will to her. She approved of the will.

9. The Sub-Registrar is the second witness. He said that the will was produced before him on 6th June, 1963. Jawahar Devi appeared before him. Execution was admitted by her. The Sub-Registrar admitted the will to registration. He explained the contents of the will to the testatrix. She admitted it to be her last will and testament. In addition to signatures she also affixed thumb mark in his presence. Hori Ram, Pleader, identified Jawahar Devi before the Sub-Registrar.

10. Two attesting witnesses of the will are R. K. Tandon and Jagdish Narain Tandon. They are brothers. Jagdish Narain is the father of Deepak Tandon. R. K. Tandon is his uncle. Both the attesting witnesses appeared in witness-box. They deposed that they signed the will in presence of the testatrix. She was in a sound disposing mind at that time. The contents of the will were explained by R. K. Tandon to Jawahar Devi. She admitted the will to be correct and signed the will in their presence.

11. The appellants examined 3 witnesses. They tried to show that Jawahar Devi was more than 80 years of age at the time of the execution of the will. She was hard of hearing. She could not see. She was operated in the eye twice — once in 1959 and a second time in 1965. She was unable to walk. Her mental faculties were impaired due to old age. She was unable to take decisions. She was unable to understand things. This is the purport of their evidence.

12. Mr. Makhija counsel for the appellant in the first place has contended that there is no proof on the record to satisfy the conscience of this court that the instrument propounded by Deepak Tandon is the will of a free testatrix. He argued that the will set up is a fabricated document. The burden of his argument was that there is no independent attesting witness of the will. He said there are circumstances attending the execution of the will which excite and arouse suspicion of the court. The attesting witnesses are the father and the uncle of Deepak Tandon. Their word cannot be relied upon, he argued. Jagdish Narain, it was said, took a leading part in the execution of the will. He introduced the lawyer to the old lady. Narinder Dutt was a class fellow of Jagdish Narain and therefore it was said that Narinder Dutt was not a reliable witness. In any case Narinder Dutt did not sign the will nor did he get it executed and registered. Then it was said that the relations were not consulted. H. K. Kapoor brother of the testatrix was living in Delhi. He was not consulted at the time of making the will. The Sub-Registrar did not know the lady himself. She was identified by Hori Lal. Hori Lal

is a professional identifier. Without knowing the lady personally Hori Lal identified her for which he was paid Rs. 3/-. These are the various factors, the counsel said, which go to prove that the will is not a genuine document.

13. To all these manifold arguments there is a short answer. The appellants Kanwar Sain, Suraj Singh, Banadur Singh and Bachhi Rani brought a suit for administration on 5th of July, 1964 in the court of the Sub-Judge. To this suit Deepak Tandon, Jagdish Narain, R. K. Tandon were party defendants among others. In paragraph 5 of this plaint an important averment was made which to a very large extent demolishes the case of the appellants. I will read the paragraph in full. It runs as follows:—

"It seems defendants 12 and 13 (Jagdish Narain and R. K. Tandon) who were the relatives of Smt. Jawahar Devi on her parents' side imposed upon her and made her sign a document purporting to be a will dated the 6-6-1963. Being in 1963 about 82 years of age, she was deaf and had almost lost her vision. She could not even understand what was talked to her. The said defendants are her sister's grandsons and she had attachment for them. Later his father (L. Nawal Kishore Tandon) turned defendant No. 12 Jagdish Narain out of his house and shelter, he being a wastrel. He induced the old lady to allow him to live in one room of her house No. 3756 in Kucha Parmanand, Darya Ganj, Delhi. Probably the whole show of turning defendant No. 12 out of doors was enacted to let him have a foothold in the house of the deceased. Suffice it to say that the old lady being too feeble both in mind and body, defendants Nos 12 and 13 (who are real brothers) took undue advantage of their relationship in the garb of protecting and serving her and made her sign the said will without her understanding what she was subscribing to. So the will cannot be considered to be the conscious act of a person knowing her interests or having a disposing mind, besides she never had any independent advice. Even before the Sub Registrar her age was not divulged, to avoid all suspicion of lack of understanding, advanced senility and helplessness."

14. From this paragraph it is quite clear that it is admitted that Jawahar Devi did sign and execute the will. The only plea raised in this paragraph is that Jagdish Narain his brother exercised undue influence on the old lady. In other words what is said is that the old lady did not know what she was doing. It was not the act of a free and independent mind. She had no sound disposing mind.

15. This paragraph in my opinion is a damning piece of evidence. Nowhere it is said that Jawahar Devi did not sign

the will. That she did sign the will appears to be the underlying admission. The appellants admit that Jagdish Narain and R. K. Tandon are the grandsons of the deceased's sister and that "she had an attachment for them". If that is admitted it is not difficult to understand why she made a will in favour of Deepak Tandon. She wanted to give a part of her property to the descendants of her deceased sister. She did not want to give anything to husband's family. It is true that she got these properties from her husband on his death and became the owner of these properties by reason of the Married Women's Property Act, Hindu Succession Act made her absolute owner. But it appears that she had no affection for the sons and daughter of the sister of her husband. She was deeply attached to her own sister. For her heirs she had affection.

16. The only question that remains for decision is whether the testatrix had a sound disposing mind at the time of the execution of the will. It appears to me that she was in full senses and was mentally alert at the time of the execution of the will. No undue influence was exercised on her. This conclusion can be drawn from the fact that Jawahar Devi was managing her two properties till the very last. She used to recover rent from the tenants. She used to sign the receipts. This is the appellant's own evidence (See R. W. 5, R. W. 7 and R. W. 8). The lady who could collect rent and issue receipts and manage the property herself till the age of 82 or so must be in possession of her senses. She was able to go to the lawyer twice in 1963. She was able to instruct him for more than an hour. I have no reason to disbelieve that evidence of the lawyer Narinder Dutt.

17. It seems to me that the will propounded is a natural will. The appellants themselves admit that Jawahar Devi was attached to Jagdish Narain. This is why Jawahar Devi made a bequest in favour of his son. Jagdish Narain was living with the old lady for 6 or 8 years. He was looking after her. In 1964 just before her death he took her to the hospital.

18. It was said that Jagdish Narain had influence with the old lady. But in order to avoid a will, it is not enough that there was influence. It must be shown that the influence destroyed the free agency of the testator. Then it can be said to be undue influence. Persuasion, appeals to the affections or ties of kindred, to a sentiment of gratitude to past services, or pity for future destitution or the like — these are all legitimate and may fairly be pressed on the testator. (See Charu Chandra Mukherjee v. Khitish Chandra Mukherjee, AIR 1948 Cal 351 following Hall v. Hall (1868) 1 P & D 481).

19. Lord Carnworth has said: "Undue influence cannot be presumed". (Boyse v. Ross Borough, (1857) 6 HLC 2). While the overall burden of proving a will lies on those who propound it, such burden is, in general, discharged by showing that the will was duly executed and that the testator had testamentary capacity. On these matters being shown, those alleging undue influence must prove it; for, as already stated, undue influence cannot be presumed. It is not sufficient to show that the circumstances attending the execution are consistent with its having been procured by undue influence, it must be shown that they are inconsistent with any other hypothesis. There is no undue influence unless the testator if he could speak his wishes would say "this is not my wish but I must do it." (See Williams and Mortimer — Executors, Administrators and Probate p. 162 (1970) ed.)

20. The other thing of note is that Jawahar Devi has not given both houses to Jagdish Narain's son. She has given one. One she has set apart for the use of Dharamshala. If the will had been forged there would have been no provision for Dharamshala, this shows the righteousness of the transaction, this is the weightiest factor for pronouncement in favour of the will. Then out of the trustees of the board of management two are from the appellants before me. Kailash Nath and Bahadur Singh are two of the three trustees. That the testatrix did not completely ignore them is clear from the provision of the will by which they were appointed trustees. But she did not make a bequest in their favour. All that she wanted them to do for her is that they should manage her Dharamshala after her death. If the will had been a spurious document Kailash Nath and Bahadur Singh would not have been appointed as trustees.

21. There are no particulars of undue influence in the objection petition. Nor is there any satisfactory evidence on the record to prove that the old lady was coerced by Jagdish Narain into doing that which she did not desire to do or in other words he exercised undue influence. That Jawahar Devi died after a year of the execution of the will is a factor in favour of the genuineness of the will. She has signed the will at several places. She also thumb marked it before the sub-registrar. She has made meticulous provisions in the will to ensure that on attaining majority Deepak gets the property.

21-A. The District Judge was also of opinion that it was a natural will. He said:

"There was nothing unnatural in the old lady preferring the grand children of her own sister to the grand children of

the sister of her husband, who had died some years earlier and if the respondents were entitled to succeed under the ordinary law of inheritance, that may have been the very reason for the old lady making the will and thereby diverting the course of devolution to her own relations in preference to those of her deceased husband".

22. It was said that Jawahar Devi was getting on in years and did not have the mental capacity to make a will. I do not agree. The degree of capacity which must be retained by the old is dealt with in Den v. Vancleve, (2 Southard, at p. 600 cited in Banks v. Goodfellow, (1870) LR 5 QB 549, 567). There it was said:—

"By the terms 'a sound and disposing mind and memory' it has not been understood that the testator must possess these qualities of mind in the highest degree; otherwise, very few would make testaments at all; neither has it been understood that he must possess them in as great a degree as he may have formerly done, for even this would disable most men in the decline of life; the mind may be in some degree debilitated, the memory may have become in some degree enfeebled, and yet there may be enough left clearly to discern and discreetly to judge, of all those things and all those circumstances which enter into the nature of a rational, fair, and just testament. But if they have so far failed as that these cannot be discerned and judged of, then he cannot be said to be of sound and disposing mind and memory."

23. Criticism was made of certain writings which appear in the will in hand. The boundaries of the property and the names of the trustees are written in hand. The counsel said that on this aspect the evidence is discrepant. As regards the person who filled these blanks there is the dependable testimony of the lawyer who says that he filled the blanks and wrote the boundaries and the names of the trustees himself. This criticism is therefore not well founded.

24. Criticism was made that the lawyer should not be believed as he did not sign the will himself. There is no requirement of law that lawyer must sign the will.

25. Criticism was made that the old lady did not consult her own brother. In my opinion, this shows strength of her will and a determined mind.

26. It was said that neither in the will nor before the sub-registrar the age of the lady was given. This is also not required by law.

27. Capital was sought to be made of the tenants' evidence who deposed that she was unable to take decisions. When the tenants asked for repairs she did not reply. It seems to me that she was a

shrewd landlady and knew where her pecuniary interests lay.

28. The counsel criticised the evidence of Hori Lal who identified the lady. This is true that Hori Lal is a professional identifier. But that factor alone will not invalidate the will.

29. From the surrounding circumstances it appears that the will is the offspring of the old lady's own volition, and not the record of some one else.

30. For these reasons I would dismiss the appeal leaving the parties to bear their own costs.

Appeal dismissed.

AIR 1976 DELHI 15

H. L. ANAND, J.

Mrs. Birendar Amarjit Singh, Petitioner v. General Marketing and Manufacturing Co. Ltd., Calcutta, Respondent.

C. R. No. 467 of 1974, D/- 28-7-1975.*

(A) Stamp Act (1899), Sch. I, Article 35 — Registration Act (1908), Section 17 (1) (d) — Document whether lease or agreement to lease and liable to stamp and registration — Test.

A document to be treated as a lease must satisfy the test of immediate and present demise in respect of the property covered by it and an agreement to lease is no exception and this test would apply to determine not only the liability of a document to stamp but also to its registrability. AIR 1919 PC 79 and AIR 1959 SC 620, Rel. on. (Para 5)

(B) Stamp Act (1899), Sch. I, Article 35 — Registration Act (1908), Section 17 (1) (d) — Agreement between landlord A and tenant B of premises — A to construct new building on premises — In consideration of B delivering possession of premises A to give flat in new building to B on certain conditions. — If construction of new building not started before certain date A to deliver possession of premises to B — New building not constructed — Suit by B to enforce agreement — Document held was not lease or agreement to lease and did not require stamp or registration. AIR 1919 PC 79 and AIR 1959 SC 620, Rel. on. (Para 2, 5)

Cases Referred: Chronological Paras
AIR 1959 SC 620 = 1959 Supp (2) SCR 107

AIR 1919 PC 79 = 46 Ind App 240 2, 5

Shiv Charan Singh, for Petitioner;
Leila Seth, with B. Mohan, for Respondent.

ORDER:— The only question that this petition under Section 115 of the

*(From order of H. K. S. Malik Acld. Dist. J., Delhi, D/- 21-8-1974.)

IS/KS/D578/75/GNB

Code of Civil Procedure, by a defendant in the suit out of which it has arisen, raises is as to whether the document of July 23, 1971, on which the suit of the plaintiff is based, is inadmissible in evidence either because being compulsorily registrable, it is not registered or because it is insufficiently stamped.

2. The facts and circumstances leading to the petition are not in dispute and may be briefly stated. The premises in dispute was, during the material time, held by the respondent, the plaintiff in the suit, as a tenant. By an agreement of July 23, 1971, entered into between the parties, it was envisaged that the petitioner would set up in place of the premises a multi-storeyed building on the site and in consideration of the respondent delivering vacant possession of the premises to the petitioner, the petitioner would give to the respondent a flat on the ninth floor with certain specified dimensions on the terms and conditions set out in the agreement and that in case the work on the proposed multi-storeyed building was not commenced before a certain date, the petitioner would hand over to the respondent the vacant possession of the premises on the same terms and conditions on which it was hitherto held by the respondent. It was further provided that that the agreement will be valid for a period of 10 years from the date the flat in the proposed multi-storeyed building was handed over to the respondent and that thereafter will be renewable on the terms and conditions as may be mutually agreed between the parties. Pursuant to the aforesaid agreement, the respondent admittedly delivered vacant possession of the premises to the petitioner but, for reasons which are not material for our present purpose, the petitioner did not or could not pursue the project. By the suit the respondent seeks to enforce the aforesaid agreement. The suit is contested and in the written statement, the petitioner has, inter alia, raised the plea that the aforesaid agreement is inadmissible in evidence because being compulsorily registrable, it has not been registered and being a lease was insufficiently stamped. The agreement is on a stamp paper of Rs. 2/-. By the order which is impugned, the trial Court has held that the document is not inadmissible. The learned Additional District Judge repelled the contention that the document is inadmissible in evidence for want of registration holding, following Hemanta Kumari Devi v. Midnapur Zamindari Co. Ltd., AIR 1919 PC 79 and Trivenibai v. Smt. Lilabai, AIR 1959 SC 620, that it did not create a present demise. The learned Additional District Judge further held that even if the document was an agreement of lease and was, therefore, compulsorily registrable, it could nevertheless be used for the colla-

teral purpose of substantiating a plea for the possession of the premises. The learned Additional District Judge, however, did not deal with the question if the document was insufficiently stamped and as to its inadmissibility on that account apparently because of the finding that the document did not create a present demise and did not even appear to be an agreement of lease.

3. I have heard Bakshi Shiv Charan Singh, learned counsel for the petitioner with regard to the question as to the inadmissibility of the document and as to whether it could be used for any collateral purpose both with reference to the reason on which the impugned order is based as well as the additional reason as to the insufficiency of stamp and it appears to me that there is no merit in the contention.

4. For the purpose of stamp duty, an agreement or memorandum of an agreement is to be stamped in accordance with Article 5 of Schedule I of the Stamp Act. An agreement to lease is, however, one of the exceptions and such an agreement has to be stamped in the same way as a lease under Article 35 of Schedule I to the Act, inter alia, because by virtue of Section 2 (16) of the Stamp Act, "lease" includes such an agreement to lease. By virtue of Section 17 (1) (d) of the Registration Act, "lease of immovable property from year to year, or for any term exceeding one year, or reserving a yearly rent" are compulsorily registrable. The expression "lease" in the Registration Act includes "an agreement to lease" by virtue of the definition contained in Section 2 (7) of that Act. If the document in the present case is an agreement covered by Article 5 of Schedule I of the Stamp Act, it is sufficiently stamped. If the document in question is a lease or an agreement to lease or the agreement to let, it is insufficiently stamped. Its registrability, however, would depend on if such a lease or agreement to lease, being admittedly in respect of immovable property, is from year to year.

5. The first question that, therefore, requires consideration is as to whether the agreement is either a lease or an agreement to lease. It is well settled, and was not disputed on behalf of the petitioner, that a document to be treated as a lease must satisfy the test of immediate and present demise in respect of the property covered by it and an agreement to lease is no exception. Reference may be made to *Hemanta Kumari Devi v. Midnapur Zamindari Co. Ltd.*, AIR 1919 PC 79 and *Trivenibai v. Smt. Lilabai*, AIR 1959 SC 620. It is equally well settled that this test would apply to determine not only the liability of a document to stamp but also as to its registrability. The docu-

ment in question deals in the first instance, with the flat that may be built by the petitioner and in the second instance, with the premises in dispute should the multi-storeyed building be never put up. So far as the multi-storeyed building is concerned, the document does not create any immediate or present demise in respect of a part of it because the multi-storeyed building had not as yet come into existence and one does not know whether it would ever be put up. It has not been put up so far and would perhaps never be put up. The right, being conferred by the document on the respondent, is contingent on a number of imponderables and at best would be a right to ask for a lease of the flat after one comes into existence. So far as the premises in dispute is concerned, there is no question of an agreement or an agreement to lease because month to month tenancy in favour of the respondent was never surrendered either by the document or otherwise. All that the document provides is surrender of possession by the respondent of the demised premises with a right, subject to the terms of the agreement, to the possession being delivered as if nothing had happened. Mere delivery of possession of a demised premises by a tenant to a landlord does not by itself constitute a surrender of tenancy. Nothing more has happened in the present case which may sublimate the mere delivery of possession with the right to its restoration to the position of a surrender. The provision in the agreement, therefore, that in the event of the petitioner failing to put up the multi-storeyed building, the petitioner would "hand over" to the respondent the vacant possession of the demised premises "on the same terms and conditions as covered in the previous lease" does not and could not be tantamount to either a lease or an agreement to lease. It is a mere reiteration of the right of the respondent to the vacant possession of the demised premises being restored, if the limited purpose, for which the vacant possession of the premises was being delivered to the petitioner, was frustrated. The document, therefore, could not be said to be either a lease or an agreement to lease with reference to either of the properties and was, therefore, not liable to be stamped under Article 35 of Schedule I of the Stamp Act, or be compulsorily registrable and would, therefore, be admissible.

6. In the view that I have taken of the admissibility of the document, the question whether it could be used for a collateral purpose does not survive and need not be considered.

7. In the result, the petition fails and is hereby dismissed with costs.

8. The parties are directed to appear before the trial Court on August 20,

1975, before which date the records be transmitted to that Court.

Petition dismissed.

AIR 1976 DELHI 17

S. N. SHANKAR AND F. S. GILL, JJ.

Union of India, Appellant v. Bal Dev Singh, Respondent.

F. A. O. (OS) No. 75 of 1970, D/- 22-4-1975.*

(A) Arbitration Act (1940), Sections 30, 33 — Auction of Cinema by Government — Dispute between auction purchaser and Government in regard to machinery, building and electrification — Reference to arbitration — Award of compensation against Government — Validity.

In an auction held on 31-1-1960 in pursuance of a public notice issued on behalf of President of India, by the Managing Officer of the Regional Settlement Commissioner in respect of a cinema A (auction purchaser) gave the highest bid. His bid was accepted and possession of the cinema was given to him after about two years of the acceptance of the bid. Later, disputes arose between the parties, amongst others, in regard to the machinery, building and the electrification of the cinema. On 31-5-1967 parties agreed to refer the same to the sole arbitration of the Secretary to the Department of Rehabilitation, New Delhi. On 1-5-1968 the arbitrator made his award which was filed before a single Judge of the High Court. On 4-9-1968 the Government filed objections under Sections 30 and 33. It was held by the single Judge that the first part of the award awarding compensation in respect of machinery, electrification and building was valid but the rest of the award dealing with the details of the balance of the purchase price and the mode in which it was to be paid, being not covered by the reference, could not be sustained, but as it was severable from the first part of the award the whole award could not be set aside. On appeal by Government it was contended that the jurisdiction of the arbitrator was inflexibly limited to the claims on the basis of notice of auction, but he entertained and allowed claims based on the Cinematograph Act and as such exceeded his jurisdiction and the award for this reason was vitiated and was liable to be set aside.

Held (1) the objection of the Government was wholly misconceived. Scope of reference in the case had to be determined not by reference to a particular clause of the agreement alone but with reference

to the whole agreement because the reference to arbitration was made after disputes had arisen and the reference deed in terms said that the parties agreed to refer the matter to arbitration. (Para 14)

(2) that it could not be said that the claims raised before the arbitrator were something different from the "matter" that the parties agreed to refer to arbitration. Reference to the Cinematograph Act in the claim petition was only a plea in justification of the claim and not a claim by itself. It could not be said that the arbitrator had no jurisdiction to entertain the claims merely because he made reference to Cinematograph Act. Thus the arbitrator did not exceed his jurisdiction either in entertaining A's claims or in allowing compensation to A in terms of the award. AIR 1963 SC 1677, Applied.

(Paras 17, 18, 19, 22)

(3) that it could not be said that the arbitrator omitted to consider any claim urged before him so as to vitiate the award. There was no material on the record even to indicate, much less prove, that the parties by the reference deed intended the arbitrator to separately record his finding or to give his award in a particular form. The Government had miserably failed to discharge the onus that lay on it to support this plea. Case law discussed. (Paras 26, 27)

Cases Referred: Chronological Paras

AIR 1968 Raj 99 = 1968 Raj LW 11 27

AIR 1963 SC 1677 = (1964) 3 SCR 410

21, 25

AIR 1958 All 692 28

AIR 1915 Cal 713 = 26 Ind Cas 73 23

(1912) 13 Ind Cas 118 = 16 Cal WN 256

23

A. B. Saharya with V. B. Saharya, for Appellant; R. H. Dhebar, with Rishi Kesh, for Respondent.

S. N. SHANKAR, J.:— Challenge in this appeal is to the order of the learned Single Judge dismissing the objections filed by the appellant under Sections 30 and 33 of the Arbitration Act, 1940 and refusing to set aside the award.

2. In an auction held on January 31, 1960, in pursuance of a public notice issued on behalf of the President of India, by the Managing Officer of the Regional Settlement Commissioner Jamnagar House, New Delhi, in respect of a cinema in Faridabad, the respondent gave the highest bid for Rs. 6,11,000/-. His bid was accepted and possession of the cinema was given to him after about two years of the acceptance of the bid. Later, disputes arose between the parties, amongst others in regard to the machinery, building and the electrification of the cinema. On May 31, 1967 parties agreed to refer the same to the sole arbitration of Shri V. Nanjappa, Secretary to the Government of India, Department of Rehabili-

* (Against Judgment of V. D. Mishra, J., D/- 20-5-1970).

tation, New Delhi. On May, 1, 1968 the arbitrator made his award and held that the respondent was entitled to a sum of Rs. 30,000/- as compensation in respect of the machinery, Rs. 45,000/- as compensation in respect of electrification and Rs. 40,000/- in respect of building.

He further held that the respondent had already paid a sum of Rs. 2,42,575.57 towards the purchase price of the cinema and subject to the receipt of reports in regard to certain other claims filed by him, the balance amount of the purchase price payable was Rs. 2,99,573.11 against which the amount awarded shall be adjusted leaving a balance of Rs. 1,84,573.11 to be paid by him within six months. The award was filed before a learned Single Judge of this Court. On September 4, 1968 the appellant filed objections under Sections 30 and 33 of the Arbitration Act, alleging, amongst others, that the arbitrator had misconducted himself, the award was beyond the terms of reference that the claims made by the respondent before the arbitrator were on the basis of Cinematograph Act and these claims were beyond the scope of reference, that the award was vague inasmuch as it did not show as to whether the claims were accepted by the arbitrator, with reference to the terms of the auction notice or on the basis of expenditure incurred for the fulfilment of the requirement of Cinematograph Act. Certain other objections were also raised but they have not been canvassed and it is unnecessary to notice them.

3. Respondent also filed objections against the award but the same were not pressed and nothing further need be said in respect of them.

4. On the objections of the appellant, the learned Judge framed the following issues:

(1) Whether the award is liable to be set aside on the grounds set out in paragraph 4 of the objections of the Union of India?

(2) Relief?

5. Parties led no oral evidence and relied on the record of the arbitration proceedings filed in court. By the impugned order, the learned Single Judge held that the first part of the award awarding compensation in respect of machinery, electrification and building was valid but the rest of the award dealing with the details of the balance of the purchase price and the mode in which it was to be paid, being not covered by the reference, could not be sustained, but as it was severable from the first part of the award the whole award could not be set aside. Appellant's objections against the first part of the award were thus dismissed.

6. Shri A. B. Sahariya, learned counsel for the appellant, has urged that

the jurisdiction of the arbitrator was inflexibly limited to the matters specifically referred to him which were claims on the basis of notice of auction; but he entertained and allowed claims based on the Cinematograph Act and as such exceeded his jurisdiction and the award for this reason is vitiated and is liable to be set aside. No moral turpitude of any kind was attributed to the arbitrator.

7. To decide this contention, it will be appropriate to set out the relevant part of the reference stating the matter referred; the claims as raised before the arbitrator and the part of the award accepting the claims and awarding compensation.

8. In the agreement of reference dated May 31, 1967 it is stated that a cinema house at Faridabad Township was sold by auction by the appellant in favour of the respondent for a sum of Rupees 6,11,000/- out of which the appellant made only a part payment and possession of the cinema was given to him subject to his making the payment of the balance. Then the agreement stated:

"Whereas the Second Party put in claim for certain deficiencies in machinery and defects in the building etc. which claim was not accepted by the First Party.

"Whereas it has been agreed between both the parties to refer the matter to the sole arbitration of the Secretary to the Government of India, Department of Rehabilitation, Ministry of Labour, Employment and Rehabilitation, without prejudice to the action to be taken under the provisions of the D. P. (C & R) Act, 1954."

9. In the clauses following, the sole arbitrator was named and Clause 5 which is being relied upon by Shri Sahariya read as under:

"5. The terms of reference of the arbitration in this dispute shall be as follows:

(a) Whether or not all the machinery specified in the notice of auction was supplied by the First Party to the Second Party? If the supply of the machinery was not in accordance with the notice of auction what would be the amount of compensation payable by the First Party to the Second Party?

(b) Whether the electrification of the building was or was not as specified in the auction notice? If it was not what would be the amount of compensation payable by the First Party to the Second Party?

(c) Whether the building and the equipment handed over to the second party was otherwise not in accordance with the terms of the auction notice? If not what would be the amount of compensation payable by the First Party to the Second Party."

10. We have set out the relevant clauses preceding the appointment of the arbitrator as they have a bearing on the controversy and the scope of the matter which the parties agreed to refer to arbitration as we shall presently show

11. After the arbitrator entered on the reference, the respondent put in a detailed claim stating, amongst others, that "at the time of auction, it was announced in clear terms that the said cinema was a running one and that the intending purchaser will not experience any difficulty in obtaining licence from the appropriate authority", but on taking possession of the Cinema he found several items missing. None of the items including the building was in conformity with the Cinematograph Act and licence for running the cinema could neither be issued nor renewed, that by his letter dated November 2, 1961, he had informed the authorities about the condition of the building electric fittings etc. but to no effect and that he had incurred heavy expenses which the appellant was liable to pay. After stating these and the other facts, the concluding part of the claim was in the following words:

"The applicant now claims the following amounts on account of removing deficiencies in machinery, for electric installations and for removing defects in the building and other items including interest.

1. Expenditure incurred in providing electric fittings, and installations as per Cinematograph Act:	Rs.	55,984/-
2. Addition and alteration carried out in the building so as to bring it in accordance with the Cinematograph Act:	Rs.	42,000/-
3. Cost of deficiency and shortages, defects etc., etc.	Rs.	43,308/-
4. Cost for providing acoustic treatment and ceiling in the Cinema-hall and some other renovations to bring it in conformity with Cinematograph Act:	Rs.	1,50,000/-
5. Interest on Rupees 5,61,000/- from 31-1-60 to September, 1961 at the rate of Rs. 9%:	Rs.	84,150/-
	Rs.	3,75,442/-"

12. Part of the award relevant for the decision of the controversy reads as under:

"AND WHEREAS, I, the sole Arbitrator appointed herein entered upon the reference, have read the pleadings and

documents filed on behalf of the parties, and Whereas I have duly considered and deliberated over the respective contentions advanced on behalf of the parties in respect of all the claims in terms of the reference herein above mentioned

..... Now, therefore, I hereby make and publish my award as follows:

(i) That Shri Baldev Singh shall be entitled to a sum of Rs. 30,000/- as compensation in respect of machinery;

(ii) That Shri Baldev Singh shall be entitled to a sum of Rs. 45,000/- as compensation in respect of electrification;

(iii) That Shri Baldev Singh shall be entitled to a sum of Rs. 40,000/- in respect of building.

....."

13. The argument of Shri Sahariya is that according to para (5) of the deed of reference the disputes referred for decision of the arbitrator were disputes based on claims made with reference to the notice of auction but in the plaint filed before the arbitrator the respondent raised claims not on the basis of auction notice but on the basis of Cinematograph Act. The arbitrator, the learned counsel maintained, had no jurisdiction to entertain these claims, much less to uphold them in the award.

14. To our mind the objection is wholly misconceived. Scope of reference in the case has to be determined not by reference to clause 5 of the agreement alone but with reference to the whole agreement because the reference to arbitration was made after disputes had arisen and the reference deed in terms says that the parties agreed to refer this matter to arbitration. This is borne out by the clauses of the reference-deed extracted above, preceding the appointment of the arbitrator.

15. The respondent has produced before the arbitrator the claims that he had raised prior to the agreement of reference. This he did by his letter dated November 2, 1961, addressed to the Regional Settlement Commissioner, New Delhi. The relevant part of this letter reads as under:

"The provisional possession of the Cinema building at Faridabad was given to us by you yesterday. The discrepancies found in the machinery and equipment have already been written by us on the inventory of the articles. Numerous defects were noticed in the Cinema building some of which are detailed below.

2. The electric installations wherever they exist are not as per Cinematograph Act. Three separate circuits are required under this Act but they do not exist at site. Many of the fittings are only dummy and there are no connections to

the same. These things could not be checked as there was no electric connection in the building. Some fittings which were available at the time of auction, are now missing.

3. There is no acoustic treatment in the building at all.

4. The spacing of the exit doors, urinals and water closets and Projection Room etc., is not as per provision of the Cinematograph Act. There is no ceiling in the building which is essential to fulfil the requirements of Cinematograph Act.

5. The building remained unattended in the last two years, causing sufficient damage and deterioration in its condition.

6.

7.

8. You are, therefore, requested to inspect these premises and verify the discrepancies pointed out by us within 15 days, failing which we shall start the work of repairs and alterations required to bring the building as per Cinematograph Act on your costs and risk."

16. The respondent also produced before the arbitrator copy of a letter dated November 10, 1961 sent by the Regional Settlement Commissioner, New Delhi to the Sub-Divisional Officer, Palwal, District Gurgaon forwarding his application for renewal of cinema licence with the recommendation that the same may be done at an early date to enable the respondent to run the cinema as also copy of a letter dated February 1, 1962 sent by the Deputy Commissioner and District Magistrate, Gurgaon, to Chief Electric Inspector, Government of Punjab, Patiala, stating that the cinema had been sold by auction and purchased by the respondent who had applied for grant of licence and that the Chief Electric Inspector may examine the electric appliances installed in the cinema building at an early date and intimate whether these electric installations comply with the provisions of the Cinematograph Act and the Rules framed thereunder.

According to the endorsement on this letter its copy was also forwarded by the District Magistrate to the Executive Engineer, P. W. D. B. & R. Gurgaon with the request to inspect the cinema building and "intimate whether the building conforms to the conditions of the licence and Cinematograph Rules". This shows that from the very start it was the respondent's case that he was entitled to be delivered possession of a cinema capable of being licensed under the Cinematograph Act and not just a building of the cinema. The appellant did not accept this position also.

17. It was all these disputes which are covered by the expression "matter" used in the extracted clause of the reference-deed which the parties agreed to

refer and did refer to arbitration by means to the reference deed. Para. (5) of the reference-deed simply set out the heads of these claims. Claims in the claim-petition before the arbitrator, it is not denied, conform to these heads. It is, therefore, not right to say that the claims raised before the arbitrator were something different from the "matter" that the parties agreed to refer to arbitration. Reference to the Cinematograph Act in the claim petition was only a plea in justification of the claim and not a claim by itself.

18. Even if it be assumed for the sake of argument that para. (5) of the reference-deed set out the claims, we find nothing in the agreement to limit the jurisdiction of the arbitrator to debar him from taking into consideration the provisions of Cinematograph Act in upholding those claims. The reference-deed did not provide that in determining the claim the arbitrator shall refer to the auction notice alone and shall not take into consideration anything else.

19. We are, therefore, unable to accept the submission of the learned counsel that the arbitrator had no jurisdiction to entertain the claims as filed before him only because they made a reference to the Cinematograph Act.

20. We further find that factually there is no basis for the grievance of the learned counsel. The arbitrator in his award has nowhere said that the claims of the respondent were being sustained by him because of any provision in the Cinematograph Act. The arbitrator has said in the award that he had read the pleading and documents filed on behalf of the parties and duly considered and deliberated over the respective contentions. The plea now raised was also urged before the arbitrator. The award is a non-speaking award. This Court is precluded to gauge the mind of the arbitrator or to examine the considerations that entered his mind in arriving at his conclusion. There is nothing on the record, therefore, to suggest that in the award the arbitrator awarded compensation because of the provisions in the Cinematograph Act. The whole grievance, is thus misconceived and without basis.

21. In Smt. Santa Sila Devi v. Dharendra Nath Sen, AIR 1963 SC 1677, the Supreme Court has laid down certain basic considerations that the Court should be guided by in the matter of interfering with the award of the arbitrator. These are: (1) a Court should approach an award with a desire to support it, if that is reasonably possible, rather than to destroy it by calling it illegal; (2) unless the reference to arbitration specifically so requires the arbitrator is not bound to deal with each claim or matter separately, but can

deliver a consolidated award; (3) unless the contrary appears the court will presume that the award disposes finally of all the matters in difference; and (4) where an award is made 'de praemissis' (that is, of and concerning all the matters in dispute referred to the arbitrator), "the presumption is that the arbitrator intended to dispose finally of all the matters in difference and his award will be held final, if by any intendment it can be made so."

22. For all these reasons, we are firmly of the view that in the facts of this case and the award as it is, it cannot be said that the arbitrator exceeded his jurisdiction either in entertaining the claims of the respondent or in allowing compensation to the respondent in terms of the award.

23. Shri Sahariya referred us to Narsingh Narain Singh v. Ajodhya Prasad Singh, 1912-13 Ind Cas 118 (Cal) in support of the proposition that the arbitrator had no jurisdiction to go beyond the precise questions submitted to him. In this case, the question submitted to the arbitrator was whether the plaintiff had a right of way over a specified strip of land but the arbitrator in his award laid out a new path on a piece of land over which neither party alleged a right of way. It was in this context that it was observed that he cannot go beyond the precise questions submitted to him and determine any claim or demand which the parties did not refer.

Reliance was next placed by the learned counsel on Jagar Hari Bepin Behary Poddar v. Moran and Co., AIR 1915 Cal 713 where it was held that an award was bad if the arbitrator went beyond the scope of reference and decided disputes not submitted to it. This conclusion was arrived at on the finding that the dispute about 447 bales involved in the case was not at all covered by the original contract but formed the subject-matter of another contract between the parties in regard to which there was no arbitration clause. No exception can be taken to the abstract proposition of law laid down in these cases. But they do not in any manner assist the learned counsel.

24. The learned counsel then urged that the award was bad because the arbitrator failed to determine the specific dispute contained in the first part of sub-paras (a) and (b) of para. 5 of the reference-deed, namely, whether the machinery and the electrification was not as specified in the notice of auction. This finding, it was argued, was a condition precedent to give jurisdiction to the arbitrator to award damages and this having not been done the award of damages is without jurisdiction. This submission is as much without merit as the previous one.

25. According to Halsbury's Laws of England, para. 609, page 321, unless the agreement of reference prescribes in what form the award is to be made, it may be made in such form as the arbitrator or umpire thinks fit. On page 322, (para. 610) of the same book, after stating the proposition that found recognition from the Supreme Court in AIR 1963 SC 1677 (supra) that the Court should approach the award with a desire to support it rather than destroy it, it is observed that the burden of proving that the arbitrator failed or omitted to award on matters which were referred, lies on the party who seeks to impeach the award. According to Russell 'On Arbitration' Seventeenth Edition, page 243, in a case where several claims are made between the parties, the award must decide upon each of them. But it is unambiguously provided that the award will be sustained even though the arbitrator has omitted to notice some claim put forward by a party, if, according to the fair interpretation of the award, it is to be presumed that the claim has been taken into consideration.

26. In this case, as we have pointed out above, the arbitrator in his award has stated that he has "considered and deliberated" over the respective contentions of the parties to arrive at the conclusions recorded by him. On a fair interpretation of the award, in these circumstances, it cannot, therefore, be said that the arbitrator omitted to consider any claim urged before him so as to vitiate the award. There is no material on the record even to indicate, much less prove, that the parties by the reference deed intended the arbitrator to separately record his finding in regard to the first part of sub-paras (a) and (b) of Para. 5 of the reference or to give his award in a particular form. The appellant has miserably failed to discharge the onus that lay on it to support this plea. The objection is, therefore, wholly without merit and is repelled.

27. Shri Sahariya relied on Union of India v. Firm J. P. Sharma and Sons, AIR 1968 Raj 99. In this case there was a dispute between the Railway Administration and Railway contractor who claimed certain amounts from the Railway for different items of work done by him. The dispute was referred to an arbitrator. A joint list of issues was submitted to the arbitrator by the parties. The arbitrator awarded a consolidated sum to be paid to the contractor. On the interpretation of the reference, in the facts of the case, the Court found that the real dispute between the parties that was referred to the arbitrator was about the applicability of correct rate for the job done by the contractor. The Court observed:

"It was not that the parties only wanted the arbitrator to determine what sum was payable by one to the other. Indeed there was no serious dispute between them regarding the actual amount that may be payable once the question of rate was adjudicated upon."

The award did not indicate any decision of the arbitrator in regard to rate that was to be applied to the various items of work. It was, therefore, held incomplete and defective. After noticing the rival contentions of the parties and exhaustively dealing with the case law on page 112 of the report, the legal position was set out by the Bench in the following words:

"In the light of these observations we now proceed to deal with the merits of the case in hand. The crux of the matter is whether the disputes or differences as a whole subsisting between the parties were referred to arbitration or whether it is only the issues framed by the arbitrator that constituted the subject-matter of the dispute as referred to the arbitrator. In other words, if the issues were merely the points for decision as a Court would frame them, then according to the dicta of the several cases referred above, the arbitrator was not bound to decide each issue separately and he could have awarded a consolidated sum. On the other hand, if we can predicate that it were the issues that were the several disputes referred to the arbitrator and he was specifically required to deal with or to decide each claim or matter separately than he could not deliver a consolidated award without deciding each point as required in the submission to adjudication."

These observations very aptly support the view that we have taken. The "matter" that was referred for decision of the arbitrator in this case was the determination of compensation that the respondent claimed under the heads specified in paragraph 5 of the reference deed and the arbitrator has given his finding in that regard. Nothing referred to him thus remains undetermined to vitiate the award.

28. The learned counsel also referred us to *Indian Minerals Co. v. The Northern India Lime Marketing Association*: AIR 1958 All 692 where it was held that when the parties agree to refer the matter to arbitration there is an implied condition in the submission of the parties that the arbitrator shall dispose of all the matters. In this case, in an application under Section 20 of the Arbitration Act the court had formulated the points for decision by the arbitrator. It was held that the failure to perform the essential duties which are cast on the arbitrator, even if there be no moral turpitude, would be a legal misconduct and as the arbitrator was bound to decide the points

submitted to him for decision and he had failed to do so, the award could not be sustained.

On page 696 of the report, it was observed that when a submission is made to an arbitrator and the points in dispute are referred to him, the arbitrator would not be justified in ignoring the points formulated by the court for his decision and in framing other points. It is in this context that it was held that when the parties agree to refer the matter to arbitration, there is an implied condition in the submission of the parties that the arbitrator shall dispose of all matters. There can be no dispute with the broad proposition of law enunciated but that is not attracted to the facts of this case. Reference to the agreement dated May 31, 1967, shows that even though in paragraph 5 of the agreement separate heads of the disputes were mentioned but what the arbitrator, in substance, was to decide was "what would be the amount of compensation payable by the First Party to the Second Party".

29. For reasons aforesaid, we find no merit in this appeal. The same is accordingly dismissed with costs.

Appeal dismissed.

AIR 1976 DELHI 22

AVADH BEHARI ROHATGI, J.

Delhi Development Authority: Appellant v. Shiv Charan Respondent.

S. A. O. No. 5 of 1970, D/- 14-7-1975.*

(A) Civil Procedure Code (1908), Section 99, Order 18, Rule 5 — Depositions not signed by Judge — Effect.

The mere fact that the witnesses' depositions were not signed by the Judge will not vitiate the trial. At best it was an irregularity under Section 99.

The omission to sign the depositions is a defect or irregularity in the proceedings. But the merits of the case or the jurisdiction of the Court are not affected by the omission. A decision of a Court cannot be upset merely for technical and immaterial defects. Non-compliance of Rule 5 of Order 18 does not destroy the validity of the whole proceeding. Rule 5 is a rule of procedure. Rules of procedure are made to subserve the ends of justice and not to defeat them. Section 99 aims to prevent technicalities from overcoming the ends of justice. (Paras 9, 10)

Cases Referred: Chronological Paras
AIR 1957 Pat 293 = 1956 BLJR 408 9
AIR 1954 SC 340 = (1955) 1 SCR 117 10

*(Against order of S. D. Tyagi, Sr. Sub. J., Delhi. D/- 29-10-1969).

HS/IS/C929/75/KNA

AIR 1937 PC 233 = 64 Ind App 250 10

AIR 1923 Nag 7 (1) = 68 Ind Cas 664 9

Keshav Dayal and R. K. Khanna, for Appellant.

JUDGMENT:— This is an appeal against the order of the Senior Sub-Judge Delhi dated October 29, 1969.

2. The facts are these. The respondent instituted a suit against the Delhi Development Authority (the Authority) for permanent injunction. His suit was dismissed. He filed an appeal against the decree of the trial court.

The appeal was heard by the Senior Sub-Judge. When the appeal was being argued, the learned Senior Sub-Judge noticed that the trial Judge had not signed the depositions of two witnesses who were examined by the Authority in support of their case.

3. The Authority examined in all three witnesses on March 18, 1968. One was Attar Chand. The second was R. G. Bhatnagar. The third was Kanihyee Ram. All of them were examined on one day. All the three witnesses signed their depositions. These were read over to them. The trial Judge signed at the end of the third deposition. He did not sign at the end of the first and the second depositions. It just escaped his notice. The seal of the court is there. It seems that inadvertently the judge forgot to put his signatures above the seal.

4. The first appellate court noticed the omission. It thought that it was mandatory for the judge to sign each deposition. It relied on rule 5 of Order 18. That rule provides:

"R. 5. In cases in which an appeal is allowed the evidence of each witness shall be taken down in writing, in the language of the Court, by or in the presence and under the personal direction and superintendence of the Judge, not ordinarily in the form of question and answer, but in that of a narrative, and, when completed, shall be read over in the presence of the Judge and of the witness, and the Judge, shall, if necessary, correct the same, and shall sign it."

5. This rule no doubt requires that the deposition of a witness has to be signed by the judge. This rule must be followed. This also is not in doubt. It is a salutary rule. It ensures the authenticity of court record.

6. The appellant Judge thought that this rule was imperative and it was incumbent on the trial Judge to sign the deposition of the two witnesses Attar Chand and R. G. Bhatnagar. Since he did not do this the Senior Sub-Judge set aside the decree of the trial Judge and remanded the case to him for recording the statements of these two witnesses over again "in accordance with law", as he said. The appeal was allowed. The

trial Judge was directed to summon the two witnesses again for recording their statements anew and to decide the case afresh. The Authority now appeals to this Court.

7. The contention of the counsel for the Authority is that this remand was entirely uncalled for and that if the trial Judge did not sign the depositions of the two witnesses it did not matter much since it was at best an irregularity. He said that the appeal should have been heard and decided on merits.

8. No one raised this objection before the appellate court. The appellate Judge himself took up the objection and thought that the procedure adopted was illegal. It was not the case of the appellant that these witnesses were not produced or that they did not make their statement in court. In fact the depositions are signed by the witnesses.

9. In my opinion the learned Senior Sub-Judge was not right in setting aside the decree on this ground. The mere fact that the witnesses' depositions were not signed by the Judge will not vitiate the trial. At best it was an irregularity under Section 99, Code of Civil Procedure. It did not afford a ground for retrial since there is no doubt whatsoever that the depositions were recorded in the presence and under the personal direction and superintendence of the Judge. No one said that the depositions were wrongly recorded or that the witnesses did not appear in the court below: See *Alam Singh v. Seth Gopal Das*, AIR 1923 Nag 7 (1) and *Channoo Mahto v. Jang Bahadur Singh*, AIR 1957 Pat 293.

10. The omission to sign the depositions was a defect or irregularity in the proceedings. But the merits of the case or the jurisdiction of the court were not affected by the omission. A decision of a court cannot be upset merely for technical and immaterial defects. Non-compliance of Rule 5 of Order 18 did not destroy the validity of the whole proceeding. Rule 5 is a rule of procedure. Rules of procedure are made to subserve the ends of justice and not defeat them. Section 99 aims to prevent technicalities from overcoming the ends of justice. The object is to avoid circuity of litigation (See *Muhammad Husain Khan v. Babu Kishya Nandan Sahai*, AIR 1937 PC 233 and *Kiran Singh v. Chaman Paswan*, AIR 1954 SC 340).

11. The appellate judge ought to have accepted the statements of these witnesses. He should have heard the appeal on merits. There was no challenge to the correctness of these statements. Mere non-signing of the depositions did not amount to an illegality.

12. For these reasons I would allow the appeal. The order of the Senior Sub-Judge dated October 29, 1969, is set

aside. The case is remanded to the court of the Senior Sub-Judge. He will now hear the appeal and decide it on merits.

13. Since no one appears on behalf of the respondent in this court the Senior Sub-Judge will issue a notice to the respondent and his counsel for a date fixed for the hearing of the appeal.

14. The appellant's counsel is directed to appear in the court of the Senior Sub-Judge on July 28, 1975.

15. Since no one has appeared to oppose the appeal there will be no order as to costs.

Appeal allowed.

AIR 1976 DELHI 24

H. L. ANAND, J.

M/s. Anand Prakash Om Prakash, Plaintiff v. M/s. Oswal Trading Agency and another, Defendants.

Suit No. 326 of 1970, D/- 26-5-1975.

(A) Contract Act (1872), Section 23 — Suit based on unlawful or void contract — Plea as to unenforceability not taken in defence — Court can determine such question for itself.

The failure or refusal of any party to raise the question as to the enforceability of a contract on the ground of its being void, unlawful or illegal, being contrary to public policy or any statute would not prevent a Court, nor absolve it from its obligation, to determine for itself if the process of law would be available to a suitor whose claim may be based on a contract which may be illegal, unlawful or void on account of being contrary to law or the consideration or the object of which may be opposed to public policy. It is well settled that if the illegality or unlawfulness of a transaction is brought to the notice of a Court, the Court will not assist a suitor whose claim was based on such a transaction even if the defendant did or did not wish to set up such a defence. Halsbury's Laws of England (3rd Edn.), Vol. 8 at p. 125 and (1903) 89 LT 347 (PC), Relied on.

(Para 32)

(B) Contract Act (1872), Section 23 — Contract opposed to public policy — Principle of severability — Agreement for sale of goods in 'black market' — Consideration to consist of 'black money' — Goods supplied — Suit for recovery of price — Transaction whether opposed to public policy and unenforceable.

Where the consideration or the object of an agreement is opposed to public policy, such an agreement would be void and could not be enforced in any Court of Law. As regards the concept of public policy the cautious approach of

Courts of England that new heads of public policy should not be propounded has been adopted in India. The maxim *ex dolo malo non oritur actio* (that is, no Court will lend its support to a man who founds his cause of action upon an immoral or an illegal act) has also been applied to India and so have the principles of severability and the various exceptions to the rule that the Court will not lend its aid in a cause founded on illegal contract.

(Para 34)

In applying the principle of severability what one has to see is whether the illegality goes so much to the root of the matter that the plaintiff cannot bring his action without relying upon the illegal transaction into which he had entered. If the illegality be trivial or venial, and the plaintiff is not required to rest his case upon that illegality, then public policy demands that the defendant should not be allowed to take advantage of the position. A strict view, of course, must be taken of the plaintiff's conduct, and he should not be allowed to circumvent the illegality by resorting to some subterfuge or by misstating the facts. If, however, the matter is clear and the illegality is not required to be pleaded or proved as part of the cause of action and the plaintiff recanted before the illegal purpose was achieved, then, unless it be of such a gross nature as to outrage the conscience of the Court, the plea of the defendant should not prevail. English law considered. AIR 1959 SC 781 and AIR 1960 SC 213. Relied on.

(Para 34)

A contract which had for its objects the fraud of the revenues or the generation or consumption of black money would be considered to be sufficiently tainted so as to disentitle a suitor to a relief in a Court of law based on such a contract.

(Para 35)

Where the goods in question had been supplied by the plaintiff to the defendants pursuant to an agreement for the sale of the aforesaid goods entered into between the parties in the black market and the consideration for the promise to supply the goods was to consist of unaccounted funds popularly known as the "black money", the contract, which is *ex facie* innocuous, could not be said to be tainted and come within the mischief of the provisions of Section 23 of the Contract Act merely because it was carried out in such a way or was intended to be carried out in such a way as to defraud the revenues and to find an outlet for or generate black money. Such a contract is therefore not unenforceable and the Court of law would not decline to assist the plaintiff in a suit for recovery of balance of the price of goods sold to the defendants.

(Para 36)

The relief could not be refused to the plaintiff either on the basis of the provi-

sions of Section 23 of the Contract Act or the general principles applied in England. Section 23 makes a contract illegal of which the "consideration" or the "object" is contrary to public policy. The consideration in the instant case could not be said to be contrary to public policy because the corresponding considerations are the payment of money and delivery of goods. The object of the contract could also not be said to be opposed to public policy because the object of the contract was not to consume or to generate unaccounted funds or to defraud the revenues. The object obviously was to do business — so far as the seller is concerned, to sell the goods and so far as the purchaser is concerned, to buy goods for further sale and in the process to make income. Neither the consumption nor the generation of unaccounted funds nor to defraud the revenues could, therefore, be said to be the object of the agreement. (Para 38)

The object is, however, at times, given an extended meaning of a "design" but neither of these can constitute a design for the agreement because the substantial design again was to do business. It may at best be described as an incidental purpose of the agreement to be achieved in the manner in which an innocuous agreement was to be carried out. (Para 38)

Assuming, however, that the taint of unlawfulness attaches to the agreement even if it was ex-facie legal but was intended to be carried out by improper means, the claim of the plaintiff would still be saved on an application of the principle of severability both because the taint is clearly severable from the main agreement because under the compulsion of circumstances which led to the filing of the suit, the plaintiff had to recant from the original design. The taint is severable in the sense that the plaintiff sues on the innocent part of the contract when he claims recovery by a decree of the Court for the sale of the goods made by him. The manner in which the payment was to be made or the type of funds to be used for the purpose is not part of the relief sought by the plaintiff. The tainted part, therefore, which consists in the manner in which the agreement was to be carried out, both by the defendants and the plaintiff, is clearly severable and beyond the scope of the relief. In the peculiar circumstances of the case, therefore, no taint could attach to the part of the agreement which is sought to be enforced and to hold to the contrary would be tantamount to a differential treatment to the two persons whose hands are equally soiled and if the relief is refused to the plaintiff, it would be virtually making a wholly undeserved gift of a large amount of money to the defendants whose conduct was equally, if not more, reprehensible than that of the plaintiff. (Para 38)

Cases Referred: Chronological Paras
AIR 1974 SC 1892 = (1975) 1 SCR 703 37
(1966) 2 QB 633 = (1966) 2 WLR 1027 33, 35

AIR 1960 SC 213 = (1960) 1 SCR 861 34, 37

AIR 1959 SC 781 = 1959 Supp (2) SCR 406 34

(1903) 89 LT 347 (PC) 32

(1936) 1 KB 169 = 105 LJKB 148 33

16 Toronto LJ 287 33

Bawa Shiv Charan Singh, for Plaintiff;
S. L. Bhatia, for Defendants.

ORDER:— This suit for the recovery of balance of the price of goods said to have been sold to the defendants involves a difficult question of considerable public importance viz., whether a claim arising out of a transaction entered into between the parties otherwise than in the open market and intended to be carried out with the aid of unaccounted funds, popularly called the "black money" and to defraud public revenues is invalid and unenforceable.

2. The plaintiff, a registered partnership carrying on wholesale business in textiles and hosiery goods in a large way as a representative of a number of leading manufacturing units and having number of sister concerns, claims to have supplied on various dates between October 21, 1969 and December 28, 1969, hosiery goods of the total value of Rs. 1,68,059.25 to defendant No. 2 carrying on business in the name and style of defendant No. 1 against the said defendant's chits out of which the said defendant is said to have paid a sum of Rs. 25,000/- thereby leaving a balance of Rs. 1,58,857.11 inclusive of interest at 12% per annum in accordance with the terms of the contract pursuant to which the goods were supplied. It is further claimed that the aforesaid chits contained the details of the goods, such as their description, quality, value and freight etc., and were duly signed by the said defendant No. 2 at the time of delivery; that the delivery was followed by regular bills containing all the details and the transactions and the payment recovered from the defendants in cash were duly reflected in the books of accounts of the plaintiff which were duly maintained in the ordinary course of business.

3. The defendants deny that any legal or valid contract of sale for the supply of goods was ever entered into between the parties or the goods as alleged were either purchased or received by the defendants from the plaintiff. It is contended that the bills are fake and fictitious and so are the entries in the books of accounts of the plaintiff and that the suit is based on a false claim as a counter-plaint to the complaint of a criminal offence filed by the defendant against the plaintiff for fraud and should be dismissed.

ed with costs. It is further averred that the chits purporting to be delivery challans said to represent the delivery of goods to the defendant contained interpolations, over-writings and are suspicious in character; that these were never signed in token of receipt of goods and "the plaintiffs have been procuring requirements of goods from time to time from the answering defendant on these chits which the plaintiffs were required to deliver later on as and when they received such goods from the wholesale dealers of the manufacturers"; that the plaintiff normally sent goods with regular delivery challans followed by bills on which plaintiff obtained the signature of the buyer; that the bills in the present case were also made from one bill book in a consecutive order showing thereby that the transactions were made up; that no payment towards the transactions in dispute was made by the defendant to the plaintiff and a sum of Rs. 25,000/-, referred to by the plaintiff, represented a payment made by the defendant to the plaintiff towards another transaction in which the plaintiff did not deliver the goods even though they received the payment and got the goods released from the transporter and this transaction forms subject-matter of a criminal action filed by the defendant against the plaintiff.

4. On the pleadings of the parties, the following issues were framed on February 12, 1971:

1. Whether the plaintiff is a registered partnership firm?
2. Whether the plaintiff supplied to the defendants the goods in suit? (Onus Objected to)
3. What is the price of the goods supplied?
4. Relief.

(After discussing issues Nos. 1 to 3 and the evidence produced by the parties (Paras. 5 to 27), the judgment proceeded):

28. The question that requires consideration under this issue is as to the relief to which the plaintiff would, in the circumstances, be entitled.

29. The position that emerges on my conclusions on Issues Nos. 2 and 3 is that the goods in question had been supplied by the plaintiff to the defendants pursuant to an agreement for the sale of the aforesaid goods entered into between the parties in the black market and the consideration for the promise to supply the goods was to consist of unaccounted funds popularly known as the "black money".

30. The question, and it is one of considerable public importance and great legal difficulty, that thus arises is whether such a contract is illegal, unlawful or void and, therefore, unenforceable so that a Court of law would decline to assist a

suitor in an action for the claim arising out of it.

31. Before embarking upon the examination of the aforesaid question, it may be proper to point out that, for reasons which are quite obvious, the defendants did not resist the claim of the plaintiff on the ground that the contract was unlawful or void on account of taint of black money in its consideration or because of the illegality in the object of the contract, namely, the fraud of the revenues. While hearing arguments it occurred to me that, having regard to the suspicious manner of the execution of the contract and the suspicious circumstances attending on it, the contract was prima facie unenforceable as being opposed to public policy, in that, the consideration for the promise by the plaintiff to supply the goods and the object for the contract appeared to be unlawful as being opposed to public policy and I, therefore, put it to learned counsel for both the parties, my first impression with regard to the nature of the transaction and invited such submissions in that behalf that they may have to make on law or on facts. Learned counsel for both the parties observed an understandable reticence on both the questions and almost gave a tacit assurance that even if it was found that the transaction had been entered into as found by me above, it would not vitiate the transaction or render it void on any ground or prevent enforcement of any claim based on it in a Court of law.

32. Be that as it may, in view of the state of the pleadings and the attitude of the learned counsel for the parties with regard to the aforesaid question, I spent some time wading through the English as well as Indian reports on this aspect of the law of contract to which I would presently make a reference. I may, however, point out that the failure or refusal of any party to raise the question as to the enforceability of a contract on the ground of its being void, unlawful or illegal, being contrary to public policy or any statute would not prevent a Court, nor absolve it from its obligation, to determine for itself if the process of law would be available to a suitor whose claim may be based on a contract which may be illegal, unlawful or void on account of being contrary to law or the consideration or the object of which may be opposed to public policy. It appears to me to be well settled that if the illegality or unlawfulness of a transaction is brought to the notice of a Court, the Court will not assist a suitor whose claim was based on such a transaction even if the defendant did or did not wish to set up such a defence. The legal position obtaining in England in that behalf and the law in India do not appear to me to be any

different and has been succinctly summarised by Halsbury's Laws of England, 3rd Edition, Vol. 8 at p. 125 in the following words:

"If the illegality of a transaction is brought to the notice of the Court, whether the contract *ex facie* shows illegality, or it appears in the course of the proceedings, and the person invoking the aid of the Court is himself implicated in the illegality, the court will not assist him, even if the defendant has not pleaded the illegality and does not wish to raise that objection."

In *Connally*, (*Connally v. Consumer's Cordage Co.*, (1903) 89 LT 347 (PC)) the question of illegality was raised on its own motion by the Court of Appeal for the first time. I have, therefore, no hesitation in considering the question if the contract in the present case could be said to be unlawful or void and as to its impact on the claim of the plaintiff.

33. In England an agreement which tends to be injurious to the public or against public good is void at Common Law as being contrary to public policy.* Even though it is a country wedded to contractual freedom, it is recognised that any contract that tends to prejudice any social or economic interest of the country must be forbidden.** What contracts would be contrary to public policy has been subject-matter of considerable controversy. At one time, it was thought that the rules already established in that behalf by precedent may be moulded to fit the new conditions of a changing world, yet it was no longer legitimate for the courts to invent a new head of public policy. In course of time, however, this concept underwent considerable change and it was recognised that the determination of what was contrary to public policy must necessarily vary from time to time and it was pointed out that the rules remain but "its application varies with the principles which for the time guide public opinion".† Recent thinking on this branch of the law favours a more dynamic approach and it is suggested that "the law relating to public policy cannot remain immutable. It must change with the passage of time. The wind of change blows upon it." (Per Danckwerts, L. J., in *Nagle v. Feilden*, (1966) 2 QB 633 at p. 650). On the application of these principles, it has been universally recognised that a contract to defraud the revenues or that tends to promote corruption in public life or which tends to prejudice social and economic interest of the community would

be void and unenforceable as being opposed to public policy. The general principle has been exemplified and extended to contracts which may be *ex-facie* lawful but which were intended to be exploited for an illegal purpose, *Alexander v. Rayson*, (1936) 1 KB 169 or to provide a setting for an act which may be contrary to the policy of the law. 16 Toronto LJ 287. In all such cases, the Courts in England have refused to grant relief based on such contracts on the principle of *ex dolo malo non oritur actio*, that is, no Court will lend its support to a man who founds his cause of action upon an immoral or an illegal act. It has, however, been recognised in England that if the illegal consideration constituted a subsidiary or a minor part of the total consideration and if the illegality did not involve a criminal act or one *contra bonos mores*, the illegal part of the consideration may be severed from the rest of the consideration and the legal promises may be enforced and in such cases, the principle of severability has been applied. It has also been recognised that in case a claimant has relented and withdrawn from the contract before the illegal purpose has been substantially performed, money paid or goods delivered pursuant to such a contract could be recovered from the other party.*

34. In India, the law on the subject is contained in Sections 10 and 23 of the Contract Act. According to Section 10, an agreement is enforceable only if it is made for a lawful consideration and with a lawful object. Section 23 however, declares what kinds of considerations and objects are not lawful. Section 23 is in the following terms:

"23. The consideration or object of an agreement is lawful, unless—

It is forbidden by law; or

is of such a nature that, if permitted, it would defeat the provisions of any law; or

is fraudulent; or

involves or implies injury to the person or property of another; or the Court regards it as immoral, or opposed to public policy.

In each of these cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void."

To the extent it is relevant to the present discussion, the Section provides that "the consideration or object of an agreement is lawful unless — the Court regards it opposed to public policy." in which case, the consideration or object would be unlawful and further

*Halsbury's Laws of England, 3rd Edn. Vol. 8, para. 223 at p. 130.

**Cheshire: Law of Contract, 8th Edition, page 319.

† Halsbury's Law of England, 3rd Edition, Vol. 8, Para. 224 at p. 131.

*Halsbury's Laws of England, 3rd Edn., Vol. 8, Para. 258 at p. 150.

provides that "every agreement of which the object or consideration is unlawful is void." It has been recognised in India that Section 23 was inspired by the Common Law of England and should be construed in that light, per Subba Rao, J., in *Gherulal Parakh v. Mahadeo Das*, AIR 1959 SC 781, and has in fact been construed in the light of the principles and precedents that have prevailed in England. It is therefore, beyond controversy that where the consideration or the object of an agreement is opposed to public policy, such an agreement would be void and could not be enforced in any Court of law. As regards the concept of public policy the cautious approach of Courts in England that new heads of public policy should not be propounded has been adopted in India and it has been pointed out that the Courts should ordinarily "expound" and not "expand" the frontiers of public policy. It has, however, at the same time been recognised, as in England, that the existing heads are not closed and theoretically it may be permissible to evolve new heads in the circumstances of a changing world, it was advisable in the interest of stability of a society not to make any attempt to discover new heads in these days, AIR 1959 SC 781. The maxim *ex dolo malo non oritur actio* has also been applied to India and so have the principles of severability and the various exceptions to the rule that the Court will not lend its aid in a cause founded on illegal contract. The maxim as applied in India was thus stated by Hidayatullah, J., while speaking for the Court in *Kedar Nath Motani v. Prahlad Rai*, (1960) 1 SCR 861 = (AIR 1960 SC 213).

"The correct position in law, in our opinion, is that what one has to see is whether the illegality goes so much to the root of the matter that the plaintiff cannot bring his action without relying upon the illegal transaction into which he had entered. If the illegality be trivial or venial, as stated by Williston and the plaintiff is not required to rest his case upon that illegality, then public policy demands that the defendant should not be allowed to take advantage of the position. A strict view, of course, must be taken of the plaintiff's conduct, and he should not be allowed to circumvent the illegality by resorting to some subterfuge or by mis-stating the facts. If, however, the matter is clear and the illegality is not required to be pleaded or proved as part of the cause of action and the plaintiff recanted before the illegal purpose was achieved, then, unless it be of such a gross nature as to outrage the conscience of the Court, the plea of the defendant should not prevail."

35. It, thus, appears to me to be beyond doubt, both on principle and pre-

cedent, that, except in exceptional cases, referred to by Hidayatullah, J., the Court would not lend its assistance to a suitor whose cause was based on a contract which was opposed to public policy. As regards the true concept of public policy, it appears to me that if the Courts in England, where free trade obtains, could deviate from the accepted notions of public policy, and propound the theory, as was done by Danckwerts L. J. in *Nagla* (1966) 2 QB 633 (Supra), that the law relating to public policy could not remain "immutable" and must change with the passage of time because "the wind of change blows upon it", why would it remain static in a developing society like India where the content of socio-economic policy of the State, as envisaged in the Constitution, is based on social control of means of production and where, having regard to the almost total crisis of character among those engaged in industry, trade and commerce, there was extensive fraud of the revenues and the widening pernicious influence of the black economy was casting its evil influence in polluting the entire system to the point of posing a threat to its very stability. The frontiers of public policy need not necessarily be confined to the conservative limits conceived in England and must undergo drastic change so as to meet the new situations that emerge. In any event, it became clear that whichever way one looks at the concept of public policy, a contract which had for its objects the fraud of the revenues or the generation or consumption of black money would be considered to be sufficiently tainted so as to disentitle a suitor to a relief in a Court of law based on such a contract.

36. Two further questions must, however, be answered before a decision could be arrived at in the present case, namely, (1) whether a contract, as in the present case, for the sale of goods which is ex-facie innocuous could be said to be tainted and be within the mischief of the provisions of Section 23 of the Contract Act merely because it was carried out in such a way or was intended to be carried out in such a way so as to defraud the revenues and to find an outlet for or generate black money; (2) if the answer to the first question be in the affirmative, whether the plaintiff would be entitled to the relief because the hands of the defendants were equally soiled and the plaintiff having recanted, did not rely on the part of the contract which involved the taint.

37. At this stage, it occurred to me that it may be proper to direct the attention of the learned counsel for the parties to the aforesaid material and to give them an opportunity if they had anything to say in relation to it or if they could bring to bear any fresh thinking on

the question or could rely on any other principle or precedent one way or the other. I, therefore, had the matter reheard vis-a-vis the aforesaid two questions. In the course of a brief hearing, learned counsel for the defendant followed the line convenient to his client and contended that on the basis of the principles and the precedents referred to above, no relief could be given to the plaintiff on the basis of the aforesaid contract and that on the test laid down by Hidayatullah, J., in *Kedar Nath Motani* (AIR 1960 SC 213) (supra), the plaintiff would not even be entitled to the relief of return of the goods and that the suit must, therefore, be dismissed. On the other hand, learned counsel for the plaintiff, however, contended that the contract could not be said to be contrary to public policy even on the basis of the finding which I propose to return and that in any event, the hands of the defendants being equally soiled, there was no reason why the relief of return of goods be denied to the plaintiff. Learned counsel invoked the provisions of Section 65 of the Contract Act in support of his claim for such a relief and relied on the decision of the Supreme Court in the case of *Kuju Collieries Ltd. v. Jharkhand Mines Ltd.* AIR 1974 SC 1892. Learned counsel further contended that in the present state of the pleadings it was not open to the Court to refuse relief on ground of alleged taint to the transaction.

38. To my mind both the questions mooted above must, in the present state of law, be answered in favour of the plaintiff. On the finding of fact returned by me that the contract for the sale of goods was entered into between the parties to be carried out with the aid of unaccounted funds to enable the purchaser to consume such funds, the seller to generate the same and as a result to defraud the revenue, the relief could not be refused to the plaintiff either on the basis of the provisions of Section 23 of the Contract Act or the general principles applied in England. Section 23 makes a contract illegal of which the "consideration" or the "object" is contrary to public policy. The consideration could not be said to be contrary to public policy because the corresponding considerations are the payment of money and delivery of goods because when the Section refers to consideration for the agreement it obviously implies consideration for the promise. Neither the payment of money by itself nor the delivery of the goods could be said to be contrary to public policy. The object of the contract could also not be said to be opposed to public policy because the object of the contract was not to consume or to generate unaccounted funds or to defraud the revenues. The object obviously was to do business — so

far as the seller is concerned to sell the goods and so far as the purchaser is concerned to buy goods for further sale and in the process to make income. Neither the consumption nor the generation of unaccounted funds nor to defraud the revenues could, therefore, be said to be the object of the agreement. The object is, however, at times, given an extended meaning of a "design" but neither of these can constitute a design for the agreement because the substantial design again was to do business. It may at best be described as an incidental purpose of the agreement to be achieved in the manner in which an innocuous agreement was to be carried out. Assuming, however, that the taint of unlawfulness attaches to the agreement even if it was ex-facie legal but was intended to be carried out by improper means, the claim of the plaintiff would still be saved on an application of the principle enunciated by Hidayatullah, J., both because the taint is clearly severable from the main agreement because under the compulsion of circumstances which led to the filing of the suit, the plaintiff had to recant from the original design. The taint is severable in the sense that the plaintiff sues on the innocent part of the contract when he claims recovery by a decree of the Court for the sale of the goods made by him. The manner in which the payment was to be made or the type of funds to be used for the purpose is not part of the relief sought by the plaintiff. The tainted part, therefore, which consists in the manner in which the agreement was to be carried out, both by the defendant and the plaintiff, is clearly severable and beyond the scope of the relief. In the peculiar circumstances of the case, therefore, no taint could attach to the part of the agreement which is sought to be enforced and to hold to the contrary would be tantamount to a differential treatment to the two persons whose hands are equally soiled and if the relief is refused to the plaintiff, I would be virtually making a wholly undeserved gift of a large amount of money to the defendants whose conduct was equally, if not more, reprehensible than that of the plaintiff.

39. In the result, the plaintiff succeeds and the claim of the plaintiff for Rs. 1,68,059.25 is decreed with costs. The plaintiff would also have interest on the said amount from the date of the suit till the date of the payment at 6% per annum.

40. Before parting with this case I must point out that, if the way I have looked at the matter as to the enforceability of the claim represents the true legal position, there is urgent need of reform in the law of contract with a view to plug some of the loopholes in it so that any taint in the manner in which a con-

tract may be carried out or may be intended to be carried out such as the fraud of the revenues or the generation or consumption of tainted money may vitiate the contract and bar a Court from giving any relief so that it may operate as a deterrent against such nefarious activities which need to be curbed in the interest of national economy and political stability.

Suit decreed.

AIR 1976 DELHI 30

AVADH BEHARI ROHATGI, J.

The Caxton Press Pvt. Ltd., New Delhi, Appellant v. Municipal Corporation of Delhi, Respondent.

Second Appeal No. 6 of 1969, D/- 4-3-1975.*

(A) Electricity Act (1910), Sections 2 (1), 2 (f) — "Electric supply line" — Time switch does not form part of electric supply line and does not become the property of the undertaking and cannot be removed by the undertaking from the premises. (Paras 10, 11, 12)

W. C. Chopra, for Appellant; Bishamber Dayal, for Respondent.

JUDGMENT:— This is a second appeal against the order of Additional District Judge, Delhi, dated August 26, 1968.

2. The appellant brought a suit against the Municipal Corporation of Delhi (respondent) for the recovery of Rs. 1,690/- on account of compensation for a time switch which was taken away by the officials of the Delhi Electric Supply Undertaking, a branch of the Corporation, on May 6, 1963, and was converted by them to their own use.

2-A. The appellant company carries on the business of printing. They were sanctioned a night load of 30 KW for use of their press by the Delhi Administration. The Undertaking insisted upon the installation of a time switch as a condition for supply. The appellant purchased it at a cost of Rs. 1,690/-. This was fitted at the appellant's premises. The Undertaking granted the necessary connection. It was used by the appellant for running the press.

3. It appears that later on position of electricity improved. The night load was converted into a regular day load with no restrictions as to the timings during which electricity may be used by the appellant. The time switch became surplus as the night load was converted into a day load. The officials of the Undertaking removed the time switch

* (Against Judgment and decree of K. S. Sidhu, Addl. Dist. J., Delhi, D/- 26-3-1968).

and took it away. They refused to return it to the appellant. They claimed that it had become their property.

4. The appellant brought a suit for the return of the time switch and in the alternative for its price. The Subordinate Judge found that the time switch did not form part of the service line and did not become the defendant's property. He awarded a decree for Rs. 1,500/- with costs.

5. The corporation appealed. The Additional District Judge who heard the appeal set aside the decree and dismissed the appellant's suit. He was of the view that the time switch is a device which is used in the distribution of energy and was a part of the service line.

6. The only question for decision in this case is: Did the time switch form part of the service line and as such did it become the property of the respondent?

7. At the time the load was sanctioned by the Administration one of the conditions for the supply was

"that the consumer shall provide a time switch at their own cost."

Another condition of supply was this:

"Note: The service line, notwithstanding that a portion of the cost has been paid for by the consumer, shall remain the property of the Undertaking by whom it is to be maintained. The Undertaking shall reserve the rights to use such service line for the purpose of supply to other persons."

8. This condition means that the service line will be laid by the Undertaking. The appellant will pay the cost of laying the service line. The service line so laid shall remain the property of the Undertaking. They can supply electricity to other persons from this service line.

9. The expression "service line" is defined in Section 2 (1) in the Indian Electricity Act of 1910 and in so far as it is material is in these terms:

"service line" means any electric supply line through which energy is, or is intended to be supplied, ...

"Electric supply line" is defined in Section 2 (f) in these terms:

"electric supply line" means a wire, conductor or other means used for conveying, transmitting or distributing energy (whether by overhead line or underground cable), together with any casing, coating, covering, tube, pipe or insulator enclosing, surrounding or supporting the same or any part thereof, or any apparatus connected therewith for the purpose of so conveying, transmitting or distributing such energy and includes any support, cross-arm, stay, strut or safety device erected or set up for that purpose."

10. On a conjoint reading of the conditions of supply and the definitions of

"service line" and "electric supply line" as given in the Indian Electricity Act, 1910 it appears that a wire, conductor or other means used for conveying, transmitting or distributing energy will form part of the electric supply line. It will also include any apparatus connected therewith for the purpose of so conveying, transmitting or distributing energy. Energy is supplied through the electric supply line and the electric supply line is defined in comprehensive terms so as to include a wire, conductor, apparatus etc. In my opinion time switch does not form part of the electric supply line. It is a contrivance which is superposed or super-added to electric supply line so as to regulate and control the supply. The consumer is allowed to use the energy only during specified hours, from 10 p. m. to 8 a. m. In order to see that this is done the Undertaking requires him to put a time switch on the electric supply line. He does it. It does not mean that it becomes a part of the electric supply line. A device fitted for the purpose of regulation and control of electricity cannot be said to be an apparatus for conveying, transmitting or distributing energy within the meaning of Section 2 (f). Even after the Undertaking had removed the time switch the electric supply line remained there as before. It was transmitting energy uninterrupted and unhindered. Now there was no regulator on it.

11. A time switch is a device to control and regulate the hours of supply of energy. It cannot be said to be a device or apparatus used for distributing energy, for energy can be conveyed even without it and in fact it is being supplied to the appellant even after the time switch had been removed. A time switch is installed only to regulate the hours or period of supply and not to regulate the supply itself. The supply will continue to be transmitted even if there is no time switch. A time switch by itself is not necessary for "conveying, transmitting or distributing energy". It is not essential for the purpose of any of those functions. It does not become a part of the service line. Its office is to check the misuse of the energy by the consumer. In order to see that the appellant does not use the energy beyond the hours for which load was sanctioned to him the Undertaking required him to install a time switch at his own cost. It was not essential for transmission or distribution of energy. It was not an integral part of the service line in the sense that its removal would affect the transmission or distribution of the supply of energy to the appellant or any other consumer on that line.

12. The note in the conditions of supply makes the intention clear. It says that the service line though laid at the

cost of the consumer shall remain the property of the Undertaking so that it may be used for purpose of supply of energy to other persons. A time switch cannot be used for the purpose of supply to other persons.

13. In my opinion, the first Appellate Court did not correctly interpret the conditions of supply. My conclusion, therefore, is that the time switch did not become the property of the Undertaking and they had no right to remove it from the premises.

14. I would allow the appeal. The decree of the first appellate Court is set aside. The decree of the trial Court is restored. The respondent is allowed one month's time to return the time switch to the appellant and if the respondent fails to return it within that period then the appellant will be entitled to recover Re. 1,500/- from the respondent. The appellant will be entitled to costs throughout.

Appeal allowed.

AIR 1976 DELHI 31

S. RANGARAJAN, J.

K. N. Kapoor, Petitioner v. Union of India and others, Respondents.

Civil Writ No. 519 of 1968, D/- 24-7-1975.

(A) Displaced Persons (Compensation and Rehabilitation) Act (1954), Section 40 — Displaced Persons (C. and R.) Rules 1955, Rule 90 (11), (12), (13) and (14) — Auction sale of property — Auction purchaser not depositing full price as required by Rules — He has no claim to property — No order cancelling sale is necessary. (Civil P. C. (1908), Order 21, Rule 86).

Where the purchaser of Property at a public auction fails to comply with the conditions imposed by Rule 90 (11), (12) and (13) and fails to deposit the full price the purchase becomes a nullity and the purchaser has no claim to the property under Rule 90 (14) and no order cancelling the auction sale is necessary. Civil Writ No. 482-D of 1964, D/- 8-9-1967 (Delhi) and AIR 1954 SC 349 and AIR 1965 SC 1994 and AIR 1958 SC 289, Rel. on. (Paras 6, 7, 8, 13)

Cases Referred: Chronological Paras
(1967) Civil Writ No. 482-D of 1964, D/- 8-9-1967 (Delhi) 5
AIR 1965 SC 1994 = (1965) 2 SCJ 873 8
AIR 1958 SC 289 8
AIR 1954 SC 349 = 1955 SCR 108 6

Naunit Lal with V. P. Chaudhary, for Petitioner; P. N. Talwar, for Respondents Nos. 4 to 7, for Respondents.

ORDER:— This petition under Articles 226/227 of the Constitution is to quash
IS/KS/D579/75/GNB

an order passed by Shri Raju Kant, Officer with delegated powers of the Central Government under the Displaced Persons (Compensation and Rehabilitation) Act, 1954 (Act No. 44 of 1954) (hereinafter called as the Act), dated 4-6-1968, refusing to interfere under Section 33 of the Act with the order passed by the Settlement Commissioner Shri Sudarshan Aggarwal with delegated powers of Chief Settlement Commissioner dated 30-4-1968, taking suo motu proceedings for cancellation of sale of a bungalow in Plot No. 26 N. H. III, Township, Faridabad as well as sale certificate dated 18-1-1963 issued in favour of the petitioner K. N. Kapoor. The facts which led to the filing of this petition may be briefly noticed.

2. One Alam Chand, whose legal representatives are respondents Nos. 4 to 7 in this petition, purchased the said property in a public auction held on 31-12-1957 wherein he was the highest bidder in the sum of Rs. 8,050/- whereupon he was issued a notice requiring him to pay balance of the bid price. In accordance with the rules, to which reference will be made later, he had to deposit 10 per cent. of the purchase money and in the event of his holding a verified claim (as Alam Chand did) he could execute a bond to that extent.

3. Passing over the details of what happened at this stage it is sufficient to note that Alam Chand did not deposit the sale amount as required by the rules because (as it turned out) he had withdrawn the entire amount of compensation due to him in the verified claim No. P/Gurgaon/215421/2421. A statement to this effect was made by Alam Chand himself in the application which he had made, on 1-2-1960 (vide p. 8-F of file No. 26/N.H./III). He had categorically admitted therein that he had realised the entire compensation on 18-1-1960 and that he may be informed about the orders concerning the whole of the amount to be deposited by him in cash. It may be noticed, even at this stage, he could not have had any difficulty in the matter of knowing for what amount he had bid: it was Rs. 8,050/-; the 10 per cent. earnest money, for which he had given the bond to be adjusted out of his compensation amount, was no longer available after he had withdrawn the entire amount of compensation due to him. As would appear from a later statement which Alam Chand made before the Assistant Settlement Officer on 29-4-1960 (vide p. 5-N of the same file) he had intimated that he received a sum of Rs. 1000/- in cash and Rs. 1740/- in the form of National Planning Savings Certificates. Having made this admission he had no option but to pay the entire sale price, including the 10 per cent. which he was bound to pay initially. This position was

in fact, conceded by him when he made a request that he may be granted 20 days time for paying the said amount. It is also seen from the file from a note dated 24-5-1960 (despite the portion of the file being torn) that Alam Chand had not appeared until that date or made the deposit. It may be further noticed that Alam Chand died on 13-4-1961.

4. It is not necessary at this stage, to be detained by the notices that were sent to Alam Chand both before and after his death in view of the fact that Alam Chand had himself appeared, long after the acceptance of his bid by the Settlement Commissioner; his earlier request to have the sale price adjusted out of his compensation amount could not have any validity after he had himself withdrawn the entire compensation (it has not been stated before me that any further amount of compensation was due to him than what he had drawn).

5. In these circumstances, the prime question, which will be dealt with in the course of this judgment as arising for consideration, would be whether Alam Chand had any claim against the property within the meaning of Rule 90 sub-rule (14) of the Rules framed under the Act. If this question is to be answered against the petitioner then we would not be detained by anything that happened in the shape of the proceedings taken to (1) cancel the sale and (2) forfeit the 10 per cent. of the earnest money which, in fact, was not deposited in this case. As explained by Ismail, J., in *Ram Chand v. Union of India*, (Civil Writ No. 482-D of 1964 decided on 8-9-1967 (Delhi)) sub-rule (14) of Rule 90 enumerates what he described as "two consequences" following upon failure to comply with the conditions postulated by the earlier sub-rules (11) to (13). Ismail, J., had set out all the three rules and had considered them. It may be necessary to read sub-rule (14) fully;

"14. If the auction purchaser does not deposit the balance of the purchase money within the period specified in sub-rule (11), or does not make an application for the payment of Compensation within the period specified in sub-rule (12), or if the net compensation admissible to the auction purchaser and to his associate claimants, if any, is found to be less than the balance of the purchase money and the auction purchaser does not make up the deficiency as provided in sub-rule (13), the initial deposit made by the auction purchaser under sub-rule (8) shall be liable to forfeiture and he shall not have any claim to the property."

6. It may be sufficient to merely summarise, in so far as it is material to the present case, the contents of sub-rules (11) to (13). Sub-rule (11) merely

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Gauhati High Court

AIR 1976 GAUHATI 1

BAHARUL ISLAM J.

Union of India, and another, Petitioners
v. Monoranjan Banik, Opposite Party.

Civil Revn. No. 116 of 1973, D/- 25-6-1975*.

(A) Civil P. C. (1908), Order 23, R. 1
(2) (b) — "Other sufficient grounds" under
Cl. (b) need not be analogous to the grounds
stated under Cl. (a). 1970 Assam LR 278,
Foll. (Paras 6 and 7)

(B) Civil P. C. (1908), Order 23, Rule 1
(2) (b) — "Satisfied about existence of 'sufficient grounds'" — Satisfaction is of the trial
Court considering the question in the light of
all the facts and circumstances of the case.
Held, on facts that as the suit which had
become infructuous was properly allowed to
be withdrawn and a fresh suit for compensation
filed in its place. 1970 Assam LR 278
Followed. (Para 10)

(C) Civil P. C. (1908), Order 2 Rule 3
and Order 23, Rule 1 — Bar of relief under
Order 2 Rule 3 — Question arises only
in subsequent suit and not while plaintiff
seeks leave to withdraw suit and file a fresh
one. (Para 9)

Cases	Referred:	Chronological	Paras
1970 Assam LR 278			6, 10
AIR 1951 All 845 = 1951 All LJ 607			6
(FB)			6
AIR 1940 Bom 121 = 42 Bom LR 143			6
(FB)			6

P. P. Duara, for Petitioners; S. K. Ghose,
S. K. Sen and C. R. De, for Opposite Party.

ORDER:— This is an application under
Section 115 of the Code of Civil Procedure
(hereinafter called 'the Code') The applica-
tion has been made on behalf of the two

* (Against Order of Asst. Dist. J., No. 2 of
Gauhati, in T. S. No. 39/37 of 1972 D/-
14-8-1973).

IS/JS/D429/75/TVN

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defendants, the Union of India and the Dist-
rict Commercial Superintendent, N. F. Rail-
way, Lunding and is directed against an order
passed by the Assistant District Judge No. 2,
Gauhati, under Order 23 Rule 1 of the
Code.

2. The plaintiff instituted the suit in
the Court of the Assistant District Judge,
aforesaid, for a declaration that the plaintiff
was "entitled to the assessment delivery of
the goods under the Rule 1843 of the Indian
Railway Commercial Manual Volume II", that
the proposed sale of the goods on auction
was illegal and void, and for a perpetual
injunction.

3. The facts of the case, briefly stat-
ed, are that one consignment of 100 cases of
Biri was booked 'self' by one Khaliluddin
Abdul Sattar of Ballygunge Railway Station
on 18-8-1971 under Invoice No. 63, R/R No.
C-743687 to be delivered at Karimganj Rail-
way Station. The consignment arrived at the
destination on 28-3-1972. The plaintiff was
the endorsee of the railway receipt. So he
demanded assessment delivery of the consig-
ment, but the defendants refused to do so
on the ground that assessment delivery was
not warranted. The plaintiff, therefore, re-
fused to take delivery of the consignment.
Thereafter the consignment was brought to
New Gauhati Railway Station for disposal by
public auction under the provisions of Sec-
tions 55 and 56 of the Indian Railways Act.

4. The plaintiff then instituted in the
Court of the Assistant District Judge, afore-
said, a suit being T. Suit No. 29/37 of 1972
for the reliefs mentioned above. Along with
the plaint he also filed an application for
granting a temporary injunction restraining
the defendants not to sell the consignment
in public auction and got an order in his
favour. The order of temporary injunction
was made absolute by the Court after hear-
ing both the parties. The order of injunction
was challenged before the High Court in M.
A. (F) No. 63 of 1972 and the High Court

eventually vacated the order of injunction. The defendants then sold the consignment by public auction on 26-2-1973 for a sum of Rs. 43,100/-. The plaintiff then filed before the Assistant District Judge an application under Order 23 Rule 1 of the Code praying for permission to withdraw the suit with liberty to institute a fresh suit. The learned Court allowed the plaintiff to withdraw the suit with liberty to bring a fresh suit. The plaintiff was also directed to pay a cost of Rs. 30/- to the defendants. This order has been challenged by this application.

5. Shri P. P. Duara, learned counsel appearing for the defendant-petitioners, makes two submissions before me: (i) that "other sufficient grounds" within the meaning of clause (b) of sub-rule (2) of Rule 1 of Order 23 must be grounds analogous to the ground covered by clause (a) of the said sub-rule. His submission is that the ground on which the learned court below granted permission to allow the plaintiff to withdraw the suit with liberty to file a fresh suit must be a ground of the nature of formal defect and in the instant case it was not so. (ii) His second submission is that "other sufficient grounds" do not include a ground on which permission may be given to the plaintiff to file a fresh suit, which is barred by some provision of law. His submission is that in the instant case the Court has given the plaintiff liberty to file a fresh suit, which is barred by Order 2 Rule 2 of the Code.

6. There was divergence of opinion on the question whether 'other sufficient grounds' within the meaning of clause (b) of sub-rule (2) of Rule 1 of Order 23 meant grounds analogous to the grounds within the meaning of clause (a). The Bombay and the Allahabad High Courts in their decisions reported in AIR 1940 Bom 121 (FB) and AIR 1951 All 845 (FB) supported the contention of the petitioners, while some other High Courts held the opposite view. So far as this Court is concerned, the law is well settled by a Division Bench decision of this Court reported in 1970 Assam LR 278, which has disented from the view taken by Bombay and Allahabad High Courts. This Court held:

"We are, therefore, clearly of opinion that under Order 23, Rule (2), when the Court is satisfied that a suit must fail by reason of some formal defect, or defects analogous thereto, or when there are other sufficient grounds independent of formal defects or those analogous thereto entailing dismissal of a suit, it may allow the plaintiff to withdraw the suit or part of his claim with liberty to institute a fresh suit in an appropriate case."

7. When confronted with this decision, Shri P. P. Duara, learned counsel for the petitioners, very fairly concedes that in view of the above decision he cannot press his first submission.

8. Learned counsel then strenuously urges his second submission. His submission is that the relief, the plaintiff is going to

seek in the proposed suit, was the relief which could have been sought in the present suit, but as he has not done so, the relief will be barred under Order 2 Rule 2 of the Code. The effect of the permission given by the Assistant District Judge would be, he submits, to enable the plaintiff to file a suit for a relief barred by law.

9. Order 2 Rule 2, sub-rule (3) of the Code provides:

"(3) A person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs; but if he omits, except with the leave of the Court, to sue for all such reliefs, he shall not afterwards sue for any relief so omitted."

The bar of the relief contemplated by sub-rule (3) of Rule 2 of Order 2 is against a relief, which has been omitted in an earlier suit but is sought in a subsequent suit. This can be examined only in the subsequent suit and not in an application under Order 23 Rule 1 of the Code, inasmuch as the plaintiff of the proposed suit is not before the Court. This plea may be taken only in the subsequent suit.

10. Order 23 Rule 1 (2) (b) of the Code provides:

"(2) Where the Court is satisfied—

(a)

(b) that there are other sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject-matter of a suit or part of a claim.

it may, on such terms as it thinks fit, grant the plaintiff permission to withdraw from such suit or abandon such part of a claim with liberty to institute a fresh suit in respect of the subject-matter of such suit or such part of a claim."

The satisfaction with regard to the sufficiency of the ground is of the Court concerned and when it considers all the facts and circumstances before it and comes to the conclusion that there are sufficient grounds for allowing the plaintiff to institute a fresh suit it can pass the order. This Court in 1970 Assam LR 278 observed:

"Whether there are sufficient grounds will always be a question for consideration of the Court and no exhaustive rule can be indicated".

The learned Assistant District Judge has observed that in view of the fact that the consignment of Biri has already been sold in auction, the present suit would be infructuous and the proposed suit of the plaintiff for compensation could be the only alternative. By this finding the learned Assistant District Judge has committed no error of jurisdiction and as such cannot be interfered with in an application under Section 115 of the Code.

11. In the result this application is rejected with costs and the Rule is discharged. Hearing fee Rs. 50/-.

Petition dismissed.

AIR 1976 GAUHATI 3

BAHARUL ISLAM, J.

Junaram Bora, Appellant v. Sarucholi Kuchuni and others, Respondents.

Second Appeal No. 7 of 1973, D/- 26-5-1975*.

(A) Civil P. C. (1908), Order 17, Rule 1 (2) — Award of costs against party applying for adjournment — Principle to be followed.

The award of costs on adjournment must not be arbitrary and the cost must not be imposed by way of penalty; it should be to meet the reasonable expenses of the ready party that it has to bear because of the adjournment granted at the instance of the other party. AIR 1950 Assam 169; AIR 1946 Bom 113, Rel. on.; AIR 1964 J. and K. 58, D st.

(Para 7)

(B) Civil P. C. (1908), Order 17 Rule 3 — Order under Appeal.

Where time is granted to the defendant (1) to cause the attendance of his witnesses and (2) to pay as a condition precedent the cost of adjournment and the defendant paying failed to do so the Court proceeds to decide the suit, the case falls under Rule 3 and an appeal lies from such decree. (Para 9)

Cases Referred: Chronological Paras
AIR 1964 J & K 58 = 1964 Kash LJ 68 7
AIR 1950 Assam 169 7
AIR 1946 Bom 113 = 47 Bom LR 978 7

B. R. Das, for Appellant; B. K. Goswami, for Respondents.

JUDGMENT:— This appeal is by the principal defendant, Junaram Bora (herein-after referred to merely as 'the defendant').

2. The plaintiff filed a suit for declaration of her title and confirmation of possession in respect of the suit land measuring 1 katha and ½ lecha being half of the total land covered by Dag No. 377. Her case is that the total land covered by dag No. 377 was the joint property of her husband Krishnam and his brother Mihiram, who had equal shares in the land. The land was partitioned during the lifetime of her husband and the eastern half fell to her husband's share and he was in possession thereof. Before his death the husband made a gift of the suit land together with some other property under a registered deed of gift dated 18-7-32 and since then she was in physical possession of the land. The defendant set up his title to the suit land and threatened to dispossess the plaintiff. Hence she filed the present suit.

3. The defendant does not deny that the property in question was the joint property of Krishnam and Mihiram. His case is that on the death of Mihiram his shares devolved on his daughter Moina, who was enjoying her father's share jointly with Krishnam. During 1942-43 there was an amicable

partition of the property and Moina got the entire land of dag No. 377 and Krishnam got his share elsewhere. Moina died leaving a minor son, Puspa. Kamala, Moina's husband, sold the land on behalf of Puspa to one Jadunath by a registered deed of sale on 8-12-1949 and delivered possession. In turn Jadunath sold the land to the defendant by a registered deed of sale on 9-12-1949.

4. The Munsiff decreed the plaintiff's suit.

5. In order to appreciate the points raised before me a few further facts need be stated. The suit was filed in Court of Munsiff on 11-7-1969 and it was protracting, several adjournments having been given for one reason or other. One of the adjournments was granted on 11-12-1970 on which date the suit was fixed for peremptory hearing. On that date the plaintiff was ready with witnesses but the defendant prayed for an adjournment on the ground of illness. The adjournment was granted and the defendant was directed to pay a cost of Rs. 10/-. Ultimately, after several adjournments thereafter, the suit was fixed for peremptory hearing on 27-7-71. On that date the plaintiff was ready with witnesses, but the defendant prayed for an adjournment on the ground that due to his illness, he could not summon his witnesses. The Munsiff granted adjournment on payment of Rs. 50/- as adjournment cost to be paid on the following date and the case was fixed for peremptory hearing on 3-9-71. On that date both the parties were ready with witnesses; three witnesses of the plaintiff were examined and the hearing was adjourned till 9-11-71 as there was no time for further hearing. The defendants on that date filed a petition with a prayer for reducing the adjournment cost of Rs. 50/- awarded against him on the previous date. The defendant had to pay altogether adjournment costs of Rs. 60/-. The Munsiff reduced this amount to Rs. 50/-. He ordered that the defendant's case would be heard only if he paid the adjournment cost on that date. On 9-11-71 the plaintiff was ready with witnesses, but the defendant filed a petition for adjournment on the ground that his witnesses were ill on that date. The Munsiff rejected the petition on the ground that the defendant had taken no steps to summon his witnesses, that his petition was not verified, and that the motive of the defendant was to prolong the case. Two more witnesses of the plaintiff were examined on that date, but the defendant was not allowed to cross-examine these two witnesses as he had not paid the adjournment cost as directed and 24-11-1971 was fixed for hearing argument. On that date the defendant filed an application stating that he was ready with the adjournment cost and prayed for recalling the plaintiff's witnesses for cross-examination, but the application was rejected and the suit was fixed for delivery of judgment on 14-12-1971. As the Munsiff was absent on leave on that date, the judgment was delivered on 6-1-1972.

* (Against judgment of Asst. Dist. J., Nowgong, in T. A. No. 9 of 1972, D/- 19-8-1972).

6. The first submission of learned counsel for the appellant is that the learned Munsiff committed an illegality in striking off the defence of the defendant. His submission is that the valuation of the suit was Rs. 500/- and the cost assessed in the decree was Rs. 46.54 p. He, therefore, submits that the adjournment cost of Rs. 50/- was highly disproportionate.

7. It is indisputable that Order 17, Rule 1 of the Code of Civil Procedure (hereinafter called 'the Code') gives power to a Court to grant adjournment at any stage of the suit to the parties or any of them, and to make such order as it thinks fit with respect to the costs occasioned by the adjournment. The Court also has the power to make prepayment of the adjournment cost a condition before the defaulting party at whose instance the adjournment has been granted, is heard.

A Division Bench of this Court in the case of the Gauhati Bank Ltd. v. Baliram Dutta reported in AIR 1950 Assam 169 has observed:

"The powers of the Court to adjourn the hearing of the suit from time to time under Order 17, Rule 1 are very wide. It may grant adjournment on any terms that it considers fit. It is, therefore within the competence of the Court to grant an adjournment on the condition that costs are paid on a particular date, failing which the suit shall be dismissed or defence struck off as the case may be. Such a condition if imposed could also be enforced in the event of non-compliance of the order."

But the adjournment cost must not be arbitrary or imposed by way of penalty; it should be to meet the reasonable expenses of the ready party that it has to bear because of the adjournment granted at the instance of the other party.

In AIR 1946 Bom 113 on which the appellant has taken reliance, the Bombay High Court has observed:

"In granting an adjournment of the hearing of the suit the Court is empowered by Order 17, Rule 1 (2), 'to make such orders as it thinks fit with respect to the costs occasioned by the adjournment'. The expression 'occasioned by the adjournment' is liberally used in order that the discretion of the Court should not be restricted to the taxable costs of the day. The principle underlying Order 17, Rule 1 (2) is that the party who is ready to proceed with the suit should be awarded such costs as can reasonably be held to be 'occasioned by the adjournment', and as might reasonably compensate him for the expense incurred by reason of the adjournment. Of course the condition imposed should not be in the nature of a penalty or punishment to the party asking for adjournment, and hence the costs awarded should in no case exceed a sum commensurate with the expense, which, in the opinion of the Court,

the party ready to proceed reasonably incurs as a result of the adjournment." Appellant also cites AIR 1964 J. and K. 58 in support of his contention. This case is not helpful to the appellant. In that case the valuation of the suit was Rs. 4331.34 and the adjournment cost awarded was Rupees 300/- which was imposed in the shape of a penalty on the ground that the defendant was a "big business concern" and the plaintiff was a poor man and the High Court in revision reduced the amount to Rs. 30/-, as the adjournment cost of Rs. 300.00 was imposed not on judicial considerations but by way of penalty.

8. In the instant case let us see whether the adjournment cost was arbitrary by way of penalty or imposed on judicial principles. On 9-11-1971 the plaintiff was present with 7 witnesses. The learned counsel appearing for the respondents submits that the plaintiff had to pay his advocate's fee, fee of the pleader's clerk and conveyance and other costs of the P. Ws., which he submits, in calculation, totals more than Rs. 50/-. He submits that this amount of Rs. 50/- was not only not disproportionate but was justified. This submission of the learned counsel for the respondents that the costs occasioned by the adjournment would come to not less than Rs. 50, could not be challenged by learned counsel for the appellant. It must therefore be held that the adjournment cost of Rupees 50.00 was imposed not by way of penalty, and the impugned order is not illegal.

9. One of the points raised by learned counsel for the respondents was that the appeal was incompetent inasmuch as the decree was 'ex parte' under Order 17, Rule 2 of the Code. In my opinion this submission of learned counsel has no substance, Rule 3 of Order 17 provides:

"Where any party to a suit to whom time has been granted fails to produce his evidence, or to cause the attendance of his witnesses, or to perform any other act necessary to the further progress of the suit, for which time has been allowed, the Court may, notwithstanding such default, proceed to decide the suit forthwith."

In the instant case time was granted to the defendant (i) to cause the attendance of his witnesses, and (ii) to pay as a condition precedent the adjournment cost. The defendant failed to perform both the acts. The Court then proceeded to decide the suit and did decide it. Clearly, therefore, the decree was under Order 17 Rule 3 and the appeal was competent.

10. In the merit of the judgment the appellant has not pointed out any error of law committed by the learned lower Appellate Court. The learned Courts below have considered Ext. 1, the deed of gift, Exts. 4 to 9, the Record of Rights and the revenue receipts Ext. 10 series, and have come to the categorical finding that the disputed land belonged to and was in exclusive possession of the plaintiff. This is a finding of fact,

which, even if erroneous, cannot be upset in a second appeal.

11. This appeal has no force and is dismissed. I, however, make no order as to costs.

Appeal dismissed.

AIR 1976 GAUHATI 5

BAHARUL ISLAM, J.

Suranjan Nandi and another, Petitioners v. S. R. Sastri and others, Opposite Parties.

Civil Revn. No. 104 of 1974, D/- 5-5-1975*.

(A) Civil P. C. (1908), Section 115 — Order granting temporary injunction — Interference by High Court in its revisional powers.

Whether principles of law governing issue of temporary injunction were correctly appreciated and applied to the facts of a particular case is a question of law that relates to jurisdiction. If the subordinate court's appreciation or application of such principles of law is erroneous it can be interfered with under Section 115 of Civil P. C. (Para 4)

Cases Referred: Chronological Faras

AIR 1966 SC 153 = (1966) 1 SCR 102 3

AIR 1964 SC 1341 = (1964) 5 SCR 157 3

A. M. Mazumdar, S. R. Bhattacharjee, for Petitioners; N. M. Lahiri, B. K. Goswami, P. K. Kalita, for Opposite Parties.

ORDER:— The Government of Assam by its notifications dated 22-9-1972 and 13-8-1973 nominated six members as the Government nominees to the Governing Body of the Ramkrishna College (hereinafter referred to as 'the College'). It included defendants Nos. 1 and 2 who are respectively the President and the Secretary of the Governing body of the college. The University also by its letters dated 5-9-1972 and 9-12-1972 nominated defendants Nos. 9 and 10 under clause (vi) of Rule 3 of Assam Aided Colleges Management Rules, 1965 (hereinafter referred to as 'the Rules'). The defendant No. 2 convened the first meeting of the Governing Body to be held on 23-8-1973 by his notice dated 21-8-1973. The plaintiff who claims himself to be the Principal and Secretary of the College filed Title Suit No. 66 of 1973 in the Court of the Assistant District Judge No. 1, Silchar, for a declaration that the constitution of the Governing Body of the college was illegal, that he was the rightful Principal of the college and entitled to operate its funds, and also for a permanent injunction to restrain the defendant Nos. 1 and 2 from the management of the college affairs including the operation of the college funds. Along with the plaint,

* (Against order of Md. G. Hussain, Dist. J., Cachar, in Misc. Appl. No. 28 of 1973, D/- 27-6-1974).

HS/IS/C856/75/MBR

the plaintiff also filed an application under Order 39, Rules 1 and 2 of the Code of Civil Procedure (hereinafter called 'the Code') for a temporary injunction. The learned Assistant District Judge initially granted an ad interim injunction; but after full hearing he vacated it. On appeal by the plaintiff, the District Judge granted the temporary injunction as prayed for.

2. Defendants Nos. 1 and 2 have now filed this application under S. 115 of the Code challenging the aforesaid order of the District Judge granting the injunction.

3. Shri N. M. Lahiri, learned Advocate General of Meghalaya appearing for the plaintiff, submits that the application under Section 115 of the Code is incompetent. He submits that when the District Judge had the jurisdiction to decide the question involved, he had the jurisdiction to decide it either rightly or wrongly, and his order cannot be challenged under Section 115 of the Code. In support of his contention, he relies on a decision of the Supreme Court reported in AIR 1964 SC 1341 in which their Lordships observed—

"The power of the High Court under Section 115 of the Code of Civil Procedure is not thereby excluded, but the exercise of that power is by the terms of the statute investing it severely restricted. The High Court may exercise its powers in revision only if it appears that in a case decided by a Subordinate Court in which no appeal lies thereto the Subordinate Court has exercised a jurisdiction not vested in it by law or has failed to exercise a jurisdiction so vested or has acted in the exercise of its jurisdiction illegally or with material irregularity. If the trial Court had jurisdiction to decide the case and even if it decided the question wrongly, it did not exercise its jurisdiction illegally or with material irregularity".

In the case of Pandurang Dhondi Chougule v. Maruti Hari Jadhav reported in AIR 1966 SC 153, their Lordships of the Supreme Court have held:

"The High Court cannot while exercising its jurisdiction under Section 115, correct errors of fact, however gross they may be, or even errors of law; it can only do so when the said errors have relation to the jurisdiction of the Court to try the dispute itself. It is only in cases where the subordinate Court has exercised a jurisdiction not vested in it by law, or has failed to exercise its jurisdiction so vested or has acted in the exercise of its jurisdiction illegally or with material irregularity that the revisional jurisdiction of the High Court can be properly invoked. Points of law may arise which are related to questions of jurisdiction. A plea of limitation or a plea of res judicata is a plea of law which concerns the jurisdiction of the Court which tries the proceedings. A finding on these pleas in favour of the party which raises them would oust the jurisdiction of the Court. An erroneous decision on these pleas,

therefore, can be said to be concerned with questions of jurisdiction falling within the purview of Section 115 of the Code."

4. The law therefore is that when a question of law having relation to jurisdiction, is erroneously decided by a subordinate Court, and by such erroneous decision, it assumes jurisdiction which it did not have, or refuses to exercise jurisdiction which it had, then it will be a case relating to the question of jurisdiction of the Court and the decision can be interfered with by the High Court in its revisional powers under Sec. 115 of the Code; if it is erroneous. Whether principles of law governing issue of temporary injunction were correctly appreciated and applied to the facts of a particular case is a question of law that relates to jurisdiction. If the subordinate court's appreciation or application of such principles of law is erroneous it can be interfered under Section 115 of the Code. It therefore cannot be said that in the instant case the petition under Section 115 is incompetent. This submission of the learned Advocate General has no substance.

5. The well known principles of law governing issue of a temporary injunction under Order 39 of the Code are whether the plaintiff has made out a prima facie case in the plaint and whether the balance of convenience is in favour of the grant of the injunction. Shri A. M. Mazumdar, learned counsel appearing on behalf of the petitioners submits that in the instant case, the learned District Judge had no jurisdiction to grant the injunction as he did. His submission is that the plaintiff has not made out any prima facie case to go for trial and that the balance of convenience was heavily against the grant of the temporary injunction. Mr. Mazumdar bases his first submission on two grounds; (1) that in this suit, the plaintiff virtually challenges the notifications dated 22-9-1972 and 13-8-1973 by which the Governing Body was constituted by the Government of Assam, but the Government has not been made a party; and so no decree declaring the constitution of the Governing Body invalid can be passed in the absence of the Govt. of Assam as a party, and the suit is bad for non joinder of a necessary party. (2) His second ground is that the plaintiff filed the suit on 6-11-1973. The Govt. by its notification No. ECL. 209/72/102 dated 31-5-1974 amended R. 3 of the Assam Aided Colleges Management Rules of 1965, and in pursuance of the new rule, the Govt. have constituted a new Governing Body which is now functioning as the Governing Body of the College. He submits that the cause of action of the suit has ceased to exist and the suit will be infructuous. He submits that although the defendants Nos. 1 and 2 are the President and the Secretary of the present Governing Body also they are accidentally so; the Govt. could very well have appointed two other persons as President and Secretary. His submission is that no Court will grant a temporary injunction in a

suit which has ceased to have its cause of action.

6. Although the questions raised by Shri Mazumdar are substantial, they form the merit of the suit. The learned District Judge has held that the plaintiff has a prima facie case to go for trial. I therefore refrain from expressing any opinion on the first point raised by Sri Mazumdar and propose to proceed on the assumption that the plaintiff has a prima facie case as found by the learned District Judge.

7. The only other submission of Shri Mazumdar is that the principles of law involved in granting a temporary injunction has been erroneously applied to the facts of the present case. His submission is that the balance of convenience is against the grant of a temporary injunction.

8. The admitted position is that the plaintiff was suspended by the Governing Body immediately after the filing of the suit and he was ousted from office and since then the defendant No. 2 has been functioning as the Secretary of the college. It is admitted that the plaintiff filed a suit against the order of suspension and got an ex parte decree. It is also admitted that an appeal from the ex parte decree has been filed by the petitioner together with an application for condonation of the delay and they are pending for orders. Be that as it may, the admitted position is that the aforesaid ex parte decree has not been executed; in other words, the plaintiff has not been reinstated in his office and that the defendants Nos. 1 and 2 have been functioning in their respective capacities.

9. At this stage it is necessary to refer to the relevant rules. Rule 3 of the Rules provides for the constitution of the Governing Body. Rule 6 provides that the college shall satisfy the Gauhati University that it is under the management of a Governing Body in which teaching staff is adequately represented. These two rules relate to the constitution of the Governing Body and we are not concerned with them in this petition. Under Rule 12 the duties assigned to the Governing Body have been enumerated. They are (i) the financial management of the college, including collection of subscriptions, realisation of funds and exemption from payment of fees in accordance with rules; (ii) maintenance of the college building, furniture and equipments; (iii) granting of leave to teachers according to rules, filling up of vacancies and reporting the same to the Director of Public Instruction, Assam, and the Gauhati University; (iv) Appointment of persons in connection with the affairs of the college; (v) making arrangement for half yearly and annual audit of the college fund and verification of stock and furniture. These duties shall ordinarily be entrusted to one or two members of the Governing Body, other than the office bearers and teacher members. If there be no such men in the governing

body to undertake the duty of audit, the governing body is to employ an outsider for the purpose of auditing the funds. Rule 14 enumerates the other duties and functions of the governing body; they are; (i) to determine the general scheme of the studies of the college subject to the approval by the Gauhati University and of the State Govt. through the Director of Public Instruction with regard to the inclusion of additional steps and grant of new posts, (ii) to construct and visualise projects for improvement of the college, (iii) to deal with the questions of discipline and grant of fee exemption under rules prescribed by the Govt. and (iv) to deal with any question and to exercise any function that may be referred to it by the State Govt. or the Gauhati University. Rules 12 and 14 clearly show that a college functions through its Governing body, and cannot do so normally without it. When a Governing Body is suspended, the Government can reconstitute it under Rule 8; but until such a Governing Body is reconstituted, the Director of Public Instruction has been empowered to take over the control of management of the college and ask the Principal to carry on the day-to-day administration under the Director of Public Instruction's orders for a period not exceeding three months. Rule 8 is not in operation in the present case.

10. In the instant case, the petitioner's case is that defendants Nos. 1 and 2 were withdrawing money from the college funds deposited in Banks and misappropriating it. These allegations have been denied by the petitioners in their counter-affidavit. They have admitted that they withdrew some money, but they spent it in the payment of the salaries of the teachers, stipends and allowances of the students and for other purposes of the college. The suit was filed in November, 1973, and ever since then the Governing Body has been administering the college smoothly and there has been no objection of any mis-management of the college from any quarters, either from the students or from the guardians or the local public. There is nothing on record to show that after the constitution of the impugned Governing Body, the management of the college is in any way suffering. On the other hand, if an injunction be granted, it can easily be seen that the duties and functions of the Governing Body enumerated in rules 12 and 14 will come to a stop and the administration of the college will be completely paralysed.

11. The grant of an injunction is discretionary and that discretion is to be exercised under well known principles of law. A court will grant or refuse a temporary injunction according to the facts of a particular case and needs of the situation. An injunction will always be refused if the grant of it results in defeat of justice and creates deadlock; and will be granted in order to prevent the mischiefs mentioned in Rule 1 or commission of a breach of contract or any other

injury mentioned in Rule 2 of Order 39 of the Code.

12. In the instant case, if an injunction is granted, serious injury will be caused to the college inasmuch as its administration will be paralysed.

13. Another aspect of the matter is that temporary injunction has been sought not against the impugned Governing Body, but against defendants Nos. 1 and 2 only. The plaintiff could not show that under any rules the President or the Secretary of the Governing Body of a college, or both of them jointly, alone shall operate the duties and functions of the college. If temporary injunction be granted, it will be futile, if the Governing body by a resolution authorise another of its members to operate the funds and carry on its other duties and functions.

14. In the result, it must be held that the learned District Judge committed an error in granting the injunction in the case. The impugned order is quashed. The petition is allowed. The Rule is made absolute. But in the circumstances of the case, I leave the parties to bear their own costs.

Petition allowed.

AIR 1976 GAUHATI 7

M. C. PATHAK, C. J.

Budhai Nepal Chandra Lalit Mohan Saha Firm and another, Petitioners v. Sudhangshu Ranjan Dev and others, Opposite Parties.

Civil Revn. No. 100 of 1972, D/- 31-3-1975.

(A) Civil P. C. (1908), Order 9, R. 13 — Setting aside ex parte decree — Application by a minor who was not represented by Guardian not maintainable.

Where in a suit, one of the defendants is a minor not represented by any guardian, the ex parte decree passed in the suit cannot be binding on him as he cannot be treated as a defendant in the suit. Consequently, an application by the minor defendant under Order 9, Rule 13 is not maintainable. In view of the matter that the ex parte decree passed in the suit was not effective against the minor defendant, there was no necessity to set aside the decree so far as the minor was concerned. AIR 1953 Cal 196; AIR 1957 Madh Bha 10, Rel. on. (Paras 10, 11, 12)

(B) Civil P. C. (1908), Section 115 — Finding of fact — Finding of lower Court as to service of summons — Neither without evidence nor perverse. — No interference in revision. (Para 19)

(C) Civil P. C. (1908), Order 9, R. 13 — Limitation — Application for setting aside of ex parte decree dated 18-5-65 — Considering the facts and circumstance of the case the Court coming to conclusion that specific knowledge of ex parte decree was derived only on

HS/IS/C799/75/SGK

3-1-1970 — Application filed on 30-1-1970 held was within period of limitation.

(Para 21)
Cases Referred: Chronological Paras
 AIR 1957 Madh Bha 10 = 1956 Madh Bha
 LJ 1258 12
 AIR 1953 Cal 196 = 56 Cal WN 757 12

P. Choudhary and C. R. De, for Petitioners; S. K. Sen and S. S. Dey, for Opposite Parties.

ORDER:— This revision petition is directed against the order dated 30-9-1972 by which the learned Sadar Munsiff No. 1, Silchar has set aside the ex parte decree dated 18-5-1965 passed in Money Suit No. 323 of 1964 and the execution proceedings in pursuance thereof.

2. The facts leading to this petition may briefly be stated:

3. Petitioner No. 1 M/s. Budhai Nepal Chandra Lalit Mohan Saha firm (registered) instituted Money Suit No. 323 of 1964 against opposite parties Nos. 1, 2, 3, 4 and petitioner No. 2 described as Proprietor, of M/s. Jayatara Stores, for realisation of an amount of Rs. 1,866.45 (P) in the Court of the Sadar Munsiff at Silchar. The suit was decreed ex parte on 18-5-1965. Properties of the defendants-judgment debtors were attached and sold in Money Execution Case No. 80 of 1965 on 22-2-1966 and the plaintiff decree-holder purchased the same with the permission of the Court. Delivery of possession of the properties purchased were also taken through Court on 26-4-1966. At the time of sale of the properties in question opposite parties Nos. 5 and 6 were in possession. It is stated that opposite parties Nos. 5 and 6 were tenants in respect of the properties in question and attorned to the auction purchaser. But they having defaulted in payment of rent petitioner No. 1 brought two ejectment suits against them being T. S. No. 275 of 1969 and T. S. No. 276 of 1969. While those two ejectment suits were pending in the Munsiff's Court at Silchar, opposite party No. 1 Sudhangshu Ranjan Dev and Opposite party No. 2 Sushendra Ranjan Dev filed an application on 30-1-70 under Order 9, R. 13 of the Civil Procedure Code for setting aside the ex parte decree dated 18-5-1965 passed in Money Suit No. 323/64 against petitioner No. 1 M/s. Budhai Nepal Chandra Lalit Mohan Saha Firm (Registered) and petitioner No. 2 Sashanka Sekhar Dev in the Court of the Sadar Munsiff No. 1, Silchar and the case was numbered as Misc. Case No. 43 of 1970. Petitioners Nos. 1 and 2 filed two separate objections in the Misc. Case in which four P. Ws. and 2 D. Ws. were examined and by the impugned order dated 30-9-72 the learned Munsiff set aside the ex parte decree and also execution proceedings in pursuance thereof.

4. In the application under Order 9, Rule 13, Civil Procedure Code, the petitioners (Opposite Parties Nos. 1 and 2 in this revision petition) contended that the summonses on

the defendants Nos. 3 and 4 Sushendra Ranjan Dev and Sudhangshu Ranjan Dev were suppressed by defendant No. 1 Sashanka Sankar Dev, who is opposite party No. 2 in the Misc. Case and the petitioner No. 2 in this revision petition and that the summonses on the defendants Nos. 3 and 4 were not at all served. It was also stated that on 4-12-1964 and 18-5-1965 on which Money Suit No. 323 of 1964 was filed and decreed ex parte respectively defendant No. 3 Sushendra Ranjan Dev was a minor. The opposite parties in the Misc. Case filed objections stating that summonses were served on the defendants and defendant No. 3 was a major.

5. On the pleading of the parties in the Misc. Case the learned Munsiff framed the following points for decision:—

- (1) Whether the Misc. Case is maintainable?
- (2) Whether the petition is barred by limitation?
- (3) Whether the petitioner No. 2 was a minor at the time of the original suit?
- (4) Whether the summonses were duly served on the petitioners?

6. The learned Munsiff took up Point No. 3 first and having considered all the evidence on record he came to the definite finding that petitioner No. 2, that is, defendant No. 3 in the Money suit was a minor when the ex parte decree was passed against him in Money Suit No. 323 of 1964. The learned Munsiff also found on consideration of the materials on record that summonses were not served on the petitioners, that is, defendants No. 3 and 4 in the Money Suit.

7. The learned Munsiff then took up point No. 2 and after considering the materials on record came to the finding that the petitioners came to know of the ex parte decree only on 3-1-1970 and therefore the application under Order 9, Rule 13 Civil Procedure Code filed on 30-1-1970 was within the period of limitation.

8. Regarding the first point the learned Munsiff held that gross injustice would be done if the minor defendant were not given an opportunity to fight out the original suit. Considering the materials on record the learned Munsiff set aside the ex parte decree as stated hereinabove.

9. Mr. P. Choudhury, the learned counsel appearing on behalf of the petitioners in this revision petition submits that the learned Munsiff has found that the Defendant No. 3 Sushendra Ranjan Dev was a minor when the money suit No. 323 of 1964 was filed and ex parte decree in question was passed in that suit. Since defendant No. 3 was a minor and not represented in the suit by a legal guardian, he cannot be legally deemed to be a defendant in the suit and therefore, the ex parte decree is not operative against him. It is submitted that if a minor is impleaded in a suit as defendant without appointing a guardian for him, he cannot

be said to be a party in the suit and no decree passed in such a suit can bind the minor. That being so no application under O. 9, R. 13 Civil Procedure Code is maintainable against the ex parte decree inasmuch as an application under Order 9, Rule 13, Civil Procedure Code for setting aside an ex parte decree may be made only by a defendant.

10. It has been found as a fact by the learned Munsiff that defendant No. 3 in Money suit No. 323/64 was a minor when the ex parte decree was passed. That being so, in law defendant No. 3 could not be treated as a defendant in that suit and the ex parte decree passed in the suit cannot be binding against the minor defendant. Consequently an application by the minor defendant No. 3, who cannot be treated as a defendant in the case, is not entitled to file an application under order 9, Rule 13, Civil Procedure Code. Thus the petition under Order 9, Rule 13, Civil Procedure Code by the minor defendant though may be major at the time of filing the application, is not maintainable.

11. Since defendant No. 3 was a minor and not represented by a guardian the question of serving of summons on the minor also does not arise. The minor if aggrieved may have a remedy by way of a suit and he may get the benefit of Section 6 of the Limitation Act. In any view of the matter, the ex parte decree is not effective against the minor defendant and that being so, in fact there is no necessity to set aside that decree so far as the minor defendant is concerned. Because, in law that ex parte decree is no decree at all so far as the minor is concerned.

12. That an application under Order 9, Rule 13, Civil Procedure Code is not maintainable by a minor defendant not represented by any guardian is supported by the decision in *Probhat Kumar Chatterjee v. Sm. Latika Debi*, AIR 1953 Cal 196 and the decision in *Gendalal v. Sitabai Bhagwat*, AIR 1957 Madh Bha 10.

13. We are thus, left with the application under Order 9, Rule 13, Civil Procedure Code by petitioner No. 1.

14. His case is that no summons was served on him in the suit and the summons was suppressed by the Defendant No. 1 in collusion with the plaintiff. Definite allegations were made against the defendant No. 1 who is opposite party No. 2 in the Misc. Case.

15. The learned Munsiff in his order has observed that the petitioners specifically stated in the petition that summonses were not served in the original suit. They also stated on oath that the summonses were not served on them. From the records of the original suit the returned copies of summonses were not found.

16. Witness No. 2 for the opposite party, who is a partner of opposite party No. 1

M/s. Budhai Nepal Chandra Lalit Mohan Saha Firms in his evidence stated that he could not say whether the summonses were duly served or not.

17. The learned counsel for the petitioner submits that in the order dated 22-3-1965 in the order sheet of the original suit it has been stated that "summons served. No steps taken by defendant." So the legal presumption was that the summonses were served. The submission of the learned counsel in normal course may be correct. But in the instant case it is found that one of the defendants was a minor and he was not shown as a minor in the plaint. The petitioners in their application under Order 9, Rule 13, Civil Procedure Code, not only stated that no summonses were served in the original suit but also deposed on oath before the court that no summonses were served on them. The witness for the opposite party—plaintiff stated that he could not say whether the summonses were duly served or not.

18. Then again it is stated that in the execution case the properties were sold. In that case the opposite parties could have brought the records of the execution proceedings to show that the notices for attachment and/or sale of the properties were served on the defendants but nothing was done.

19. Considering all the materials on record the learned Munsiff found that in the instant case summonses were not served on the defendants, that is, defendant Nos. 3 and 4 and we have already found that defendant No. 3 was a minor at the time. That being so, the finding of the learned Munsiff to the effect that no summons was served on the defendant No. 4 in the original suit cannot be said to be bad in law or without evidence or perverse. This finding of fact cannot be interfered with in this revision petition in any view of the matter.

20. The learned Munsiff then considered the materials on record and came to the finding that the petitioners in the Misc. Case could know of the ex parte decree only on 3-1-1970. In evidence petitioner No. 1 in the Misc. Case, namely, Sudhangshu Ranjan Dev has stated that towards the end of December 1969 he came to know that ejectment notices had been served on the tenants of their paternal houses and having got that information he consulted his lawyer and obtained the certified copy of the ex parte decree on 3-1-1970 and filed an application under Order 9, Rule 13, Civil Procedure Code on 30-1-1970. Considering the facts and circumstances of the case, the learned Munsiff has found correctly that the defendant No. 4 came to know about the ex parte decree only on 3-1-1970.

21. It may be observed that information regarding an ejectment notice with respect to the properties in question cannot be treated as knowledge of the ex parte decree. In the circumstances the finding of the learned Munsiff that the specific knowledge of

the ex parte decree was derived only on 3-1-1970 and therefore the application under Order 9, Rule 13 was within the period of limitation is legally correct.

22. It is, therefore, found that the impugned order of the learned Munsiff setting aside the ex parte decree on the petition under Order 9, Rule 13 of the Civil Procedure Code, filed by Sudhangshu Ranjan Dev, defendant No. 4 is legally sustainable and there is no ground to interfere with the same.

23. In the result the impugned order of the learned Sadar Munsiff No. 1, Silchar, setting aside the ex parte decree and the execution proceedings in pursuance thereof is upheld. The Revision petition is rejected. The Rule is discharged. The stay order stands vacated. I make no order as to costs.

Revision dismissed.

AIR 1976 GAUHATI 10
BAHARUL ISLAM, J.

Madhab Chandra Barua and others, Appellants v. Smt. Joymati Kalitani Barua, Respondent.

Second Appeal No. 94 of 1973, D/- 20-8-1975*.

(A) Registration Act (1908), Section 49 Proviso and Section 17 — Release of title to immoveable property — Unregistered Deed silent about delivery of possession — Releasee claiming title by adverse possession — Deed not admissible in evidence. (Limitation Act (1963), Article 65). (Para 10)

(B) Limitation Act (1963), Article 65 — Adverse possession among Co-owners.

Possession of one Co-owner is possession on his own behalf and on behalf of all the other Co-owners. Though the other Co-owners do not have actual possession, they do have constructive possession of the property. Therefore, a Co-owner to acquire title by adverse possession should have been in open and hostile possession to the knowledge and exclusion or ouster of the other Co-owners.

Where neither the Plaintiff nor her widowed mother through whom the plaintiff claimed title was in actual possession of the suit properties but which was for over 20 years in the possession of persons who were Co-owners with the father, held, that in the absence of evidence of open ouster, the Defendants could not claim title by adverse possession. Suit for declaration of title was decreed. AIR 1971 SC 376, and AIR 1957 SC 314 and AIR 1962 Assam 137 Followed. (Para 11)

*(From order of R. M. Chakrabarty, Asst. Dist. J., Darrang at Tezpur in T. A. No. 34 of 1970, D/- 8-8-1973).

IS/JS/D422/75/TVN

(C) Hindu Succession Act (1956), Section 14 (1) — Constructive possession sufficient to attract the provision. (Para 11)

(D) Court Fees Act (1870), Section 7 (iv) (c) — Suit for declaration of title and possession of share of Co-owner — Prayer for khas possession could be granted only in a suit for partition. (Para 12)

Cases Referred: Chronological Paras
AIR 1971 SC 376 = 1971 UJ (SC) 123 9
AIR 1971 SC 2184 = (1971) 3 SCR 734 9
AIR 1962 Assam 137 9
AIR 1957 SC 314 = 1957 SCR 195 9

K. Sarma and C. K. Sarma Barua, for Appellants; P. Choudhuri, C. R. Dey and B. K. Ghose, for Respondent.

JUDGMENT:— This appeal is by the Defendants and is directed against a judgment and decree passed by the Assistant District Judge, Darrang, Tezpur, in Title Appeal No. 34/70.

2. The facts of the case may be briefly stated as follows:

An area of 32 Bighas 4 Kathas 8 Lechas of land as described in the Schedule to the plaint originally belonged to one Dehiram. Dehiram died leaving two sons Bangsi and Dhutiram. Bangsi died leaving his son Mukunda. Mukunda died leaving his widow Laheswari and minor daughter Joymati. Laheswari died in 1372 B. S. corresponding to 1965-66 A. D. Dhutiram died leaving two sons, Madhab Defdt. No. 1 and Prafulla, Defdt. No. 2.

3. The plaintiff's case is that the suit patta stood in the name of Dehiram. After his death, it stood in the name of Bangsi, and after his death, Mukunda and Dhutiram had equal shares. During his lifetime, Mukunda was living jointly with his uncle Dhutiram and possessed the land in Ejamali till the death of Dhutiram who died about 17 or 18 years ago before filing of the suit. Mukunda died about 8 years before the institution of the suit. After the death of Mukunda, Laheswari returned to her parents' home, but was getting half share of the crops grown on the land for the maintenance of herself and her minor daughter, the plaintiff, till her death. Before her death, the plaintiff had been given away in marriage, in 1368 B. S. Dhutiram died three years before filing of the suit leaving the two defendants. The plaintiff attained majority on 15th Bahag 1373 B. S. on attaining majority, she claimed half share of the property separately from the defendants, but they refused. The plaintiff has further alleged that her name had been mutated in respect of her share on 11-6-1969. She has filed the present suit for declaration of her title and recovery of khas possession.

4. The two defendants have contested the suit. In their written statements, they have stated that Mukunda died about 20 years ago and one year after his death, Laheswari left her husband's place for good, relinquishing her claim to the share of her husband's properties in favour of Dhutiram and return-

ed to live in her parents' home as early as 13-6-1939, and since then neither Laheswari, nor the plaintiff had any possession in the suit land. After returning to her parents' home, Laheswari filed a number of mutation cases in respect of her share in the suit land; but her prayers for mutation were rejected by the Sub-Deputy Collector concerned. As, thereafter, she did not file any Civil Suit, her claim is now barred by limitation and the defendants have acquired title to the suit land by adverse possession.

5. On the basis of the pleadings, the learned Munsiff framed a number of issues, of which three related to acquisition of title to the suit land by adverse possession by the defendants.

6. After trial the Munsiff found the suit to be barred by limitation and dismissed the suit. On appeal, the learned Assistant District Judge reversed the judgment and decree of the Trial Court, and decreed the plaintiffs' suit. Hence this appeal.

7. The first point urged by Mr. K. Sarma, learned counsel for the appellants is that the finding of the lower appellate Court that the plaintiff's suit was not barred by adverse possession was erroneous inasmuch as, he submits, this finding, albeit of fact, is based on the omission from consideration of material documents, namely, Exts. 'Ka', 'Kha', 'Ga', 'Gha' and 'Younga'.

8. Before the consideration of the submission of learned counsel, let us first examine the law on the point.

9. The law of adverse possession between co-sharers is well settled by the Supreme Court. In AIR 1971 SC 376 their Lordships have held that the possession of land by a co-owner, however long it might be, cannot confer on him any right unless it is adverse to the two other co-owners. In the case of *P. Lakshmi Reddy v. L. Lakshmi Reddy*, reported in AIR 1957 SC 314 their Lordships of the Supreme Court have held:—

"To prove adverse possession, 'the possession required must be adequate in continuity, in publicity and in extent to show that it is possession adverse to the competitor.'"

"But it is well settled that in order to establish adverse possession of one co-heir as against another it is not enough to show that one out of them is in sole possession and enjoyment of the profits, of the properties. Ouster of the non-possessing co-heir by the co-heir in possession who claims his possession to be adverse, should be made out. The possession of one co-heir is considered, in law, as possession of all the co-heirs. When one co-heir is found to be in possession of the properties it is presumed to be on the basis of joint-title. The co-heir in possession cannot render his possession adverse to the other co-heir, not in possession, merely by any secret hostile animus on his own part in derogation of the other co-heirs' title. It is a settled rule of law that as between co-heirs there must be evidence of open assertion

of hostile title, coupled with exclusive possession and enjoyment of one of them to the knowledge of the other so as to constitute ouster.

The burden of making out ouster is on the person claiming to displace the lawful title to a co-heir by his adverse possession."

In the case of *Gulam Ghouse Mohiuddin v. Ahmad Mohiuddin Kamisul Qadri* reported in AIR 1971 SC 2184 their Lordships have held:—

"Possession of one Co-owner is presumed to be the possession of all the co-owners unless it is established that the possession of the co-owner is in denial of title of co-owners and the possession is in hostility to co-owners by exclusion of them. Ouster is an unequivocal act of assertion of title. There has to be open denial of title to the parties who are entitled to it by excluding and ousting them."

Considering a number of decisions of the Privy Council and other authorities, this Court in AIR 1962 Assam 137 held:—

"A co-sharer in order to establish adverse possession must establish clear ouster which amounts to the open denial of the title of the other co-sharers and also assertion of hostile title to the knowledge of other co-sharer."

10. The submission of learned counsel for the appellants, is that the limitation started from the date of the execution of Ext. 'Ka'. This document Ext. 'Ka' was admitted under objection. Ext. 'Ka' purports to be a deed of relinquishment executed on 13-6-1949. It is unregistered. It is conceded by learned counsel for the appellants that it is not admissible as a deed of relinquishment as it needs registration under Section 17 of the Registration Act. But he submits that the document is admissible under the proviso to Section 49 of the said Act for collateral purposes. The relevant line in Ext. 'Ka' is as follows:—

"I relinquish my title to the property moveable or immovable left by my husband."

The document, therefore, purports to transfer her title to the land left by her husband. But it does not speak of any possession as submitted by learned counsel. The Proviso to Section 49 of the Indian Registration Act is not applicable to this case. In the result, I hold that Ext. 'Ka' is inadmissible in evidence and that it was illegally admitted by the learned Trial Court.

11. Learned counsel for the appellants has further submitted that the learned Lower Appellate Court did not consider Exts. 'Kha', 'Ga' and 'Younga'. The submission of the learned counsel is not correct. The learned lower appellate Court has considered the above documents. He has found that Ext. 'Kha' is the order of the mutation case No. 267/49-50 and Ext. 'Ga' is the order in mutation case No. 266/49-50. He has found that Ext. 'Ga' shows that Laheswari had no possession in the land and as such her prayer for mutation was disallowed. With

regard to Ext. "Younga", he has found that Ext. "Younga" is the order in mutation case no. 57/49-50 and Ext. E "Gha" is the order in mutation case No. 76/49-50. He has found that Ext. "Kha" shows that Laheswari made the application for mutation on behalf of the plaintiff by right of inheritance. The Sub-Deputy Collector disallowed mutation on the ground that the plaintiff could not claim mutation so long as her mother Laheswari was alive. It is not correct, therefore, to say that Exts. 'Kha' and 'Younga' were not considered by the appellate Court below. They have been considered and their value assessed. In addition, the learned lower appellate Court has also considered Ext. 'Jha', which is the certified copy of Jamabandi showing the mutation of the name of the plaintiff in respect of the suit land in place of Mukunda. Ext. 'Jha' shows that the plaintiff's name was mutated on 11-6-1959. He has also considered Ext. 'Niya' series, which were revenue paying receipts showing payment of revenue in respect of suit land. These documents show payment of revenue on behalf of Dhutiram and others. He has found that others in the context mean only Mukunda and his successors. On a consideration of these documents and the oral evidence on record, the learned lower appellate Court has found that in the mutation case, the objection was only with regard to the possession of Laheswari and not to her title. He has found that Ext. 'Ga' does not show that the defendant claimed his exclusive title over the suit land. He has found that the defendant did not raise any hostile title in respect of the suit land." His ultimate finding is that the defendant failed to establish adverse possession in respect of the suit land. The above finding of the learned appellate Court below is a finding of fact and it cannot be upset in a Second Appeal, even if it be erroneous. The learned counsel referred to Section 14 of the Hindu Succession Act, which provides;—

"14. (1) Any property possessed by a female Hindu, whether acquired before or after the commencement of this Act, shall be held by her as full owner thereof and not as a limited owner."

He submitted that as the plaintiff, and before her, her mother was not in possession, she was not entitled to title. But it is settled law that amongst co-heirs, possession of one co-heir is the possession of the other. Even if the plaintiff, and before her, her mother was not in actual physical possession, and the defendants were in possession of the suit property, in the eye of law, the defendants were in possession on their own behalf as well as on behalf of the plaintiff, and before her, her mother. In other words, the plaintiff, and before her, her mother was in constructive possession of the land in suit. The learned Appellate Court below, therefore, committed no error when it held that the suit had not been barred by limitation and that the defendants had acquired no title to the suit land by adverse possession.

12. The only other submission of the learned counsel is that the decree for khas possession is untenable. The suit was only for declaration of title to half share of the property and for delivery of khas possession. It was not for partition. Without partition, the plaintiff is not entitled to get khas possession. Learned counsel for the respondent has very fairly conceded to this proposition. In the result, the decree of the learned lower appellate Court is modified to the extent that the plaintiff's title to half share of the suit land is declared; she will get joint possession with the defendants.

13. With the above modification in the decree, the appeal is dismissed. I make no order as to costs.

Order accordingly.

AIR 1976 CAUHATI 12

BAHARUL ISLAM, J.

Budheswar Barua, Appellant v. Jatindra Nath Barua, Respondent.

First Appeal No. 46 of 1967, D/- 20-8-1975^o.

(A) Partnership Act (1932), Sec. 43 — "Partnership at will" — Dissolution of — Notice to the other partner of one's intention to dissolve the firm and that it stands dissolved, held, sufficient. (Para 11)

(B) Partnership Act (1932), Section 69 (1) and (2) — Bar under Sub-sections (1) and (2) apply to existing firms only.

Partner of a firm already dissolved can sue his erstwhile partner for rendition of accounts under Cl. (a) of sub-section (3) to which the bar of suit under sub-sections (1) and (2) do not apply. (Para 14)

(C) Contract Act (1872), Section 23 — "Forbidden by Law" — P. W. D. contracts by partner of an unregistered firm. (Partnership Act (1932), Section 58).

Although unregistered firms as such could not undertake contracts works under the Public Works Department and such contracts would therefore be void, such contracts in one's individual name entered into for himself and on behalf of another financing the undertakings, both forming an unregistered firm, were not hit and a suit inter se such partners for rendition of accounts was not barred. (Paras 15 and 17)

J. K. Barua, for Appellant; T. C. Bargohain, for Respondent.

JUDGMENT:— This appeal by the defendant is directed against a judgment and decree passed by the Sub-Judge, U. A. D., Jorhat, in Title Suit No. 30 of 1960.

2. The plaintiff's case is that he and the defendant carried on a business during

*(Against order of G. C. Phukan, Sub J., U. A. D. at Jorhat in T. A. No. 30 of 1960 D/- 28-9-1961 and decree D/- 2-6-1966).

IS/JS/D423/75/TVN

the years 1953-54 and 1954-55. The plaintiff used to advance money in the business while the defendant used to do contract works, taking contracts in his own name. In that capacity the defendant had earned profits in the business; but, taking advantage of the position that he was managing the business and doing the contract works has refused to pay money to the plaintiff. The defendant is liable to render accounts of the business and pay necessary share of the profits earned by the firm. In a rough estimate, according to the plaintiff, he has received from the defendant a sum of Rs. 7,853/-, which he advanced to the defendant for the purpose of business. It is also alleged by the plaintiff that on 5-11-1955, the defendant made an endorsement in the plaintiff's book to the effect that the final account would be rendered after receipt of the final bills from the works done in 1954-55. The defendant also admitted, it is alleged, that he had received sums of money from the plaintiff.

3. As the defendant did not pay any money to the plaintiff, the latter filed Money Suit No. 6 of 1956 against the defendant for recovery of Rs. 7,853/-. The suit was, however, withdrawn with the permission of the Court to refile it. But the defendant did neither render any account nor did he pay any money to the plaintiff. The plaintiff sent a notice dated 28-7-1959 through his Advocate intimating the dissolution of the partnership firm with effect from the date of the notice and requested the defendant to render accounts by 30-8-1959. But, as his request was not complied with, the plaintiff has brought the present suit.

4. In the present suit, the plaintiff has prayed for a decree for Rs. 7,853/- or any other amount that may be found due after rendition of accounts of the dissolved firm.

5. The defendant has filed a written statement. He has admitted that he carried on business in partnership with the plaintiff since January, 1953, but he alleges that, as the partnership firm has not yet been dissolved, the question of rendering accounts does not arise. According to the Defendant the partnership firm sustained a loss of Rupees 10,000/- and, as such, the plaintiff was not entitled to receive any money. His second plea is: as contract work under the Public Works Department by an unregistered firm is forbidden by law, the plaintiff cannot claim any money or any share of any income by the partnership firm.

6. The learned Trial Court framed the following issues:—

- a). Whether the suit is maintainable?
- b). Whether there is any partnership between the plaintiff and the defendant?
- c). Whether the partnership is liable to be dissolved?
- d). Whether the contracts done by the defendant under P. W. D. were on

behalf of the partnership business or in his individual capacity?

- e). Whether on dissolution of the partnership the parties are liable to render accounts?
- f). Whether the suit is barred by limitation?
- g). To what relief if any are the parties entitled?

After considering the above issues, the learned trial Court passed the impugned decree by which he declared the partnership firm dissolved and passed the preliminary decree directing rendition of the accounts by the parties and for the appointment of a commission for the purpose.

7. Mr. J. K. Barua, learned counsel appearing for the appellant submits that the suit is hit by Sec. 69 of the Partnership Act; that a suit for account cannot be combined with a suit for dissolution of partnership; that an unregistered partnership firm cannot take contract under the P. W. D., and that there is no sufficient evidence to warrant the impugned decree.

8. The notice dated 28th July, 1959, was issued to the defendant by the plaintiff through his Advocate Mr. R. Barua. In paragraph 4 of that notice (Ext. 7) it was stated, "my client therefore, intends to dissolve the partnership from today and accordingly it stands dissolved."

9. Section 43 of the Partnership Act, 1932 — hereinafter referred to as "the Act" provides—

"43(1) Where the partnership is at will, the firm may be dissolved by any partner giving notice in writing to all the other partners of his intention to dissolve the firm."

"(2) The firm is dissolved as from the date mentioned in the notice as the date of dissolution or, if no date is so mentioned, as from the date of the communication of the notice."

10. 'Partnership at will' has been defined under Section 7 of the Act as follows:—

"7. Where no provision is made by contract between the partners for the duration of their partnership, or for the determination of their partnership, the partnership is "partnership at will."

11. In the instant case, admittedly, there is no written agreement of partnership. It is a common ground that the partnership in question was a 'partnership at will.' As such the notice (Ext. 3) was a notice under Section 43 of the Act and by it, the partnership between the plaintiff and the defendant was dissolved with effect from 28th July, 1959, i. e. the date of the notice Ext. 3.

12. The material portion of Section 69 of the Act, may be quoted:—

"69. (1) No suit to enforce a right arising from contract or conferred by this Act shall be instituted in any Court by or on behalf of any person suing as a partner in a firm against the firm or any person alleged to be or to have been a partner in the firm

unless the firm is registered and the person suing is or has been shown in the Register of Firms as a partner in the firm."

"(2). No suit to enforce a right arising from a contract shall be instituted in any Court by or on behalf of a firm against any third party unless the firm is registered and the persons suing are or have been shown in the Register of Firms as partners in the firm."

"(3) The provisions of sub-sections (1) and (2) shall apply also to a claim of set-off or other proceeding to enforce a right arising from a contract, but shall not affect—

- (a). the enforcement of any right to sue for the dissolution of a firm or for accounts of a dissolved firm, or any right or power to realise the property of a dissolved firm.

13. A plain reading of the Section quoted above shows that sub-sections (1) and (2) apply to existing firms only. Sub-sections (1) and (2) apply only when a partner sues to enforce a right arising from a contract or confirmed by the Act and when the suit is by a partner as a partner in a firm against the firm. This shows that the suit must be by a partner of a firm and against the firm and a suit against a firm is possible only when it is in existence and a suit as a partner in a firm is possible only when the firm is existing. The same interpretation applies to sub-section (2) of Section 69. Sub-section (3) provides that sub-sections (1) and (2) shall apply to a claim of set-off or other proceeding to enforce a right arising from a contract but shall not apply for the enforcement of any right to sue for the dissolution of a firm or for accounts of a dissolved firm, or any right or power to realise the property of a dissolved firm.

14. In the instant case, we have already held that the firm had already been dissolved before the suit was instituted. Therefore, the relief for dissolution of the firm was misconceived and unnecessary as the firm being a partnership firm at will had already stood dissolved under Section 43 of the Act. But the suit for rendition of account of a dissolved firm is competent under clause (a) of sub-section (3) to which sub-sections (1) and (2) of Section 69 are not applicable. In the result, I hold that the plaintiff's suit for rendition of accounts of the firm, which had already been dissolved is not barred under Section 69 of the Act.

15. It is not denied that an unregistered partnership firm cannot take contract work under the Public Works Department. There is also nothing to show that the contract work in question was taken by the partnership firm under the P. W. D. The evidence of P. W. 2, Md. Golapjan Ali, who was the Head Assistant of the E and D Department, shows that there were contracts in the name of the defendant during the years 1953-54, 1954-55 and 1955-56. He says that all the payments have been made. It is, therefore, clear that the contract in question

was in the name of the defendant. The only question is: whether this contract in question was taken by the defendant for and on behalf of himself alone or on behalf of the plaintiff and himself. The defendant did not examine himself, nor did he examine any other witnesses; on the other hand, the evidence of the plaintiff shows that the defendant was doing the contract works under the E and D/PWD and Local Board. His evidence is that the defendant used to maintain all accounts and that he has also maintained a book wherein the defendant recorded the payments received from him and payments made to him. The defendant made those records in his own hand. The book has been proved as Ext. 1 and the relevant entries have been proved as Exts. 1 (1) to 1 (6). Ext. 1 (2) is very material and may be quoted:—

"No account of the contract work which I did together with Sri Jatin Barua as shareholder in 1953/54 and 1954/55 on the agreement that half of the profit would go to the Capital and other half to the contractor has yet been calculated. Today, on 5-11-1955, I recorded the accounts in details in his book after scrutiny in respect of the capital received from the said Sri Jatindra Nath Barua for spending in the contract work and of the amount which were returned to him. The calculation in respect of profit and loss of the contract work done during 1954/55 will be finalised as soon as the receipt of the final bills."

This endorsement has not been denied by the defendant. On the contrary, in paragraph 8 of the written statement filed by the defendant in Money Suit No. 6 of 1956, which is proved as Ext. 10 in the present suit, the defendant stated:—

"That both the plaintiff and the defendant advanced capital in the business and without any account of income and expenditure in the business the plaintiff cannot be entitled to any money as from the plaintiff it appears that the plaintiff and the defendant are joint equal partners and entitled to half of profit and loss of the business."

In paragraph 7 of the same written statement, it was stated:—

"That from the plaintiff's own account enclosed with the suit it will be found that the total sum would have been Rs. 7326/15/- in place of Rs. 7,853/-/6 and the amount advanced for the joint equal partnership business by the plaintiff yet to be returned will be Rs. 3505/1/- without taking into account of profit and loss and as such the account furnished are not correct and the plaintiff cannot get remedy in such a suit."

Ext. 4 is another document executed by the defendant, which acknowledges a due Rs. 720.14 As. 6 P. (Rupees seven hundred twenty and annas fourteen and paise six only) on account of the goods purchased from the shop of the plaintiff. It runs as under:—

"The total amount taken Rs. 720.14 As. 6 P. (Rupees seven hundred twenty and annas

fourteen and paise six only) on account of goods purchased from the shop of Sri Jatin Baruah upto 5-11-1955 or 1955".

Ext. 5 is another document, which shows a series of receipts of different sums of money by the defendant from the plaintiff. The above documents considered along with the oral evidence of the plaintiff conclusively prove that there was a business between the plaintiff and the defendant and in that business the plaintiff advanced from time to time sums of money to the defendant for the purpose of their business and unless the accounts of the amounts advanced by the plaintiff to the defendant and all the payments made by the defendant to the plaintiff is taken, the exact amount due to the plaintiff, if any, cannot be ascertained.

16. In the instant suit, the learned Sub-Judge passed only a preliminary decree, as stated above, directing rendition of accounts and for that purpose, for appointment of a commission. In my opinion, he has committed no error in passing the above decree. But his decree for dissolving the firm is illegal inasmuch as there was no existing firm at the time of the institution of the suit, as it had already been dissolved under Section 43 of the Act referred to above.

17. In the result, the decree of the learned Sub-Judge is modified to the extent that his decree for the dissolution of the partnership firm is set aside; but his preliminary decree for rendition of accounts and his order for appointment of a commission, for that purpose, are maintained.

18. With the above modifications in the decree, the appeal is dismissed with costs. Order accordingly.

AIR 1976 GAUHATI 15

BAHARUL ISLAM AND D. PATHAK JJ.

Saraswati Goswami and others, Appellants v. General Manager, N. F. Railway, Respondent.

Letters Patent Appeal No. 15 of 1974, D/- 23-7-1975*.

(A) Motor Vehicles Act (1939), Sec. 82-C — Application for compensation under Section 82-A — Can be made only by dependent of the deceased. (Para 4)

(B) Evidence Act (1872), Sections 107, 108 — Burden of proof.

Section 108 is a proviso to Section 107. These two sections are based on the principle that once it is shown that a man was alive within a certain period, continuance of his being alive shall be presumed. The presumption is rebuttable. These two sections deal with the burden of proof in such a case.

*(Against Judgment of R. S. Bindra J. reported in AIR 1972 Gauhati 97).

IS/JS/D281/75/RSK

Section 107 provides that when the question is whether a man is alive or dead, and it is shown that the man was alive within 30 days, the presumption is that he is alive; the burden is then upon him who asserts that the man is dead to prove that he is dead.

(Para 6)

S. K. Senapati, for Appellants; P. P. Duara, for Respondent.

BAHARUL ISLAM, J.:— This appeal is under the Letters Patent and is from a judgment and decree passed by a learned single Judge of this Court.† It arises out of a claim petition made by the mother of one Mahendra Goswami, alleged to have been the victim of a Railway accident that took place at the Diphu Railway Station on the 23rd April, 1966.

2. The Claims Commissioner on consideration of a number of points raised by the parties rejected the application. Two of the grounds on which the application for compensation was rejected were (1) that the application was barred by limitation; and (2) that the death of Mahendra Goswami has not been proved. The learned Single Judge affirmed the order.

3. It is admitted by both the parties that the accident in question took place on the 23rd April, 1966. The application for compensation was made by the appellant who was the mother of Mahendra Goswami on 2nd September, 1968. The period of limitation of the application is three months. But on the discretion of the Claims Commissioner the period can be extended to one year. Clearly the application is barred by limitation.

4. Mr. S. K. Senapati, the learned counsel for the appellant submits that on an earlier occasion one application claiming compensation was made by one T. P. Bhattacharjee, then a local M. L. A. of Silchar from which place Mahendra Goswami hailed. The claim petition alleged to have been filed by T. P. Bhattacharjee has not been proved in the case. That apart, under Section 82-C, an application for compensation under Section 82-A arising out of any accident of the nature specified therein may be made,

where death has resulted from the accident, by any dependent of the deceased.

Admittedly, T. P. Bhattacharjee was not a dependent of the deceased. The applicant was the mother who made the application on 2-9-1968 and was a dependent of the deceased. The Claims Commissioner as well as the learned Single Judge have concurrently held that the application is barred by limitation. We do not find any reason as to differ from the finding of the learned Single Judge.

5. The next question that was canvassed before the learned Single Judge was whether Mahendra Goswami died as a result of the accident in question.

†(Reported in AIR 1972 Gauhati 97).

The only evidence on the point was the evidence of P. Ws. 1 and 2. Their evidence is to the effect that on 23rd April, 1966, Mahendra Goswami purchased a third class ticket and boarded the 20Dn. train en route to Silchar. They saw him off. According to the evidence the train started at 11 A. M. and the accident took place towards the afternoon. It is admitted by the parties that Amguri where Mahendra Goswami boarded the train and Diphu where the accident took place are intervened by several stations and the evidence fell far short to prove the death of Mahendra Goswami in the accident.

6. Shri Senapati submits that under Section 108 of the Evidence Act the burden is upon the defendant to prove that Mahendra Goswami is alive and the defendant has failed to discharge that burden. So, he submits the death of Mahendra Goswami shall be presumed.

Section 108 of the Evidence Act is a proviso to Section 107. These two sections are based on the principle that once it is shown that a man was alive within a certain period, continuance of his being alive shall be presumed. The presumption is rebuttable. These two sections deal with the burden of proof in such a case. Section 107 provides that when the question is whether a man is alive or dead, and it is shown that the man was alive within 30 years, the presumption is that he is alive; the burden is then upon him who asserts that the man is dead to prove that he is dead. In the instant case, Mahendra Goswami was admittedly alive within 30 years. So, under Section 107 the burden is upon the claimant to prove that Mahendra Goswami is dead. But as Section 107 is subject to the proviso embodied in Section 108, if the claimant proves that Mahendra Goswami has not been heard of for seven years by those who would naturally have heard of him, the burden will be shifted to the respondent. But in the instant case there is no such evidence. The contractor with whom Mahendra Goswami was alleged to have worked at Jorhat, and the persons who worked with him in his timber contract at Amguri, at the relevant time have been examined. The burden therefore does not shift to the respondent, as the claimant has not discharged her burden under Section 108.

7. In the instant case the question was not merely whether Mahendra Goswami was dead; but further whether he died as a result of the accident. There is absolutely no evidence to show that he died as a result of the accident.

8. In view of our findings on the above two points against the appellant, we do not think it necessary to examine the other points sought to be raised by the appellant.

9. In the result, the appeal fails and is dismissed. We, however, make no order as to costs.

D. PATHAK, J.:— I agree.

Appeal dismissed.

AIR 1976 GAUHATI 16

M. C. PATEAK, C. J.

Must. Dagri and others, Petitioners v. Kera Kachari and others, Opposite Parties.

Civil Revns. Nos. 15, 17 and 18 of 1972, D/- 21-7-1975.

(A) Civil P. C. (1908), Section 151, O. 9 Rule 13 — Ex parte order set aside on condition of payment of cost before certain date — Failure to pay on specified date entailing rejection of case — Non-compliance — Case automatically stands rejected — Specific order not necessary — Court specifically passing order to that effect — Court commits illegality in granting time to pay costs under Section 151. (Case Law Discussed). (Para 13)

Cases Referred: Chronological Paras

AIR 1971 Assam and Naga 156 = Assam LR (1971) Assam 124 9, 10, 11, 12, 13

AIR 1965 Cal 354 10

AIR 1957 Andh Pra 780 = 1956 Andh WR 177 10, 12

AIR 1954 Assam 1 = ILR (1953) 5 Assam 538 (FB) 13

AIR 1928 Mad 154 = 53 Mad LJ 494 10

N. Chakravarty, for Petitioners; S. K. Goswami and J. N. Sarma, for Opposite Parties.

ORDER:— The facts leading to these three revision petitions are as follows:

The petitioners Must. Dagri alias Dageswari Baroni, Birendra Boro and Rajendra Boro filed Title Suit No. 32 of 1967 for declaration of their title and delivery of khas possession of the suit land. The petitioners Nos. 2 and 3 were minors represented by their mother plaintiff petitioner No. 1. The plaintiffs-petitioners claimed their title to the suit land by right of inheritance from their ancestors. The suit was filed against 18 principal defendants and 5 pro forma defendants. Summonses were served on the defendants, but the defendants-petitioners Nos. 14 and 14 (a), sons of deceased defendant No. 14, only contested the suit by filing a written statement and the trial court ordered the suit to proceed ex parte against the other defendants. Title Suit No. 32 of 1967 was filed on 27-1-1967 and the same was registered on 1-2-1967. The suit was ultimately fixed for hearing on 9-7-1969. On the date fixed, that is on 9-7-1969, the defendants were found absent and no steps were taken on their behalf. The trial Court examined plaintiff No. 1 and decreed the suit ex parte. Thereafter it is found that within the period of limitation three separate applications under Order 9, Rule 13 of the Code of Civil Procedure were filed by three sets of defendants for setting aside the ex parte decree. The application filed by Maheswar Barman, Praneswar Barman and Bhabendra Nath Barman, sons of deceased defendant No. 6 Dadhiram Barma, and Lankeswar Barma, son of deceased defendant No. 16 Ratia Barma, was

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Goa, Daman and Diu J. C.'s Court

AIR 1976 GOA, DAMAN & DIU 1

K. N. SHUKLA, ADDL, J. C.

Matias Costa, Appellant v. Roque Augustinho Jacinto and another, Respondents.

First Appeal No. 1 of 1974, D/- 22-8-1975.

(A) Motor Vehicles Act (1939), S. 110-B — Child A crossing road to reach school — B riding on motor cycle dashing against A and causing fracture resulting in permanent disability — B held was guilty of rashness and negligence — Plea of contributory negligence was not available to B as child is not expected to be as careful as adult. (Paras 2, 7)

(B) Motor Vehicles Act (1939), S. 110-B — Child aged six knocked down by motor cycle — Fracture of thigh resulting in permanent disability — Claim of Rs. 3,000/- as general damages held should be allowed. 1966 Acc CJ 101 (Mad) and AIR 1970 Madh Pra 172, Rel. on. (Para 9)

Cases Referred: Chronological Paras

AIR 1970 Madh Pra 172 = 1970 ACC CJ 189 9

1966 ACC CJ 101 = (1966) 1 Mad LJ 374 9

R. R. Kolwalkar, for Appellant; H. R. Bharne, for Respondents.

JUDGMENT:— This is an appeal under Section 110-D (1) of the Motor Vehicles Act against the award of the Claims Tribunal dismissing appellant's claim for damages arising out of a motor vehicle accident which admittedly took place on 21-9-1970.

2. The applicant/appellant at the time of the alleged accident was a six year old student. On the relevant date at about 8 a.m. he was proceeding to his school at Tivim. It was not in dispute that the applicant while on way to the school from his house had to cross a public road and while he was doing so respondent No. 1 who was riding a motor cycle dashed against him and

knocked him down causing several injuries one of which was a fracture of the lower third of the femur as reported by Dr. Sardesai a Govt. Radiologist.

3. Case for the appellant was that respondent No. 1 was coming from Mapura to Sircaim along with a companion riding the pillion of the motor cycle. The respondent No. 1 was driving the motor cycle in rash and negligent manner and when the appellant had just stepped on the main road from the foot-path from the left side, the motor cycle knocked him down and caused him the injuries mentioned above. Rs. 4,000/- were claimed as damages, Rs. 1,000/- as special damages and Rs. 3,000/- as general damages.

4. The reply on behalf of the respondents was that the appellant who was walking on the extreme left side of the road suddenly attempted to cross the road with utter disregard of the vehicular traffic and was knocked down by the motor cycle. Thus the respondents denied any liability for damages.

5. The learned Claims Tribunal after examining the evidence found himself "rather reluctant to accept as true the isolated statement of the so called eye witness Kashiram" and came to the conclusion that the applicant met with the accident because he "suddenly and unexpectedly tried to cross the road when this accident took place."

6. After going through the pleadings of the parties and the evidence on record I am clear that the learned Claims Tribunal failed to appreciate the facts of the case properly and the order was liable to be set aside.

7. In the present case certain cardinal questions of fact were not in dispute. They were that the appellant was a young child aged about 6 years. He was on the left side of the road and when he was trying to cross the road he was struck down. The path to the school is just on the other side of the road from the point where the child was knocked down showing that the appellant had to cross the road at that point to reach the path going

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to the school. It was also clear from the evidence (statement of respondent No. 1 Caríasco D. W. 1 himself) that between 7.30 to 8.30 a.m. (the accident took place admittedly at 8 a.m.) there used to be children on the road as there is a school nearby (pg. 42 lines 22 to 24 of the paper book). It was also admitted during arguments that the road was straight without any bend or curve. This being the admitted position we have to see whether the accident could be attributed to the rashness or negligence of respondent No. 1. As already observed respondent No. 1 knew that it was school time and children would be present on the road on their way to the school. The road being straight the view in front should have been clear and respondent No. 1 could clearly notice the young child on the left side of the road. He could as a reasonable man guess that the child would cross the road at that point to reach the path opposite going to the school. To say that the child suddenly and unexpectedly came on the road could not help respondent No. 1 because any reasonable man could expect the school going children to cross the road at that point. There cannot be a case of contributory negligence on the part of children because a child cannot be expected to be as careful for his own safety as an adult and in such a case a plea of contributory negligence cannot be availed. (See Halsbury's Laws of England, Third Edition Vol. 28, p. 98). Further it was clear from the statement of respondent's own witness Alberto D. W. 2 that the motor cycle stopped at a distance of 10 to 15 meters after dashing against the child (and not 7 to 8 feet as falsely stated by respondent No. 1 in his statement). In addition, the severe injuries suffered by the child also indicated that the vehicle was running in high speed and was not easily controllable by the driver. On these facts a prima facie inference of negligence should have been drawn against the respondent No. 1. This inference was strengthened by the statement of the injured child who stated in cross-examination clearly that at the time of the accident he was not running but walking slowly. The only reasonable inference in these circumstances would be that the accident occurred due to want of care and caution on the part of respondent No. 1 and he was liable for compensation.

8. It was clear and not disputed that the appellant had received injuries on the head and on his leg. Statement of the radiologist showed that the femur was fractured into fragments and there was a permanent disability. The appellant had claimed Rupees 1,000/- as special damages and Rs. 3,000/- as general damages on account of pain, suffering and permanent disability. The learned Claims Tribunal did not care to record any finding about the quantum of damages because he felt that in view of his decision about the liability of the respondents he was not called upon to record his findings on issue Nos. 3 and 4. This approach was incorrect because the Court of appeal was deprived

of a finding of fact recorded by the Tribunal. About special damages P. W. 1 Edmundo Costa, father of the appellant stated that he paid a sum around Rs. 500/- to the bone-setter Shanu (P. W. 2) and spent Rs. 120/- for transport and examination fees of the Radiologist when he brought the boy for 'medical check-up'. In answer to a question in cross-examination the witness stated that he was paying sometimes Rs. 40/- sometimes Rs. 20/- to the doctor (i.e. the bone-setter) who visited his house. P. W. 2 Shanu supported his statement. I do not see any reason to reject this testimony and a sum of Rs. 620/- stated by him in his deposition was not a very heavy amount for the treatment of the type of injuries suffered by the boy.

9. As regards general damages looking to the fact that the child will have to live with a permanent disability which will affect his capacity to enjoy life and keeping in view the legal principle that damages on this count should more or less be conventional and moderate, I believe a sum of Rs. 3,000/- claimed by the applicant was quite moderate and should be allowed. In *Ayesha Begum v. G. Veerappan*, 1966 ACC CJ 101 (Mad) a young girl aged about 5½ years who had received an injury to the pelvic bone causing permanent disability was awarded Rs. 15,000/- as damages. In *Vinod Kumar v. Ved Mitra*, AIR 1970 Madh Pra 172 the injured aged about 17 years had suffered a compound fracture of the lower one-third tibia and fibula bones. In that case the medical evidence was that there was partial disability and an amount of Rs. 5,000/- was considered adequate and proper towards general damages. I feel that the claim of Rs. 3,000/- on this head was quite moderate and should be allowed.

10. In the result the appeal is allowed and the order of the Claims Tribunal is set aside. Claim for Rs. 3,620/- is decreed against the defendants/respondents with costs throughout. Advocates fees according to scale.

Appeal allowed.

AIR 1976 GOA, DAMAN & DIU 2

TITO MENEZES, J. C.

Teotonio Nunes, Applicant v. Maria Lilia Nunes and others, Respondents.

Civil Revn. Appln. No. 77 of 1973, D/- 12-8-1975.

(A) Civil P. C. (1908), O. 22, R. 11 and S. 115 — Suit dismissed as barred by time — Revision application by plaintiff — One of defendants dying before filing of application — His heirs not substituted — Revision application does not abate — Order 22 does not apply to revisions. AIR 1972 Goa 30 and AIR 1958 Punj 171 and AIR 1963 Punj 206, Rel. on. (Paras 2, 3)

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(B) Limitation Act (1963), S. 14 (1) and Art. 23 — D dying leaving heirs A, B and C — Inventory proceedings started by A to recover from B and C amount paid by A for D — Court ordering A to file suit — Cause of action for suit held arose when D died and not when court ordered filing of suit — In computing limitation for suit period during which inventory proceedings were pending should be excluded. (Paras 5, 6)

Cases Referred: Chronological Paras
 AIR 1972 Goa 30 2
 AIR 1963 Punj 206 = ILR (1961) 2 Punj 507 3
 AIR 1958 Punj 171 = 60 Pun LR 415 3

Ataide Lobo, for Applicant; A. Noronha Rodrigues, for Respondents Nos. 3 & 4.

ORDER:— By this civil revision application the applicant/plaintiff seeks to have the order of the junior Civil Judge, Panaji dated 5-7-1973 set aside. By the said order the learned Senior Civil Judge held that the suit of the plaintiff was barred by limitation and dismissed it.

2. A preliminary objection was raised by the respondents/defendants on the ground that the respondent No. 2 Matias Crasto had died and that his daughter Cynthia Crasto had not been brought on record and that therefore the revision application must fail. An application was made by Dr. A. Lobo, learned advocate for the petitioner/plaintiff, for substituting the name of Cynthia for the name of her father Matias Crasto who is dead. Matias Crasto died before the revision application was filed and I agree with Dr. Lobo that the question of bringing his heirs on record does not arise, because the real question in this case is not the substitution of Matias by his heirs, but of joining of new party. This question has already been decided by me in 'Polpoto v. Nilkhant Ganba Borkar', AIR 1972 Goa 30.

3. Another argument raised by Dr. Lobo against the abatement of the revision application on account of the alleged failure of the applicant to bring on record the heirs of respondent No. 2 is that the provisions of Order XXII of the Civil P. C. do not apply to revision applications. He is fortified in this contention by the decision given in 'Jowala Singh Prem Singh v. Malkan Nasirpur', AIR 1958 Punj 171, wherein it was laid down that ordinarily the provisions of Order XXII govern the cases of abatement during the pendency of the suit. This principle has been extended expressly by Rule 11 of that Order to the case of appeals, but there is no such express extension to revision applications. The maxim 'inclusio unius est exclusio alterius' should be applied and the intention of the Legislature can be clearly gathered to be that it did not mean to apply Order XXII to revision applications. Khosla, C. J., held in 'Ram Saran Dass Tara Chand v. Ram Richhpal L. Mannu Lal', AIR 1963 Punj 206, that an appeal is always a continua-

tion of a suit but a revision petition cannot be said to be so, and it appears that for this reason he concluded that Order XXII does not govern cases of revision. I may however, be permitted to say with great respect, that such a conclusion is no longer necessary in view of Rule 11 which expressly extends the provisions of Order XXII to appeals.

4. Therefore the question of joining the heirs of the deceased does not arise. Shri A. Noronha Rodrigues, learned advocate for the defendants has in fairness, conceded this point and given up his objection.

5. The plaintiff was the son of Joao Francisco Nunes who died on the 8th of July, 1964, in Verem, leaving as his heirs the plaintiff and defendants Nos. 1 and 3. The defendant No. 2 is the husband of the defendant No. 1 and defendant No. 4 is the husband of defendant No. 3. On the death of Joao Francisco Nunes the plaintiff applied for inventory proceedings which were pending in the court of Civil Judge, Senior Division, Panaji. The plaintiff as the 'cabeça de casal' produced a list of the assets of properties and debts to be accounted for in the said proceedings. Amongst other items of the said list there was a claim for the four sums of money mentioned in paragraph 3 of the initial petition, which according to the plaintiff constitute the debt of the deceased at the time of his death. By his order dated 6-3-1971 the learned Senior Civil Judge, Panaji, held that some papers filed in the proceedings and bearing page No. 215 and the subsequent pages, do not per se have probatory value and that the facts alleged by the plaintiff need deeper investigation which cannot be appropriately made in the inventory proceedings. The learned Judge therefore ordered the parties to file an ordinary suit. The defendants resisted the suit with the objection that the suit was barred by limitation. The objection was upheld by the trial court and the suit dismissed by the impugned order.

6. The question before me is whether the suit is barred by limitation. It is contended by Dr. Lobo, that the cause of action in the suit arose on 6-3-1971 when the Senior Civil Judge, Panaji, ordered the plaintiff to file a suit and not when the deceased died as contended by Shri Noronha Rodrigues. I agree with Shri A. Noronha Rodrigues. The cause of action arose on the 8th July, 1964 when the "inventariados" died. Whilst reckoning the period of limitation the period during which inventory proceedings were pending in the court of the Senior Civil Judge, Panaji, in regard to the debt which is now the subject-matter of the suit, cannot be counted in view of the provisions of Sec. 14 (1) of the Limitation Act, 1963. It was open to the plaintiff to pursue two remedies for recovering the amount alleged to be payable by the other heirs of the deceased on account of money alleged to have been paid by the plaintiff for the deceased. One of the remedies was the inventory proceeding and the other one was a

regular suit. The plaintiff chose to file inventory proceeding because, according to him, the matter was simple and did not require deeper investigation. However, the learned trial Judge came to a different finding. Until the finding was given it can legitimately be said that the plaintiff was prosecuting, with due diligence, a civil proceeding within the meaning of Section 14 (1) of the Limitation Act. Under the Limitation Act the period of limitation for filing the present suit would be three years. The plaintiff is therefore within the period of limitation.

7. In the circumstances I allow the civil revision application with costs and remand the case to the junior Civil Judge for proceeding according to law.

Application allowed.

AIR 1976 GOA, DAMAN & DIU 4

TITO MENEZES, J. C.

Francisco Xavier Ludgero Assis de Silva o Souza, Appellant v. Antonio Filipe Do Rosario Pinto, Respondent.

'Agravio' Appeal No. 21 of 1971, D/-11-8-1975.

(A) Portuguese Civil P. C., Art. 264 — Decree No. 28-228 dated 24-11-37 — Sale in execution of decree — Judgment-debtor required to raise objections within 5 days of notification — Objection filed more than 30 days after that date held was barred by time — Court held was not bound suo motu to declare sale void under Decree No. 28-228 or Art. 264 on ground that auction-purchaser was foreign national. (Paras 2, 3, 5)

M. E. Rao, for Appellant; P. Mulgaokar, for Respondent.

JUDGMENT :— This appeal arises from the order dated 5-9-1967 passed by the Senior Civil Judge, Panaji, whereby he dismissed the "reclamacao" of the appellant/judgment-debtor on the ground that it was barred by limitation.

2. The respondent purchased some properties in the auction sale carried out by the court in execution of a decree. After the auction sale was over the judgment-debtor was called upon by the court to raise any objection that he might have against the auction sale. No objection was raised by the judgment-debtor within five days from the date of the notification. An objection was raised more than 30 days after the judgment-debtor was required to raise the objection. The trial court held that the objection was time-barred and dismissed it. The point for my determination is whether the order of the trial court dismissing the objection was legal.

3. There can be no conflict with the proposition that the objection is time-barred if the provisions of the Portuguese Civil Procedure Code are to be applied. The point

raised by Shri Rao, learned advocate for the judgment-debtor, is that the judgment-debtor need not raise any objection against the validity of the auction sale. Shri Rao contends that the auction sale being null and void in view of the fact that the respondent/auction-purchaser is a foreign national and of the provisions of Decree No. 28:228 dated 24-11-1937, the court should suo motu declare the sale void the moment it came to the notice of the court that the auction-purchaser was a foreign national. It is urged before me by Shri Rao, that Decree No. 28:228 was enacted in public interest and that therefore the court had suo motu to investigate whether the auction-purchaser was an Indian citizen or not. In my opinion the mere fact that the Decree No. 28:228 is stated to be enacted in public interest does not give to that Decree a special status so as to cast upon the court the duty of ascertaining the citizenship of every auction bidder, suo motu. Truly speaking all laws are enacted in public interest, even those which are enacted for limited purposes or to safeguard the interests of a sector of the society. There is no doubt that some of the laws are eminently of national interest, but even in such cases the duty cast upon the court does not exonerate private parties to act with diligence. I must admit that a court of law could always take notice of the provisions of Decree No. 28:228 of its own accord and annul the auction sale if it so deems necessary. This however does not mean that the appellant was entitled to require the Court to annul the sale. A remedy was given to the appellant to obtain the annulment of the auction sale. Having regard to that remedy the Court did, in the present case, issue a notice to the appellant to avail of that remedy. The law prescribes a time during which such remedy must be availed of by the appellant. If the appellant does not avail of that remedy within the period of limitation that remedy is lost to the appellant once and for all. That however does not mean that the auction sale cannot at all be challenged by any other person or any other authority entrusted with the enforcement of foreign exchange regulations.

4. Further, it cannot be said in the present case that the Court did not exercise powers to annul the sale. It is evident that the Court did consider the citizenship of the respondent and the Court did it suo motu.

5. Shri Rao also relies on the second paragraph of Article 264 of the Portuguese Civil P. C. which gives the court power to order of its own accord any act to be done which the court may deem necessary for the purpose of ascertaining the truth. He contends, based on this provision of law, that under this provision it was the duty of the court to annul the sale. The provisions of law relied upon by Shri Rao relate to the power of the court and not to the duty of the court and that power is very similar to the inherent powers which every court possesses. At any rate what is stated about the duty

of the court which according to the appellant exists in view of the provisions of Decree No. 28:228 can also be said of its duty under the provisions of Article 264, if such duty is at all imposed by that Article.

6. In the circumstances the appeal fails and is dismissed with costs.

Appeal dismissed.

AIR 1976 GOA, DAMAN & DIU 5

TITO MENEZES, J. C.

Jose Filipe de Costa and another, Petitioners v. Miss Conceicao de Mello, Respondent.

Civil Revn. Appln. No. 62 of 1974, D/- 7-8-1975.

(A) Civil P. C. (1908), S. 9 — Suit of civil nature — Plea in defence cannot force plaintiff to go to a forum (Rent Controller in this case) where on his averments in plaint he cannot go — Plaintiff giving his tenanted shop to defendant on royalty basis — Defendant trying to demolish premises in collusion with plaintiff's landlord — Suit for injunction restraining defendants from demolishing premises, declaring him as lawful tenant, injunction to hand over premises, and for arrears of royalty and mesne profits — Suit is of civil nature triable by Civil Court — Plea in defence that defendant was sub-tenant does not change nature of suit and give exclusive jurisdiction to Rent Controller — (Goa, Daman and Diu Buildings (Lease, Rent and Eviction) (Control) Act (2 of 1969), S. 22).

The plaintiff chooses his forum and files his suit and if he establishes the correctness of his acts he gets his relief from the forum chosen. It is true that Section 22 of the Rent Act gives to the Controller in the territory exclusive jurisdiction to entertain and try applications made by the landlord to evict his tenant, but Section 22 does not say, nor intends to say, that the plea of the tenant will determine or change a forum. It does not invest the Controller with exclusive power to try questions of title such as questions between rightful owners and trespassers or licensees, for such questions do not arise under the Rent Act. (Para 5)

The defendant, by his plea, cannot force the plaintiff to go to a forum where on his averments he cannot go. On the averments in the plaint, the plaintiff could not go to the Rent Controller. (Para 4)

The Civil Court had jurisdiction to proceed with the case unless and until in the course of the trial the court came to the finding that the defendants were tenants in respect of the suit premises. If such a finding was arrived at, the civil court would have no jurisdiction to evict the defendants. In case there were no other issues in the suit that the Civil Court could decide, the Court had

to dismiss the suit for want of jurisdiction. AIR 1964 SC 1348, Rel. on. (Para 6)

Cases Referred: Chronological Paras
AIR 1964 SC 1348 = (1964) 3 SCR 214 5
AIR 1930 All 193 = 1930 All LJ 256 (FB) 5

G. D. Kamat, for Petitioners; Gilman Fernandes, for Respondent.

ORDER:— This revision application is filed against the order of the Junior Civil Judge, Vasco da Gama, dated 12-6-1974. By the said order the learned trial Judge rejected the preliminary contention raised by the petitioners/defendants that the Civil Court had no jurisdiction to try the suit.

2. The respondent/plaintiff was the tenant of the applicant No. 2/defendant No. 2 in respect of a shop. The shop was given by the plaintiff to the applicant No. 1/defendant No. 1. The present suit is filed for obtaining the various reliefs mentioned in the plaint. The plaint inter alia, states:— The plaintiff's father and mother who were deceased were possessed of a tailoring shop with its accessories and tenancy. The shop was given to the defendant No. 1 to conduct the tailoring business in his name on royalty basis for the monthly royalty of Rs. 100/-. The defendant No. 1 was allowed to make use of one sewing machine, one table, one mirror, one bench and the tenancy of the shop premises. The defendant No. 1 was to pay the monthly rent to the Petitioner No. 2/defendant No. 2. After the death of the parents of the plaintiff, the defendant No. 1 was paying to the plaintiff the royalty at the rate of Rs. 70/- per month after deducting taxes and so on and was paying the rent in respect of the shop premises to the defendant No. 2. The plaintiff as a lessee was entitled to the peaceful and vacant possession of the suit premises. Acting in collusion the defendants tried to demolish the premises for the purposes of re-constructing new premises on that place. The plaintiff therefore prayed: (1) for a perpetual injunction restraining the defendants from demolishing the old premises and reconstructing new premises; (2) for a mandatory injunction requiring the defendants to acknowledge the plaintiff as the true and lawful tenant in respect of the shop premises; (3) for a mandatory injunction requiring the defendant No. 1 to hand over the said machine, bench, mirror and the shop premises to the plaintiff and to remove himself therefrom; and (4) for an order directing the defendants to pay to the plaintiff the sum of Rs. 420/-, being the arrears of royalty and mesne profits.

3. In their written statement the defendant No. 1 raised the issue that he was a sub-tenant of the mother of the plaintiff and that the plaintiff's mother was originally the tenant of the defendant No. 2, but later on defendant No. 2 objected to the sub-tenancy created in favour of defendant No. 1 and threatened eviction of the plaintiff. An issue was in fact framed as to whether the defendant No. 1 was the sub-tenant of the plaintiff.

4. It is in the light of the averments in the plaint that I have to decide whether the civil court had jurisdiction to entertain the suit and to try and dispose it of.

5. It is contended by Shri G. D. Kamat, for the defendants, that since an issue as to whether the defendants were tenants of the plaintiff in respect of the shop premises had arisen and had been framed, the suit had to be tried by the Controller. I must say that from the plaint as it is framed, there is nothing to show that the Civil Court had no jurisdiction to try the suit and the lower court was justified to proceed with it at least up to the stage it had reached in the instant case. A similar question arose in 'Raizada Topandas v. M/s. Gorakhram Gokalchand', AIR 1964 SC 1348. The facts in that case were that the Small Causes Court in Greater Bombay was given, by Section 28 of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947, exclusive jurisdiction to entertain and try any suit or proceeding between a landlord and a tenant relating to the recovery of rent or possession of any premises to which any of the provisions of Part II of that Act apply and to decide any application made under that Act and to deal with any claim or question arising out of that Act. Section 28 further barred any other court from entertaining any such suit, proceeding or application or to deal with any such claim or question. The question that arose in AIR 1964 SC 1348 was: does it mean that if the defendant raises a claim or question as to the existence of a relationship of landlord and tenant between him and the plaintiff, the jurisdiction of the City Civil Court is ousted even though the plaintiff pleads that there is no such relationship, and the only court which has exclusive jurisdiction to try the suit is the Court of Small Causes, Bombay? In answering that question the Supreme Court referred to the general principle which admittedly governs the question of jurisdiction at the inception of the suits. Their Lordships adopted with approval a passage in the judgment of the Allahabad High Court in 'Mt. Ananti v. Chhannu', AIR 1930 All 193 (FB), which, inter alia, states that the plaintiff chooses his forum and files his suit and that if he establishes the correctness of his acts he gets his relief from the forum chosen. It is true that Section 22 of "the Act" gives to the Controller in this Territory exclusive jurisdiction to entertain and try applications made by the landlord to evict his tenant, but Section 22 does not say, nor intends to say, that the plea of the tenant will determine or change a forum. It does not invest the Controller with exclusive power to try questions of title such as questions between rightful owners and trespassers or licensees for such questions do not arise under "the Act." In Raizada Topandas's case the Supreme Court further observed that if the plaintiff in his plaint does not admit a relation which would attract any of the provisions of the Bombay Rent Act on which the exclusive juris-

diction given under Section 28 depends, the defendant, by his plea, cannot force the plaintiff to go to a forum where on his averments he cannot go. In the present case on the averments in the plaint which I have already considered, the plaintiff could not go to the Controller. Any interpretation contrary to this interpretation would give rise to anomalous results. For example, the defendant might in every case force the plaintiff to go to the Controller by merely raising the issue that he was a tenant of the plaintiff. After being thus forced to go from the ordinary civil court to the Controller, if the Controller finds against the defendant's plea, the plaintiff might have to be returned for presentation to the proper court for a second time. In Topandas's case, the Supreme Court rejected the argument on behalf of the defendant that the Small Causes Court need not return the plaint a second time because that court had "exclusive" jurisdiction to decide the case whenever a claim is made under the Act even though the claim is found to be false on trial.

6. The trial court has jurisdiction to proceed with the case unless and until in the course of the trial the court comes to the finding that the defendants are tenants in respect of the suit premises. If such a finding is arrived at the civil court shall have no jurisdiction to evict the defendants. In case there are no other issues in the suit that the Court can decide, the Court shall dismiss the suit for want of jurisdiction.

7. The revision application is dismissed. The costs of the application shall be the costs in the cause.

Revision dismissed.

AIR 1976 GOA, DAMAN & DIU 6

K. N. SHUKLA, ADDL. J. C.

Agostinho D'Mello and others, Appellants v. Pratap Srinivas Bakal and others, Respondents.

Misc. Civil Appeal No. 7 of 1975, D/- 7-8-1975.

(A) Civil P. C. (1908), Ss. 96 and 100 and O. 43. R. 1 — Incompetence of suit for non-registration of the firm — Plea raised for the first time in appeal — Suit remanded to trial court for amendment of pleadings — (Partnership Act (1932), Ss. 58 & 69).

The appeal against order appointing Receiver for purpose of taking charge of the Partnership asset (Passenger bus) and to take account of the profits made was allowed remanding the case to trial court for amending the pleadings to include the new plea of non-maintainability of suit for non-registration of the firm. (Para 9)

Cases Referred: Chronological Paras
AIR 1951 Raj 11 9

IS/KS/D736/75/TVN

R. D. Khalap, for Appellants; R. R. Kolwalkar, for Respondent No. 1.

JUDGMENT :— This miscellaneous civil appeal is directed against the order passed by the Civil Judge, Senior Division, Panaji under Order 40, Rule 1, Civil P. C. appointing a receiver for taking possession of a bus and all the account books relating to its management and preparing a statement of account of income and expenditure.

2. This question has arisen in a suit filed by respondent No. 1 against the appellants and respondents 2 and 3 for rendition of accounts in respect of a subsisting partnership business and other incidental reliefs. There is no prayer for dissolution of the firm.

3. Facts relevant for disposal of the present appeal are as follows :— According to the plaint, plaintiff and defendant No. 1 (appellant No. 1) had entered into a partnership for starting business of transport of passengers between Goa and Bombay. The partnership started its work under the name of M/s. Jumbo Travels and for starting the business purchased a bus. Later defendants 3 and 4 (appellant No. 3 and respondent No. 2 respectively) were also inducted as partners and they all contributed to raise the capital for purchasing the bus. According to the plaint on 25-9-1972 plaintiff and defendant No. 1 agreed that the said bus should be made over to a bigger transport company M/s. Indian Safari defendant No. 5. It is alleged in the plaint that defendant No. 1 as partner of Jumbo Travels and also of M/s. Indian Safari was bound to render account of the profits earned by the bus belonging to the firm of Jumbo Travels which he has been avoiding to do. Plaintiff therefore claimed rendition of accounts and recovery of share in profit.

4. Defendants 1 to 4 (i.e. appellants and respondent No. 2) filed a joint written statement. It was not specifically denied that plaintiff and defendant No. 1 had entered into a partnership to run a passenger transport business under the firm name of Jumbo Travels. It was also admitted that at a later date defendants 2 to 4 were inducted as partners of the said firm. They denied that the plaintiff was a party to the agreement between defendant No. 1 and M/s. Indian Safari by which the bus belonging to Jumbo Travels was pooled with the assets of the firm of Indian Safari. It was also denied that plaintiff had any right in respect of profits of the firm Indian Safari. It was pleaded that at a later stage differences arose between plaintiff and defendant No. 1 and it was agreed in January 1972 that the firm Jumbo Travels should be dissolved and the bus should be transferred exclusively to defendant No. 1 who would refund the capital advanced by other partners and would bear the liability for all debts etc. of the firm. Accordingly the firm was dissolved and the bus was made over exclusively to defendant No. 1. Defendant No. 1 thereafter became a partner of M/s. Indian Safari and pooled his bus for running

a passenger service by firm M/s. Indian Safari. In this way defendants 1 to 4 denied any liability for rendition of accounts to the plaintiff.

5. On 27-9-1974 plaintiff filed an application for appointment of a receiver under Order 40, Rule 1, Civil P. C. According to this application appointment of receiver was sought on two grounds. One was that the defendant No. 1 had not rendered necessary account in respect of the operation of the bus No. GDT 2298 to the plaintiff and second was that plaintiff had reasonable cause to believe that defendant No. 1 was using the profits of the bus and of the firm for his own use.

6. In reply defendants 1 to 4 submitted that the said bus No. GDT 2298 belonged to defendant No. 1 exclusively. Defendant No. 1 was a partner of a firm M/s. Indian Safari and plaintiff had no right to claim accounts from him. On these grounds it was submitted that it was not just and convenient to appoint a receiver.

7. The learned lower Court held that defendant No. 1 and plaintiff jointly entered into partnership with M/s. Indian Safari under an agreement dated 25-9-1972 and as partner of the subsisting firm Jumbo Travels which was the owner of the bus in question, plaintiff was entitled to rendition of accounts. Since there was an apprehension that defendant No. 1 might appropriate the profit for himself, it was just and proper to appoint a receiver who shall take control of the bus and all the account books and maintain an account of profits.

8. First question raised on behalf of the appellants before me was that the suit was incompetent under Section 69 of the Partnership Act because the firm Jumbo Travels was not registered. The second contention was that no receiver could be appointed in respect of the business of a running firm.

9. The plea about the non-registration of the firm was not raised in the written statement. It has been raised for the first time before this Court. It was submitted by the learned counsel for respondent No. 1 that this question could not be raised for the first time at the appellate stage. He relied on *Kalyan Sahai v. Firm Lachhminarain*, AIR 1951 Raj 11. This authority is not in point because it was observed therein that the question of registration of a firm was a mixed question of law and fact. In the present case it was not disputed in this Court that the firm Jumbo Travels was unregistered. This fact was clearly conceded. It would not therefore be proper to say that any question of fact remained to be investigated and the same could not be raised in appeal. However, the learned counsel for respondent No. 1 submitted that had this objection been raised in the written statement he would have suitably amended plaint so as to avoid the embargo envisaged under Section 69 of the Partner-

ship Act. It was not disputed that the plaintiff/respondent No. 1 could amend the plaint and particularly the relief clauses by praying for the dissolution of the firm, in order to avoid the requirement of the registration of the firm, as per Section 58, r/w 69 (1) of the Partnership Act.

10. This argument has some force and instead of dismissing the application for appointment of a receiver on the ground of non-registration of the firm and impliedly the suit itself on this ground, it would be proper that the parties be directed to raise the requisite pleadings in the written statement as well as in the plaint with regard to the effect of Section 69 (1) of the Partnership Act. Since for this purpose a remand would be necessary, the impugned order would have to be set aside and the case remitted for disposal of the application after parties amend their pleadings suitably.

11. In the light of the above observations, it is not necessary to examine the argument whether it would be just and convenient to appoint a receiver to manage a running partnership business.

12. The appeal is allowed and the order passed by the lower Court is set aside. The case is remanded to the trial Court for fresh hearing and decision on the application under Order 40, Rule 1, Civil P. C. after granting an opportunity to both the parties to amend their pleadings in the light of my observations above. Parties to appear before the trial Court on 10-9-1975. Costs of this appeal will be borne as incurred.

Appeal allowed; Case remanded.

AIR 1976 GOA, DAMAN & DIU 8

TITO MENEZES, J. C.

Joseph Mariano Santos Pinto, Appellant
v. Aires Concocho Rodrigues, Respondent.

Second Appeal No. 15 of 1972, D/- 6-8-1975.

(A) Negotiable Instruments Act (1881), S. 118 (a) — Civil P. C. (1908), O. 6, R. 2 — Suit by A against B to recover money due under pronote executed by B in 1967 — A alleging that consideration for pronote was given in cash — In course of evidence A admitting that consideration was price of buffalo purchased by B in 1966 as stated by B in written statement — Variance between pleading and proof held was not fatal to suit — Money due prior to execution of pronote was good consideration. AIR 1922 Cal 254 and AIR 1930 Pat 476 and AIR 1932 Lah 570 and AIR 1940 Pat 187 and AIR 1925 Nag 434 and AIR 1923 Cal 142, Rel. on; AIR 1968 Punj & Har 552 and AIR 1953 SC 235 and AIR 1960 Punj 500, Dis.; AIR 1915 Lah 86 (1), Ref. (Paras 2, 4, 5, 10)

IS/KS/D589/75/GNE

Cases Referred: Chronological Paras

AIR 1968 Punj & Har 552 = 1968 Cur LJ 824	6
AIR 1960 Punj 500 = 62 Pun LR 624	8, 9
AIR 1953 SC 235 = 1953 SCR 789	7
AIR 1940 Pat 187 = 5 Cut LT 69	5
AIR 1932 Lah 570 = 139 Ind Cas 662	5
AIR 1930 Pat 476 = 11 Pat LT 447	5
AIR 1925 Nag 434 = 89 Ind Cas 486	5
AIR 1923 Cal 142 = ILR 50 Cal 292	5
AIR 1922 Cal 254 = 26 Cal WN 294	5
AIR 1915 Lah 86 (1) = 1915 Pun LR 150	9

M. A. Rodkar, for Appellant.

JUDGMENT:— This appeal is directed against the order of the District Judge, Panaji, dated 9-3-1972, dismissing the suit of the appellant/plaintiff after setting aside the decree of the trial court.

2. The plaintiff filed a suit to recover the sum of Rs. 500/- due to him on a promissory note dated February 16th, 1967. The pro-note was payable on demand. It was alleged by the plaintiff in the plaint that the sum due on the pro-note was borrowed by the respondent/defendant from the plaintiff. In paragraphs 2 and 3 of the written statement the defendant states:—

"2. The plaintiff and the defendant were dealing with the business of she-buffaloes. The defendant had purchased from the plaintiff the last she-buffalo in or about May, 1966 and that the defendant was in arrears to the plaintiff an amount of Rs. 485/- from the purchase of she-buffalo in or about month of May, 1966. The plaintiff induced the defendant to execute a promissory note dated 16-2-1967, even though the defendant did not receive any consideration on 16-2-1967. The defendant states that as no consideration is passed to him on the day of execution of promissory note, he is not obliged to pay any sum to the plaintiff and consequently the defendant is not liable to pay any interest.

3. The defendant denies that he has not paid any money to the plaintiff. The defendant states that on the execution of the promissory note dated 16-2-1967 about 4 months thereafter, the defendant paid to the plaintiff a sum of Rs. 300/- out of 485/-.

3. As for the payment of Rs. 300/- alleged to have been made by the defendant to the plaintiff there is no issue framed in the Appellate Court and the point was not at all considered. From the evidence on record, it is seen that the defendant was not serious about the alleged payment of Rs. 300/-. Besides his bare statement that that sum was given by him to the plaintiff there is nothing to corroborate his statement.

4. The learned District Judge came to the conclusion that though the plaintiff had stated that the consideration for the pro-note was given in cash, he had to admit in the course of evidence that the consideration was the price of a she-buffalo sold by the plaintiff to the defendant and that therefore there was no consideration for the pro-note.

5. I must admit that there is variance in the plaint and the evidence on record, but

the defendant has in his written statement clearly admitted that he owed to the plaintiff a sum of Rs. 485/- on account of a she-buffalo purchased by him in May 1966 and that the plaintiff induced the defendant to execute the said promissory note. The argument of the defendant however is that as the consideration did not pass on the day the promissory note was executed, he was not obliged to pay any sum to the plaintiff. It is evident that before the plaintiff proceeded to prove his case the real issue was whether the money which the defendant owed to the plaintiff on account of the she-buffalo purchased by the defendant in May 1966 was sufficient consideration for the promissory note executed on 6-2-1967. The general rule is that the plaintiff is bound by his pleadings but the only reason for this rule is that a party will be seriously prejudiced if his opponent is allowed to substantiate a case different from that pleaded. From the principles laid down in 'Gendli v. Joynal', 26 Cal WN 294 = (AIR 1922 Cal 254); 'Bankey v. Gudo', AIR 1930 Pat 476; 'Ghulam v. Azim Bibi', 139 Ind Cas 662 = (AIR 1932 Lah 570); 'Danrnu v. Narasingh', AIR 1940 Pat 187; 'Ratansrani v. Bannuji', AIR 1925 Nag 434; 'Ananda Chandra v. Bhojalal', ILR 50 Cal 292 = (AIR 1923 Cal 142) it follows that every variance between pleading and proof is not necessarily fatal and a slight variance will not be regarded as such. Every such variance should be carefully watched to see that the opposite party is not taken by surprise. As in all such cases, the real test is whether the other party has been taken by surprise. Where there has been no surprise and the parties have understood what the real issue was and justice is better done by deciding the case on the merits as presented by the parties, this technical rule need not be enforced.

6. The next question is whether a sum of money due some time prior to the execution of the pro-note can be good consideration for the issuance of a pro-note. In the present case the defendant has stated in the pro-note in very clear terms that he has received the money which he promised to pay on demand. In arriving at the conclusion that the pro-note in question was executed without consideration the learned trial Judge (District Judge?) relied on five decisions out of which I shall presently consider only four. The first of such decisions is *Krishna & Co. v. Bhagat Ram Girdhari Lal*, AIR 1968 Punj & Har 552. There was a clear finding that the hundi had been obtained in anticipation of the payment to be made which was never made. This finding of the trial court was confirmed by the lower appellate court, but the lower appellate court accepted that a new case regarding the consideration had been set up by the plaintiff's firm in the memorandum of appeal. Admittedly no such version with regard to the payment of consideration or nature of consideration was put forth at the trial by the plaintiff's firm or any of its witnesses. The

lower appellate court based its findings entirely on the statements made in the ground of the memo of appeal. Such a finding of the lower appellate court had necessarily to be set aside as was done by the High Court in *Krishna & Co.'s case*.

7. In *Trojan & Co. v. R. M. N. N. Nagappa Chettiar*, AIR 1953 SC 235, the evidence as recorded by the trial court clearly negated the plaintiffs assertion. That however was not the case before us and I have already stated, relying on a passage of P. C. Mogha's "The Law of Pleadings In India" and on the decisions quoted by me above, that variance between the pleadings and proof is not fatal when the parties have had fair notice of the case that they have to meet.

8. The plaintiff in '*Chandan Lal Jhora v. Amin Chand Mohan Lal*', AIR 1960 Punj 500, the third case on which the learned District Judge relied, made out both in the plaint and in his examination-in-chief the case that he had paid cash consideration for the pro-note, but in his cross-examination he took a complete somersault and said that he was merely the benamidar of the pro-note and that the consideration was paid by another person and that he did not know the executant of the pro-note. I need not state that there is a wide difference between the facts in *Chandan Lal Jhora's case* and those in the instant case. The evidence of the plaintiff before me was substantially in accordance with his case and with the case set out in his written statement by the defendant. Whereas in the present case the only difference between the pleadings and the evidence was that the consideration for the pro-note was not present but past, the difference in *Chandan Lal Jhora's case* was that the consideration for the pro-note was not at all given by the plaintiff but by a third party and that the plaintiff did not at all know the person executing the pro-note. The learned District Judge has overlooked the fact that the High Court clearly laid down that Section 118 (a) of the Negotiable Instruments Act provides a special rule of evidence in the case of negotiable instruments contrary to the case of an ordinary contract and that the party denying consideration has to prove want of consideration or, in other words, to rebut the presumption that the negotiable instrument was made or drawn for consideration. The statutory presumption in favour of there being a consideration for every negotiable instrument continues unless it is rebutted.

9. The fourth case relied upon by the learned District Judge was '*Kishen Sarup v. Tara Chand*', AIR 1915 Lah 86 (1). That case was merely quoted by him and after quoting it he proceeded to rely upon a passage in *Chandan Lal Jhora's case*, AIR 1960 Punj 500, which I have already considered.

10. The learned District Judge appears to have taken a very narrow view of the entire matter. The defendant owed to the plaintiff a sum of Rs. 485/- for the she-buffalo that he

purchased in May 1966 and on February 16th, 1967, he executed the pro-note wherein he stated that he had received the money mentioned in the pro-note. The learned trial Judge was correct in holding that there was consideration and in decreeing the suit of the plaintiff. In the circumstances the appeal is allowed. The order of the District Judge is set aside and the order of the trial Court is restored. The respondent shall pay the costs throughout.

Appeal allowed.

AIR 1976 GOA, DAMAN & DIU 10

TITO MENEZES, J. C.

Antonio Neves and another, Appellants v. Lelaali Javerbhai Mavany, Respondent.

First Appeal No. 19 of 1974, D/- 1-8-1975.

(A) Civil P. C. (1908), S. 47 — Plaintiff advancing loan to defendant — Defendant pawning jewels to plaintiff by way of security — Decree obtained by plaintiff for recovery of loan and applying for execution — Defendant alleging that pawned articles were substituted by plaintiff — As jewels pledged were not the subject-matter of the suit the question of conversion by the plaintiff was not one in execution, discharge or satisfaction of the decree, and could not be gone into in execution of the decree. AIR 1968 Mad 433, Dist.

(Para 5)

Cases Referred: Chronological Paras

AIR 1968 Mad 433 = (1968) 2 Mad LJ 472 5

AIR 1957 Pat 700 = 1957 BLJR 440 5

AIR 1956 SC 359 = 1956 SCR 62 5

AIR 1950 All 186 5

B. S. Ramanim, for Appellants; G. D. Kamat, for Respondent.

JUDGMENT:— A challenge is thrown by this appeal of the appellants/defendants to the order of rejection of an application under Section 47 of the Civil P. C., 1908, by the trial court.

2. The respondent/plaintiff loaned to the defendants a sum of Rs. 2,000/- approximately. By way of security the defendants pawned with the plaintiff some gold jewellery articles weighing about 50 grammes. The plaintiff filed a suit against the defendants for recovery of the amount loaned and obtained a decree for Rs. 2,579.96 p. inclusive of interest on the amount loaned. He applied for execution of the decree and called upon the defendants to make a declaration of their assets. In reply the defendants stated that the plaintiff should sell the articles pawned and adjust the proceeds against the decretal amount and undertook to pay the balance, if any had remained due. The plaintiff agreed with the proposal and brought the jewellery articles to court. When the packet contain-

ing the articles was opened the defendants protested on the ground that the articles originally pawned by the defendants had been converted into other articles of lesser value. They therefore applied to the court on 12-11-1973 under Section 47 of the Civil P. C. for an inquiry to ascertain whether the articles produced by the plaintiff were the same as the articles pawned by the defendants with the plaintiff at the time of the acquisition of the loan. The application was resisted by the plaintiff on the grounds: (1) that there was no set-off or counter-claim made in their written statement by the defendants on account of the said jewellery articles; (2) that the articles were described by the plaintiff in paragraph 6 of the plaint and the defendants did not challenge their description in their written statement; (3) that the decree was a simple money decree and its execution could not be hampered because of the jewellery pawned; and (4) that a separate suit for ascertaining whether there was conversion had to be filed by the defendants as the question of conversion of the jewellery pawned was not a matter relating to the execution, discharge or satisfaction of the decree within the meaning of Section 47 of the Civil P. C.

3. The learned trial Judge accepted the contentions of the plaintiff and rejected the application of the defendants dated 12-11-1973. Hence the appeal.

4. The short question for my determination is whether the alleged conversion of the jewellery pawned by the defendants with the plaintiff for the acquisition of the loan, into other jewellery of lesser value was a matter relating to the execution, discharge or satisfaction of the decree within the meaning of Section 47, Civil P. C.

5. It is argued by Shri Ramanim, learned advocate for the defendants, that the three pieces of jewellery having been pawned to secure the said debt, the question of conversion of jewellery would be a matter relating to the execution, discharge or satisfaction of the decree. I am unable to agree with this contention. The executing Court must execute the decree as it stands and it cannot go behind it. Shri Ramanim relies on 'Marudanayagam Pillai v. P. K. Venkataswami Naidu', AIR 1968 Mad 433, wherein it was held, dissenting from 'Bhagwati Saran v. Gargi Devi', AIR 1950 All 186 and relying on 'Jainarain v. Kadamath', AIR 1956 SC 359, and 'Rajendra Prasad v. Jai Prakash Pandey', AIR 1957 Pat 700, that the question whether certain property is covered by the decree or not is a question relating to execution, discharge or satisfaction of the decree; that it is for the executing Court to examine the question as to the identity of the property that is the subject of the decree which it is executing; and that if the decree-holder takes in execution land not included in the decree or in excess of the decree, the judgment-debtor must apply under Section 47 for the recovery of such land, and a separate suit for that purpose will not lie.

The ratio descidendi is not applicable to the present case. In Marudanayagam Pillai's case the question related to the identity of the property that was the subject-matter of the decree. In the present case the identity is not of the property that is the subject-matter of the decree, as undoubtedly the three pieces of jewellery were not the subject of the decree, the question for my determination is whether the conversion of the three pieces into other pieces of lesser value was the subject-matter of the decree. In deciding this last question I have no hesitation to hold that the conversion is not the subject-matter of the decree and that therefore it was not a matter relating to the execution, discharge or satisfaction of the decree.

6. In the circumstances the First Civil Appeal is dismissed with costs.

Appeal dismissed.

AIR 1976 GOA, DAMAN & DIU 11

K. N. SHUKLA, ADDL. J. C.

Sadassiva Rauji Gaitonde and others, Appellants v. Jose Joaquim Fonseca, Respondents.

First C. A. No. 9 of 1974, D/- 1-8-1975.

(A) Limitation Act (1908), Art. 177 — Civil P. C. (1908), O. 22, R. 4 — Death of defendant pending suit — Limitation to substitute heirs runs from date of defendant's death — Date of plaintiff's knowledge about death is not relevant.

The limitation for bringing the legal representatives of the deceased defendant on record is 90 days from the date of death of the deceased defendant and the date on which the plaintiff gets knowledge about the defendant's death is not relevant under Article 177 read with Order 22, Rule 4 under which the abatement of the suit as against the deceased defendant is automatic and no separate order is necessary. AIR 1964 SC 215, Rel. on. (Para 8)

(B) Civil P. C. (1908), O. 22, Rr. 4 and 9 — Limitation Act (1908), Art. 171 — Application under R. 4 to substitute legal representatives filed after limitation — Legal representatives joined without objection from legal representatives — They are not estopped from challenging validity of substitution in appeal. AIR 1924 Cal 633, Dissent.

Where the application, under Rule 4 to substitute the legal representatives of the deceased defendant was filed after limitation and the legal representatives were substituted without objection by them against their joinder they are not estopped from challenging the validity of their joinder in appeal because there is no estoppel against law and under Rule 4 the suit as against the deceased defendant abates automatically and the legal effects of such abatement will follow and the court

will have to import them without waiting for formal objection by any party and the procedure being binding on all cannot be waved expressly or by implication by any of the parties to the suit. AIR 1924 Cal 633, Dissent. (Paras 10, 11)

(C) Civil P. C. (1908), O. 22, Rr. 4 and 9 (2) — Limitation Act (1908), Art. 171 — Application under R. 4 to substitute legal representatives filed by plaintiff after limitation — No plea that plaintiff was prevented by sufficient cause taken — Application cannot be treated as one for setting aside abatement.

A bare application by the plaintiff under Rule 4 for substituting the legal representatives of the deceased defendant filed after the period of limitation without any plea that the plaintiff was prevented by sufficient cause from continuing the suit cannot be treated as a composite application for setting aside abatement and for bringing the legal representatives on record because such an application does not afford an opportunity to the opposite party to challenge and rebut the sufficiency or otherwise of the cause which can entitle the plaintiff to get the abatement set aside. AIR 1964 SC 215, Rel. on; AIR 1927 Bom 156, Dist. (Para 11)

(D) Civil P. C. (1908), O. 22, R. 4 — Suit by A for declaration of title and possession of suit property against B — B's wife C joined as pro forma defendant with B as guardian ad-litem — Death of B pending suit — Legal representatives not substituted within limitation — Suit abates as whole. AIR 1965 SC 1531 and AIR 1972 SC 1181, Rel. on. (Para 14)

(E) Evidence Act (1872), S. 33 — Portuguese Civil P. C., Arts. 563, 564 and 641 — Defendant in suit examined and cross-examined in earlier proceedings between same parties — Section 33 applies — That scope of cross-examination in earlier proceedings was limited because of Port. Civil P. C. is immaterial.

Where the defendant in the subsequent suit was examined and cross-examined by the adverse party in the earlier summary suit for eviction under the Portuguese Civil P. C. between the same parties, the statements made by the defendant in the earlier proceedings would be admissible under Section 33 in the subsequent suit and the fact that under the Port. Civil P. C. a party to the earlier proceedings was not a witness on his own behalf but could be examined if the other party so desired and therefore the scope of cross-examination was limited would not alter the applicability of Section 33. (Paras 17, 18)

(F) Evidence Act (1872), S. 33 — Applicability — All questions in issue in earlier and subsequent suit need not be substantially same.

For the applicability of Section 33 it is not necessary that all the questions in issue in the earlier and subsequent suit should be substantially the same and therefore where the scope of the earlier summary suit for eviction under the Portuguese Civil P. C. against the de-

defendant was limited to issue of possession only and in the subsequent suit against the same defendant for declaration of title and recovery of possession the question of possession was also substantially an issue and a very important one Section 33 would be applicable. AIR 1933 PC 202, Rel. on. (Para 19)

(G) Transfer of Property Act (1882), Section 41 — Benami — A purchasing property in court auction in B's name — B at A's instance transferring it to C without consideration — D purchasing it from C — Possession through C remaining with A — Original sale deed remaining with notary public — Transactions in favour of B and C held were benami — D held acquired no title to property under sale to him by C. AIR 1974 SC 171, Rel. on.

(Paras 26, 28)

Cases Referred: Chronological Paras
 AIR 1974 SC 171 = (1974) 2 SCR 90 15, 24
 AIR 1972 SC 1181 = (1973) 2 SCC 9 14
 AIR 1965 SC 1531 = (1965) 2 SCR 830 14
 AIR 1964 SC 215 = (1964) 3 SCR 467 8, 12
 AIR 1962 SC 89 = (1962) 2 SCR 636 14
 AIR 1933 PC 202 = 60 Ind App 336 19
 AIR 1927 Bom 156 = 29 Bom LR 244 10, 11
 AIR 1924 Cal 633 = 28 Cal WN 559 10, 11
 AIR 1922 Bom 449 (1) = 24 Bom LR 909 10, 11

U. S. Kolwalkar, for Appellants; M. S. Usgaonkar, for Respondents.

JUDGMENT:— This is a defendants' appeal.

2. The dispute refers to a property named "Xir" or "Molloi" Vinanechem Bata together with a residential house standing thereon.

3. Plaintiffs claimed title to the suit property by virtue of a sale deed dated 16-6-1960 executed by one Rajaram Vaglo. Earlier, plaintiffs had brought a suit under Art. 1043 of the Portuguese Civil P. C. r/w Section 953 of the Port. Civil Code for summary eviction of these defendants i.e. Sadashiva (Since deceased) and his wife. The suit was decreed by the trial Court but in appeal the decree was set aside by the Court of the Judicial Commissioner on the ground that the property was in possession of defendant Sadashiva for a period exceeding one year before the filing of the suit and no relief by way of summary eviction under Art. 1043 of Port. Civil P. C. (which is analogous to Section 6 of the Specific Relief Act, 1963) could be granted. Plaintiffs therefore were obliged to file a suit for declaration of title and recovery of possession.

4. Plaintiffs' case, shortly stated was as follows:— On 17-6-1960 plaintiff No. 2 Smt. Apolonia purchased the suit property from one Rajaram Vaglo for a consideration of Rs. 5,000/-. It was alleged that the suit property belonged originally to one Rosaria. This property was sold through Court auction in execution of a decree and one Dangui purchased it on 17-3-50. Later, the said Dangui

sold the property to Rajaram for a consideration of Rs. 1,000/- vide sale deed dated 3-10-52. Rajaram Vaglo was thus the owner of the suit property and by virtue of the sale deed dated 17-6-1960 plaintiffs became the owners thereof. According to the plaintiffs, possession of defendant Sadassiva and his wife was unlawful and they were liable to be evicted.

5. Defendants denied the claim of title set up by the plaintiffs. According to them vendor Rajaram Vaglo was not the real owner of the suit property. They pleaded that defendant Sadassiva was the real owner of the property and Dangui was only a benamidar. The consideration for purchasing the property in the Court auction flowed from defendant Sadassiva and he entered into possession of the property after Rosaria was evicted therefrom sometime in 1950. The sale to Rajaram Vaglo ostensibly made by Dangui had actually been made by defendant Sadassiva who was the real owner. This was also a fake and benami transaction because the benamidar Dangui was being pestered by Rosaria and he desired to free himself with these botherations. For this reason a fake and bogus deed, without passing any consideration was executed by Dangui in the name of Rajaram Vaglo. The real ownership and possession always remained with the defendants. On these grounds defendants challenged the title of the plaintiffs and their vendor Rajaram Vaglo.

6. During the pendency of the suit defendant No. 1 Sadassiva died on 10-2-1969. Application to bring his legal representatives was filed on 23-6-1969 and defendants 1-A to 1-K were brought on record. Defendant No. 2, the wife of Sadassiva was a person of unsound mind and her husband Sadassiva had been appointed the guardian ad-litem. These facts should be mentioned here because they constitute a major ground of attack against the impugned decree.

7. The learned Judge of the lower Court held that the onus of proving the benami character of the transaction by which Dangui had purchased the property in Court auction and also by which (he) had sold the property to Rajaram Vaglo, was on the defendants. They failed to discharge this burden and on the basis of the document it was proved that Rajaram Vaglo, had full title to the suit property and after the sale in plaintiffs' favour, they became the owners thereof. Accordingly the impugned decree for declaration and possession was passed.

8. The first ground on which the decree has been attacked relates to the abatement of the suit on account of plaintiffs' failure to bring the legal representatives of defendant Sadassiva on record within the period of limitation. It is clear, and has not been disputed that defendant Sadassiva died on 10-2-1969. An application for bringing the legal representatives on record was filed on 23-6-1969. The limitation for an application

to bring the legal representatives of the deceased defendant on record is 90 days from the date of the death of the deceased defendant under Article 177 of the Limitation Act. The date when the plaintiff gets the knowledge about the death of the defendant is not relevant under Article 177 r/w Order 22, Rule 4, Civil P. C. (*Union of India v. Ram Charan*, AIR 1964 SC 215). Under sub-rule (3) of Rule 4, Order 22, Civil P. C. the abatement of the suit as against the deceased defendant is automatic and no separate order is necessary for declaring so.

9. After the abatement of the suit against the deceased defendant, the opposite party can apply under Order 22, Rule 9 for setting aside the abatement or dismissal on proof of sufficient cause. Limitation for this application under Art. 171 of the Limitation Act is 60 days from the date of the abatement. Admittedly no such application was filed for setting aside the abatement by the plaintiffs/respondents within or even beyond the period of limitation. The abatement therefore remained in force and legal representatives of the deceased defendant Sadasiva could not be brought on record.

10. Learned counsel for plaintiffs/respondents conceded that under Order 22, Rule 4, sub-rule (3), C. P. C. the suit against deceased defendant Sadasiva had automatically abated and no application under R. 9 for setting aside the abatement was filed. He however, contended that the belated application filed on 23-6-1969 for bringing the legal representatives on record could itself be treated as an application for setting aside the abatement. Further it was argued that in pursuance of the said application the legal representatives were already brought on record and they did not raise any objection about their joinder and therefore the matter could not be agitated in appeal. He relied on some old decisions of the Bombay and Calcutta High Courts. The rulings are:—*Lakshmibai v. Yeshwant*, AIR 1922 Bom 449 (1); *Sitaram v. Anant*, AIR 1927 Bom 156 and *J. Bibi v. Satish Chandra Bhattacharya*, AIR 1924 Cal 633.

11. In *Lakshmibai's* case AIR 1922 Bom 449 (1) the delay in filing an application to bring the heirs on record within the prescribed period of limitation was excused on the ground that under the old Limitation Act of 1908 the period of limitation was six months which was reduced to three months by the amending Act and it was held that this change probably did not come to the knowledge of the parties. This case therefore is not in point. In *Sitharam's* case AIR 1927 Bom 156 the decree was challenged at the execution stage on the ground that the abatement of the suit was not properly set aside before the final decree was passed and it was held that the objection in execution proceedings against the decree could not be entertained. The case of *J. Bibi* AIR 1924 Cal 633 (*supra*) to some extent supports the argument of the

respondents that when substitution of heirs is allowed after the period of limitation without objection it cannot be set aside by the appellate Court. Actual reasoning adopted by the learned Judge of the Calcutta High Court may be reproduced:—

"The learned District Judge was undoubtedly right in his view of the law that the proceedings had automatically abated on the 18th January, 1921, under Order 22, Rule 3, Civil P. C., and no application for substitution could be entertained after that date, but the petitioners by presenting a proper application under Order 22, Rule 9 (2), Civil P. C., and by showing sufficient cause could obtain an order setting aside the abatement. We think, however, that by reason of the application for substitution being readily allowed by the learned Munsif and no objection having been taken by the Opposite Party at any stage of the protracted proceedings that followed in his Court, the petitioners were deprived of an opportunity to make an application under Order 22, Rule 9 (2), Civil P. C., and they were misled by the course of the proceedings that were adopted."

With great respect I cannot subscribe to this view. There is no estoppel against law and merely because a party has not raised any objection on a question of law, it cannot be estopped from raising it at any subsequent stage of the proceedings. Under Order 22, Rule 4, Civil P. C., the suit as against the deceased defendant abates automatically whether or not an objection is taken by any party. The legal effects of such abatement will follow and a court of law will have to import them without waiting for a formal objection by any party. The procedure is binding on all and it cannot be waived expressly or by implication by any of the parties to the suit. After the abatement of the suit, the only course open for the opposite party is to apply under Order 22, Rule 9 (2), Civil P. C. for setting aside the abatement by pleading facts to show that the party was prevented from sufficient cause from continuing the suit. On such a plea the opposite party can join issue and try to refute the ground on which the application for setting aside is based. A bare application for bringing the heirs on record after the period of limitation without containing any plea that the party was prevented by sufficient cause, cannot be treated as a composite application for setting aside an abatement and for bringing the legal representatives on record. The reason is that such an application does not afford an opportunity to the opposite party (in this case the opponent heirs) to challenge and rebut the sufficiency or otherwise of the cause which can entitle the plaintiff to get the abatement set aside.

12. The case of AIR 1964 SC 215 (*supra*) is to a limited extent similar on facts to the case under appeal. In that case also no separate application under Order 22, Rule 9 (2), Civil P. C. was filed for setting

aside the abatement. An application with bare statement that the heirs of the deceased respondent be brought on record was filed by the appellant after the appeal had already abated due to the respondent's death. Their Lordships in paragraphs 12 and 14 referred to the procedural requirements under O. 22, Rr. 4 and 9, Civil P. C. and observed as follows:—

"This means that the applicant had to allege and establish facts which, in the view of the Court, be a sufficient reason for his not making the application for bringing on record the legal representatives of the deceased within time. If no such facts are alleged, none can be established and, in that case the Court cannot set aside the abatement of the suit unless the very circumstances of the case make it so obvious that the Court be in a position to hold that there was sufficient cause for the applicant's not continuing the suit by taking necessary steps within the period of limitation. Such would be a very rare case. (Para 12). It appears to be due to such an attitude of the appellant that the application dated March 17, (sic) 1958 purported to be simply under Rule 4 of Order XXII and did not purport to be under Rule 9 of the said Order as well and that no specific prayer was made for setting aside the abatement." (Para 14)

13. It would appear from this judgment that according to Their Lordships of the Supreme Court an abatement could not be set aside unless a proper application was filed for the purpose stating the sufficient cause which prevented the plaintiff from continuing the suit. In the absence of such an application and proof of such a cause the abatement could not be set aside. This being the legal position, the abatement of the suit as against the deceased defendant Sadassiva could not be impliedly set aside on an application by the plaintiffs/respondents purporting to be under Order 22, Rule 4, Civil P. C. even though the heirs were joined and they did not raise any objection to the continuation of the suit.

14. Next question is what was the effect of the abatement of the suit against the deceased defendant Sadassiva. It is clear that the absence of the legal representatives of deceased Sadassiva, (who was the principal defendant) from the record renders it impossible to proceed with the suit and obtain an effective decree for declaration of right and possession. The legal representatives will not be bound by any such decree passed against the remaining defendant i.e. the widow of deceased defendant Sadassiva. In fact the widow was only a pro-forma defendant, and the relief in the main was sought against defendant Sadassiva. Thus no effective decree for declaration of title and possession can be passed in the absence of the legal representatives of Sadassiva on record. In such a case the suit must abate as a whole. (State of Punjab v. Nathu Ram; AIR 1962 SC 89; Union of India v. Shree Ram, AIR 1965 SC

1531 and Ramagya Prasad Gupta v. Murli Prasad, (1973) 2 SCC 9 = (AIR 1972 SC 1181). The suit having been abated in full the decree passed by the learned lower Court in favour of the respondents is invalid and inoperative on this count alone and it is liable to be set aside.

15. Turning to the merits of the case, the burden of proof was rightly placed by the learned lower Court on the defendants because they had taken the plea that Dargui and later Rajaram were only benami purchasers while the real owner was Sadassiva (deceased defendant No. 1). In Jaydayal Poddar v. Bibi Hazra, AIR 1974 SC 171 it was observed that in weighing the probabilities and for gathering the relevant indicia, the courts are usually guided by the following circumstances:—

"(1) The source from which the purchase money came; (2) the nature and possession of the property, after the purchase; (3) motive, if any, for giving the transaction a benami colour; (4) the position of the parties and the relationship, if any, between the claimant and the alleged benamidar; (5) the custody of the title-deeds after the sale and (6) the conduct of the parties concerned in dealing with the property after the sale."

16. These are not exhaustive of all the possibilities which may be considered for inferring the real nature of the sale but broadly they will provide the necessary help to a Court of fact to draw a proper inference.

17. In this case two important persons namely Sadassiva (defendant No. 1) and Dargui who could throw proper light on the main issue, died before the stage of evidence. but both these persons were examined and cross-examined in the earlier summary suit for eviction between the same parties. Appellants wanted to produce those statements in support of their case but the learned lower Court refused to admit them in evidence holding that they were inadmissible as they did not come within the purview of Section 33 of the Evidence Act. Appellants have sought permission under Order 41, Rule 27, Civil Procedure Code to file certified copies of these statements in this Court.

18. These statements according to me were admissible under Section 33 of the Evidence Act and the learned lower Court wrongly refused to admit them. It was not in dispute that the earlier proceeding was between the same parties and the adverse party had the right and opportunity to cross-examine. There was a suggestion that under the Port. Civil Procedure Code a party to the proceeding was not a witness on its own behalf but he could be examined if the other party so desired. My attention was invited to Articles 563, 564 and 641 of the Portuguese Civil P. C. It was argued that because of this embargo, the scope of cross-examination was limited and Section 33 of the Evidence Act would not apply. This objection must be

rejected. The above quoted translation of the Portuguese Civil Procedure Code does not alter the applicability of Section 33 Evidence Act because the only requirement under proviso 2 is that adverse party had the right and opportunity to cross-examine. As Sadassiva had been examined as a witness and was also cross-examined at length, this requirement was fulfilled.

19. It was then argued that Section 33 Evidence Act was not applicable because the question in issue was not the same in the first and in the second proceeding. This argument had prevailed with the lower Court. To appreciate this point we will have to look at the issues involved in the first suit. Though the scope of the earlier suit was limited to the issue of possession only, the pleadings in the written statement gave an elaborate account of facts showing that possession was always with the defendant (Sadassiva) and never with Rajaram Vaglo or the plaintiffs. The question of possession was substantially an issue in the present suit also as it was one, and a very important one at that, of the various facts which proved the benami character of the transaction. It was not necessary that all the questions in issue should be substantially the same (*Krishnayya v. Venkata Kumara*, AIR 1933 PC 202).

20. Statements of Sadassiva and Dangui recorded in the earlier suit between the same parties were therefore relevant under Sec. 33 of the Evidence Act. They should have been admitted in evidence by the lower Court and since it did not do so, permission is granted to file them in this Court.

21. Statements of Sadassiva and Dangui (English translations along with the certified copies in Portuguese have been filed), showed very clearly the background of the transactions resulting in the transfer of the property by Dangui in the name of Rajaram. Dangui an old man and a respectable businessman not in any way hostile to Rajaram Vaglo, fully supported the statement of Sadassiva as regards the nature of the transactions and source through which consideration passed. Dangui very clearly stated that the property had been purchased in his name by Sadassiva in public auction after he (Sadassiva) had paid off the decree holders of Rosaria and had become a subrogee or assignee of the decree. Dangui made no mistake about the real owner of the property. He also stated that possession was taken by Sadassiva after the Court auction. Statement of Dangui further showed that he was pestered by Rosaria for allowing her to sell the property and repay the loan. For this and for some other reasons he asked Sadassiva to find out some other benami purchaser. Accordingly property was transferred at the instance of Sadassiva to Rajaram's name both being close relatives. No consideration ever passed for this transfer from Rajaram to Dangui nor was possession ever delivered.

22. Thus the statements of Sadassiva and Dangui recorded in the earlier suit showed very clearly that consideration for the purchase of the house had come from Sadassiva and not from Dangui. Dangui was only a benamidar for Sadassiva.

23. Once the defence version about this primary transaction in respect of the suit property is accepted it will follow that the subsequent transaction between Dangui and Rajaram Vaglo was fake, bogus and without consideration. Statement of Rajaram Vaglo on the point cannot be believed. It is inconsistent with the proved fact that consideration for purchase in the Court auction passed from Sadassiva and not Dangui. Secondly there was no explanation for sale of the property for a sum of Rs. 1,000/- when in the court auction it was purchased for Rs. 1,500/- as stated by Rajaram (P. W. 1) himself. Unfortunately the learned trial Judge skipped over Rajaram's statement completely and took a short-cut under the uncertain ground of burden of proof.

24. Then the next important circumstance is possession. It was held by the Judicial Commissioner's Court (Exh. D.1) in the previous suit that possession was always with Sadassiva. This finding though not relevant to prove title, is relevant on the issue of possession. In that suit also Rajaram was plaintiff's star witness and was disbelieved by the Judicial Commissioner's Court with regard to his testimony about his possession. In the instant suit also, the conclusion would be same on the basis of the clinching evidence led by the defendant. Again on this point as well, the learned trial Judge went astray in not examining the question of possession or recording his clear finding thereon and instead wrongly trying to apply Article 1031 of the Portuguese Civil Code. He paid a lip service to the ruling in AIR 1974 SC 171 (supra) without trying to follow the principles laid down therein. The transaction in suit was not a case of 'simulation' which has an element of fraud in it. It was alleged to be a 'benami' and not 'simulated' transaction and so the tests to ascertain the true nature thereof could not be found in Article 1031 of the Port. Civil Code.

25. Admittedly the management of the property was with Vaikunth Porob (D. W. 2). Rajaram Vaglo stated that Vaikunth was managing on his behalf and on his instructions. Vaikunth denied this and supported in full defendants' case that Sadassiva had been put in possession right from the beginning after the Court auction and he (this witness) was managing the property on his behalf. He also stated that Sadassiva used to stay in the house every year during summer season. No reason was given for discrediting the testimony of this witness. It is not necessary to refer to other evidence because Vaikunth's statement sufficiently proved defendants' possession at all relevant time.

26. The title-deed, as per the law in this territory remained in the office of the notary public and not with any party to the sale. Hence neither Sadassiva nor Dangui or Rajaram were in possession of the original title-deed. Plaintiffs/respondents' advocate has drawn my attention to Ex. P.1 (Bill of exchange) dated 8-2-1949 drawn by Dangui on Rosaria for payment of Rs. 3,500/- to Gonu Vaglo. This document did not create any right in favour of Rajaram Vaglo. It was nobody's case that Dangui had purchased the property benami for Rajaram. It only showed that Gonu had advanced a sum of Rs. 3,500/- to Dangui. Now the suggestion that a part of this debt was adjusted towards the consideration of Rs. 1,000/- for purchase of the property by Rajaram appears to be an afterthought. The sale-deed Ex. P.2 (copy) makes no such reference. It was also not shown how this loan became payable to Rajaram. No partition-deed or account book was produced to show that this amount fell to the share of Rajaram. On the contrary this statement supported tacitly Dangui's and Sadassiva's statements that no consiceration ever passed and the transaction was just a sham one. Thus this document did not advance the case of the plaintiffs at all.

27. The reason why occasions arose twice for such benami deeds was explained by Sadassiva and Dangui in their statements in the earlier suit, which have been taken on record. The reasons were that Sadassiva who was Rosaria's neighbour did not want to come in light as a purchaser to avoid pestering by Rosaria.

28. In this way two important circumstances viz. the source of consideration and possession of the property favoured an inference that the transactions in favour of Dangui and later in favour of Rajaram Vaglo were benami in character and the title remained with the real owner Sadassiva. This being the position plaintiffs did not acquire any title over the suit property by virtue of the sale deed in favour of plaintiff No. 2 Apolonia executed by Rajaram Vaglo. Plaintiffs were not entitled to the reliefs of declaration of title and recovery of possession. The suit was liable to be dismissed on merits as well.

29. The appeal is allowed and the decree of the learned lower Court is set aside. The suit is dismissed, with costs throughout, Advocates fees Rs. 100/- if certified.

Appeal allowed.

AIR 1976 GOA, DAMAN & DIU 16

TITO MENEZES, J. C.

Raju Bapu Talavnekar, Petitioner v. Ramakant D. Clap, Respondent.

Election Petn. No. 1 of 1974, D/- 17-6-1975.

HS/HS/C782/75/CWM

(A) Representation of People Act (1951), Ss. 83 and 123 (6) — Election petition alleging corrupt practice — Concise statement of material particulars not given — Petition held liable to be dismissed.

Where in the election petition challenging the election on the ground of corrupt practice under S. 123 (6) the election petitioner had merely quoted the words of the section and he had not specified whether the expenditure in connection with the election alleged to have been incurred in excess of the permitted expenditure was incurred by the respondent or by his agent or by both.

Held that the petitioner failed to give in his election petition, a concise statement of the material particulars, within the meaning of Section 83 (1). The corrupt practice being the only ground of challenge of the election, and the petitioner having failed to give material particulars the petition was liable to be dismissed. 1969 (3) SCC 685; AIR 1969 SC 1201 and AIR 1972 SC 515, Rel. on.

(Paras 13, 14)

The petitioner gave certain items but he did not state that the banners, posters, petrol and so on mentioned in those items were paid for by the respondent or that the respondent authorised to pay them or that they were paid by the election agent of the respondent. Such a statement was essential, because even though expenses may have been incurred with the banners, posters, petrol and so on, as the possibility exists that such expenses may have been incurred by the friends or supporters of the respondent or by the party to which the respondent belonged, the expenses must specifically be stated to have been incurred by the respondent or by his election agent or otherwise authorised by the respondent.

(Para 8)

The Act envisages the existence of free work done by volunteers and similarly of free election expenses made by the supporters of the candidate.

(Para 8)

(B) Representation of the People Act (1951), Ss. 123 (6) and 77 — Section 123 (6) is relatable only to Cl. (3) of S. 77.

The failure to produce accounts of the election expenses or mistakes and omissions in the accounts does not attract the provisions of Section 123 (6), as such failure may relate to clauses (1) and (2) of Section 77, and not to clause (3), which, is the only clause to which Section 123 (6) is relatable. (Para 6)

(C) Representation of the People Act (1951), Ss. 123 (6) and 83 — Consent to commission of corrupt practice — Does not amount to commission of corrupt practice.

The consenting by a candidate of the commission of a corrupt practice by another person does not amount to the commission of a corrupt practice under Section 123 (6). Therefore, in the absence of a specific allegation that the respondent has committed and has not merely consented the commission of a corrupt practice under Section 123 (6), no cause of action is disclosed. (Para 12)

THE All India Reporter

1976

Gujarat High Court

AIR 1976 GUJARAT 1

B. J. DIVAN, C. J. AND

M. P. THAKKAR, J.

Shantilal Chandrashankar and another, Appellants v. Bai Basi, Respondent.

Letters Patent Appeal No. 145 of 1974, D/- 27-8-1974.*

(A) Civil P. C. (1908), O. 41, R. 11 (1) and (2) and R. 17 and O. 17, R. 3 — Appellant or his counsel absent at admission stage — Appellate Court cannot dismiss appeal on merits. M. C. A. No. 409 of 1971 (Guj), Reversed.

An appeal posted for admission cannot, for non-appearance of the appellant or his counsel, be dismissed on merits, although the Court may on merits admit it overlooking such default. The other courses open in the circumstances are that it may adjourn the appeal to another date or dismiss it for default. Power to dismiss a suit on merits under O. 17, R. 3 in the event of Plaintiff's default is significantly absent under O. 41, R. 11. At the admission stage, the Court has not the benefit of the arguments and the narration needed for a disposal on merits. That the Court has no such power is further confirmed by the circumstance that even at the stage of final hearing of the appeal an order dismissing the appeal on merits cannot be passed under O. 41, R. 17. Rule 19 provides for re-admission of the appeal dismissed under R. 11 or R. 17. AIR 1962 Puni 82. Followed: AIR 1966 All 1 (FB). Referred: AIR 1967 All 47 (observations held obiter) — M. C. A. No. 409 of 1971 (Guj), Reversed.

(Paras 7, 9 and 10)

*(Against decision of D. P. Desai, J. in M. C. A. No. 409 of 1971).

IS/JS/D517/75/TVN

1976 Gui/1 I G—27

(B) Civil P. C. (1908), O. 41, Rr. 30, 11 and 17 — Appeal can be dismissed on merits only under R. 30. (Paras 11 and 12)

(C) Civil P. C. (1908), O. 41, R. 11 and R. 19 — Appeal at admission stage — Appellant and counsel absent — Dismissal on merits read as dismissal for default. (Para 12)

Cases Referred: Chronological Paras
AIR 1967 All 47 8

AIR 1966 All 1 = 1965 All LJ 462 (FB) 10

AIR 1962 Puni 82 = ILR (1962) 1 Puni 156 11

(1873) 20 Suth WR (Civil) 425 4

(1871) 15 Suth WR (Civil) 193 = 6 Beng LR App 120 4

R. M. Vin. for Appellants; R. K. Abichandani, appeared as Amicus Curiae, for Respondent.

DIVAN, C. J.:— The main question which arises for our consideration in this appeal is whether under O. 41, R. 11, sub-rule (1) of the Code of Civil Procedure, it is open to the appellate Court to dismiss the appeal before it on merits of the case even though the appellant or his pleader may be absent at the time when the appeal is called on for hearing. D. P. Desai, J., sitting singly, has taken the view that the Appellate Court has such power under Order 41, Rule 11 (1) and this appeal has been filed against the order passed by him refusing to restore the appeal and re-admit it under its original number under the provisions of O. 41, R. 19.

2. The facts giving rise to this Letters Patent Appeal are as follows. On July 1, 1971 D. P. Desai, J., was sitting singly for admission and at that time Second Appeal No. 218 of 1971 came up for admission before him. On that day he passed the following order:—

"Mr. Vin absent. Having gone through the judgments of the Courts below and

the memorandum of appeal. I see no reason to admit this appeal. Dismissed." Thereafter Mr. Vin moved the Court by Miscellaneous Civil Application No. 409 of 1971 for readmitting the appeal on file and fixing it again for admission and his contention was that on July 1, 1971 when the appeal was called out, he was prevented from appearing before D. P. Desai, J., on account of sufficient reasons. On November 24, 1971 D. P. Desai, J. passed the following order on the application filed by Mr. Vin:—

"Rule. Notice to the members of the Bar as ordered on the office (note) in C. R. A. No. 602/71. To be heard with C. R. A. No. 602/71."

The ground given in the application for setting aside the order of dismissal and re-admission of the appeal on file was that Mr. Vin was busy with some other matter in some other Court when the Second Appeal was called out on July 1, 1971 before D. P. Desai, J., for admission. This ground was not controverted by the other side and, therefore, the learned Single Judge proceeded on the basis that Mr. Vin could not appear before him at the stage of admission because he was engaged in some other matter before another Judge of this High Court. In his judgment and order on the Miscellaneous Civil Application for re-admission of the Second Appeal on file and for restoration, D. P. Desai, J., made it clear that when the matter was called out for admission along with several other matters fixed on July 1, 1971, no mention was made on behalf of Mr. Vin before the learned Judge that Mr. Vin was busy in some other Court and, therefore, the matter might be kept back for sometime in order to enable him to come and make his submissions before D. P. Desai, J., nor was the matter transferred to another advocate under the right given to an advocate under Rule 17 of the High Court Appellate Side Rules. It was made clear by D. P. Desai, J., that it was not incumbent on Mr. Vin to transfer the matter to another advocate, because he was engaged or was likely to be engaged in some other Court. He only took note of the fact that this right was not exercised in the present case.

3. It was urged by Mr. Vin before the learned Single Judge at the hearing of the Miscellaneous Civil Application that an order of dismissal on merits could not be passed by the Appellate Court under Order 41, Rule 11 (1) when the party or his advocate was absent on the date fixed for hearing the party or the advocate. The submission was that there was no jurisdiction in the Court to pass such an order and that Order 41, Rule 11 (1) contemplated hearing of the party or his pleader before the matter was dismissed

summarily on merits. It was also urged that the only course left open to the Court while dealing with a matter fixed for hearing under O. 41, R. 11 was to adjourn the matter if the party or his pleader did not appear and make submissions or to dismiss the matter for default under sub-rule (2) of Rule 11. It was contended before D. P. Desai, J., in the Miscellaneous Civil Application that the order passed by the Court was on the face of it illegal and a nullity and, therefore, the order could be reviewed either under the provisions relating to review or under Section 151 of the Code. D. P. Desai, J., has made it clear that if the order passed by him on July 1, 1971 were to be read as an order for dismissal for default, there was sufficient ground made out by Mr. Vin for restoration and re-admission of the matter so that the matter may be placed down once again for admission. It is in the light of this history of the matter that we will now proceed to deal with this appeal.

4. Before proceeding further with the case, we may point out that as far back as 1873, a Division Bench of the Calcutta High Court had taken the view in *Mohesh Chunder Bose v. Thakoor Dass Gossamee*, (1873) 20 Suth WR (Civil Rulings), 425, that where a Judge, on the non-appearance of the appellant in person or by pleader, instead of observing the direction of the law, namely, Civil Procedure Code of 1859, Section 316, goes into the merits of the case and gives a judgment against the appellant, the appeal must be considered as dismissed for default of the appellant in appearing; and an application for re-admission and re-hearing cannot be treated as one for review, but must be entertained under Section 347. Sir Richard Couch, C. J., pointed out in his judgment in the case that when the appeal was called out before the District Court though three pleaders had been retained by the appellant, all the three were engaged in other Courts at the particular moment and hence not one of them appeared before the District Court when the matter was called out. The learned District Judge, instead of dismissing the appeal for the non-appearance of the appellant in person or by pleader, appeared to have thought that it was his duty to see what were the merits of the case and accordingly he gave a judgment in which, after saying that the onus was upon the plaintiff and that he only produced certain witnesses, the District Judge observed that he considered that the evidence was not sufficient to establish the plaintiff's title and just an old occupant. Sir Richard Couch observed that the District Judge was wrong in taking that course. He ought to have observed the direction of the law and acted

under S. 346 of the Code of Civil Procedure. It was observed that in an earlier decision reported in (1871) 15 South WR (Civil) 193, it was held that where a Judge does as the District Judge had done in this case, the appeal must be considered as having been dismissed for default of the appellant in appearing and Sir Richard Couch observed:—

"Perhaps it ought to have occurred to the Judge that it was not a satisfactory way of considering or of deciding upon the merits of the case when he did not hear what the appellant had to say in support of his case."

and finally it was observed:—

"There has been an erroneous procedure of these Courts which vitiates the decision that is appealed from, and we think the decrees must be set aside and the case remanded for re-hearing."

Thus, nearly a century back, the view was taken by the Calcutta High Court that when the appellant or his advocate is absent at the time when the matter is called on for hearing, the correct course is to dismiss the appeal for default instead of deciding the appeal on merits.

5. Before proceeding to consider the provisions of Order 41, Rule 11 and the other relevant provisions of the Code of Civil Procedure, it is necessary to point out that under Order 41, Rule 1, sub-rule (2) the memorandum of appeal has to set forth, concisely and under distinct heads, the grounds of objection to the decree appealed from without any argument or narrative; and such grounds have to be numbered consecutively. Every appeal has to be preferred in the form of a memorandum signed by the appellant or his pleader and presented to the Court or to such officer as it appoints in this behalf. The memorandum has to be accompanied by a copy of the decree appealed from and of the judgment on which it is founded unless the Appellate Court dispenses with the copy of the judgment. It is clear, therefore, that when the appellate Court purports to take up for hearing on merits at the admission stage an appeal before it, it has only got a copy of the decree against which the appeal has been filed and a copy of the judgment on which the decree is founded, and without any argument or narrative, the grounds of objection to the decree appealed from. At that stage, in view of the provisions of Order 41, Rule 1, the Appellate Court has not got the benefit of the argument or the narrative in support of the case of the appellant. Under Order 41, Rule 11 it is provided—

"11. (1) The Appellate Court, after sending for the record if it thinks fit so to do, and after fixing a day for hearing the appellant or his pleader and hearing

him accordingly if he appears on that day, may dismiss the appeal without sending notice to the Court from whose decree the appeal is preferred and without serving notice on the respondent or his pleader.

(2) If on the day fixed or any other day to which the hearing may be adjourned the appellant does not appear when the appeal is called on for hearing, the Court may make an order that the appeal be dismissed.

(3) The dismissal of an appeal under this rule shall be notified to the Court from whose decree the appeal is preferred."

Under Order 41, Rule 19, where an appeal is dismissed under Rule 11, sub-rule (2), or Rule 17 or Rule 18, the appellant may apply to the Appellate Court for the re-admission of the appeal; and, where it is proved that he was prevented by any sufficient cause from appearing when the appeal was called on for hearing, the Court shall re-admit the appeal on such terms as to costs or otherwise as it thinks fit. Rule 17 provides for the hearing of the appeal after it has been admitted and the notice of the admission of the appeal has been served on the respondent. Under Order 41, Rule 17 where on the day fixed, or on any other day to which the hearing may be adjourned, the appellant does not appear when the appeal is called on for hearing, the Court may make an order that the appeal be dismissed. Where the appellant appears and the respondent does not appear, the appeal shall be heard ex parte. Under Order 41, Rule 18 where on the day fixed, or on any other day to which the hearing may be adjourned, it is found that the notice to the respondent has not been served in consequence of the failure of the appellant to deposit, within the period fixed, the sum required to defray the cost of serving the notice, the Court may make an order that the appeal be dismissed. Provided that no such order shall be made although the notice has not been served upon the respondent, if on any such day the respondent appears when the appeal is called on for hearing. It is clear that when an appeal is dismissed for default, either at the stage of order under Order 41, Rule 11, sub-rule (2) or dismissed for default under Order 41, Rule 17, sub-rule (1), it is open to the appellant to show that he was prevented by any sufficient cause from appearing when the appeal was called on for hearing on the earlier occasion and on so satisfying the Court, he can get the appeal re-admitted on the file and thereafter have the matter disposed of after hearing the appellant or his advocate. The two stages, one contemplated by Order 41, Rule 11 and Order 41, Rule 17 are distinct stages,

Order 41, Rule 11 deals with the stage where the matter has not yet been admitted and notice to the respondent has not yet been issued. Order 41, Rule 17 deals with the stage where the notice has been served on the respondent and where he appears in that case or if he does not appear, the appeal has been heard *ex parte*.

6. Coming now to the wording of Order 41, Rule 11, sub-rule (1), it is obvious when read in the context of sub-rule (2), that at the admission stage, the appellate Court may send for the record of the case if it thinks fit so to do and it has to fix a day for hearing the appellant or his pleader regarding the admission of the appeal. If the appellant or his pleader appears on the day fixed for hearing at the admission stage after hearing him accordingly, the appellate Court may dismiss the appeal without sending notice to the Court from whose decree the appeal is preferred and without serving notice on the respondent or his pleader. Thus it is open to the appellate Court after hearing the appellant or his pleader to dismiss the appeal summarily under Order 41, Rule 11, sub-rule (1). However, if on the day fixed for the admission of the appeal or on any other day to which the hearing may be adjourned the appellant does not appear (and in this context the non-appearance of the advocate of the appellant would stand on the same footing as non-appearance of the appellant himself) when the appeal is called on for hearing for admission, the Court may make an order that the appeal be dismissed. It is clear that under the scheme of O. 41, R. 11 both the contingencies which are likely to happen are dealt with, namely, what is to be done when the appellant or his pleader appears when the matter is taken up for hearing for admission and when he does not appear. If he appears, it is open to the Court to dismiss the matter summarily after hearing the appellant or his advocate. If he does not appear, the Court can pass an order that the appeal be dismissed for default or it may adjourn the matter to some other date when the appellant or his advocate has not appeared. It may even pass an order admitting the appeal if the Court is satisfied that the matter deserves to be admitted. The main question, however, is whether the Court can dismiss the matter on merits in the absence of the appellant or his advocate.

7. We may point out that in the context of the trial of original suit or the matter before a trial Court, the legislature in terms has provided under O. 17, R. 3 that it is open to the trial Court to proceed to decide the suit on merits where any party to a suit to whom time has been granted fails to produce his evi-

dence, or to cause the attendance of his witnesses, or to perform any other act necessary to the further progress of the suit, for which time has been allowed to decide the suit forthwith on such materials as may be on the record of the case on the date to which the matter has been adjourned for doing any of the things mentioned above. No such specific power to dispose of an appeal on merits at the admission stage has been conferred on the Appellate Court in the absence of the appellant or his advocate. So far as the admission stage of the appeal is concerned, it must be borne in mind that the arguments and the narration which are highly necessary for the disposal of the appeal even at the admission stage, are not before the appellate Court because under Order 41, Rule 1, sub-rule (2), the memorandum of appeal cannot contain any argument or narrative; it can only contain the grounds of objections to the decree appealed from and not any argument or narrative. Under these circumstances, it is obvious, that the appellate Court would be without the benefit of the narration or the arguments if it were to proceed to dismiss on merits an appeal at the admission stage. As we have pointed out, the specific power conferred on a trial Court under Order 17, Rule 3 is not conferred upon the Appellate Court and, in our opinion, looking to the scheme of the Code of Civil Procedure, and particularly the scheme of Order 41, Rule 11, as contrasted with the scheme of O. 17, R. 3, it is not correct to read by implication a power in the Appellate Court to dismiss the appeal on merits. Further, the words "may make an order that the appeal be dismissed" occurring in Order 41, Rule 11, sub-rule (2) clearly indicate that the Court even in the absence of the advocate may admit the appeal or may adjourn it to another date or may dismiss the appeal for default if on the date fixed for admission or any other date to which the hearing for admission is adjourned, the appellant or his advocate does not appear. It is only if the appellant or his advocate appears on that day that the Court is empowered under Order 41, Rule 11, sub-rule (1) to dismiss the appeal summarily without sending notice to the Court from whose decree the appeal is preferred and without serving notice on the respondent or his pleader. The same language which is to be found in Order 41, Rule 11 sub-rule (2) is to be found in Order 17, Rule 1, namely, that where at the stage of final hearing of the matter after the appeal has been admitted and notice has been issued to the respondent and is properly served upon him, if on the date fixed for the final hearing of the matter, or on any other day to which the hearing may be adjourned, the appellant or his advocate does not

appear when the appeal is called on for hearing the Court may make an order that the appeal be dismissed. It must be noticed that the words used by the Legislature in Rule 11(2) and Rule 17(1) of Order 41 are almost identical. If under Order 41, Rule 19 in the event of an order of dismissal passed under Rule 17 on sufficient cause being shown for non-appearance when the appeal was called on for hearing, the appeal can be re-admitted, that is, restored, it is difficult to imagine why a different type of order should be passed when the appeal is dismissed at the time when at the admission stage on the day fixed for the admission or on any other day to which the hearing may be adjourned, the appellant or his advocate does not appear when the appeal is called on for hearing. It is nowhere contemplated under Order 41, Rule 17 that at the stage of final hearing of the appeal an order of dismissal on merits can be passed and it is too much to believe that the Legislature conferred power upon the Appellate Court to dismiss an appeal on merits at the stage of admission if, when the matter is called on for hearing at the admission stage, the appellant or his advocate is absent.

8. The decision of the Allahabad High Court on which D. P. Desai, J. relied in support of his conclusion that it is open to the Appellate Court to dismiss an appeal on merits even at the admission stage is in *Prem Prakash v. Ram Pratap*, AIR 1967 All 47. According to D. S. Mathur, J., sitting singly in that case, Order 41, Rule 11(1) can be given only one interpretation, namely, that in case of absence of the appellant or his pleader in spite of communication to him of the day for hearing, it is in the discretion of the Appellate Court either to dismiss the appeal on merits by proceeding under sub-rule (1), or to dismiss the appeal for default by proceeding under sub-rule (2). Where the Court decides to dismiss the appeal on merits under sub-rule (1), the only remedy available to the aggrieved party is to challenge the order if it is a decree in the appeal. But if the appeal is dismissed for default under sub-rule (2), the aggrieved party has the remedy to apply for restoration under O. 41, E. 19. According to Mathur, J., where it is clear from the order that the appeal preferred by the appellant was dismissed on merits and the matter was also not such that the appellate Court should not have dismissed the appeal under sub-rule (1), the order is and must be deemed to be under that sub-rule and, as such, no application under Order 41, Rule 19 is maintainable. It was further held that sub-rules (1) and (2) of Order 41, Rule 11 govern different kinds of cases and it cannot be said that there exists any conflict between these

two. Now, on a perusal of the facts of the case before Mathur, J., it is clear that, as a matter of fact, the entire observations regarding Order 41, Rule 11 are obiter as we will now proceed to explain.

9. In that particular case the appellant before the High Court was the defendant. He was appealing against the order passed by the District Judge of Kumaun dismissing his application under Order 41, Rule 19 for restoration of the appeal which had earlier been dismissed on merits. But it was the case of the original defendant that the appeal had been dismissed for default under O. 41, R. 11. Mathur, J., found that the District Judge had not worded his order properly, but what he apparently meant was that the appeal had been dismissed on merits under Order 41, Rule 11(1) and consequently no application under O. 41, R. 19 for restoration of the appeal was maintainable and the only remedy available to the party was to challenge the decree passed in the appeal by way of Second Appeal. Paragraph 2 mentions that the suit instituted by the original plaintiff was decreed ex parte by the trial Court when the defendant did not put in appearance on the date fixed for hearing. The defendant applied for restoration of the suit after setting aside the ex parte decree, but the application was dismissed. It is, therefore, clear that the defendant had applied to the trial Court under O. 9, R. 13 for setting aside the ex parte decree and the trial Court had dismissed that application. The original defendant thereafter preferred an appeal against the order refusing to set aside the ex parte decree. That appeal was listed for admission on July 1, 1961. The notice of the date of hearing was given to the counsel for the original defendant but on the date fixed, that is, July 1, 1961, neither the original defendant who was the appellant before the District Court nor his counsel put in appearance and the District Judge decided to dismiss the appeal on merits. The Allahabad High Court held that such an inference could be drawn from the following words used in the order dismissing the appeal:

"The reasons given by the learned Munsif for refusing the application are, in my opinion proper."

The defendant who was the appellant before the District Judge treated the order of dismissal to be for default and moved an application under Order 41, Rule 19 for setting aside the order and for re-admission of the appeal for hearing. The application was dismissed under the order under appeal which ran as under:—

"The appeal having been dismissed under Order 41, Rule 11, I do not think I can restore it to its number. The ap-

plicant has his remedy by appeal. Rejected."

It is, therefore, clear that the appeal which the original defendant had preferred to the District Court was an appeal against the order refusing to set aside an ex parte decree and it could only be an appeal under Order 43, Rule 1, clause (d), namely, an appeal against an order under Rule 13 of Order 9 rejecting an application for an order to set aside a decree passed ex parte. It was, therefore, what is known as an Appeal from Order. The Rules of Order 41, apply, as far as may be, to Appeals from Orders. Under Section 104, sub-section (2) of the Code of Civil Procedure, no appeal lies from any Order passed in Appeal because Sec 104 provides that an Appeal shall lie from the Orders mentioned in Order 43 and no further. Second Appeal lies from any order passed in Appeal from Order. It is thus obvious that the appeal before the High Court with which Mathur, J., was dealing was not maintainable, the Appeal being against an Order passed by the District Court in an appeal before him under the provisions of O. 43, R. 1(d). It is thus clear that whatever has been observed by Mathur, J., in *Prem Prakash v. Ram Pratap* (supra) is clearly obiter. According to Mathur, J., in the above case, the Legislature intentionally incorporated the words "if he appears on that day" in sub-rule (1), making it clear that the hearing of the appellant or his pleader shall not be a material part of the passing of an order of dismissal under sub-rule (1). In other words, the Appellate Court shall have jurisdiction to pass an order under sub-rule (1) after hearing the appellant or his pleader, or without hearing him, for so long as a day for hearing had been fixed and information thereof was communicated to the appellant or his pleader. When the Legislature intentionally added the above words in sub-rule (1), the Courts of law shall not be justified in treating them as superfluous or in disregarding their effect. According to him, sub-rule (1) can be given only one interpretation, namely, that in case of absence of the appellant or his pleader in spite of communication to him of the day for hearing, the Appellate Court has the discretion either to proceed under sub-rule (1) by dismissing the appeal on merits or to proceed under sub-rule (2) by dismissing the appeal for default. With respect to Mathur, J., and with respect to D. P. Desai, J., we are unable to agree with this line of reasoning. Really speaking, sub-rule (2) of Rule 11 deals with precisely the stage referred to in sub-rule (1). At that stage if the appellant or his advocate appears, the matter can be dealt with under sub-rule (1). If he does not appear, the matter has to be dealt

with under sub-rule (2). The Legislature has been very clear under Order 41, Rule 11 and by implication a power of dismissing the appeal on merits, when no such power has been conferred in express terms, cannot be assumed by the Appellate Court to itself. As a matter of fact, it would be reading much more into the wording of Order 41, Rule 11 than what the Legislature has intended to provide by that sub-rule if a power in the appellate Court to dismiss the appeal on merits were to be read into the provisions of sub-rule (1) of Rule 11.

10. In *Babu Ram v. Bhagwan Din*, AIR 1966 All 1, a Full Bench of the Allahabad High Court has dealt with the provisions of Order 41, Rule 17(1) and Rule 30 and it has held that the most important feature of Order 41, Rule 17(1) is its permissive character. The use of the word 'may' or 'shall' is not decisive of the enabling or imperative nature of a statutory provision and there may be cases where, having regard to the nature and object of the act contemplated by a statute and to the rights of persons for whose benefit it is to be done, the word 'may' has to be read as imposing a duty as well. According to the Full Bench of the Allahabad High Court, there is nothing in the nature and object of the act empowered by Order 41, Rule 17(1), nor is there any such right in the person for whose benefit the power has been conferred, to couple the power with the duty to do that act and no other. Under O. 41, R. 30 of the Code of Civil Procedure, the appellate Court, after hearing the parties or their pleaders and referring to any part of the proceedings, whether on appeal or in the Court from whose decree the appeal is preferred, to which reference may be considered necessary, shall pronounce judgment in open Court, either at once or on some future day of which notice shall be given to the parties or their pleaders. In terms Rule 30 speaks about the Appellate Court passing its judgment after hearing the parties and their pleaders. When the party or pleaders are not heard and when the date fixed for hearing the appellant or the advocate does not appear when the matter is called on for hearing, the Court may make an order that the appeal be dismissed. The other alternative to the Court is to adjourn the matter to some other date and it is clear in the light of O. 41, R. 17 that where the matter has been dismissed under O. 41, R. 17, it is treated as an order of dismissal for default and not of dismissal on merits of the case. Reading the scheme, therefore, of O. 41, R. 17 in the context of O. 41, R. 19, it is clear that the only order which the Court can pass under Order 41, Rule 17 is an

order for dismissal for default since when an order of dismissal is passed under Order 41, Rule 17, it is open to the appellant or his pleader to have the matter restored or re-admitted on showing sufficient cause to the satisfaction of the Appellate Court regarding his absence at the time when the matter was called on for hearing at the final hearing stage. With respect to the learned Judges of the Allahabad High Court, therefore, we are unable to agree with their conclusions that the appellate Court under O. 41, R. 17 has also the option of considering the appeal on merits and confirming, varying or reversing the decree appealed against. It is true that in the absence of the appellant or his advocate an order may be passed in his favour and to that extent the Appellate Court may decide the matter on merits in his favour but if the matter is to be dismissed, it cannot be dismissed on merits under Order 41, Rule 17. That is the distinction which we want to make as against the observations of the learned Judges of the Full Bench of the Allahabad High Court.

11. We find that the reasoning which has appealed to us also appealed to P. C. Pandit, J., of the Punjab High Court in *Kundha Singh v. Punjab State*, AIR 1962 Puni 82. There the learned Single Judge of the Punjab High Court was dealing with a situation under Order 41, Rule 17 and he held that under the provisions of Order 41, Rule 17, a Judge is not entitled to dismiss an appeal on merits if the appellant is not present on the date of the hearing. An appeal can be dismissed on merits only under Rule 30 of Order 41, after hearing both the parties. He pointed out that under Order 41, Rule 17 the appellate Court has a discretion to dismiss the appeal in default or to adjourn it to some future date. But it is not authorised to dismiss the same on merits in the absence of the appellant, or his advocate. He dissented from the views of the Allahabad and the Patna High Courts to the contrary. He also held, as was done by Sir Richard Couch in the decision delivered in the Calcutta High Court in 1873 that where instead of dismissing the appeal for default the Appellate Court dismissed it on merits, the order dismissing the appeal on merits in the absence of the appellant would be treated as an order of dismissal for default; such an order cannot come within the definition of the word 'decree' as given in Section 2, subsection (2) and, therefore, no appeal lies from such an order and the only remedy of the aggrieved party is to move an application under Order 41, Rule 19. We agree with the reasoning of the learned Single Judge of the Punjab High Court since the line of reasoning which has ap-

pealed to us, also appealed to him in that case.

12. In our opinion, on an analysis of the provisions of Order 41, Rule 11, read in the light of the scheme of O. 41, R. 1, O. 41, R. 17, O. 41, R. 19 and O. 41, R. 30 and the identical language to be found in O. 41, R. 11 (2) and O. 41, R. 17 (1), it is obvious that it is not open to an appellate Court to dismiss an appeal on merits at the admission stage; if when the matter is called on for hearing the appellant or his advocate is absent. The only order which the Appellate Court can pass in such circumstances is to dismiss the matter for default and even if the appellate Court purports to dismiss the appeal on merits, it must be read as an order of dismissal of the appeal for default. Under these circumstances, with respect to him, we are unable to agree with the conclusions of D. P. Desai, J., and, in our opinion, the Appellate Court having no jurisdiction to dismiss an appeal on merits at the admission stage, whatever might have been observed in the order dated July 1, 1971 regarding the merits of the case must be disregarded and the Miscellaneous Civil Application must be treated as an application for restoration and re-admission under O. 41, R. 19. Since D. P. Desai, J., has held that there was sufficient cause for Mr. V's non-appearance on July 1, 1971 when the matter was called on for hearing at the admission stage, it is clear that the matter should be restored and re-admitted so that it can be taken up for admission once again.

13. We had asked Mr. R. K. Abichandani to appear as an Amicus Curiae and to help us by looking up the authorities and we express our appreciation and our gratitude to him for the help that he has rendered. He pointed out that it is possible to take the view that the present Letters Patent Appeal may not be maintainable but the Order under appeal finally disposes of the rights of the parties and is really an order on an original proceeding before D. P. Desai, J., namely, on an application for restoration and hence the Letters Patent Appeal would lie and is maintainable and it is, therefore, on this footing that we have proceeded to deal with this Letters Patent Appeal.

14. We, therefore, allow this Letters Patent Appeal and direct that the Second Appeal shall be restored and re-admitted under its original number and will now be placed at an early date for admission before the learned Single Judge. There will be no order as to costs of this Letters Patent Appeal.

Appeal allowed.

AIR 1976 GUJARAT 8

B. J. DIVAN, C. J. AND

M. P. THAKKAR, J.

Pragjibhai Kesurbhai Patel, Petitioner
v. State of Gujarat and another. Respondents.

Misc. Civil Appln. No. 1012 of 1972,
D/- 14-8-1974.

(A) Advocates Act (1961), Section 55 — Persons practising as pleaders and vakils before enforcement of Chap. IV of Act — Powers of superintendence exercisable by High Court in context of Legal Practitioners Act and Bombay Pleaders Act — Repeal of these Acts — Powers if affected by any provision of Advocates Act, (i) Legal Practitioners Act (1879), S. 14; (ii) Bombay Pleaders Act (17 of 1920), S. 25 (since repealed by S. 50 (4) (b) of Advocates Act, 1961)).

Notwithstanding the repeal of the Legal Practitioners Act, 1879 and the Bombay Pleaders Act, 1920 in so far as persons who were practising before the enforcement of Chapter IV of the Advocates Act as pleaders and vakils were concerned, they continued to be subject to the provisions of the two repealed Acts and that the said Acts were kept alive to the limited extent in so far as they were concerned. And the powers exercisable by the High Court have been saved under Section 55 of the Advocates Act notwithstanding the repeal, namely, the powers which were enjoyed by the High Court in exercise of its disciplinary jurisdiction when the aforesaid two Acts were in force. (Para 5)

The powers of superintendence exercisable by the High Court in the context of the Legal Practitioners Act and the Bombay Pleaders Act are not affected by any provision contained in the Advocates Act particularly having regard to the clear language employed by the Legislature in Section 55 of the Advocates Act. With regard to the persons who were previously practising under the Bombay Pleaders Act and the Legal Practitioners Act, the authorities constituted under the Advocates Act would have no jurisdiction. The High Court therefore, continues to possess the same powers as hitherto, namely, the powers to exercise disciplinary jurisdiction in appropriate cases as also the concomitant power to reinstate in appropriate cases. (Para 5)

A pleader enrolled under the Bombay Pleaders Act of 1920 who has been removed from practice can be reinstated under the general powers of superintendence exercisable by the High Court even subsequent to the enforcement of the Advocates Act of 1961. AIR 1937 Bom 48, Applied. (Para 5)

JS/IS/D739/75/SSG

Cases Referred: Chronological Paras

AIR 1937 Bom 48 = 38 Bom LR 1161 5

(1845) 1 NPC 330 5

(1760) 1 Wm Bl 222 = 96 ER 122 5

C. K. Patel, for Petitioner; C. V. Jani
Asst. Govt. Pleader, for Respondents.

M. P. THAKKAR, J.:— The question which confronts the Court is whether a pleader enrolled under the Bombay Pleading Act of 1920, hereafter called the "Pleaders Act", who has been removed from practice can be reinstated under the general powers of superintendence exercisable by the High Court subsequent to the enforcement of the Advocates Act of 1961.

2. A few facts require to be mentioned in order to understand the point at issue. The petitioner, Pragjibhai Kesurbhai Patel, was practising as a Pleader at Sinor in the Baroda District. It appears that one Mavjibhai Govindbhai a client of petitioner Pragjibhai made an application to the learned District Judge of Baroda under Section 26 of the Pleaders Act. In pursuance of the report submitted by the learned District Judge, the matter came up before a Division Bench of this High Court by way of Misc. Civil Appln. No. 293 of 1965. By an order D/- 8-3-1966 the Division Bench came to the conclusion that the petitioner was guilty of misconduct and that he was not a fit person to be retained on the roll of Pleaders. Accordingly he was removed from practice and it was directed that he should surrender his Sanad. This order was passed on March 8, 1966. The petitioner appears to have felt contrite and to have reformed himself. Though he was till then practising as a Pleader, he joined the office of Shri Kantilal Ambalal Joshi, an advocate practising at Rajpipla as a clerk. For about last five years the petitioner had been working for advocate Shri Joshi in his capacity as a Clerk. The affidavit sworn by Shri Joshi on 12th April 1972 shows that the petitioner has attended to the legal affairs entrusted to him to the entire satisfaction of Shri Joshi and that the petitioner has been found to be honest, upright and sincere in the discharge of his duties. In the course of his work as a Clerk attached to a senior advocate like Shri Joshi large sums of money came to be entrusted to him and Shri Joshi declares on solemn affirmation that the petitioner has scrupulously accounted for all the monies entrusted to him and that he has been quite diligent and industrious in his work. This is what Shri Joshi has to say in this affidavit:—

"He has done utmost to make amends for his previous misconduct and conducted himself honourably during the last

years since he came in contact with me. I sincerely believe that he would justify clemency that may be shown to him and will act with integrity and honour and he deserves to be admitted to the rank of pleaders."

Substantially to the same effect is the affidavit of advocate Shri Mahendrasinh Umangsinhji Mahida of Raipipla. The petitioner has been working for Shri Mahida for the last five years. Initially the petitioner had joined the office of advocate Shri Prahladbhai Pandva who died about 2 years back. Thereafter he joined the office of Shri Mahida. Shri Mahida has also expressed the opinion that the petitioner was found to be upright, honest and sincere and has discharged his duties to the entire satisfaction of Shri Mahida. He has also stated that in the course of his duties the petitioner was entrusted with large amounts and that the petitioner has been found to be honest in his dealings, diligent in his work and industrious. Shri Mahida has also expressed the opinion that if clemency is shown to the petitioner, he would justify the trust reposed in him and that he deserves to be reinstated. He has expressed a high opinion about the integrity and honesty of the petitioner. His affidavit is supported by the affidavit of Shri Umangsinhji Dolatsinhji Mahida who has also made similar statements in regard to the petitioner. The petitioner has preferred this application for reinstatement supported by the aforesaid three affidavits.

3. Now, ordinarily in order to ascertain the suitability of the petitioner at the present moment we would have called for the opinion of the learned District Judge of the concerned district. In the present case, however, having regard to the facts and circumstances mentioned earlier and having regard to the nature of the affidavits filed by the three senior respectable advocates of Raipipla, we feel safe in making a departure from this principle and in deciding this petition on the basis of the aforesaid three affidavits. It is of importance to realise that Shri Joshi, a leading senior advocate of Raipipla, aged 68, with whom the petitioner has been working as a Clerk, has filed an affidavit in the terms mentioned earlier. Human nature being what it is, one would not be very anxious to have a rival in one's own field of practice. Therefore, there is, if at all, an in-built bias against swearing an affidavit merely to secure the reinstatement of the petitioner who has been removed from practice as a pleader. Even so, Shri Joshi, as is expected of a member of this noble profession, has come forward and placed before the Court the true facts as regards the conduct of the petitioner as noticed by him in the

course of his employment for the last five years as a Clerk. Same is the case with regard to the affidavit of Shri M. U. Mahida. We feel safe in relying on their affidavits.

4. The question then is whether we have the powers to reinstate the petitioner having regard to the opinion formed by us that the petitioner has atoned for his past misconduct, has now turned a new leaf, and has conducted himself with honesty and integrity. Even for hardened criminals an approach of understanding is usually made with a view to reform them. Under the circumstances obtaining at the material time the petitioner committed an act of misconduct and was found guilty therefor. For the last eight years, one who was practising as a full-fledged Pleader has worked as a Clerk of an advocate and in that capacity he has shown honesty, integrity and uprightness. It is shown by his conduct that he has withstood all the temptations and has benefited from the punishment imposed on him. Having already atoned sufficiently for his past misdeeds, he deserves to be reinstated in case we have such powers. We will, therefore, proceed to examine the question whether we have such powers.

5. The learned Assistant Government Pleader appearing for the State has in his fairness assumed the posture that having regard to the settled law the Court has the jurisdiction in exercise of its general powers of superintendence to reinstate the petitioner under the Pleaders' Act. That the Court does have such powers cannot be disputed having regard to the decision of a Division Bench of the High Court of Bombay in the matter of an Advocate, AIR 1937 Bom 48. This is what the High Court has observed in this connection:—

"The first question is whether this Court has jurisdiction to reinstate a pleader after he has been struck off the Roll. I entertain no doubt on that question. It is clear from the authorities that the Court has and must have the power to reinstate a pleader even though the Court, for professional misconduct, had struck him off the Roll. I need only refer to (1760) 1 Wm Bl 222. (King v. Greenwood), in which it was held that the striking off the Roll was not to be understood as a perpetual disability, but was sometimes only meant as a punishment, and might be considered in the light of a suspension only, if the Court saw good cause. In (1845) 1 NPC 330 (In re Pyke), Cockburn, C. J. observed that both on principle and precedents sentences of exclusion from either branch of the profession need not necessarily be exclusion for ever." The learned Assistant Government Plea-

der, however, called our attention to the provisions of the Advocates Act. Now, Section 55 of the Advocates Act of 1961 makes a provision in regard to rights of legal practitioners who immediately before the date of the enforcement of Chapter IV of the Act, were practising as pleaders or vakils under the provisions of the Legal Practitioners Act, 1879, or the Bombay Pleaders Act, 1920. This section (Section 55) provides that notwithstanding the repeal of the aforesaid two Acts, namely, the Legal Practitioners Act, 1879 and the Bombay Pleaders Act, 1920, the persons practising as pleaders or vakils, as the case may be, continue to enjoy the same rights as respects practice in any Court or revenue office or before any authority or person and be subject to the disciplinary jurisdiction of the same authority which he enjoyed or, as the case may be, to which he was subject immediately before the said date and accordingly the relevant provisions of the Act or law aforesaid shall have effect in relation to such persons as if they had not been repealed. It is, therefore, abundantly clear that notwithstanding the repeal of the aforesaid two Acts in so far as persons who were practising before the enforcement of Chapter IV of the Advocates Act as pleaders and vakils were concerned, they continued to be subject to the provisions of the two repealed Acts and that the said Acts were kept alive to the limited extent in so far as they were concerned. And the powers exercisable by the High Court have been saved under this provision notwithstanding the repeal, namely, the powers which were enjoyed by the High Court in exercise of its disciplinary jurisdiction when the aforesaid two Acts were in force. Importance of the expression "continue to enjoy the same rights" and "be subject to the disciplinary jurisdiction of the same authority" cannot be over-emphasized for it clearly shows that rights hitherto enjoyed by him were in terms kept alive albeit subject to the obligations to which he was subject. There is no manner of doubt, therefore, that the powers of superintendence exercisable by the High Court in the context of the Legal Practitioners Act and the Bombay Pleaders Act are not affected by any provision contained in the Advocates Act particularly having regard to the clear language employed by the Legislature in Section 55 of the Advocates Act. This stands to reason for with regard to the persons who were previously practising under the Bombay Pleaders Act and the Legal Practitioners Act, the authorities constituted under the Advocates Act would have no jurisdiction. Therefore, the jurisdiction hitherto enjoyed by the High Court in exercise of its general powers of superintendence would con-

tinue to govern the persons practising as pleaders or vakils in pursuance of the transitional provisions embodied in Chapter VII of the Advocates Act and more particularly Section 55 of the said Act. The High Court, therefore, continues to possess the same powers as hitherto, namely, the powers to exercise disciplinary jurisdiction in appropriate cases as also the concomitant power to reinstate in appropriate cases.

6. Having regard to the opinion expressed by us earlier that the petitioner appears to us to have made appropriate atonement for his past acts and now appears to have turned a new leaf and conducted himself in a manner wherein trust can be reposed in him, he deserves to be reinstated.

7. We accordingly direct that the petitioner shall be reinstated as a Pleader under the Bombay Pleaders Act and the sanad surrendered by him shall be restored to him. There will be no order regarding costs.

Order accordingly.

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A. A. DAVE, J.

Bai Annapurna Shantilal, Appellant
v. Kantilal Laljibhai and others, Respondents.

First Appeals Nos. 135 and 136 of 1970. D/- 30-7-1974.*

(A) Bombay Public Trusts Act (1950), Sections 22-A and 70-A — 'Particular' in relation to public trust — Connotation — Information relating to mode of succession to trusteeship left out in previous inquiry — Fresh inquiry if permissible.

The word 'particular' in relation to a public trust would include any information or detail in relation to the mode of succession which is required to be determined by the Assistant Charity Commissioner.

In the instant case, the applicants under Section 22-A produced documents showing that there were orders of competent authorities holding that the mode of succession to trusteeship was hereditary and not appointment by village people. These documents were not produced by the original trustee at the time of registration of the trust before the Assistant Charity Commissioner in the inquiry made by him under S. 19. No one appeared before him in that inquiry and on the submission made on the application that

*(Against decision of J. P. Desai, Extra Asst. J., Baroda in Misc. C. A. No. 138 of 1967).

GS/HS/C426/75/MBR

the mode of succession was 'appointment by village people', the learned Assistant Charity Commissioner recorded a finding to that effect.

Held, the learned Charity Commissioner was right in setting aside that finding and remanding the matter for fresh inquiry, when he found, on relying on the documents produced by the applicants under Section 22-A, that the finding could not be sustained. His order setting aside the finding could not be said to be contrary to the provisions of Section 22-A or 70-A. (1961) 2 Gui LR 564 and ILR (1963) Gui 767. Followed; (1972) 13 Gui LR 93. Explained. (Para 4)

Cases Referred: Chronological Paras

(1972) 13 Gui LR 493	4
ILR (1963) Gui 767	4
(1961) 2 Gui LR 564 = (1961) 2 Gui HCR 223	4

C. G. Patel, for Appellant; J. M. Patel with M. M. Patel; M. R. Shah, Asstt. Govt. Pleader, for Respondents.

JUDGMENT:— These two appeals arise out of the order passed by the learned Extra Assistant Judge, Baroda in Misc. Civil Applications Nos 138 and 139 of 1967 against the orders passed in Revision Applications Nos. 13/67 and 94 of 1967, passed by the learned Joint Charity Commissioner.

2. The facts leading to these appeals briefly stated are as under:—

Narayandev Maharaj Mandir at Varnama, Ta. Baroda is a public trust registered under No. A 19 (Baroda). The application for its registration was made in 1952 by Bai Nathi widow of Fulji Nathuram and Laljibhai Nagjibhai who has been shown in the application as two trustees of that trust. The mode of succession to the trusteeship shown by these two trustees in the application was "as appointed by the village people." The Assistant Charity Commissioner registered the trust on 7th April, 1953 and held inter alia that these two persons were the trustees and that the mode of succession was as shown in the application. Laljibhai Nagjibhai died on 23-12-1960 and in his place the name of his son Kantilal Laljibhai was entered by the Change Report No. 254 of 1961. It was shown in this change report that he was appointed by the village people. Thereafter on 28th May 1963 Bai Nathi died. A dispute arose on her death regarding the vacancy caused by her death. Change Report No. 585 of 1963 was filed on 17-8-1963 for entering the name of Bai Annapurna who is daughter of Nathi's brother as having been appointed by the village people as per mode of succession. Kantilal son of Laljibhai opposed this change report contending that the village people had ap-

pointed him as trustee in place of Bai Nathi and so he was the sole trustee of the trust. On 11-4-1966, the Assistant Charity Commissioner granted this change report. Against the order of the Assistant Charity Commissioner passed on this change report, Kantilal filed an appeal to the Charity Commissioner being Appeal No. 27/66. This appeal was rejected by the learned Charity Commissioner on 9-5-1967. He held that Bai Annapurna is the only appointed trustee as per the mode of succession recorded in the registration inquiry. On 21-7-1966, an application under Section 22-A being Change Inquiry No. 296 of 1966 was made by original applications Nos. 2 and 3 who are the brother and mother respectively of Kantilal Laljibhai for a further inquiry regarding the mode of succession to trusteeship. Their case was that the mode of succession as stated by Bai Nathi and Laljibhai was not correctly shown. They went to the extent of alleging fraud on the part of these trustees in getting mode of succession wrongly recorded. Their contention was that the mode of succession was in fact hereditary in the family of Narbheram. Applicant No. 1 who was also in this family applied for joining him in the above mentioned application. He was ordered to be joined as an applicant. He also alleged fraud on the part of the two trustees, who got this trust registered. They produced certain documents showing that in the past the mode of succession was held to be hereditary and not as appointed by the village people. During the pendency of this application under Section 22-A the original applicants filed application under Section 70-A on 23rd February, 1967 to the Charity Commissioner praying that the Charity Commissioner should revise the order passed under Section 19 regarding the mode of succession as important evidence regarding the mode of succession was not placed before the Assistant Charity Commissioner when this trust was got registered. On 30-6-1967 the Assistant Charity Commissioner rejected the application under Section 22-A on the preliminary issue of jurisdiction holding that as the mode of succession had already been decided by his predecessor in 1958 this matter could not be reopened on mere application of the interested parties. Against the said order passed by the Assistant Charity Commissioner an appeal No. 94/67 was preferred before the Charity Commissioner. Both the appeals and the revision application were heard together by the learned Joint Charity Commissioner. From the perusal of the documents prima facie, the learned Joint Charity Commissioner was of the view that the mode of succession to trusteeship was hereditary and not as appointed by village people.

In his opinion, both under Sections 22-A and 70-A of the Public Trusts Act, he was competent to hold a fresh inquiry with regard to the mode of succession in the light of the documents produced before him. He, therefore, allowed the appeal and the revision application and sent back the papers to the Assistant Charity Commissioner for holding a fresh inquiry with regard to the mode of successions after cancelling his order in that connection. Against the order of the Charity Commissioner passed in the revision application, as well as the appeal, the applications were preferred in the District Court. Baroda under Section 72 of the Act, which were heard by the learned Extra Assistant Judge who dismissed the said application and confirmed the order of the Joint Charity Commissioner. Against that order the present two appeals have been preferred.

3. Mr. C. K. Patel the learned Advocate for the appellants in both these appeals submitted that as the particular was inquired into by the Assistant Charity Commissioner and a finding recorded, it would not be open to him under Section 22-A of the Act to go into that question again. He submitted that S. 22-A would be applicable in a case where any particular relating to any public trust was not the subject-matter of the inquiry under Section 19 or sub-section (3) of Section 22 as the case may be. In the instant case, he submitted that the mode of succession was a subject-matter of inquiry under Section 19 of the Act and the Assistant Charity Commissioner having recorded his finding that the mode of succession was appointment by village people, no fresh inquiry under S. 22-A of the Act could be held. With regard to revision application under Section 70-A of the Act he urged that as no appeal was preferred against the order of the Assistant Charity Commissioner registering the trust and recording a finding that the mode of succession was by appointment of village people, the said finding should not be disturbed under the powers vested in the Charity Commissioner under Section 70-A to issue or revise the order of the Assistant Charity Commissioner or the Deputy Charity Commissioner as the case may be.

4. In respect of his first submission that as the particular relating to the public trust was already the subject-matter of the inquiry under Section 19 no further inquiry could be made. Mr. Patel relied on the case of Shukla Ramanujacharya Govindacharya v. N. N. Shah, (1972) 13 Guj LR 493 wherein it was observed that

"Section 22-A of the Bombay Public Trusts Act applies to cases where any

particular relating to any public trust was not the subject-matter of the inquiry under Section 19 or sub-section (3) of Section 22, as the case may be, and in respect of which an inquiry is required to be made. It is only in such cases that Section 22-A empowers the Deputy Charity Commissioner to make further inquiry into the matter. If the subject-matter of the inquiry was registered as a public trust property, no fresh inquiry in relation thereto can be made by the Deputy Charity Commissioner. Section 22 presupposes the occurrence of a change and an inquiry to be instituted in order to determine the facts relating to change and then to cause the necessary amendment to be made in the public trust register pursuant to the finding recorded in relation to a change. Section 22 does not contemplate an inquiry to be made by the Deputy Charity Commissioner for bringing about a change."

So far as the observations that Sec. 22-A applies to the cases where any particular relating to any public trust was not the subject-matter of the inquiry under Section 19 or sub-section (3) of Section 22, as the case may be are concerned, with respect I am in complete agreement. However, what is that particular which could be said to be the subject-matter of inquiry under Section 19 is a moot point. In this judgment it is not clearly stated as what the words any particular in relation to a public trust indicated. Two previous decisions of this High Court do not seem to have been cited before the learned Judge in this case. It is, therefore, necessary to refer to the previous decisions in order to understand the correct interpretation about the word 'particular' in relation to a public trust. In the case of Kuberbhai Shivdas v. Mehta Purshottamdas Kalvandas, (1961) 2 Guj LR 564. Mr. Justice J. M. Shelat (as he then was) held

"though retaining the final and conclusive character of the finding and entries made by the Deputy or Assistant Charity Commissioner, under Sections 20 and 21 of the Bombay Public Trusts Act, Sections 22 and 22-A make provisions for changes to be made when such changes appear to be necessary either as a result of a change having occurred subsequent to the date of the entries or as a result of some particular having been left out for consideration in the previous inquiry. Any person, not merely a trustee, can apply under Section 22-A for a change in the entry on a matter or a particular left out from consideration in a previous inquiry under Section 19 of the Act. The word "particular" in Section 22-A of the Act would mean any information or detail as to a trust, for example, information re-

garding suppression of a particular for the purpose of avoiding a property to be declared to be property belonging to a public trust."

It will thus be seen that the word "particular" as interpreted by Justice Shelat would include any information or detail as to a trust. Now, in the instant case the respondents have produced documents showing that there were orders of competent authorities holding that the mode of succession to trusteeship was hereditary and not appointment by village people. These documents were not produced before the Assistant Charity Commissioner in the inquiry made by him under Section 19 of the Act by Bai Nathi. No one had appeared before the Assistant Charity Commissioner in that inquiry and on the submission made on the application that the mode of succession was 'appointment by village people', the learned Assistant Charity Commissioner had recorded a finding to that effect. No appeal was preferred against this order before the Charity Commissioner. Thus so far as Section 70-A is concerned it would be open to the Charity Commissioner to revise the order passed by the Assistant Charity Commissioner or Deputy Charity Commissioner as the case may be. It cannot be said that the Charity Commissioner had in any way erred in revising the order passed by the Assistant Charity Commissioner without going into the question on merit. Similarly as held by Mr. Justice J. M. Shelat in the case referred to above when any such information relating to the mode of succession was left out in the previous inquiry it is open to the Deputy Charity Commissioner or the Assistant Charity Commissioner, as the case may be, to hold fresh inquiry as contemplated under Section 22-A of the Act. The ratio of the case of Kuberbhai (Supra) was followed by Mr. Justice Modi in the case of Ishwarlal Nanalal v. Ghanchi Chimanlal R. ILR (1963) Gui 767. With respect I am in entire agreement with the observations made in those two cases. The view propounded by Mr. Justice S. H. Sheth in Shukla Ramakrishna-charya (Supra) does not run counter to the view expressed in the previous two cases. As these two cases were not cited before him, Mr. Justice S. H. Sheth has not interpreted the word "particular" in relation to a public trust. His observations in the light of the word used in Section 22-A are correct. But I do not agree with Mr. C. K. Patel, learned Advocate for the appellants that the word "particular" would mean the finding recorded by the Assistant Charity Commissioner regarding the mode of succession. The word "particular" as interpreted by our High Court in the previous two cases would include any information or detail

in relation to the mode of succession which was required to be determined by the Assistant Charity Commissioner. If the documents in question were produced before the Assistant Charity Commissioner, at the time of the inquiry for which we know he could have taken different view of the matter. Even Bai Nathi before her death had made an application for change in this finding on the plea that through mistake she had stated in her application that the mode of succession was 'appointment by village people'. She had alleged that the mode of succession was hereditary and not by appointment of village people. However, that application was rejected. But the fact remains that even before her death Bai Nathi had tried to correct the mistake which she herself had made in giving that application for registration of the trust. Under the circumstances, in the interest of justice when the learned Charity Commissioner found that if the documents produced by the present respondents were relied upon the finding recorded by the learned Assistant Charity Commissioner could not be sustained he was right in setting aside those findings and remanding the matters for fresh inquiry. It cannot be said that the order passed by the learned Charity Commissioner was contrary to the provisions of Section 22-A or Section 70-A of the Act. The learned Extra Assistant Judge was, therefore, right in rejecting applications preferred before him under Section 72 of the Act against the decision of the learned Charity Commissioner.

5. In the result both the appeals fail and are dismissed with costs. The costs of Charity Commissioner to come out of the trust property. There will be no order as to costs of other respondents. Appeals dismissed.

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J. B. MEHTA AND S. H. SHETH, JJ.

Amreli Vistar Kadava Patel Ghati Kelavani Prachar Mandal Sanchalit Vidyarthi Ashram, Petitioner v. District Magistrate of Amreli and others, Respondents.

Special Civil Appln. No. 1766 of 1973, D/- 18-2-1974.

(A) Bombay Cinema (Reg.) Rules (1954), Rule 6 — Cinema licence — Grant of "no objection" certificate is an administrative act — Objector cannot claim opportunity of being heard as objection does not create lis between applicant and ob-

*(Only portions approved for reporting by High Court are reported here).

JR/JR/E59/74/AGT

14 Guj. [Prs. 1-4] A. V. K. V. Ashram v. Dt. Magistrate Amreli (Sheth J.) A.I.R. jector-public. AIR 1971 SC 1650, Dist. (Para 5).

(B) Constitution of India, Article 226 — Administrative order — Principles of natural justice attracted to such an order. (Bombay Cinema (Reg.) Rules (1954), Rule 6).

Even an administrative order should be made impartially, reasonably, in good faith and in fairness to the parties concerned. Therefore, though a person making a grievance may not have a right to be heard in the matter the order has got to be made fairly and justly and the Officer or the body making the order has a duty to act fairly towards parties concerned, in public interest.

The statutory duty cast upon the licensing authority by the Cinema Reg. Rules to invite public objections is not a matter of empty formality nor is it a matter to be dealt with light-mindedly. It is a matter of substance. The substance lies in safeguarding public interest fully. In order to fully safeguard the public interests the Dist. Magistrate should have heard the petitioner, particularly when the petitioner wanted to be heard in the matter and should have informed the petitioner, particularly when the petitioner had made a specific enquiry in that behalf, that he had made a reasoned order in the matter. AIR 1973 SC 389 and AIR 1970 SC 150 and (1967) 1 All ER 226 and (1970) 2 All ER 528, Rel. on.

(Paras 6 to 11)
Cases Referred: Chronological Paras
AIR 1973 SC 389 = (1973) 3 SCR 22 6
AIR 1971 SC 1650 = (1971) 2 SCR 110 4
AIR 1970 SC 150 = (1970) 1 SCR 457 7
(1970) 2 All ER 528 = (1970) 2 WLR 1009 8
(1967) 1 All ER 226 = (1962) 2 WLR 962 8

P. K. Parekh, for Petitioner; J. R. Nanavati, Asst. Govt. Pleader with R. P. Bhatt for M/s. Bhaishanker Kanga and Girdharlal. Addl. Govt. Pleader for (Nos. 1 and 5) and S. B. Vakil, for (Nos. 2 to 4), for Respondents.

S. H. SHETH, J.:— The respondents Nos. 2 to 4 applied on 4th November, 1972, to the District Magistrate, Amreli for a no-objection certificate under the Bombay Cinema Rules, 1954 in order to enable them to construct a permanent cinema theatre on plots Nos. 6, 7 and 8 of S. No. 2770, 2771 and 2772 of Amreli town. Public notice of that application was issued by the District Magistrate. The petitioner runs a Students' Home on neighbouring plots Nos. 11, 12 and 13. It houses about 60 to 70 students. He, therefore, objected to this proposal and lodged written objections with the District Magistrate on 29th November, 1972. The distance between the proposed site for the cinema theatre and the Students' Home is

about 20 feet. In fact only 20 ft wide road runs between them. The petitioner was not heard in the matter. On 10th April, 1973, the District Magistrate granted to the respondents Nos. 2 to 4 the no-objection Certificate. Fifty four students also objected to this proposal. The petitioner challenged the order granting the No-objection Certificate in a revision application which he filed before the State Government in June, 1973. The State Government dismissed it on 3rd November, 1973.

The petitioner has thereupon filed this petition.

2. Mr. Parekh, appearing for the petitioner, has raised before us the following contentions:—

1. The District Magistrate did not give the petitioner any opportunity of being heard before he granted the No-objection Certificate to the respondents Nos. 2 to 4. Therefore, the No-objection Certificate has been granted in violation of the principles of natural justice. It is, therefore, void and liable to be quashed.

2. The impugned order is bad and void because it gives no reasons for rejecting the objections lodged by the petitioner.

3. Since the local authorities were not consulted before the District Magistrate made the impugned order it has been made in violation of Rule 3 (4) of the Bombay Cinema Rules.

4. The District Magistrate has made the impugned order without considering the factors which are required to be taken into account under Rule 3 (3).

5. The order made by the State Government in Revision Application is bad because the conditions imposed by it are contrary to the Development Plan of Amreli.

3. So far as the first contention raised by Mr. Parekh is concerned, the question whether the petitioner is entitled to be heard in support of his objections depends upon the nature of the functions which the District Magistrate performs and the nature of the order which he makes. It has been contended by Mr. Parekh that the order which the District Magistrate makes is a quasi-judicial order. On the other hand, it has been contended by Mr. Vakil that it is an administrative order which does not attract the right of hearing.

4. Mr. Parekh has placed reliance upon the decision of the Supreme Court in State of Gujarat v. M/s. Krishna Cinema, AIR 1971 SC 1650. It was a case under the Bombay Cinema Rules, 1954. It has been laid down by the Supreme Court in that decision that the power to issue, revoke or suspend a licence conferred upon the District Magistrate is exercisable on the satisfaction of that officer

as to certain objective conditions and is plainly quasi-judicial. It has been further observed by the Supreme Court in that decision that the Bombay Cinemas (Regulation) Act, 1953 does not confer upon the licensing authority or the State Government arbitrary authority. It was a case in which the District Magistrate had refused to grant a No-objection Certificate. It may be noted that under Section 8-A of the Act right has been conferred upon any person aggrieved by an order of a licensing authority refusing to grant a licence or revoking or suspending any licence under Section 8 to appeal against it to the State Government.

5. Mr. Vakil has argued before us that though an order refusing to grant a licence is a quasi-judicial act, as laid down by the Supreme Court in the aforesaid decision, an order rejecting the objections filed by a member of the public to the grant of a No-objection Certificate is not a quasi-judicial order. According to him, it is a purely administrative act because at no stage there is any lis between an applicant for No-objection certificate and an objector. He has invited our attention to Rules 3 to 6 of the Bombay Cinema Rules, 1954 in order to convince us that the objections are invited from the members of the public only in public interest. The District Magistrate functioning under the Rules has indeed a duty to collect from the members of the public information in discharge of his public duty. It is difficult to say that in a matter of this type there is any lis at any stage between an applicant for a No-objection Certificate and an objector. In our opinion, therefore, the order which the District Magistrate makes rejecting the objections received from the members of the public is an administrative order as distinguished from an order refusing to grant a No-objection Certificate to the applicant therefor. We take this view because what the Rules require the District Magistrate to do is to inform the members of the public of a proposal to construct a permanent cinema theatre, to receive from them such information which they give him in order to decide upon the suitability or otherwise of a cinema theatre being constructed on a particular site. In such a situation there is hardly any scope for a public objector to agitate before the District Magistrate his individual or personal rights. It is on account of these reasons that we say that it creates no lis between an applicant for a No-objection Certificate and a public objector and that the order which the District Magistrate makes rejecting the objections received from a public objector is an administrative order.

6. The next question which has been canvassed before us is this: "What are the considerations which should pre-

vail with the District Magistrate before he makes such an administrative order? It is well-settled that an administrative order should be made fairly, impartially and reasonably. In the case of *The Kesaava Mills Co. Ltd. v. Union of India*, AIR 1973 SC 389 the Supreme Court has considered the question relating to the application of the principles of natural justice by administrative authorities. The principle which has been laid down is that such an order must be made in good faith and in fairness to the parties concerned.

7. In *A. K. Kraipak v. Union of India*, AIR 1970 SC 150 it has been laid down that the purpose of the rules of natural justice is to prevent miscarriage of justice and that there is no reason why those rules should be made inapplicable to administrative enquiries. Arriving at a just decision is the aim of both quasi-judicial enquiries as well as administrative enquiries. An unjust decision in an administrative enquiry may have more far-reaching effects than a decision in a quasi-judicial enquiry. Which particular rule of natural justice will apply to a given case depends to a great extent on the facts and circumstances of that case, the framework of the law under which the enquiry is held and the constitution of the Tribunal or body of persons appointed for that purpose. Whenever a complaint is made before a court that some principle of natural justice has been contravened the Court has to decide whether the observance of that rule was necessary for a just decision on the facts of that case. While considering the validity of administrative actions all that the Court has to see is whether the ultimate decision is just or not.

8. In *R. v. Gaming Board for Great Britain*, ex parte Benaim, (1970) 2 All ER 528 it has been laid down by the Court of Appeal that even the administrative or executive bodies are bound to observe the rules of natural justice. However, everything depends upon the subject-matter. The view that the principles of natural justice apply only to judicial proceedings and not to administrative proceedings has since long been exploded. It has relied upon a passage from *Re H. K. (an infant)*, (1967) 1 All ER 226 at p. 231 in which the principle laid down by Lord Parker, C. J. is as follows:—

"....., even if an immigration officer is not acting in a judicial or quasi-judicial capacity, he must at any rate give the immigrant an opportunity of satisfying him of the matters in the sub-section, and for that purpose let the immigrant know what his immediate impression is so that the immigrant can disabuse him. That is not, as I see it, a question of acting or being required to act judicially, but of being required to act fairly."

Therefore, the principle which has been settled by the aforesaid decisions is that though a person who makes a grievance may not have a right to be heard in the matter of an administrative order, the order has got to be made fairly and justly and the officer or the body which makes such an administrative order has a duty to act fairly.

9. Mr. Vakil, appearing for the respondents Nos. 2 to 4 has raised the question whether there was any public duty for the District Magistrate or the licensing authority and whether he owed it to the petitioner. The Bombay Cinema Rules, 1954 require the licensing authority to invite objections from the members of the public to the site for a proposed cinema theatre. Therefore, the members of the public have a right to point out to the licensing authority the factors which may militate against such a construction. The licensing authority is bound to take them into account because he cannot issue a No-objection Certificate in respect of a cinema theatre the situation of which will harm or injure public interests. In other words, suitability of its situation in the context of public interests is the prime factor which the licensing authority is bound to take into account. He is under an obligation to refuse to grant a No-objection Certificate where the facts placed before him by the members of the public show that the proposed theatre should not be constructed at a particular place. Therefore, there is no doubt in our mind that the District Magistrate owes a public duty and he must discharge it fairly and justly in public interests. It is true that if any private rights of the petitioner are violated, he can sue the respondents Nos. 2 to 4 in the Civil Court. Though the petitioner in the instant case has no particular private right to enforce against the respondents Nos. 2 to 4, the licensing authority, in our opinion, is bound to hear him particularly when he finds substance in the objections raised by the petitioner and subjects the respondents Nos. 2 to 4 to terms in order to meet those objections. When objections of a substantial character have been raised and when the licensing authority has been led on account of those objections to subjecting the respondents Nos. 2 to 4 to terms, the licensing authority has got to deal with the situation fairly and justly and he cannot do so unless he hears the petitioner and finds out from him whether the conditions to which he subjects the respondents Nos. 2 to 4 will meet the objections raised by the petitioner.

10. We now turn to a few relevant facts. Mr. Nanavaty has produced before us the file of the licensing authority in this case. We have perused it.

We find that after having taken into account the objections which the petitioner and other persons had raised to the site for the proposed theatre, the licensing authority tentatively came to the conclusion that a No-objection Certificate should not be granted to the respondents Nos. 2 to 4. It, therefore, issued to the said respondents a notice dated 14th March, 1973, calling upon them to show cause, if they had any, why No-objection Certificate should not be refused on account of five reasons specified therein. The first reason was that the site for the proposed theatre is situate in a residential zone of Amreli municipal area. The second reason was that students' homes are situate very near the site for the proposed theatre. The third reason was that secondary schools are situate in the area surrounding the site for the proposed theatre. The fourth reason was that police head-quarter ground is situate just opposite the site for the proposed theatre. The fifth reason was that the site for the proposed theatre is situate on Chital road leading from Amreli to Raikot and that, therefore, the situation of a cinema theatre would create traffic problems. On 20th March, 1973, the respondents Nos. 2 to 4 replied to that show cause notice and tried to meet the grounds which the licensing authority had stated on the basis of which a No-objection Certificate was proposed to be refused. Thereafter, on 29th March, 1973, the District Magistrate made his order directing the grant of a No-objection Certificate to the respondents Nos. 2 to 4. That order shows that he had inspected the site of the proposed cinema theatre before making that order. It is not necessary to reproduce the entire order in this judgment. Suffice it to say that the said order shows that the respondents Nos. 2 to 4 were subjected to certain conditions and that a No-objection Certificate was ordered to be issued on the condition that they would undertake to comply with the conditions which the licensing authority had specified in the said order dated 29th March, 1973. The notice dated 14th March, 1973, from the licensing authority to the respondents Nos. 2 to 4 and the order made by the licensing authority on 29th March, 1973, show that the objections which the petitioner, amongst others, had raised in public interest had some substance. If he found substance in the objections raised amongst others by the petitioner, he ought to have called upon the petitioner to state whether the conditions to which he proposed to subject the respondents Nos. 2 to 4 would meet his objections. Unless he did so, he could not be said to have discharged his public duty fairly. Though the licensing authority owes a public duty in the matter, he cannot arrogate unto himself an assumption that whatever he

THE All India Reporter

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Himachal Pradesh High Court

**AIR 1976 HIMACHAL PRADESH 1
FULL BENCH**

**R. S. PATHAK, C. J., D. B. LAL AND
CHET RAM THAKUR, JJ.**

Rajinder Mohan Sehgal and others, Petitioners v. Dr. Y. S. Parmar, and others, Respondents.

Civil Writ Petn. No. 87 of 1974, D/-14-3-1975.

(A) Constitution of India, Art. 226 — Who can apply — Petitioner if must have some legal right or interest in subject-matter of petition — Notification dated 21-1-1974 by Governor shifting headquarters of Solan Civil District to Nahan — Validity challenged — Petitioner held had no locus standi in the case.

Either a petitioner must have some legal right or interest in the subject-matter of the petition, or at the very least he must be prejudicially affected by the act or omission of some authority. The latter criterion prescribes the minimum standard which needs to be established before a writ petition can be maintained. The only exception to this rule appears to be the case of a petition for habeas corpus or quo warranto. The rule particularly applies to a petition for a writ in the nature of mandamus. The right or interest asserted must be real, the nexus claimed by the petitioner with the subject-matter of dispute must not be too tenuous or completely ephemeral. Case law referred to.

(Paras 8 and 9)

By a notification dated 21-1-1974 the Governor acting under Section 16 (1) of the Himachal Pradesh Courts Order, 1948 and Section 19 (1) (ii) of the Punjab Courts Act, 1918, ordered that the headquarters of the Solan civil district would be Nahan. Under the notification, the District Judge is to hold court at Nahan and also at Solan and at Nalagarh. The whole point of requiring the District Judge to hold court at Solan and at Nalagarh is that cases arising out of those

areas should be heard at Solan or Nalagarh. The notification was challenged by the petitioners on the ground that while the Governor had power under para. 16 (1) of the Himachal Pradesh Courts Order to determine the headquarters of a Civil district, he had no power under S. 19 (1) (ii) of the Punjab Courts Act to fix the headquarters of a civil district, and therefore, the entire notification must fail. Except in the case of petitioner No. 2, who was said to be interested in maintaining the writ petition because of the pendency of his Land Acquisition reference before the District Judge at Solan and the petitioner No. 6, who was an Advocate practising at Nalagarh, there was no specific averment indicating the precise interest of the remaining petitioners in maintaining the writ petition. Certain general considerations had, however, been set out in the writ petition. It was stated that if the headquarters were shifted from Solan to Nahan the litigant public would not be in a position to obtain competent legal assistance, that Nahan was an "out of the way" place and it would involve financial strain on the litigants and also lead to delay in the disposal of their cases. It was also pointed out that Solan was directly connected with all the sub-divisions while Nahan had no direct link with any of the sub-divisions and the litigant public had to pass through Solan to reach Nahan.

Held (1) that the mere circumstance that some of the petitioners reside at Solan or Kandaghat and worked for gain there did not entitle them to maintain the writ petition.

(Para 11)

(2) That even if it was assumed that any inequality existed under the prevailing arrangements, there was no evidence of it in any proceeding taken by any of the petitioners. It was apparent that the Land Acquisition reference of the petitioner No. 2 would be heard and disposed of at Solan and he could not complain of any prejudice to him by the impugned notification. As regards the petitioner No. 6, who was an Advocate practising at Nalagarh, there was noth-

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ing to show that he had any genuine cause for grievance. AIR 1968 Andh Pra 98; AIR 1970 Delhi 29; AIR 1962 SC 1044 and AIR 1964 Mys 159, Distinguished. (Para 13)

Cases	Referred:	Chronological	Paras
AIR 1973 SC 2720	= (1974) 1 SCR 665	10	
AIR 1972 SC 2112	= 1972 SCD 558	8	
AIR 1971 SC 1507	= 1971 Tax LR 939	8	
AIR 1970 Delhi 29	= 1970 Cri LJ 213 (FB)	14	
AIR 1969 SC 783	= (1969) 3 SCR 254	9	
AIR 1968 Andh Pra 98	= (1967) 1 Andh WR 341	14	
AIR 1966 SC 828	= (1966) 2 SCR 172	8	
AIR 1964 SC 685	= (1964) 2 SCA 356	8	
AIR 1964 Mys 159		14	
AIR 1962 SC 1044	= (1962) Supp 3 SCR 1	14	

M. G. Chitkara, Advocate, for Trilok Chand and others, Petitioners; B. Sitaram, Advocate General, for Y. S. Parmar and others, Respondents.

R. S. PATHAK, C. J.:— By this writ petition under Article 226 of the Constitution the petitioners challenge the validity of two notifications dated January 21, 1974 whereby the Governor of Himachal Pradesh has fixed the headquarters of the Solan Sessions Division and of the Solan Civil District at Nahan in the district of Sirmur.

2. Three notifications were issued by the Governor of Himachal Pradesh. The first notification No. 11-2/66-Appt. (DP) (i) dated August 30/31, 1972 was made under S. 7 (2) of the Code of Criminal Procedure and by it the limits of the existing Sessions Divisions were altered and the Sessions Divisions were re-constituted, the limits of the newly constituted Solan Sessions Division being the Solan and Sirmur districts with headquarters at Solan. By the same notification the Governor, acting under Section 9 (1) of the Code of Criminal Procedure, established a court of Session for each of the Sessions Divisions so constituted. A copy of this notification is Annexure 'A' to the writ petition. The next notification is No. 11-2/66-DP (Apptt) (ii) dated January 21, 1974, whereby while modifying the aforesaid notification the Governor, acting under Sections 7 (2) and 9 (2) of the Code of Criminal Procedure, fixed the headquarters of the Solan Sessions Division at Nahan in the district of Sirmur and directed that the Sessions Judge for the Sessions Division of Solan would sit at Nahan and would also hold his court at Solan and at Nalagarh of the Solan District. A copy of this notification is Annexure 'B' to the writ petition. By another notification of the same date the Governor acting under Section 16 (1) of the Himachal Pradesh Courts Order, 1948 and Section 19 (1) (ii) of the Punjab Courts Act, 1918, ordered that the headquarters of the Solan civil district would be Nahan. A copy of this notification is Annexure 'C' to the writ petition. In the writ petition the petitioners have assailed the validity of the notifications

set out at Annexures 'B' and 'C' to the writ petition.

3. In challenging the validity of the two notifications, the submissions made by learned counsel for the petitioners are as follows:—

(1) The notification, Annexure 'B', is invalid because it has not been passed in consultation with the High Court.

(2) The notification, Annexure 'C', is invalid because while the Governor has power under paragraph 16 (1) to determine the headquarters of a civil district, he has no power under Section 19 (1) (ii) of the Punjab Courts Act to fix the headquarters of a civil district, and therefore, the entire notification must fail. Elaborating this submission, learned counsel for the petitioners urged that the determination of the headquarters of a court included the determination that it would discharge its judicial functions at the place appointed as its headquarters, and when regard was had to Section 31 of the Punjab Courts Act, 1918, it is apparent that the High Court alone had the power to fix the place or places at which the court would be held. In support of this submission we have been referred to paragraphs 38 and 39 of the Himachal Pradesh Courts Order, 1948. Paragraph 38 provides that in the event of the death of a District Judge or of his being prevented from performing his duties by illness or other cause or of his absence from the Civil District on leave, the Additional District Judge, if any, in the District or where there is no such Additional District Judge the first in the rank of the Subordinate Judges shall assume charge of the District Court, without interruption to his ordinary jurisdiction, and while so in charge, shall perform the duties of a District Judge with respect to the filing of suits and appeals, receiving pleadings, execution of processes, return of writs and the like. Paragraph 39 declares that a District Judge leaving the headquarters and proceeding on duty to any place within his District, may delegate to the Additional District Judge, if any, or where there is no such Additional District Judge, to a Subordinate Judge at the headquarters, the power of performing such duties, enumerated in paragraph 38 as may be emergent, and such officer shall be designated as the Additional District Judge or the Subordinate Judge, as the case may be, in charge of the headquarters. It is urged that the filing of suits and appeals, receiving pleadings, execution of processes and return of writs and the like mentioned in paragraph 38 and referred to by paragraph 39 involve judicial functions, and therefore, it must be inferred that the determination of the headquarters of the district envisages the place where besides his administrative functions the District Judge will also perform his judicial functions.

4. Two sets of submissions have been made by learned counsel for respondents Nos. 1, 2 and 3 in opposition to the writ petition. The learned Advocate General contends that

the appointment of the headquarters of a civil district contemplates the place where the District Judge will perform his administrative functions, and it has nothing to do with the place where he will perform his judicial functions. The appointment of the headquarters, it is said, is concerned only with the discharge of administrative business and has reference to financial considerations. I is urged that the administrative seat of the District court may be different from the judicial seat of the court. In this regard, it is pointed out that while paragraph 16 (1) of the Himachal Pradesh Courts Order, 1948 deals with the determination of the headquarters of the district, separate provision has been made by paragraph 26 of the said Order providing for the fixation of the place or places at which the court is to be held. The second set of submissions on behalf of respondents Nos. 1, 2 and 3 has been made by Shri Hari Kishan who points out that as the petitioners have not challenged the original notification, Annexure 'A', they are not entitled to challenge the notification, Annexure 'B'. As regards Annexure 'C', he departs to some degree from the submission of the learned Advocate General and contends that the expression "headquarters" specifies the place not only where the administrative business of the court will be conducted but also the principal place where it will sit for performing its judicial functions. Every court, he says, must have a permanent place of sitting, designated as its principal seat and synonymous with its headquarters. When the power to constitute a court is given by legislative enactment to the State Government, it implies that the State Government will also have the power to appoint the principal place where the court will perform its administrative and judicial functions. Involved in the concept of the constitution of a court, he submits, is the necessary ingredient of appointing its principal seat, and that implies the administrative headquarters and the principal place of sitting of the court. Therefore, he says, when construing paragraph 26 of the Himachal Pradesh Courts Order, 1948, the power given therein to fix the place or places at which the court is to be held must be understood as the power to fix other place or places for the sitting of the court besides that already indicated as the principal place of sitting by reason of the determination of the headquarters of the district under paragraph 16 (1) of the Order. In this way, learned counsel attempts to reconcile the provisions of paragraphs 38 and 39 of the Order, and also satisfies the validity of the notification in the light of the Punjab Courts Act, 1918, which by Sections 18 and 19 constitutes a court of the District Judge for a civil district. Learned counsel submits that when Section 31 of the Punjab Courts Act empowers the High Court to fix the place or places at which the court is to be held, it confers the power to fix such other places for the sitting of the court besides that already fixed by the State Government

when constituting the court and defining the civil district.

5. Besides the aforesaid contentions, learned counsel for the respondents Nos. 1, 2 and 3 have raised a preliminary objection to the maintainability of the writ petition. It is contended that the petitioners have no locus standi, and that ground by itself is sufficient to defeat the writ petition.

6. Before proceeding to deal with the contentions of learned counsel for the parties, it may be noted that during the hearing of the writ petition Shri M. G. Chitkara, learned counsel for the petitioners withdrew the prayer for relief against the notification Annexure 'B' issued under the Code of Criminal Procedure. We are therefore concerned only with the remaining notification, Annexure 'C' issued under the Himachal Pradesh Courts Order, 1948 and the Punjab Courts Act, 1918.

7. It appears proper that we should consider the preliminary objection first. The writ petition has been filed by six petitioners. The petitioner No. 1, Shri Rajinder Mohan Sehgal, has withdrawn from the petition. The petitioners Nos. 2 and 3 reside at Solan and petitioners Nos. 4 and 5 reside at Kandaghat. They work for gain at those places. The petitioner No. 2 has a reference under the Land Acquisition Act pending before the District Judge at Solan. The petitioner No. 6 is an Advocate practising at Nalagarh. Except in the case of petitioner No. 2, who is said to be interested in maintaining the writ petition because of the pendency of his Land Acquisition reference before the District Judge at Solan and the petitioner No. 6, who is an Advocate practising at Nalagarh, there is no specific averment indicating the precise interest of the remaining petitioners in maintaining the writ petition. Certain general considerations have, however, been set out in the writ petition. It is stated that if the headquarters are shifted from Solan to Nahan the litigant public will not be in a position to obtain competent legal assistance, that Nahan is an "out of the way" place and it will involve financial strain on the litigants and also lead to delay in the disposal of their cases. It is pointed out that Solan is more centrally located than Nahan, that four sub-divisions in the Sessions Division of Solan are closer to Solan than to Nahan, that Solan is situated on the main national highway and is also connected by rail, while Nahan is situated in a remote corner of the Division. It is also pointed out that Solan is directly connected with all the sub-divisions while Nahan has no direct link with any of the sub-divisions and the litigant public has to pass through Solan to reach Nahan. It is averred that the work-load of Solan district is far heavier than that of Sirmur District, and that the number of cases pending before the Senior Subordinate Judge, Sirmur is hardly sufficient for ten days in the month. It is urged that if the headquarters remain at Solan, the litigant public can utilise the services of leading lawyers from Chandigarh

and Simla for arguing their cases. It is said that if the headquarters remain at Solan the practice of appointing the District and Sessions Judge of Simla Division as the Additional District and Sessions Judge of Solan Division and the District and Sessions Judge of Solan as the Additional District and Sessions Judge of the Simla Division can more conveniently be adopted than if the headquarters are maintained at Nahan. Emphasis has been laid on the fact that Nahan is situated in a corner of the Solan Division and that in the case of appeals and bail applications the absence of a lawyer from places other than Nahan for the purpose of appearing before the District and Sessions Judge at Nahan will interfere with the normal working of the Courts where he ordinarily practises. All the considerations cited are of a general nature, and it is necessary to examine whether the petitioners by reason thereof are entitled to maintain this writ petition.

8. In a long series of cases the courts in India have held that in order to maintain a writ petition the petitioner must have some legal right or interest in the subject-matter of dispute sufficient to entitle him to locus standi in the case. See *Calcutta Gas Co. v. State of West Bengal*, AIR 1962 SC 1044 at p. 1047; *State of Orissa v. Ram Chandra Dev*, AIR 1964 SC 685; *Jonnala Narasimharao and Co. v. State of Andhra Pradesh*, AIR 1971 SC 1507 & *State of Orissa v. Rajasaheb Chandanmull Indrakumar (P) Ltd.*, AIR 1972 SC 2212. In *Venkateswara Rao v. Govt. of Andhra Pradesh*, AIR 1966 SC 828 the Supreme Court observed that while a writ petitioner should "ordinarily" be one who has a personal or individual right in the subject-matter of the petition the personal right need not be in respect of a proprietary interest but may relate to the interest of a trustee. That apart, it was observed that in exceptional cases a person who has been prejudicially affected by an act or omission of an authority can file a writ petition even though he has no proprietary or even fiduciary interest in the subject-matter thereof. It is settled law, therefore, that either a petitioner must have some legal right or interest in the subject-matter of the petition, or at the very least he must be prejudicially affected by the act or omission of some authority. The latter criterion prescribes the minimum standard which needs to be established before a writ petition can be maintained. In the absence of any injury to some personal legal right or interest or prejudice otherwise, it is not open to a petitioner to apply for relief under Article 226 of the Constitution. The only exception to this rule appears to be the case of a petition for habeas corpus or quo warranto. The rule particularly applies to a petition for a writ in the nature of mandamus. And in the present case that is the only relief which can be claimed.

9. An unidentified interest or injury cannot sustain a petition for mandamus. In

Nonnala Narasimharao (supra) the Supreme Court held that whatever objection the dealers may have had to the constitutional validity of Section 9 of the Andhra Pradesh General Sales Tax (Amendment) Act, 1970 by reference to Article 14 of the Constitution, their agents had no locus standi to complain about discrimination between the principals inter se. In *Maganbhai Ishwarbhai v. Union of India*, AIR 1969 SC 783 the Supreme Court was concerned with a petition for a writ in the nature of mandamus or any other appropriate order or direction under Article 32 of the Constitution to restrain the Government from ceding areas in the Rann of Kutch to Pakistan. The questions raised on the merits were indisputably questions of public importance, but the Supreme Court considered it necessary to decide whether the petitioners had established any right or interest for maintaining their claim to relief. The Supreme Court observed:

"We discovered that most of the petitioners had no real or apparent stake in the areas now declared to be Pakistan territory. These persons claim that they had and still have the fundamental rights guaranteed to them by Art. 19 (1) (d), (e) and (f), that is to say, the right to travel, to reside or settle down, or to acquire, and hold property in these areas. None of them has so far made any move in this direction but their apprehension is that they will be deprived of these rights in the future. This, in our judgment, is too tenuous a right to be noticed by the Court in administering the law and still less in enforcing fundamental rights. When we communicated our view at an earlier hearing, some more petitioners came forward. Mr. Madhu Limaye puts forward the supporting plea that he had attempted to penetrate this area to reconnoitre possibilities for settlement, but was turned back. In this way he claims that he had attempted to exercise his fundamental rights and they were infringed. Another party claims to have had a lease of grass lands some ten years ago in this area and he is now to be deprived of the right to obtain a similar lease. Lastly, one of the parties puts forward the plea that he lives in the adjoining territory and thus has interest in the territories proposed to be ceded to Pakistan. These petitioners too have very slender rights, if at all. The only person who can claim deprivation of fundamental rights is Mr. Madhu Limaye, although in his case also the connection was temporary and almost ephemeral. However, we decided to hear him and as we were to decide the question we heard supplementary arguments from the others also to have as much assistance as possible. But we are not to be taken as establishing a precedent for this Court which declines to issue a writ of mandamus except at the instance of a party whose fundamental rights are directly and substantially invaded or are in imminent danger of being so invaded. From this point of view we would have been justified in dismissing all petitions

except perhaps that of Mr. Madhu Limaye." It will be noticed that the right or interest asserted must be real, the nexus claimed by the petitioner with the subject-matter of dispute must not be too tenuous or completely ephemeral. The Supreme Court rejected the claim of the several petitioners to maintain the writ petition except in the case of Shri Madhu Limaye in whose case there was the plea that he had attempted to penetrate this area to reconnoitre for settlement and had been turned back and therefore his fundamental rights had been infringed.

10. In his admirable analysis of the law on the point, Professor S. A. de Smith* notes that an applicant for mandamus must have a substantial personal interest in the performance of the duty to which a right is claimed. He sees a good deal of judicial support for the view that a mere stranger has no locus standi and that an applicant must establish that he is specially aggrieved by the performance of the duty or has an immediate interest in its performance greater than that of members of the public generally. While scholars and jurists maintain that the Courts may in their discretion grant an application made by any member of the public, Professor de Smith points out that the preponderance of judicial authority is opposed to the view that the Courts are entitled to exercise a free discretion in determining questions of locus standi in applications for mandamus, and that it supports the view that an applicant must have a direct interest of his own in the performance of the duty. He concludes his discussion with the opinion that as the law stands at present the applicant's interest must normally be more substantial than the general interest of other members of the local community or the interest-group to which he belongs. Although there are exceptional cases, the courts have yet to reach the point where an application for mandamus is accorded the status of an *actio popularis*. In *Dr. Satyanarayana Sinha v. M/s. S. Lal & Co. (P) Ltd.*, AIR 1973 SC 2720 the Supreme Court observed:—

"In respect of persons who are strangers and who seek to invoke the jurisdiction of the High Court or of this Court, difficulty sometimes arises because of the nature and extent of the right or interest which is said to have been infringed, and whether the infringement in some way affects such persons. On this aspect there is no clear enunciation of principles on which the Court will exercise its jurisdiction."

11. Having regard to the present state of the law, it is apparent that so far as the petitioners Nos. 3, 4 and 5 are concerned, they have no locus standi. The mere circumstance that they reside at Solan or Kaneaghat and work for gain there does not entitle them to maintain the writ petition.

12. As regards the petitioner No. 2 who has a Land Acquisition reference pending before the District Judge at Solan and the petitioner No. 6 who is an Advocate practising at Nalagarh, the position appears to be this. Under the impugned notification, the District Judge will hold court at Nahan and also at Solan and at Nalagarh. The whole point of requiring the District Judge to hold court at Solan and at Nalagarh is that cases arising out of those areas should be heard at Solan or Nalagarh. As was stated before us on behalf of the respondents, it is a time-honoured convention and practice reinforced by directions issued down from time to time, that cases arising within a particular district should be taken up by the District Judge in that district, and also that when appeals and applications are to be instituted before the District Judge at a time when he is not holding court there, they should be presented before the local senior Subordinate Judge who will then transmit them to the District Judge. That position has not been disputed before us. It may be noted that in compliance with the principle that cases arising in a district should be entertained, heard and disposed of in that district itself, the District and Sessions Judges by long practice divide the days of sitting in the month between the headquarters and the places of circuit according to the work-load pending at each place. It may also be pointed out that instructions have been issued by this Court to the various District and Sessions Judges that whenever they go on circuit they should send the files which are to come up for hearing before them during the circuit to the local senior Subordinate Judge four or five days ahead so that the lawyers and the litigants may be in a position to inspect the files; and the senior Subordinate Judges have been directed to allow inspection in accordance with the Rules. It may be that for taking certain emergent proceedings, which can be entertained by the District and Sessions Judge alone, a party may have to go wherever the District and Sessions Judge is then holding court. That is a burden cast alike on the litigants, be they from Solan District or the Sirmur District. If the District and Sessions Judge is at his headquarters at Nahan, the litigant from the Solan district must go there; and likewise if the District and Sessions Judge is at Solan on circuit the litigant from the Sirmur district must go to Solan. It is a burden inherent in the present system where the District and Sessions Judge, no matter where his headquarters, must hold Court at more than one place. So far as the obtaining of certified copies of documents in the record of the District and Sessions Judge is concerned, there is no doubt that for the present the Record Room is maintained at the headquarters alone, but copies can always be obtained by applying by post for which ample provision has been made under the Rules and Orders of the Court. All these arrangements are matters of common knowledge, and cannot be denied.

*Judicial Review of Administrative Action, 2nd Edn. pp. 571 to 574.

13. Even if we were to assume that any inequality exists under the prevailing arrangements, there is no evidence of it in any proceeding presently taken by any of the petitioners. It is apparent that the Land Acquisition reference of the petitioner No. 2 will be heard and disposed of at Solan and he cannot complain of any prejudice to him by the impugned notification. As regards the petitioner No. 6, who is an Advocate practising at Nalagarh, we are also not satisfied that he has any genuine cause for grievance.

14. The petitioners rely on *Dr. N. V. Subba Rao v. Govt. of Andhra Pradesh*, AIR 1968 Andh Pra 98. In that case the residents of a locality challenged an order renewing a licence enabling the operation of a bone factory in the locality. It was alleged that the health of the residents was affected by the existence of the foul smell emanating from the bone factory. Plainly, the residents had substantial interest in maintaining the writ petition. Learned counsel for the petitioners also relies on *Flying Officer S. Sundarajan v. Union of India*, AIR 1970 Delhi 29 (FB) where reference has been made to the observations of Professor de Smith mentioned above as well as to *Calcutta Gas Co. (supra)* and *Dr. P. S. Venkataswamy v. University of Mysore*, AIR 1964 Mys 159. Nothing stated in those cases is of any assistance to the petitioners.

15. In our opinion, the petitioners have been unable to establish, upon the material before us, that the impugned notification impairs any legal right or interest belonging to them or that they are materially prejudiced by it. We have carefully considered the matter, and it appears that the preliminary objection raised by learned counsel for the respondents must be upheld.

16. In the circumstances, it is unnecessary to enter into the questions raised on the merits of the writ petition.

17. The writ petition is dismissed, but there is no order as to costs.

Writ petition dismissed.

AIR 1976 HIMACHAL PRADESH 6

R. S. PATHAK, C. J. AND

D. B. LAL, J.

Chhabil Dass, Petitioner v. Inder Singh, and others, Respondents.

C. W. P. No. 226 of 1974, D/- 18-4-1975.

(A) Bar Council of Punjab (Constitution and Conduct of Business) Rules (1963), Rr. 35 (2) and 32 — Bar Council of Punjab and Paryana Election Rules (1968), R. 34 (4) — Bar Council of Himachal Pradesh Rules (1972), R. 34 (4) — Election Petition challenging election of Chairman of Bar Council of Himachal Pradesh — Election Tribunal if competent to entertain — Section 8 of General

Clauses Act if applicable — (General Clauses Act (1897), S. 8).

Per R. S. Pathak, C. J. — (D. B. Lal, J. Dissenting):

When reading Rule 35 (2) of the Rules of 1963, the words "the Election Tribunal referred to in Rule 34 (4) of the Rules of 1972" must be substituted in place of "the committee of Advocates referred to in R. 32." Reading Rule 35 (2) in that manner, it is apparent that the Election Tribunal had jurisdiction to entertain and decide the election petition filed by the respondent, challenging the election of the petitioner as the Chairman of Bar Council of Himachal Pradesh.

(Para 18)

It is a case where a piece of legislation, which was incorporated by reference in another piece of legislation, has been repealed and re-enacted. In a case such as this, the principle embodied in Section 8 of the General Clauses Act will come into play. AIR 1953 SC 357; AIR 1969 Delhi 330, Rel. on.

(Paras 14, 15, 16)

Even if the scope of the powers be taken to have been reduced in the case of the Election Tribunal, the reduced scope does not in any way militate against the Election Tribunal being regarded as the body for adjudicating a dispute relating to the election of the Chairman and the Vice-Chairman. The power has been merely modified, if at all, and its essential nature has not changed from the original. Rule 34 (4) amounts to a re-enactment, with modification, of Rule 32.

(Para 17)

Per D. B. Lal, J. (Dissenting):— The Election Tribunal appointed under Rule 34 of the Rules of 1968 will have no jurisdiction to decide the dispute as to the election of Chairman. For that a Committee of Advocates was required to be appointed under the relevant Rules of 1963.

(Para 47)

Section 8 of the General Clauses Act will not apply for the simple reason that the Rules of 1968 have not repealed or re-enacted the provisions of the Rules of 1963 containing the election to the office of Chairman and an authority to be appointed to decide disputes arising therefrom.

(Para 48)

Besides that, there is no reference to a Committee of Advocates "in any other enactment or in any instrument" but the reference is to an Election Tribunal in Rule 34 which has repealed and re-enacted the provisions contained in the Rules of 1963 which related to the election of a member to the Bar Council. This also completely dislodges any application of Section 8. That apart, a different intention obviously appears in the Rules of 1968 because they talk of an Election Tribunal which is a different body than the Committee of Advocates as its very constitution indicates. Therefore, no assistance can be obtained from Section 8 of the General Clauses Act.

(Para 48)

(B) Bar Council of Punjab (Constitution and Conduct of Business) Rules (1963), R. 34

— Requirement that first meeting to be convened within 15 days — Directory.

Per R. S. Pathak, C. J.:— The provision in Rule 34 that the first meeting should be convened by the Advocate General within 15 days of the election becoming final under Rule 31 is directory. (Para 27)

There is nothing in the rules which suggests that if the period of 15 days is exceeded the first meeting will become invalid or purposeless. The object of the first meeting will not be defeated if it is convened beyond the period of 15 days. The requirement has apparently been made only in order to suggest that the first meeting should be called as expeditiously as possible. (Para 28)

(C) Bar Council of Punjab (Constitution and Conduct of Business) Rules (1963), R. 34 — Meeting for electing Chairman of Bar Council of Himachal Pradesh — All members of Bar Council participating in the meeting and no objection raised as to sufficiency of period of notice of meeting — Requirement as to notice held to be waived. (1920) 1 Ch 466 and (1921) 3 KB 32, Rel. on; 1972 Cur LJ 854, Dist. (Per R. S. Pathak, C. J.). (Part 30)

(D) Bar Council of Punjab (Constitution and Conduct of Business) Rules (1963), R. 35 and 38 — Meeting for electing Chairman of Bar Council — Right of Advocate General to vote and to give casting vote as Chairman of the meeting.

Per R. S. Pathak, C. J.:— In the meeting of the Bar Council of Himachal Pradesh for the purpose of electing the Chairman, the Advocate General was entitled to vote as a member and also to give a casting vote as Chairman of the meeting. (Paras 23, 25)

There can be no doubt that the Advocate General is a member of the State Bar Council. Section 3 (2) (a) of the Advocates Act 1961 describes him as an ex-officio member. He has a right to vote like other members in a meeting for electing the Chairman and the Vice-Chairman. (Para 20)

Rule 38, which is evidently of general application, declares that voting at the meeting of Bar Council shall ordinarily be by show of hands. That does not exclude altogether voting by ballot at particular meeting. A meeting for the election of the Chairman and the Vice-Chairman is such a meeting. Rule 35 (1) provides that the election in such a case shall be by ballot. But whether the voting is by show of hands or by ballot, according to Rule 38 each member present has one vote and the Chairman of the meeting has a casting vote. When the Advocate General presides at the meeting of the Bar Council for electing the Chairman or the Vice-Chairman the voting must be by ballot, each member present has one vote and the Advocate General as Chairman presiding at the meeting has a casting vote. (Para 23)

There is no doubt that the principle that a candidate should secure a majority of votes

of the members present applies to all cases of election of the Chairman and the Vice-Chairman, whether it is a case covered by the proviso or by the main part of the Rule 35 (1). But to secure a majority of votes of the members present does not exclude a case where the majority is obtained by the Advocate General giving a casting vote where the votes are equal, the casting vote being an additional vote. Rule 35 (1) requires the securing of the majority of votes of the members present; it does not require the securing of votes of the majority of the members present. (Para 24)

Cases	Referred:	Chronological	Paras
1972 Cur LJ 854			30
AIR 1969 Delhi 330 = ILR (1969) Delhi 426			15
AIR 1953 SC 357 = 1953 SCR 1028			15
(1921) 3 KB 32 = 90 LKKB 1145			30
(1920) 1 Ch 466 = 89 LJ Ch 379			30

K. D. Sud, D. P. Sud and D. K. Khanna, for Petitioner; O. P. Sharma, Advocate, for Inder Singh, Respondent.

R. S. PATHAK, C. J.:— By this writ petition the petitioner prays for certiorari quashing the order of the Election Tribunal dated September 9, 1974 setting aside his election as Chairman of the Bar Council of Himachal Pradesh.

2. By the State of Himachal Pradesh Act, 1970, Himachal Pradesh became a State on and from January 25, 1971. Section 24 of the Act amended the Advocates Act, 1961, thereby providing for a Bar Council of Himachal Pradesh. The first Bar Council was constituted shortly thereafter, and its first meeting was held on November 7, 1971. When the term of office of the members was due to expire, proceedings were taken for the election of members to succeed them. On August 30, 1972 an election programme was issued setting out the dates for the different stages in the election process. After polling and counting of votes, the Advocate General of Himachal Pradesh verified the list of elected candidates, and the results were published in the Gazette on May 26, 1973.

3. It may be stated at this stage that by virtue of Section 24 (5) (a) of the State of Himachal Pradesh Act the rules made or deemed to have been made by the Bar Council of Punjab and Haryana and enforced immediately before the date on which the first Bar Council of Himachal Pradesh was duly constituted were, subject to such modifications and adaptations as were made therein by the Chairman of the Bar Council of Himachal Pradesh to be deemed to be rules made by the Bar Council of Himachal Pradesh and were to have effect accordingly. At that time the rules governing the Bar Council of Punjab and Haryana were the Bar Council of Punjab (Constitution and Conduct of Business) Rules, 1963 (hereinafter referred to for convenience as the Rules of 1963), and the Bar Council of Punjab and Haryana Election

Rules, 1968 (which for convenience may be referred to as the Rules of 1968). The Chairman of the Bar Council of Himachal Pradesh adopted the two sets of rules with certain modifications and adaptations. Consequently, the Bar council of Himachal Pradesh is governed by the two sets of rules as modified and adapted.

4. Section 3 (3) of the Advocates Act, 1961, provides that there shall be a Chairman and a Vice-Chairman of each State Bar Council elected by the Council in such manner as may be prescribed. Section 15 empowers the Bar council to make rules, and those rules may provide, by Section 15 (2) (a) for the election of members of the Bar Council, by Section 15 (2) (c) for the manner of election of the Chairman and the Vice-Chairman of the Bar Council and by Section 15 (2) (d) for the manner in which and the authority by which doubts and disputes as to the office of the Chairman or the Vice-Chairman are to be finally decided.

5. The Rules of 1963 cover a number of matters, including the manner in which the election of members of the Bar Council and the election of the Chairman and the Vice-Chairman of the Bar Council are to be held, and also the authority by which and the manner in which a challenge to those elections can be entertained and decided. The Rules of 1968 provide only for the election of members of the Bar Council and the forum and the manner in which disputes relating to those elections are to be decided. The parties are agreed that so far as the election of members of the Bar Council and the decision of disputes relating to such election are concerned they are governed by the Rules of 1968, and those Rules must be taken to have superseded the Rules of 1963 to that extent. The Rules of 1968 do not deal with the election of the Chairman and the Vice-Chairman and the decision of disputes concerning those elections. As regards those matters they remain within the purview of the Rules of 1963. It is also not disputed that the Rules of 1968 as modified and adapted by the Chairman of the Bar Council of Himachal Pradesh are described as the Bar Council of Himachal Pradesh Rules, 1972, to which I shall refer as the Rules of 1972. The Rules of 1972 relevant for the purposes of this case are identical with the corresponding Rules of 1968. No separate body of rules was framed for the Bar Council of Himachal Pradesh in respect of the election of the Chairman and the Vice-Chairman and the decision of disputes relating to those elections.

6. Under Rule 34 of the Rules of 1963 the Advocate General convened a meeting of the Bar Council for the purpose of electing the Chairman and the Vice-Chairman. On July 7, 1973 the Advocate General presided over the meeting. The only two candidates for election to the office of Chairman were the petitioner, Shri Chhabil Dass, and the first respondent, Shri Inder Singh, who are both

advocates of this Court. Admittedly all the sixteen members of the Bar Council were present and they cast their votes. On counting it was found that an equal number of votes had been polled by the candidates. The Advocate General took the view that he had a casting vote, and gave that vote in favour of the petitioner. In the result the petitioner was declared elected Chairman of the Bar Council.

7. On July 19, 1973 the first, second and third respondents (whom I shall refer to as "the contesting respondents") filed an election petition before an Election Tribunal constituted on October 1, 1972 under Rule 34 (4) of the Rules of 1972. The Election Tribunal consisted of three Advocates, Kanwar Dalip Singh being the Chairman, and Shri H. S. Thakur and Shri Sushil Malhotra being members. The Chairman and Shri H. S. Thakur held that the Election Tribunal was competent to entertain and decide the election petition while Shri Sushil Malhotra held to the contrary. On the question whether the Advocate General had the right to cast a vote at the meeting like other members of the Bar Council, the Chairman held that he had no such right while Shri H. S. Thakur and Shri Sushil Malhotra held that he did have such right. On the further question whether the Advocate General had the right to give a casting vote, the Chairman does not seem to have expressed any opinion in the matter, and while Shri H. S. Thakur took the view that the Advocate General had no right to give a casting vote, Shri Sushil Malhotra has held that he did have such right. Accordingly, on September 9, 1974 the Election Tribunal made an order by majority setting aside the election of the petitioner.

8. A number of grounds have been set out in the writ petition, but before us only two points have been pressed. It is contended that:

1. The Election Tribunal had no jurisdiction to entertain and decide the election petition, and
2. The Advocate General was entitled to vote as a member and as Chairman to give a casting vote and, therefore, the order of the Election Tribunal was erroneous.

While supporting the order of the Election Tribunal, the contesting respondents urge that the meeting for the election of the Chairman was invalid inasmuch as it was not convened within fifteen days of the election to the Bar Council becoming final and also because notice of ten clear days as required by R. 34 of the Rules of 1963 was not given.

9. Rules 34 and 35 of the Rules of 1963 are concerned with the election of the Chairman and the Vice-Chairman. They read:—

"34. First Meeting: Within 15 days from the election becoming final under R. 31 the Advocate General shall convene a meeting

of the Bar Council after giving notice of ten clear days for (1) election of the Chairman and Vice-Chairman; (2) electing Committees; and (3) transacting such other business as the Advocate General may direct. The Advocate General shall preside at the said meeting.

35. Election of Chairman and Vice-Chairman.

(1) The election of the Chairman and the Vice-Chairman shall be by ballot to be held in such manner as the Advocate General may determine:

Provided that in the event of there being more than two candidates, no member of the Bar Council shall be deemed to have been elected as Chairman and Vice-Chairman unless he shall have secured a majority of votes of the members present; and that in case of there being more candidates than two, the name of the candidate receiving the lowest number of votes shall be eliminated after the votes have been first recorded and thereafter the votes shall be taken for the other candidates and the same procedure shall be followed until any candidate receives a majority of votes of those present.

(2) Any dispute regarding the validity of the election of the Chairman or Vice-Chairman shall be decided by the committee of Advocates referred to in Rule 32, whose decision shall be final."

10. Point 1

Whether the Election Tribunal constituted under Rule 34 (4) of the Rules of 1972 was competent to entertain and decide the election petition?

11. It will be noticed that by R. 35 (2) the dispute regarding the validity of the election of the Chairman has to be decided by a "committee of Advocates referred to in Rule 32." Rule 32 is concerned with the determination of election disputes in the matter of election to the Bar Council. It provides:—

"32. Determination of Election Disputes: Any dispute arising under Rule 30 shall be decided by a committee of Advocates consisting of three members of the Bar Council in the previous year who are not contesting the elections and such committee shall be constituted by the Bar Council 15 days before the date of election and the unanimous or majority decision of such committee shall be final. In case three members, not contesting elections, are not available, any Advocate or Advocates on the State roll of Advocates may be appointed on the Committee."

When the Rules of 1963 were partially superseded by the enactment of the Rules of 1968, Rule 32 of the Rules of 1963 was replaced by sub-rules (4) and (6) of Rule 34 of the Rules of 1968. The said sub-rules set out:—

"34. Disputes as to the Validity of Elections:

(4) All disputes arising under the above sub-rules shall be decided by a tribunal to be known as an Election Tribunal com-

prising 3 Advocates whose names are on the State Roll and who are not less than of 10 years standing.

(6) The Election Tribunal shall have all or any of the following powers:—

- (i) To dismiss a petition;
- (ii) To order recount;
- (iii) To declare any candidate to have been duly elected on a recount;
- (iv) To set aside the election of the candidate who, either by himself or through any other person acting with his consent, is guilty of corrupt practices.

....."

12. The contention of the petitioner is that the repeal of Rule 32 makes no difference to the operation of Rule 35 (2), and for the purpose of applying Rule 35 (2) reference has to be made to Rule 32 notwithstanding its repeal. So read, Rule 35 (2) contemplates that a dispute relating to the election of the Chairman should be entertained and decided by a committee of Advocates constituted in accordance with Rule 32. On the other hand, the contesting respondents urge that R. 35 (2), when it speaks of the committee of Advocates referred to in R. 32, must be read as referring to the Election Tribunal mentioned in R. 34 (4) of the Rules of 1972.

13. It will be noticed that the Rules of 1963 provide for election to the Bar Council and the decision of disputes relating to that election, and separately to the election of the Chairman and the Vice-Chairman and the decision of disputes relating to that election. The two sets of provision are distinct, and this is so even though Rule 35 (2) incorporates by reference the provisions of R. 32. Indeed, this separate identity of provision appears to be implied by Clauses (a), (c) and (d) of Section 15 of the Advocates Act also. Now a single body of legislation may in reality consist of a number of pieces of legislation conveniently put together, where each piece of legislation deals with a distinct matter. Viewed from that standpoint, it is apparent that the provisions in the Rules of 1963 which deal with the election to the Bar Council and the decision of disputes related to that election from one piece of legislation while the provisions relating to the election of the Chairman and the Vice-Chairman and the decision of disputes relating to such election form another piece of legislation. Rule 32 belongs to the former piece of legislation and Rule 35 (2) belongs to the latter. It will also be observed that Rule 35 (2) is an instance of legislation by reference or incorporation. It refers to rule 32, and for the purpose of applying Rule 35 (2) you must, as it were, incorporate the relevant provision of R. 32 within it. Treating Rule 32 and Rule 35 (2) as provisions in two separate pieces of legislation, it will also be apparent that the legislation of which Rule 32 is part may be considered as earlier in point of sequence than the legislation which contains Rule 35 (2).

That is apparent because otherwise R. 35 (2) would not have referred to Rule 32. Now, it will also be noted that Rule 32 of the Rules of 1963 has been repealed and re-enacted as Rule 34 (4) of the Rules of 1968. Upon that scheme of things, the question which we must consider is whether Rule 35 (2) must be read to refer to Rule 32 or Rule 34 (4).

14. The petitioner relies on the principle that where the provisions of one statute are, by reference incorporated in another and the earlier statute is afterwards repealed, the provisions so incorporated continue in force so far as they form part of the second enactment.* It is also pointed out that sometimes an Act of Parliament instead of expressly repeating the words of a section contained in a former Act merely refers to it, and by relation applies its provisions to some new state of things created by the subsequent Act. In such a case, it has been said, "the rule of construction is that where a statute is incorporated by reference into a second statute, the repeal of the first statute by a third does not affect the second".† If the case had been one of mere repeal there could have been no hesitation in accepting the contention that R. 35 (2) must be taken to refer to the committee of Advocates mentioned in Rule 32. But the position in the present case is very different. It is a case where a piece of legislation, which was incorporated by reference in another piece of legislation, has been repealed and re-enacted. In a case such as this, the principle embodied in Section 8 of the General Clauses Act will come into play. Section 8 provides:—

"8. Construction of Reference to repealed enactments. — (1) Where this Act, or any Central Act or Regulation after the commencement of this Act, repeals and re-enacts, with or without modification, any provision of a former enactment, then references in any other enactment or in any instrument to the provisions so repealed shall, unless a different intention appears, be construed as references to the provision so re-enacted.

(2) x x x x x x x x
If that principle is applied, it seems clear that inasmuch as Rule 34 (4) has repealed and re-enacted Rule 32, reference in Rule 35 (2) to Rule 32 so repealed must, unless a different intention appears, be construed as reference to rule 34 (4). To that conclusion two possible objections can arise:—

- (a) Section 8 refers to an Act or Regulation and not to a body of rules;
- (b) Rule 34 (4) does not represent the re-enactment of Rule 32. Rule 35 (2) was not intended to refer to the Election Tribunal, which is a body of different composition and different scope of power.

It is a matter for consideration whether these objections are valid.

15. (a). It is not necessary that Section 8 in terms should be invoked in the present case. The section embodies a principle of construction, and can well be applied to subordinate legislation. In *N. S. Thread Co. v. James Chadwick & Bros*, AIR 1953 SC 357, Section 8 was applied to the construction of the charters of different High Courts, and it was observed:—

"The canon of construction of statutes enunciated in Section 38, Interpretation Act and reiterated with some modifications in Sec. 8, General Clauses Act is one of general application where statutes or Acts have to be construed and there is no reasonable ground for holding that that rule of construction should not be applied in construing the charters of the different High Courts. These charters were granted under statutory powers and are subject to the legislative power of the Indian Legislature. Assuming however but not conceding, that strictly speaking the provisions of the Interpretation Act and the General Clauses Act do not for any reason apply, we see no justification for holding that the principles of construction enunciated in those provisions have no application for construing these charters."

The Delhi High Court in *Management of the Advance Insurance Co. Ltd. v. Shri Gurudasmal*, AIR 1969 Delhi 330 applied the principle embodied in Section 8 to the construction of notifications issued under statutes. In my opinion, the principle can be applied to a body of rules, even though they do not fall within the express terms of Section 8.

16. (b) As regards the second objection it will be noted that Section 8 speaks of re-enactment with or without modification. In other words, the principle will apply even if the original provision is repealed and re-enacted with modification. The modification, it seems to me, should be such as does not destroy the essential substance of the original provision. If in its essence the provision remains the same, then notwithstanding the substitution of a different form or the adoption of or a variation in non-essential particulars in the re-enacted provision the principle is not offended. In the present case, Rule 32 speaks of a committee of Advocates consisting of three members of the Bar Council in the previous year who are not contesting the elections, and in case such members are not available any Advocate or Advocates on the State Roll of Advocates may be appointed on the Committee. Rule 34 (4) speaks of an Election Tribunal consisting of three Advocates whose names are on the State Roll and who are not less than of ten years standing. It will be noticed that both the Committee envisaged by Rule 32 and the Election Tribunal envisaged by Rule 34 (4) consist of three Advocates, who must be Advocates on the State Roll of Advocates; the only difference lies in the qualifying factor specified in each case.

*Maxwell on Interpretation of Statutes, 11th Edn. P. 393.

†Craies on Statute Law, 5th Edn., p. 385.

To my mind, the difference in the constitution of the two bodies turns on non-essential particulars. The change in the constitution of the body envisaged for deciding an election dispute is nothing more than a mere modification.

17. Our attention has been drawn to the circumstance that while the powers of the committee constituted under Rule 32 are not expressly limited, the Election Tribunal contemplated by Rule 34 (4) has only the limited powers detailed in Rule 34 (6) when disposing of an election petition. It seems to me that even if the scope of the powers be taken to have been reduced in the case of the Election Tribunal, the reduced scope does not in any way militate against the Election Tribunal being regarded as the body for adjudicating a dispute relating to the election of the Chairman and the Vice-Chairman. The power has been merely modified, if at all, and its essential nature has not changed from the original. I am of opinion that Rule 34 (4) amounts to a re-enactment, with modification, of Rule 32.

18. Accordingly I hold that when reading Rule 35 (2) of the Rules of 1963, we must substitute the words "the Election Tribunal referred to in Rule 34 (4) of the Rules of 1972" in place of "the committee of Advocates referred to in Rule 32." Reading Rule 35 (2) in that manner, it is apparent that the Election Tribunal had jurisdiction to entertain and decide the election petition filed by the first respondent.

19. Point No. 2

Whether the Advocate General was entitled to vote as a member and also to give a casting vote as Chairman of the meeting?

20. There can be no doubt that the Advocate General is a member of the State Bar Council. Section 3 (2) (a) of the Advocates Act, 1961 describes him as an ex-officio member. He enjoys the same right of vote as elected members. I am of opinion that he has a right to vote like other members in a meeting for electing the Chairman and the Vice-Chairman.

21. As regards the Advocate General's right to give a casting vote, the petitioner relies on Rule 38 of the Rules of 1963. Rule 38 provides:—

"38. Voting.— The voting of the Bar Council shall ordinarily be by show of hands. Each member present shall have one vote and the Chairman of the meeting shall have a casting vote."

22. Now Rule 34 declares that the Advocate General shall convene a meeting of the Bar Council for holding the election of the Chairman and the Vice-Chairman, and that he shall preside at the said meeting. It is a meeting of the Bar Council. Three kinds of meetings of the Bar Council are contemplated. There is the ordinary meeting of the Bar Council, mentioned in Rule 37 (1). There is the extraordinary meeting of the Bar

council, for which provision is made in Rule 37 (2). The third kind of meeting of the Bar Council is the one contemplated by Rule 34. For the first two kinds of meetings the Chairman, and in his absence the Vice-Chairman, have been appointed by Rule 44 (1) to preside at the meeting. In the absence of both, Rule 40 enables the members present at the meeting to elect one from amongst them to preside over the said meeting, when such member presides over the meeting, he can be described as Chairman of the meeting. Although not Chairman of the Bar Council, he is Chairman of the meeting. The Chairman of a meeting is merely one who presides over the meeting. In respect of the third class of meetings mentioned above, that is to say a meeting for the election of the Chairman and the Vice-Chairman, the Advocate General is required by Rule 34 to preside at the meeting. When doing so he is Chairman of the meeting.

23. Rule 38, which determines the voting right of each member at a meeting of the Bar Council and of the Chairman of the meeting, may be read now. Each member present has one vote and the Chairman of the meeting has a casting vote. The voting rights specified in Rule 38 apply to all manner of voting, whether it be by show of hands or by a ballot. Rule 38, which is evidently of general application, declares that voting at the meeting of the Bar Council shall ordinarily be by show of hands. That does not exclude altogether voting by ballot at a particular meeting. A meeting for the election of the Chairman and the Vice-Chairman is such a meeting. Rule 35 (1) provides that the election in such a case shall be by ballot. But whether the voting is by show of hands or by ballot, according to Rule 38 each member present has one vote and the Chairman of the meeting has a casting vote. To my mind, when the Advocate General presides at the meeting of the Bar Council for electing the Chairman or the Vice-Chairman the voting must be by ballot, each member present has one vote and the Advocate General as Chairman presiding at the meeting has a casting vote.

24. Our attention has been drawn to the proviso to Rule 35 (1) which requires that in order to be elected as Chairman or Vice-Chairman a candidate must secure a majority of votes of the members present and this, it is said, excludes the giving of a casting vote. I am unable to agree. There is no doubt that the principle that a candidate should secure a majority of votes of the members present applies to all cases of election of the Chairman and the Vice-Chairman, whether it is a case covered by the proviso or by the main part of Rule 35 (1). But to secure a majority of votes of the members present does not exclude a case where the majority is obtained by the Advocate General giving a casting vote where the votes are equal, the casting vote being an additional

vote. Rule 35 (1) requires the securing of the majority of votes of the members present; it does not require the securing of votes of the majority of the members present.

25. I hold that the Advocate General was entitled to give a casting vote, and therefore, the declaration of the petitioner as elected Chairman of the Bar Council is not invalid.

26. The points raised by the contesting respondents may be considered now as points Nos. 3 and 4.

27. Point No. 3

Whether the provision in Rule 34 of the Rules of 1963 that the first meeting should be convened by the Advocate General within 15 days of the election becoming final under Rule 31 is mandatory?

28. Under Rule 31 the election to the Bar Council acquires finality on the expiry of 21 days from the date of publication of the list of elected members certified by the Advocate General. In the present case the list became final on June 15, 1973. The first meeting was convened on July 7, 1973. That was clearly beyond the period of 15 days mentioned in Rule 34. But in my opinion, the requirement that the first meeting should be convened within 15 days is directory only. There is nothing in the rules which suggests that if the period of 15 days is exceeded the first meeting will become invalid or purposeless. The object of the first meeting will not be defeated if it is convened beyond the period of 15 days. To my mind, the requirement has apparently been made only in order to suggest that the first meeting should be called as expeditiously as possible.

29. Point No 4

Whether the first meeting is invalid because a notice of ten clear days was not given as required by Rule 34 of the Rules of 1963?

30. Notice of the first meeting was received on June 28, 1973 by at least one member, and the meeting was held on July 7, 1973. Now it appears that all the members of the Bar Council were present and they participated in the meeting, and no objection was raised as to the sufficiency of the period of notice. In such a case, the requirements as to notice may be considered as waived. In *Re. Express Engineering Works* (1920) 1 Ch 466. Younger, L. J. said;

"If you have all the shareholders present, then all the requirements in connection with a meeting are observed."

Reference may also be made to *Re. Oxted Motor Co.* (1921) 3 KB 32. In the circumstances, I am unable to hold that the meeting was invalid on the ground that all the members did not receive notice of ten clear days. Reliance was placed by the respondents on *Khan Chand etc. v. Sub Divisional Officer (Civil)*, 1972 Cur LJ 854. The provision in that case required notice to be sent "at least seven days before the date of meeting", language which is distinguishable from that em-

ployed in Rule 34. Moreover, the facts in that case show that objection was taken by some of the members present at the meeting to the insufficiency of notice.

31. On the aforesaid considerations, I am of opinion that the order of the Election Tribunal dated September 9, 1974 is vitiated and is liable to be quashed. The petitioner is entitled to succeed.

32. The writ petition is allowed, and the order dated September 9, 1974 of the Election Tribunal is quashed. The parties will bear their own costs.

D. B. LAL, J. :— 33. This petition under Articles 226 and 227 of the Constitution has been filed by Shri Chhabil Dass, Advocate wherein he has called in question the decision of the Election Tribunal dated September 9, 1974 (Annexure P.8) and wants the same to be quashed.

34. The petitioner's case is that he was duly elected as a member of the Bar Council of Himachal Pradesh along with 14 others the strength of the Bar Council being: 15 elected members and the Advocate-General ex-officio member. The respondent No. 4 who is the Advocate-General convened on July 7, 1973 the first meeting of the Bar Council for the election of Chairman and Vice-Chairman under Rule 34 of the Bar Council of Punjab (Constitution and Conduct of Business) Rules, 1963 (hereinafter to be referred to as the Rules of 1963). As provided for in that Rule, the Advocate-General presided over that meeting. Two proposals, one of the petitioner and the other of the respondent No. 1 Shri Indar Singh, Advocate, were received for election to the post of Chairman. The poll was taken by a secret ballot and it was found that both the petitioner and the respondent No. 1 polled equal number of votes. Accordingly the Advocate-General determined the manner in which the dispute was to be resolved. He gave a casting vote in favour of the petitioner and the latter was declared elected.

35. After the election was so declared and published in the Gazette, the respondents 1 to 3 who are Advocate-electors filed an election petition before the Election Tribunal constituted under Rule 34 of the Rules made by the Bar Council of Punjab and Haryana under Section 15 (2) (a) and (d) of the Advocates Act, 1961, as modified and adapted by the Chairman of the Bar Council of Himachal Pradesh (hereinafter to be referred to as the Himachal Pradesh Rules). By a majority decision dated September 9, 1974 the Election Tribunal has set aside the election of the petitioner on several grounds, the primary being that the Advocate-General had no right to give a casting vote.

36. The petitioner has contended in the foremost that the Election Tribunal was not the competent authority to entertain and decide the election petition. As such, according to petitioner, the decision of the Election Tribunal is non est and a nullity. Since the

Election Tribunal had no jurisdiction to entertain and decide the election petition its decision is not binding on the petitioner. The petitioner has also supported his election on a variety of other grounds, but it does not appear necessary to describe all such grounds because the writ petition can be disposed of on the short question of jurisdiction exercised by the Election Tribunal.

37. The respondents have no doubt contended that the Election Tribunal had the jurisdiction and its decision cannot be challenged by the petitioner. According to them, the committee of advocates referred to in Rule 32 of the 1963 Rules was replaced by an election tribunal referred to in Rule 34 of the Himachal Rules by a process of implied repeal because the Rules of 1963 were repealed by the Bar Council of Punjab and Haryana Election Rules, 1968 (hereinafter to be referred to as the Rules of 1968). It may be pointed out that Rule 34 of the Rules of 1968 is the same in material particulars as Rule 34 of the Himachal Rules. I can, therefore, as well refer to the Rules of 1968 instead of the Himachal Rules while deciding this petition.

38. The respondents, therefore, contend that in order to decide an election dispute the authority constituted under Rule 34 of the Rules of 1968 is the election Tribunal and this very authority decided the present election petition. Therefore, contend the respondents, the jurisdiction rested with the Election Tribunal and the election of the petitioner was rightly set aside.

39. In order to elucidate the point of controversy, the provisions for the constitution of the Bar Council of Himachal Pradesh and the rules made by the Punjab Bar Council may be extracted. Section 24, sub-section (5) (b) and (f) of the State of Himachal Pradesh Act, 1970 is in the following terms:

"24. (b) until the members of the first Bar Council of Himachal Pradesh required to be nominated under Cl. (a) are duly nominated in accordance with the provisions of that clause, the Bar Council of Punjab & Haryana shall function as the Bar Council of Himachal Pradesh and the provisions of the Advocates Act shall so far as may be, apply accordingly;

.....
 (f) the rules made or deemed to have been made by the Bar Council of Punjab and Haryana in force immediately before the date on which the first Bar Council of Himachal Pradesh is duly constituted in accordance with the provisions of clause (a) shall, subject to such modifications and adaptations as may be made therein by the Chairman of the Bar Council of Himachal Pradesh, be deemed to be rules made by the Bar Council of Himachal Pradesh and shall have effect accordingly". This would mean that the Rules of 1963 and the Rules of 1968 made by the Punjab Bar Council would be applicable. The relevant

rules of the Punjab Rules of 1963 may now be stated as under:—

"30. Disputes as to validity of election.

- (1) A candidate may contest the validity of the election of a candidate declared to have been elected to the Bar Council by a letter signed by him and addressed to the Secretary.
- (2) Such letter shall state the grounds on which the validity of the election is contested and shall be delivered to the Secretary within seven days of the date of publication in the Punjab Government Gazette of the list under Rule 29.
- (3) The Secretary shall, on receipt of any such letter, refer the dispute arising therefrom to the authority specified in Rule 32 for decision.
- (4) Subject to other provisions contained in this rule, after the expiry of seven days from the date of such publication, the validity of the election of a candidate shall not be contested on any ground whatsoever.
- (5) No election of a member or members to a Bar Council shall be called in question on the ground that due notice thereof has not been given to any person entitled to vote thereat, if notice of the date fixed for the election has not less than 30 days before that date, been published in the Punjab Gazette and Himachal Pradesh Government Gazette."

"32. Determination of election disputes.

Any dispute arising under Rule 30 shall be decided by a committee of Advocates consisting of three members of the Bar Council in the previous year who are not contesting the elections and such committee shall be constituted by the Bar Council 15 days before the date of election and the unanimous or majority decision of such committee shall be final. In case three members, not contesting elections, are not available, any Advocate, or Advocates on the State roll of Advocates may be appointed of the committee."

34. First meeting.

Within 15 days from the election becoming final under Rule 31 the Advocate General shall convene a meeting of the Bar Council after giving notice of ten clear days for (1) election of the Chairman and Vice-Chairman; (2) electing Committees; and (3) transacting such other business as the Advocate General may direct. The Advocate General shall preside at the said meeting."

35. Election of Chairman and Vice-Chairman.

(1). The election of the Chairman and the Vice-Chairman shall be by ballot to be held in such manner as the Advocate-General may determine:

Provided that in the event of there being more than two candidates, no member of the Bar Council shall be deemed to have been elected as Chairman and Vice-Chairman unless he shall have secured a majority of votes of

the members present; and that in case of there being more candidates than two, the name of the candidate receiving the lowest number of votes shall be eliminated after the votes have been first recorded and thereafter the votes shall be taken for the other candidates and the same procedure shall be followed until any candidate receives a majority of votes of those present.

(2) Any dispute regarding the validity of the election of the Chairman or Vice-Chairman shall be decided by the Committee of Advocates referred to in Rule 32, whose decision shall be final."

The relevant rules of the Punjab Rules of 1968 are as below:—

"4. Time and Place of Election: Election of members to the Bar Council shall be held at such place or places, on such date or dates, and during such hour or hours as the Council may appoint. Different dates and different hours may be appointed for polling at different places."

"34. Disputes as to the Validity of Elections:

- (1) Any voter may contest the validity of the election of a candidate declared to have been elected to the Bar Council by a petition signed by him and supported by an affidavit and delivered to the Secretary personally or sent by registered post so as to reach him within 15 days from the date of publication of the results of the election.
- (2) The petition shall be accompanied by a fee of Rs. 250/- which shall be paid in cash or sent by Money Order. In case it is sent by M. O. the M. O. receipt shall also be attached to the petition. The fee shall not be refundable.
- (3) Such petition shall include as respondents all the contesting candidates, and the petition shall be accompanied by as many copies as there are respondents.
- (4) All disputes arising under the above sub-rules shall be decided by a tribunal to be known as an Election Tribunal comprising 3 advocates whose names are on the State Roll and who are not less than of 10 years standing.
- (5) The election Tribunal shall be appointed by the Bar Council on or before the date on which the time of the election is fixed under Rule 4.
- (6) The election Tribunal shall have all or any of the following powers:—
 - (i) To dismiss a petition;
 - (ii) To order recount;
 - (iii) To declare any candidate to have been duly elected on a recount;
 - (iv) To set aside the election of the candidate who either by himself or through any other person acting with his consent is guilty of corrupt practices.

.....

The relevant Himachal Rules of 1972, as modified and adapted under Section 24 (5) (f) of the State of Himachal Pradesh Act, 1970, are as under:—

"4. Time and place of Election:

Election of members to the Bar council shall be held at such place or places, on such date or dates, and during such hour or hours, as the Council may appoint. Different dates and different hours may be appointed for polling at different places."

"34. Dispute as to the Validity of Elections:

- (1) Any voter may contest the validity of the election of a candidate declared to have been elected to the Bar Council, by a petition signed by him and supported by an affidavit and delivered to the Secretary personally or sent by registered post, so as to reach him within 15 days from the date of publication of the results of the election.
- (2) The petition shall be accompanied by a fee of Rs. 250/- which shall be paid in cash or sent by Money Order. In case it is sent by M. O., the M. O. receipt shall also be attached to the petition. The fee shall not be refundable.
- (3) Such petition shall include as respondents, all the contesting candidates and the petition shall be accompanied by as many copies as there are respondents.
- (4) All disputes arising under the above sub-rules shall be decided by a tribunal to be known as an Election Tribunal comprising 3 Advocates whose names are on the State Roll and who are not less than of 10 years standing.
- (5) The Election Tribunal shall be appointed by the Bar Council on or before the date on which the time of the election is fixed under Rule 4.

Explanation: The date means the date on which polling is to be held.

- (6) The Election Tribunal shall have all or any of the following powers:—
 - (i) To dismiss a petition;
 - (ii) To order recount;
 - (iii) To declare any candidate to have been duly elected on a recount;
 - (iv) To set aside the election of the candidate who either by himself or through any other person acting with his consent is guilty of corrupt practices.

.....

40-44. The Punjab Rules of 1963 were made under Section 15 (2) (a) and (c) to (j) read with Sections 3, 8, 9 and 10 of the Advocates Act, 1961. The subsequent Punjab Rules of 1968 were made under Section 15 (2) (a) and (d) of the Advocates Act, 1961. These rules were adapted and modified, and the aforesaid Himachal Rules of 1972 were made.

45. It would be abundantly clear from Section 15, sub-section (2) (d) of the Advocates Act, 1961 that the Bar Council could make and in fact they had made separate rules prescribing the manner in which, and the authority by which doubts and disputes as to the validity of (1) an election to the Bar Council, or (2) to the Office of the Chairman or Vice-Chairman, are to be finally decided. In fact in these rules, two categories of elections are contemplated, one for the election of the members to the Bar Council and second for the election of a Chairman and a Vice-Chairman for which a meeting of the Bar Council is to be called by the Advocate-General. The scheme as it permeates in the Rules of 1963 and the Rules of 1968, makes the position very clear in this respect. Therefore, under Section 15 (2) (d) the Bar Council could make two different sets of rule, one to settle the dispute as to validity of election to the Bar Council and the other to settle the dispute as to election to the office of the Chairman or Vice-Chairman. When I proceed to examine the scheme of the Rules of 1963 and the Rules of 1968, I come across very significantly that the latter set of rules were made only under Section 15 (2) (a) and (d) and the subject-matter of these rules is confined to the election of members of the Bar Council and disputes as to the validity of that election. Therefore, these rules have availed of sub-clause (d) only to the extent it relates to the manner in which, and the authority by which, disputes regarding the election to the members of Bar Council are concerned. In fact the Rules of 1968 did not refer to the subject-matter contained in the rules commencing from Rule 34 of the Rules of 1963. It may, therefore, be stated that the Rules of 1968 have repealed and re-enacted Rules 1 to 33 of the Rules of 1963 and these rules have dealt with the election of the members to the Bar Council and disputes relating thereto. In fact in the rules of 1968 there is no rule equivalent to Rules 34 and 35 of the Rules of 1963. These rules specifically deal with the election of Chairman and Vice-Chairman, and the first meeting to be called by the Advocate-General for that election. The Rules of 1963 no doubt mention under their heading sub-section (d) of S. 15 (2), but that is so because the said rules were comprehensive and contained rules prescribing the manner in which, and the authority by which, disputes as to the validity of an election to the Bar Council and to the office of the Chairman were to be finally decided. These rules were repealed and re-enacted to the extent the election of a member to the Bar Council was considered and the Rules of 1968 were made with that purpose. Since the manner in which a dispute of an election of member of the Bar Council is also the subject-matter of sub-section (a), the same was described in the heading of the Rules of 1968. From this it cannot be concluded, in my opinion, that the entire sub-section (d) was brought within the ambit of

the Rules of 1968 for the obvious reason that there is not a single rule which deals with the election of a Chairman to the Bar Council.

46. In the aforesaid Rule 34 of the Rules of 1968, they talk of an Election Tribunal and its constitution is (a) three Advocates whose names are on the State roll, and (b) who are not of less than of 10 years standing. In the corresponding Rule 32 of the Rules of 1963, they talk of a Committee of Advocates and its constitution is (a) three members of the Bar Council of the previous year, and (b) who are not contesting the elections. The difference in the constitution of the two bodies is obvious. In the first case, the three Advocates have to be on the State roll and their standing should not be less than 10 years. In the second case, the three Advocates are required to be members of the Bar Council during the previous year and they should not be contesting the elections. It cannot, therefore, be stated that the constitution of the two bodies is one and the same. In fact they are two different bodies not only named differently in the rules but their constitution is also different. In fact it is admitted case that a Committee of Advocates as contemplated in Rule 32 of the Rules of 1963 has never been appointed to resolve the dispute of the impugned election of the petitioner.

47. The vexed question before us is, as to whether the Election Tribunal constituted under Rule 34 of the Rules of 1968 can be construed to be a Committee of Advocates contemplated under Rule 32 of the Rules of 1963. It is true that in the Rules of 1963 both the disputes as to the election of a member to the Bar Council and as to the election of Chairman to the Bar Council were to be resolved by a Committee of Advocates, as is clear from Rule 35. But once the Rules of 1963 were repealed and re-enacted and R. 34 of the Rules of 1968 was made and was confined to the election of a member to the Bar Council, it would be difficult to import the conception that the Election Tribunal contemplated therein will be the same body as the Committee of Advocates in Rule 32. In fact the framers of the rules have left the constitution of the Committee of Advocates to resolve the dispute as to the election of Chairman, as it was in the Rules of 1963. This they have done purposely, because otherwise they would have made a corresponding rule in the Rules of 1968. The Bar Council of Himachal Pradesh could as well adapt and modify the Rules of 1963 in a manner so that the disputes regarding election of Chairman to the Council could also be decided by the Election Tribunal. But the Chairman of the Bar Council of Himachal Pradesh has not done so. In fact a bare reading of Rule 34 of the Rules of 1968 as well as Rule 34 of Himachal Rules of 1972 makes it clear that the contest has to be of the validity of the election of a candidate declared to have been elected to the Bar Council. Therefore, these

rules do not deal with the validity of the election of a candidate declared to have been elected as Chairman to the Bar Council. As such these rules do not apply to the election of Chairman and one has to refer to the relevant rules of the Rules of 1963 in order to decide as to which authority could be appointed to decide the dispute as to the election of Chairman. As I have stated above the Committee of Advocates has not been appointed and it is that committee alone which could decide the present dispute. I am, therefore, of the opinion that the Election Tribunal appointed under Rule 34 of the Rules of 1968 will have no jurisdiction to decide the dispute as to the election of Chairman. For that a Committee of Advocates was required to be appointed under the relevant Rules of 1963.

48. The learned counsel for the respondents brought to his aid Section 8 of the General Clauses Act and asserted that the provisions of that section formidably support his contention. Section 8 of that Act will not apply for the simple reason that the Rules of 1968 have not repealed or re-enacted the provisions of the Rules of 1963 containing the election to the office of Chairman and an authority to be appointed to decide disputes arising therefrom. When there is no repeal or re-enactment, how can one bring in Section 8? Besides that, there is no reference to a Committee of Advocates "in any other enactment or in any instrument" but the reference is to an Election Tribunal in Rule 34 which has repealed and re-enacted the provisions contained in the Rules of 1963 which related to the election of a member to the Bar Council. This also completely dislodges any application of Section 8. That apart, a different intention obviously appears in the Rules of 1968 because they talk of an Election Tribunal which is a different body than the Committee of Advocates as its very constitution indicates. Therefore, no assistance can be obtained from Sec. 8 of the General Clauses Act.

49. There was yet another objection for the constitution of the Election Tribunal and it was stated that it was appointed on 1st October, 1972 while it should have been appointed on or before the date on which the time of the election was fixed under Rule 4. The learned counsel submitted that the adaptation and modification made by the Bar Council of Himachal Pradesh under Rule 34 of the Rules of 1968 was, that the date was defined under an explanation as the date on which polling is to be held. According to the learned counsel, this explanation could not be provided as no prior concurrence of the Bar Council of India was obtained. To me it appears, the controversy is of no avail to the petitioner. Even if this explanation is accepted as correct the date shall mean the date on which polling is to be held and that is exactly the date specified in Rule 4 which is referred to in clause (5) of Rule 34 of the

Himachal Rules of 1972. In Rule 4 aforesaid the date, time and place of election is nothing but the date, time and place of the polling. Therefore, the explanation containing definition of the date in the Himachal Rules of 1972 is nothing but reproduction of Rule 4 and the question still remains if the Election Tribunal was appointed on or before the date on which the time of election was fixed under Rule 4. That was in fact done because the voting took place on 23-10-1972 and 28-10-1972 while the Election Tribunal was constituted on 1-10-1972. Therefore, no exception can be taken on this account to the appointment of the Election Tribunal.

50. In view of my findings above, the Election Tribunal had obviously no jurisdiction to decide the dispute as to the Election of the petitioner to the office of the Chairman. As such the decision of the Election Tribunal is struck down as without jurisdiction and hence a nullity. The writ petition is allowed and the order of the Election Tribunal dated 9-9-1974 (Annexure P.8) is quashed.

51. In view of the special circumstances arising in the case, no order is made as to costs.

Petition allowed.

AIR 1976 HIMACHAL PRADESH 16 CHET RAM THAKUR, J.

Puran, Petitioner v. The State of Himachal Pradesh and others, Respondents.

Civil Writ Petn. No. 25 of 1975, D/- 11-5-1975.

(A) Land Acquisition Act (1894), S. 3 (b) — 'Person interested' — Person in occupation of property whether in capacity of tenant or licensee is 'person interested'.

(Para 3)

(B) Land Acquisition Act (1894), Ss. 4 and 3 (f) — 'Public purpose' — Section 4 Notification mentioning purpose as 'for construction of buildings' — Notification is not vague.

Where Section 4 notification mentioned the purpose as 'for construction of buildings' it cannot be said that that was not a public purpose or that it was vague. Construction of a building by the Government pre-supposes that it is likely to be utilised by the Government for office or residential accommodation for its officers and not for any private purpose. The mere fact that the notification did not specifically state that the land was being acquired for residential purposes is immaterial. AIR 1973 SC 1150, Distinguished.

(Para 4)

Cases Referred: Chronological Paras
AIR 1973 SC 1150 = (1973) 2 SCC 337 2

B. B. Vaid, for Petitioner; B. Sita Ram, Advocate-General, for Respondents.

HS/IS/D112/75/JHS

THE All India Reporter 1976

Jammu & Kashmir High Court

AIR 1976 JAMMU & KASHMIR 1
MIAN JALAL-UD-DIN AND DR. ADARSH
SEIN ANAND JJ.

B. K. Thapar and another, Appellants v.
Vijay Kumar and another, Respondents.

Letters Patent Appeal No. 1 of 1975,
D/- 9-7-1975*.

(A) Letters Patent (J and K), Cl. 12 —
Right to appeal — Judgment of single judge
of High Court challenged before Division
Bench — Appeal if and when cannot be.

The clause confers a right of appeal
against judgment of a single judge of High
Court and also provides for forum therefor.
It is only against a Division Bench or Full
Bench judgment that forum of Board of Judi-
cial Advisors was provided. Since the Board
has ceased to exist its place is taken by Sup-
reme Court before which such appeal will lie.
Therefore it is a misinterpretation to say that
an appeal to Division Bench against a judg-
ment of single judge cannot lie since the
Board, the forum therefor, no longer exists.

(Paras 4 and 5)

(B) J. & K. Stamp Act (40 of 1977 Smt.),
Ss. 61 (5) and 33 — Appeals — If and when
no appeal lies against order dismissing applica-
tion under Section 33. (Letters Patent (J and
K), Cl. 12).

The section provides for appeals against
any order under the Act. An order dismissing
an application under Section 33 (for impound-
ing of lease deed inadmissible for being im-
properly stamped) is one under the Act and
hence appealable. When the dismissal is by
a single judge of the High Court who, post-
poning consideration of inadmissibility of
lease deed, had also refused to review his
earlier order, it is a judgment within the
meaning of Cl. 12 of Letters Patent. Hence

*(Against Judgment of Mufti J. in Applica-
tion D/- 19-5-1975 in C. O. S. 89 of 1974,
D/- 24-5-1975).

IS/JS/D187/75/JRM

1976 J. & K./1 I G—29

appeal against his order will lie under that
clause. Case law discussed.

(Paras 4 and 6)

(C) J. & K. Stamp Act (40 of 1977 Smt.),
Ss. 36 and 33 — Decision of admissibility of
documents — Postponement of such prelimi-
nary issue in view of pending issue thereon
— If and when valid. Judgment of Mufti
Baha-ud-Din Farooqi, J. in Application D/-
19-5-1975 in C. O. S. No. 89 of 1974, D/-
24-5-1975, Reversed.

An objection as to admissibility of a
document to be exhibited must be judicially
determined immediately and cannot be post-
poned in view of a pending issue on such
question. If the document is admitted its ad-
missibility is not open to question later. Once
the court rightly or wrongly decides the issue
so far as the parties are concerned the
matter is closed. It is not open to admit the
document provisionally. As such when an
application under Section 33 objecting to ad-
mission of lease deed on ground of being im-
properly stamped is made it must be decided
forthwith. By so allowing that application it
will only advance the cause of justice and
facilitate expeditious disposal of the case.
Judgment of Mufti Baha-ud-Din Farooqi, J.
D/- 24-5-1975, Reversed. AIR 1961 SC 1655
and AIR 1930 Cal 577 (1) followed in AIR
1937 Pat 73 and AIR 1939 All 588, Followed.

(Para 7)

Cases	Referred:	Chronological	Paras
AIR 1969 J & K 52			6
AIR 1968 J & K 71	= 1967 Kash LJ		4, 6
356			6
AIR 1965 J & K 118	= 1965 Kash LJ 244		6
AIR 1964 Andh Pra 162	= (1964) 1 Andh		6
WR 22 (FB)			6
AIR 1963 SC 946	= (1963) 1 SCR 1		6
AIR 1961 SC 1655	= (1962) 2 SCR 333		7
AIR 1960 All 692	= 1960 All LJ		387
(FB)			6
AIR 1955 Bom 266	= 57 Bom LR 228		6
AIR 1952 Nag 36	= 1951 Nag LJ 599		4
AIR 1952 Nag 357	= 1953 Nag LJ		58
(FB)			6
AIR 1939 All 588	= 1939 All LJ 552		7

AIR 1937 Pat 73 = 17 Pat LT 769 7
 AIR 1930 Cal 577 (1) = 128 Ind Cas 187 7
 (1912) ILR 35 Mad 1 = 21 Mad LJ 1 4

G. D. Sharma and P. S. Datta, for Appellants; S. P. Gupta, K. P. Sethi and H. L. Bhagotra, for Respondents.

MIAN JALAL-UD-DIN J.— This appeal under Letters Patent is directed against the judgment dated May 24, 1975 of the Hon'ble Single Judge (Mufti Baha-ud-Din Farooqi J.) of this Court dismissing the application of the defendants appellants dated May 19, 1975. Two applications one dated 19th May 1975 and the other dated 20th May 1975 were filed by the defendants 1 and 2 respectively before the learned Judge. Application dated May 20, 1975 sought the rejection of the plaint on the grounds mentioned therein with which we are not however concerned as that is not the subject-matter of the appeal before us, the appeal against that order having been dismissed in limine by us. The subject-matter of the present appeal before us is the application dated May 19, 1975. It was filed under Secs. 33/35 of the Jammu and Kashmir Stamp Act read with Order 13 Rule 3 of Civil P. C. The appellants prayed inter alia that the Court may impound and declare the lease deed dated Sept. 1974 as inadmissible in evidence. The prayer was grounded on the plea that the lease deed was improperly stamped and therefore, could not be admitted in evidence.

The learned Judge by his order under appeal dismissed the application and observed that the matter was covered by a preliminary issue and the court had already declined the prayer of the defendants to allow issue No. 4 being tried as a preliminary issue (vide Order dated April 21, 1975) and as the question sought to be raised in regard to the defect in stamping the lease deed was covered by the appropriate issue, therefore, it was hardly necessary to go into this question at this stage of the suit. The Court further observed that it was also a case which involved the examination of a latent defect which required extrinsic evidence to be recorded in order to find out whether the document was or was not duly stamped. As regards the objection raised by the defendants-appellants that the plaintiffs would seek the admission of the instrument of lease in the course of their evidence and if the document is admitted in evidence and exhibited then their object would be frustrated as they would not be able to raise the objections subsequently in view of the provisions of Section 38 of the Stamp Act, the learned Judge observed that when such an occasion would arise and the document is produced during the course of evidence, the document could be received and exhibited tentatively and such tentative and provisional reception of the document would not amount to its admission within the meaning of Section 38 of the Stamp Act. In the view of the learned Judge it was therefore,

neither legal nor proper to decide the question of the admissibility of the document forthwith or even allow the question to be tried as a preliminary issue. He consequently dismissed the application.

2. Aggrieved by this judgment, the defendants have come up in appeal before this Court.

3. Very lengthy arguments were addressed at the bar in order to sustain the respective stands taken by the parties in the appeal.

4. Appearing for the respondents Mr. Gupta has raised a preliminary objection that no appeal lies against the order of the dismissal of the application of the defendants passed by the learned Judge inasmuch as it is neither covered by Section 104 nor by Order 43 Rule 1 of the Code of Civil Procedure nor by Cl. 12 of the Letters Patent. The proposition is canvassed that the subject matter of the appeal has not decided any issue in the case nor have the rights of the parties been affected by such an order. The appellants sought to recall the earlier order of the court by moving the application on May 19, 1975. No appeal was preferred against that order. The suit of the plaintiffs has proceeded and will proceed in spite of the dismissal of the application of the defendants. In view of this the appeal, it is contended, is not maintainable. Reliance has been placed on (1912) ILR 35 Mad 1, AIR 1968 J & K 71, AIR 1952 Nag 36, and on some other authorities.

Mr. K. P. Sethi has sought to raise another preliminary objection that there is no forum which is competent to hear this appeal. His argument is that Cl. 12 of the Letters Patent undoubtedly gives right of appeal to a party aggrieved by the judgment given by a Single Judge of this Court but under the said clause the appeal could be heard by Board of Judicial Advisors which no longer exists, therefore, when no forum exists, the appeal cannot lie to the Division Bench of this Court.

5. Before we dispose of the preliminary objection raised by Mr. Gupta, it is pertinent to decide the preliminary objection of Mr. Sethi. Clause 12 of the Letters Patent reads as follows:—

"And we do further ordain that an appeal shall lie to the said High Court of Judicature from the judgment (not being a judgment passed in exercise of appellate jurisdiction in respect of a decree or order made in the exercise of appellate jurisdiction by a Court subject to the superintendence of the said High Court, and not being an order made in the exercise of revisional jurisdiction, and not being a sentence or order passed or made in the exercise of the power of superintendence) of one Judge of the said High Court or one Judge of any Division court, and that notwithstanding anything hereinbefore provided an appeal shall lie to the said High Court from a judgment of one Judge of the said

High Court or one Judge of any Division Court, consistently with the provisions of the Civil Procedure Code, made in the exercise of appellate jurisdiction in respect of a decree or order made in the exercise of appellate jurisdiction by a Court subject to the superintendence of the said High Court where the judge who passed the judgment declares that the case is a fit one for appeal; but that the right of appeal from other judgments of the Judges of the said High Court or of such Division Court shall be to Us. Our Heirs or successors and be heard by our Board of Judicial Advisors for report to Us."

It appears that the learned counsel has misread the clause and has sought to place an interpretation on the language of the Clause which is not warranted. Clause 12 expressly confers right of appeal on a person aggrieved by the judgment of a Single Judge of the High Court and the forum is also provided therein. It is only when the judgment is given by the Division Bench or by a Full Bench that an appeal was provided before the Board and as the Board has ceased to exist, therefore its place is now taken by the Supreme Court of India and an appeal can be filed before the Supreme Court in cases in which right of appeal exists or leave to appeal is granted by the High Court. In view of this it is quite manifest that there is no substance in the preliminary objection raised by Mr. Sethi.

6. The preliminary objection raised by Mr. Gupta also cannot prevail on the twin ground that an appeal is competent under Section 61 (5) of the Jammu and Kashmir Stamp Act. It is worthy to mention here that this Clause (5) does not exist in the Indian Stamp Act. Clause (5) of Section 61 provides an appeal against any order made by the Court under the provisions of the Stamp Act. The Order under appeal dismissed the application of the defendants under Section 33 of the Stamp Act. Being an order under the Stamp Act is therefore, appealable. Even otherwise the order is appealable as it can be termed as judgment within the meaning of Clause 12 of the Letters Patent. The question as to what orders can be termed as judgments under the Letters Patent has been the subject of discussion before the High Courts in India as also before this Court.

In AIR 1965 J and K 118 this Court observed that the term 'judgment' under Letters Patent should be construed liberally and an order deciding the issue between the parties affecting the merits of the case should be considered as a judgment. An order which decides the question of jurisdiction is also a question of vital importance and affects the very root of the case, such an order is a judgment within the meaning of Clause 12 of the Letters Patent. In AIR 1969 J & K 52, AIR 1955 Bom 266, and AIR 1955 Nag 357 (FB) the view has been expressed that an order even if it does not finally dispose of the suit pro tanto, is judgment if it deter-

mines the rights of the parties. A Full Bench of Allahabad High Court in AIR 1960 All 692 has held that a judgment under Clause 10 of the Letters Patent of that court included the final judgment, a preliminary judgment, and an interlocutory judgment. The term 'judgment' did not necessarily exclude the order. The order of a Single Judge of the High Court dismissing an appeal against an order granting a temporary injunction was an order which determined the rights of the parties. In AIR 1964 Andh Pra 162 (FB) a Full Bench of the court held that a decision refusing to review an order is a judgment within the meaning of the relevant clause of the Letters Patent. In AIR 1963 SC 946 it has been laid down that a review application dismissed by a Single Judge of the High Court under U. P. Agriculture Income-tax Act is a judgment within the meaning of Cl. 10 of the Letters Patent.

The authority of this Court reported in AIR 1968 J & K 71 and relied upon by the learned counsel for the respondents does not help the respondent and improve his case because that was a case where in the order under appeal all that the Single Judge had said was that the additional issue was to be tried along with the other issues already framed in the case. It was observed that this could not constitute a matter decided. The Single Judge had disposed of a matter which was a mere step towards obtaining the final adjudication in the suit and therefore, his order could not be designated as a judgment. That indeed is not the case before us. Here the learned Judge has dismissed the application of the defendants under Section 33 of the Stamp Act and has refused to consider forthwith the question of judicially determining the admissibility of the instrument of lease and has postponed its consideration and has further observed that the document could be exhibited and admitted tentatively or provisionally into evidence. He has also refused to review his earlier order. Therefore, on the basis of the authorities cited above his order under appeal could clearly be designated as a judgment within the meaning of Cl. 12 of the Letters Patent. It is pertinent to refer here that the learned Judge has himself characterised his order as 'judgment' in the opening words of the order which runs as under:—

"This judgment will govern the disposal of two applications; one dated 19-5-1975 and the other dated May 20, 1975." The preliminary objection raised by Mr. Gupta is therefore overruled.

7. Coming to the merits of the case, I find that apprehensions entertained by the appellants that once the document is allowed to be admitted into evidence and exhibited, their defence in the case may be jeopardised are not unfounded. It is true that there is an issue raised in the case which deals with the question of inadmissibility of the document. According to the learned Judge this issue will

be decided at the appropriate stage. We however do not question the jurisdiction and the power of the learned Judge to decide the preliminary issues in the case at the appropriate time but an important question does arise for consideration in the present case which has got bearing on Section 36 of the Stamp Act. When a document is sought to be admitted in evidence by a Party and is to be exhibited and an objection is raised by the other side as regards its inadmissibility that requires judicial determination of the question. Consideration of this question cannot be postponed because there is an issue already framed in the case. The existence of an issue cannot override the consideration as also the principle and the policy underlined in Section 36 of the Act. That section categorically requires that the question of admissibility of an instrument must be decided forthwith, for otherwise if the document is let in evidence in spite of objection, its admissibility cannot be called in question at any subsequent stage of the suit. Indeed the recent pronouncement of the Supreme Court on the question makes it abundantly clear that where a question as to the admissibility of a document is raised on the ground that it is not properly stamped, it has to be decided then and there when the document is tendered in evidence. Once the court rightly or wrongly decides to admit the document into evidence, so far as the parties are concerned, the matter is closed. These observations of their Lordships are incorporated in AIR 1961 SC 1655.

Therefore, notwithstanding the existence of an issue on the question of admissibility it becomes the duty of the court to decide the question of admissibility of the document then and there when the document is sought to be admitted in evidence. During the course of arguments a question was put to the learned counsel for the respondents whether in the course of evidence he would get the instrument of lease admitted into evidence and also exhibited as provided by Order 13 Rule 4 of the C. P. C. which he replied in the affirmative but he qualified his statement by submitting that this would be subject to the judicial determination of the question at the final stage of the case when all the preliminary issues are decided. In other words he submitted that the instrument of lease could be admitted into evidence provisionally or tentatively. We are afraid that this course of action is not warranted by law. The question of consideration of admissibility of an instrument cannot be postponed and the document cannot be admitted provisionally into evidence. As pointed out by their Lordships of the Supreme Court (AIR 1961 SC 1655) (supra) the language of Section 36 of the Stamp Act is categorical. It admits no exception. Sir George Rankin in 128 Ind Cas 187 = (AIR 1930 Cal 577 (1) while deciding the Principle underlined in S. 36 of the Stamp Act observed as follows:

"On the merits of the appeal, it appears to me that Section 36 Stamp Act makes it reasonably clear that the instrument having once been admitted in evidence is not to be called in question at any stage of the same suit. The Special Judge has seen this section but has thought to avoid the consequence of it by taking notice of an affidavit in which it is said that the tenure holders did object when the document was tendered and that there was a discussion as to its admissibility. The learned Judge has entirely failed to see that, under Section 36 it matters nothing whether it was wrongly admitted or rightly admitted or admitted without objection or after hearing or without hearing such objections. These stamp matters are really no concern of the Parties, and if the objection was taken at the time when the record was made up by the trial court, there it might be rejected; if not, the matter stopped there."

The same view has been expressed by a Division Bench of the Patna High Court reported in AIR 1937 Pat 73. The court held that where a Judge admits an instrument in evidence by endorsement then under Section 36 it matters nothing whether a document was rightly or wrongly admitted or admitted without objection or after hearing or without hearing such objection. Again in AIR 1939 All 588 a Division Bench of the said Court observed that there is nothing in Section 36 of the Act to warrant the conclusion that the section has application only to cases in which the court has admitted the document after consciously applying its mind to the question of its admissibility. Therefore, in order to allay the fears of the appellants and also to avoid any future controversy it will not only be appropriate but also legal and consistent with the observations of their Lordships of the Supreme Court that there must be a judicial determination of the question of the admissibility of the instrument as soon as it is tendered in evidence. The postponement of this question so as to coincide with the determination of the other preliminary issues cannot be said to be warranted in view of the language of Section 36 of the Stamp Act.

By acceding to the arguments of the appellants and by allowing the application under Section 33 of the Stamp Act forthwith would in our opinion not only advance the cause of justice but would also go a long way in facilitating the expeditious disposal of the case which the Hon'ble Supreme Court has insisted upon. The consequences of not considering the question of admissibility of the instrument of lease forthwith are obvious for if this point is allowed to be decided at the final stage and meanwhile the document is allowed to be admitted into evidence and if in the end the court holds that the document is inadmissible in evidence or requires to be impounded, it may have the effect of protracting the fair trial of the case and may give rise to several complications.

8. Apart from the pleas based on the Stamp Act, no other point was canvassed before us by the learned counsel for the parties.

9. For the foregoing reasons we are of the view that the learned Single Judge should not have dismissed the application of the defendants dated May 19, 1975 under Section 33 of the Stamp Act in so far as the limited question of the determination of the admissibility of the document based on the plea that the lease deed was improperly stamped and therefore, inadmissible in evidence, was concerned.

10. We accordingly allow the appeal to the extent indicated above and set aside the judgment of the learned Single Judge dated May 24, 1975 only in so far as it relates to the aspect of the matter under the Stamp Act. The learned trial Judge will at the time when the lease deed in question is tendered or produced in evidence judicially determine forthwith the admissibility of the said document on the basis of the plea raised that it has not been properly or sufficiently stamped.

11. Parties are directed to appear before the learned trial Judge on July 16, 1975 at Srinagar for orders.

DR. ADARSH SEIN ANAND, J.:— I agree.

Appeal allowed.

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JASWANT SINGH C. J. AND MUFTI J.

Union of India, Appellant v. Narain Singh and others, Respondents.

First Appeal No. 23 of 1973, D/- 23-4-1975*.

(A) (J. & K.) Houses and Shops Rent Control Act (34 of 1966), Section 1 (3) Clause (i) — Union of India through its officers taking house on lease — "Government" in clause (i) of Section 1 (3) of the above Act means Central Government — It is not entitled to protection under Section 1 (3) (i) of the Act. (Para 8)

(B) (J. & K.) Houses and Shops Rent Control Act (34 of 1966), Section 1 (3) (iii) — "Income of tenant".

It is well settled that the net income as contemplated by the clause (iii) of Section 1 (3) means the income that remains with a tenant after compulsory deduction, say, for instance, by way of tax, or the income which remains after deducting from the total receipts the capital invested and the expenses incurred to secure the total receipts, depending on whether the tenant belongs to a fixed income group or to a business community. (Para 9)

* (Against order of Addl. Dist. J. Jammu D/- 30-11-1972).

Where there is no material to show that the net income of the tenant (Government) does not exceed Rs. 20,000/- the tenant cannot get the benefit of clause (iii) of Section 1 (3) of the Act. (Para 9)

(C) T. P. Act (1882), Section 105 — Lease — Covenant for renewal — Conditions in covenant must be fulfilled before there can be renewal.

When the covenant of renewal is subject to the conditions precedent, the right of renewal only arises when notice is given the lessor in terms of the renewal clause and the lessee has performed all the conditions precedent as mentioned in the renewal clause. (1959) ILR 38 Pat 1160 Rel. on. (Para 7) Cases Referred: Chronological Paras (1974) Civil Appeal No. 3 of 1973 D/- 2-5-1974 (J & K) 9 (1959) ILR 38 Pat 1160 = 1960 BLJR 7 105

V. S. Malhotra, for Appellant; T. S. Thakur, for Respondents.

JASWANT SINGH C. J.:— This Civil first appeal is directed against the judgment dated November 30, 1972, of the learned Addl. District Judge, Jammu, decreeing the respondents' suit for ejectment of the appellant from the respondents' house called 'Tigers Den' situate near the Dogra Hall, Jammu.

2. It appears that the Union of India, appellant herein, through its Divisional Engineer, Telegraphs, Jammu, got on lease the aforesaid house of the respondents on April 10, 1967, at a monthly rental of Rs. 950/- which was to enure upto December 31, 1970. The rental value of the property having shot up during the currency of the lease, the respondents called upon the appellant to have the rent re-assessed. Failing to get a favourable response, the respondents served a notice under Section 80 of the Civil P. C. on the appellant intimating to it that the tenancy would stand terminated by efflux of time on December 31, 1970 and its possession beyond that date would be treated as unauthorised and it would be liable to pay Rs. 2460/- per month for the use and occupation of the premises beyond December 31, 1970, as per schedule of the CPWD rates. After the expiry of the aforesaid period of lease on the failure of the appellant to vacate the house, the respondents instituted a suit for ejectment of the appellant from the aforesaid house on April 29, 1971.

3. The suit was contested by the appellant averring, inter alia, that the lease deed gave it an option to extend the tenancy for a period of one year beyond December 31, 1970, and that it had given due notice for extension of the tenancy to the respondents, as was clear from letter No. ASP/39/70 dated March 28, 1970, addressed by Maj. Gen. A. S. Pathania, father of the respondents to the Divisional Engineer, Jammu. The appellant also averred that the Jammu and Kashmir Houses and Shops Rent Control Act, 1966

(hereinafter referred to as the 'Act') applied to the tenancy and it was fully protected from ejectment under the provisions of the Act. It was also contended by the appellant that the notice under Section 80 given by the respondents was not valid.

4. On the pleadings of the parties, the following issues were framed:—

1. Whether the tenancy between the parties stood extended upto 31-12-1971? OPD
2. Whether the Houses and Shops Rent Control Act is not applicable to the premises in dispute? OPP
3. Whether the notice under Section 80 CPC is not according to law? OPD
4. Relief. OPP

5. After a regular trial, the learned Addl. District Judge, Jammu on a consideration of the material on the record, came to the conclusion that the appellant had not been able to discharge the burden of proof of issue No. 1, that the Act did not apply to the case and that it had been conceded by the appellant that the notice under S. 80 of the Civil P. C. given by the respondents was valid. On these findings the learned Addl. District Judge decreed the respondents' suit, vide his judgment dated November 30, 1972. It is against this judgment that the present appeal is directed.

6. Appearing in support of the appeal, Mr. V. S. Malhotra has canvassed two points. He has firstly contended that it is amply proved from the aforesaid letter of Maj. Gen. A. S. Pathania that the notice as required by the lease deed in question was given to the appellant and it had exercised its option for extension of the tenancy for one year. He has next contended that the provisions of the Act apply to the tenancy and that the appellant was fully protected thereunder from eviction.

7. We have given our careful consideration to both these contentions of the learned counsel for the appellant but find ourselves unable to accede to the same. It is true that the lease deed contained a covenant which gave an option of renewing the lease of the premises to the appellant for a further term of one year, but the same was subject to the condition that the appellant would give notice of its intention of renewing the lease to the lessor at least six months before the expiry of the stipulated period. It would be advantageous in this connection to reproduce the relevant portion of the lease deed which runs as under:—

"And further that the lessee shall have the option of renewing the lease of the said premises for a further term of ... on giving notice of such intention to the lessor at least six months before the expiration of the lease hereby granted and the lessor shall forthwith execute and deliver to the lessee a renewed and duly registered lease of the said premises for such further term of years at the same rent and under the same conditions

as are herein contained excepting only this condition as to renewal. Provided that the notice for the renewal of the lease as aforesaid shall be deemed sufficient if signed by the Post Master General—the Director of Posts and Telegraphs—the Divisional Engineer Telegraphs—the Sub Divisional Officer of Telegraphs—the Superintendent of Post Offices—the Postmaster or Sub-Post Master—the Officer-in-Charge of the Telegraph Office." A careful perusal of the lease deed, would show that for the exercise of the option of renewing the lease for a period of one year, it was necessary for the appellant to serve a notice in writing on the respondents signed by the Post Master General, or the Director of Posts and Telegraphs, or the Divisional Engineer Telegraphs, or the Sub-Divisional Officer Telegraphs, or the Superintendent of Post Offices or the Post Master or the Sub-Post Master or the Officer-in-charge of the Telegraphs Office. In the instant case no such notice was given. Mr. Nagarajan, the only witness produced on behalf of the appellant, has admitted in cross-examination that for the renewal of the tenancy it was necessary for any of the aforesaid functionaries of the appellant to have served the respondents with a notice, and that no such notice was given by the department. The letter addressed by Maj. Gen. Pathania, alluded to above, does not show that any notice as contemplated by the aforesaid covenant was given by the appellant to the respondents. It is now well-settled that when the covenant of renewal is subject to the conditions precedent the right of renewal only arises when notice is given to the lessor in terms of the renewal clause and the lessee has performed all the conditions precedent as mentioned in the renewal clause. Reference in this connection may usefully be made to a Division Bench decision of the Patna High Court in (1959) ILR 38 Pat 1160 at p. 1187. As the notice contemplated by the aforesaid covenant for renewal was not given by the appellant to the respondents, the tenancy stood terminated on December 31, 1970. The first contention of Mr. Malhotra is therefore overruled.

8. For a proper decision of the second contention it is necessary to refer to the relevant portion of Section 1 (3) of the Act which is to the following effect:

"Notwithstanding anything contained in Sub-section (2), nothing in this Act shall apply to—

(i) any house or premises belonging to, taken on lease or requisitioned by the Government.

(ii) any house or shop which has been constructed on or after last day of the year 1965.

(iii) any tenancy in respect of any house or shop wherein the income of the tenant, whether accruing within or outside the State exceeds Rs. 20,000/- per annum."

We have now to see whether the appellant is protected under cls. (i) or (iii) of Section 1

(3) of the Act. It is not disputed that the expression 'the Government' occurring in cl. (i) (Supra) is not defined in the General Clauses Act. It is well-known that in a federal set up like ours, the governmental functions are shared by the State Government and the Central Government. So far as the affairs of the Union are concerned, they are administered by the Union of India and in relation to those affairs the expression 'the Government' occurring in the aforesaid cl. (i) of Section 1 (3) cannot but mean the Central Government. The appellant is not therefore entitled to the protection of clause (i).

9. It remains now to be seen as to whether the Union of India can invoke cl. (iii) of Section 1 (3) of the Act. It is well-settled that the net income as contemplated by the aforesaid cl. (iii) of Section 1 (3) of the Act means the income that remains with a tenant after compulsory deduction, say, for instance, by way of tax, or the income which remains after deducting from the total receipts the capital invested and the expenses incurred to secure the total receipts, depending on whether the tenant belongs to a fixed income group as in the former case or to a business community as in the latter case. No material has been placed before us to show that the net income of the Union of India does not exceed Rs. 20,000/-. In this view of the matter, the appellant cannot take advantage of cl. (iii) of Section 1 (3) of the Act. We are fortified in this view by an unreported decision of a Division Bench of this Court in Civil first appeal No. 3 of 1973 entitled *Rawel Singh v. Union of India*, decided on May 2, 1974.

In the result the appeal fails and is hereby dismissed, but without any order as to costs.

MUFTI J.:— I agree.

Appeal dismissed.

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**S. MURTAZA FAZL ALI, C. J. AND
JASWANT SINGH, J.**

Madan Mohan and others, Applicant: v. Kewal Krishen and another, Respondents.

Supreme Court Appln. No. 6 of 1973, D/- 21-3-1975*.

(A) Constitution of India, Article 133, (as amended by the Constitution (Thirtieth Amendment) Act, 1972) — Constitution (Application to Jammu and Kashmir) Second Amendment Order (1974) Para 2 — Pending application for grant of certificate — Conditions to be satisfied.

The Constitution (Thirtieth Amendment) Act, 1972 has a retroactive operation and

*(Application for leave to appeal to the Supreme Court against Judgment of this Court in Appeal No. 4 of 1972, D/- 10-12-1973.

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even the applications filed for grant of certificate before the commencement of the Constitution (Application to Jammu and Kashmir) Second Amendment Order, 1974 but not disposed of have to satisfy the requirements of Clause (1) of Article 133 of the Constitution of India as now amended. In other words the certificate in pending applications can only be granted by the High Court if the judgment, decree or final order involves a substantial question of law of general importance which in the opinion of the High Court needs to be decided by the Supreme Court. AIR 1974 Cal 321 and AIR 1975 Delhi 38 Relied on.

(Para 6)
Cases Referred: Chronological Paras
AIR 1975 Delhi 38 7
AIR 1974 Cal 321 7

I. K. Kotwal, for Applicants; T. S. Thakur, for Respondents.

JASWANT SINGH J.:— This is an application for grant of a certificate for the purpose of filing an appeal to the Supreme Court of India against our judgment and decree dated December 10, 1973 rendered in appeal No. 4 of 1972 preferred against the judgment and decree of a learned Single Judge of this Court dismissing the respondent's civil original suit for partition of certain properties.

2. Mr. T. S. Thakur appearing on behalf of the respondents has raised an objection to the effect that in view of the amendment of Article 133 of the Constitution brought about by the Constitution (Thirtieth Amendment) Act, 1972, which was applied to the State vide the Constitution (Application to Jammu and Kashmir) Second Amendment Order, 1974, the certificate sought for cannot be granted as the case does not involve a substantial question of law or of general importance requiring to be decided by the Supreme Court.

3. Mr. I. K. Kotwal appearing for the petitioners has on the other hand contended that since the impugned judgment was given by the court before the issue of the Constitution (Application to Jammu and Kashmir) Second Amendment Order, 1974 which came into force on June 26, 1974, and the application for leave to appeal was also made before that date and the said judgment is one of the reversal, his clients are as of right entitled to a certificate.

4. We have carefully considered the submissions of the learned counsel for the parties. The contention of Mr. Thakur is, in our opinion, well founded and must prevail. It is no doubt true that the impugned judgment is one of reversal. It is also true that the value of the subject-matter of the dispute in the Court of first instance and on appeal was and still is above Rs. 20,000/-. But these are no longer valid considerations as would be evident from a combined reading of the Constitution (Thirtieth Amendment) Act, 1972, and the Constitution (Application to Jammu and Kashmir) Second Amendment

Order, 1974. Whereas under Article 133 (1) (a) of the Constitution as it originally stood an aggrieved person was entitled as of right to a certificate if the value of the subject-matter of the dispute in the court of first instance and still in dispute on appeal was and continued to be not less than Rs. 20,000/- and the judgment sought to be appealed against was not one of affirmance, under Article 133 as now amended an appeal to the Supreme Court from a judgment, decree or final order in a Civil Proceeding of a High Court can lie to the Supreme Court only if the High Court certifies;

a) that the case involves a substantial question of law of general importance, and

b) that in the opinion of the High Court the said question needs to be decided by the Supreme Court.

5. In the instant case no such question in our opinion is involved.

6. Mr. Kotwal has next contended that his clients cannot be denied the certificate as their case squarely falls within the exception envisaged by clause (b) of Sub-Section (1) of Section 3 of the Constitution (Thirtieth Amendment) Act, 1972, as applied to the State. This contention is also misconceived. For a case to come within the ambit of Clause (b) of sub-section (1) of Section 3 of the Act, it is necessary that the certificate must have been given by the High Court before the commencement of the Constitution (Application to Jammu and Kashmir) Second Amendment Order, 1974 i. e. before June 26, 1974. In the instant case no certificate having been issued before the said date the application cannot be allowed at this stage. This view receives ample support from sub-section (2) of Section 3 of the Constitution (Thirtieth Amendment) Act, 1972 which so far as our State is concerned provides that subject to the provisions of sub-section (1) i. e. except in cases covered by sub-section (1) there will be no appeal to the Supreme Court from any judgment, decree or final order arising out of a suit or other civil proceeding which was instituted or commenced in any Court before the commencement of the Constitution (Application to Jammu and Kashmir) Second Amendment Order, 1974, unless it satisfied the provisions of Clause (1) of Article 133 as amended by the Constitution (Thirtieth Amendment) Act, 1972, which means that the Constitution (Thirtieth Amendment) Act, 1972 has a retroactive operation and even the applications filed for grant of certificate before the commencement of the Constitution (Application to Jammu and Kashmir) Second Amendment Order, 1974 but not disposed of have to satisfy the requirements of Clause (1) Article 133 of the Constitution of India as now amended. In other words the certificate in pending applications can only be granted by the High Court if the judgment, decree or final order involves a substantial question of law of general importance which in the opinion of the High Court needs to be decided by the Supreme Court.

7. I am fortified in this view by the decision of the Calcutta High Court in *Hukumchand Insurance Co. Ltd. v. Smt. Subashini Roy*, AIR 1974 Cal 321 where a similar contention was repelled by their Lordships of that court in the following words:—

“From a fair reading of the above provisions it is quite clear that under Cls. (a) and (b) the appeal either must be pending or preferred on or after the commencement of the Act by virtue of certificate already given by the High Court before the commencement of the Act under sub-clauses (a), (b) or Sub-clause (c) of Clause (1) Article 133. It is, however, said that the latter group of appeals will also include an application for appeal but we think the language of the statute is quite clear and does not admit of any such interpretation. Firstly because, there is no reference to these appeals in any form pending before the High Court at the commencement of Amendment Act and secondly because it is provided in the next paragraph that every such appeal would be heard and disposed of or as the case may be entertained and disposed of by the Supreme Court as if this Act had not been passed. It seems, therefore quite clear that all such appeals must be pending or preferred before the Supreme Court and not the High Court on or after the date of the commencement of the Amendment Act. We therefore, do not find any substance in the point raised.”

To the same effect is the recent decision of the Delhi High Court in *Gopi Krishan Khanna v. Smt. Kailash Wati* AIR 1975 Delhi 38 where it was held:

“The thirtieth amendment of the Constitution has substantially narrowed down the appellate jurisdiction of the Supreme Court in appeals from High Courts in regard to civil matters. It will be seen from sub-section (2) of Article 133 of the Constitution as amended, that it has created an absolute bar to an appeal under the said Article to the Supreme Court, unless such appeal satisfies the requirements of Article 133 (1). Under the amended Article 133 (1) an appeal lies to the Supreme Court from any judgment, decree or final order in a civil proceeding of a High Court, if the High Court Certifies that the case involves a substantial question of law of general importance and that in the opinion of the High Court the said question needs to be decided by the Supreme Court. The vested right of appeal whatever it was, has been specifically taken away by the Thirtieth Amendment to the Constitution. The language employed in sub-section (2) of Article 133 shows that Article 133 (1) has been given retrospective affect and now a right of appeal to the Supreme Court in a suit or other civil proceeding which was instituted or commenced in any court before the 30th Amendment came into force would be governed by Article 133 (1), as amended.”

8. As already observed, the instant case does not involve any substantial ques-

tion of law of general importance which requires to be decided by the Supreme Court. We cannot, therefore, see our way to grant the certificate sought for by the petitioners. The application is accordingly dismissed.

S. M. F. ALI, C. J.:— I agree.

Application dismissed.

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JASWANT SINGH AND MIAN
JALAL-UD-DIN, JJ.

Mohamad Syed Baba, Appellant v. M/s. Universal Timbers Traders, Respondent.

Letters Patent Appeal No. 2 of 1974, D/- 5-3-1975*.

(A) Contract Act (1872), Section 23 — Lease for extraction of timber granted by Govt. — Lessee not to transfer leasehold rights to any one without Govt. sanction — Agreement by lessee transferring lease rights without Govt. sanction held did not offend Section 23 and was not void.

Where the terms of the lease for extraction of timber granted by the Govt. prohibited the lessee from transferring the leasehold rights to any one without the sanction of the Govt. and the lessee under an agreement assigned the leasehold rights to a third person without the Govt's sanction, it was held that though the agreement offended the covenant in the lease deed it could not be said to be void as being against the provisions of law as contemplated by Section 23 or opposed to public policy. (1913) ILR 37 Bom 320 and AIR 1915 Bom 244 and AIR 1940 Bom 369 and AIR 1957 Him Pra 70 and AIR 1947 Sind 94 and AIR 1967 Mad 449 Rel. on.

(Paras 2, 6, 8, 13, 15, 19)

Cases Referred: Chronological Paras

AIR 1967 Mad 449 = (1967) 1 Ma	LJ
168	15
AIR 1957 Him Pra 70	12
AIR 1947 Sind 94 = 227 Ind Cas 633	15
AIR 1940 Bom 369 = 42 Bom LR 750	11
AIR 1915 Bom 244 = ILR 40 Bom 34 =	
30 Ind Cas 913	10
(1913) ILR 37 Bom 320 = 19 Ind Cas	9
442	

R. S. Mehta, for Appellant; I. K. Kotwal, for Respondent.

JASWANT SINGH J.:— This Letters Patent appeal is directed against an order dated April 27, 1974, passed by Thakur J. deciding issue No. 2 framed by him on April 2, 1974, in Civil Original Suit No. 10 of 1973, in favour of the respondent.

2. The facts leading to this appeal are: The appellant herein obtained from the State Government a lease for extraction of timber from compartments Nos. 33 to 36 of

*(Against Judgment of Thakur J. in O. S. No. 10 of 1973 D/- 2-4-1974).

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Basantgarh Range, Billawar Division, Jammu Circle, in the name of M/s. Farooq and Co. On July 15, 1972, there came into existence an agreement ostensibly executed by the appellant in favour of the respondent giving exclusive right to the latter "to carry out the remaining work" of the aforesaid lease. On April 26, 1973, the appellant brought a suit under Section 39 of the Specific Relief Act, for cancellation of the aforesaid agreement dated July 15, 1972, alleging inter alia that he was not conversant with the English language and had executed only a power of attorney in favour of the respondent on July 13, 1972, for carrying on the work of the aforesaid lease, that Shri Raj Kumar, partner of the respondent firm, obtained his signatures on a number of papers on the pretext that a number of copies of the power of attorney had to be prepared, that taking advantage of his simplicity and the fact that he was not conversant with the English language the said Raj Kumar and one Krishen Dutt who was in league with Raj Kumar got the aforesaid agreements dated July 15, 1972 signed by him making him believe that the deed was an agreement making the said power of attorney irrevocable and got it registered on the same day, that about April 19, 1973, the respondent made an application to the Forest Minister as well as to the Chief Conservator of Forests for transfer of his leasehold rights in the aforesaid lease on the basis of the agreement dated July 15, 1972, that this move on the part of the respondent put him on the alert and impelled him to apply for a copy of the agreement dated July 15, 1972, that on obtaining and examining the said copy he found that the respondent had by misrepresentation and fraud manipulated a complete transfer of his leasehold rights which debarred him from operating the lease under the aforesaid agreement with the State Government, and that in the circumstances the agreement dated July 15, 1972, was null and void. The appellant further pleaded that the agreement was also null and void as he was not competent to effect a transfer of the lease without the concurrence of the lessor in view of the following clause in the aforesaid lease deed:

"The purchaser (s) shall not be permitted to transfer his/their rights or liabilities under this agreement to any one without the previous sanction of the competent authority sanctioning the lease."

The appellant impleaded the Government of Jammu and Kashmir and the Chief Conservator of Forests as pro forma defendants in the petition of plaint of the aforesaid suit.

3. The respondent denied the allegations of fraud and misrepresentation and pleaded that the appellant voluntarily executed the aforesaid agreement as well as a power of attorney on July 15, 1972 and got them registered on the same date and it was not open to him to plead that the agreement was not effective as the concurrence of a third party was not there.

4. On the pleadings of the parties, the following two issues were framed on January 11, 1974:

1/- Whether the agreement dated 15-7-1972 entered into between the parties is void as the same was obtained by fraud and misrepresentation? O. P. P.

2/- In the event of Issue No. 1 being found against the plaintiff is the said agreement otherwise illegal and unenforceable in law? O. P. P.

5. On March 7, 1974, an application was made on behalf of the appellant before the learned trial Court praying that issue No. 2 which did not require any evidence to be adduced be tried and disposed of as a preliminary issue. According to the request of the appellant, the learned trial judge took up consideration of Issue No. 2 and decided the same in favour of the respondent vide his aforesaid order dated April 2, 1974, holding that the appellant could not avoid the contract evidenced by deed dated July 15, 1972, taking advantage of his own wrong and that the consideration or the object of the contract could not be said to be unlawful. It is against this order that the present appeal has been preferred.

6. Appearing on behalf of the appellant Mr. Mehta has submitted that the learned Single Judge has erred in deciding Issue No. 2 in favour of the respondent. He has vehemently urged that the aforesaid agreement dated July 15, 1972, being hit by Section 23 of the Contract Act was void and unenforceable in view of the aforesaid clause in the lease agreement between his client and the State which prohibited transfer of the leasehold rights in favour of any one without the previous sanction of the competent authority sanctioning the lease.

7. We are afraid we cannot accede to the contention of the learned counsel for the appellant.

8. A transfer or assignment of right can be said to be void only if it is prohibited by law or is opposed to public policy. If the transfer is neither prohibited by law nor opposed to public policy it cannot be held to be void merely because it is prohibited by a term of the contract by which the right transferred has been conferred upon the transferor. We are fortified in this view by a catena of authorities which would be referred to presently.

9. In *Karsan v. Gatlu Shivaji*, (1913) ILR 37 Bom 320 = 19 Ind Cas 442, where despite the prohibition contained in the liquor licence issued under the Abkari Act (Bombay 5 of 1878) to take a partner, a partner was taken, it was held that the act cannot be regarded as illegal.

10. Again in *Nazaralli Sayad Imam v. Babamiya Dureyatimsha*, ILR 40 Bom 64 = AIR 1915 Bom 244 = 30 Ind Cas 918, where a forest contractor took a partner in

contravention of the license given to him by the Forest Officer and subsequently on a suit being brought against him by the latter to recover his half share in the profits accruing from the forest contract, took inter alia an objection that the suit was bad as being based on an agreement which was void under Section 23 of the Indian Contract Act, it was held that although the terms of the license prohibited the assignment of a share or interest in the licence and the forest officer could revoke the license, the licensee's act in taking a partner could not be regarded as against law or defeating the provisions of law.

11. In *Bhagwant Ganuji Girme v. Gangabisan Ramgopal*, AIR 1940 Bom 369 where the terms of a lease of toll from the Government prohibited an assignment of the same except with the previous permission of the Collector and empowered the Collector to revoke the lease or impose penalty for breach of the terms of the lease and where an agreement assigning the lease without the aforesaid permission was made, it was held that the agreement only offended the covenant in the lease and not any provision of law contemplated by Section 23 of the Contract Act.

12. Then again in *Ram Chandra v. Jagan Nath*, AIR 1957 Him Pra 70, where a person obtained a lease of bamboo forest from the forest department and transferred his rights by an agreement to another without the permission of the forest department, it was held that there being nothing in the Forest Act to prohibit such transfer the agreement of transfer was not one forbidden by law or opposed to public policy and, therefore, void even though one of the conditions of the lease forbade such transfer.

13. In the instant case, it would be seen that the transfer or the Assignment of the rights in the aforesaid lease was not absolutely prohibited and no provision of law has been brought to our notice prohibiting such transfer. The impugned agreement cannot, therefore, be held to be illegal.

14. The impugned agreement cannot also be held to be opposed to public policy.

15. In *Vassandmal Davaldas v. Hiromal Mohanmal*, AIR 1947 Sind 94 where the grant of a plot of land contained a term which precluded B. the grantee, from disposing of any interest in it before any building had been erected but despite the clause 'B' entered into an agreement with 'A' whereby he shared the plot with 'A' and later on took forcible possession of the piece of land allotted by him to 'A', whereupon 'A' was compelled to bring a suit for possession and in defence it was contended by 'B' on the basis of the covenant in the grant that the agreement entered into by him with 'A' was void under Section 23 of the Evidence Act either as forbidden by law or as opposed to public policy it was held:

"The covenants in the grant were not provisions of law but even assuming they were so, the agreement alleged by A. that the land was to be taken jointly by A and B did not defeat any of them and hence was not unlawful, nor was it opposed to public policy."

Adverting to the contention that the agreement was opposed to public policy, it was further observed in this decision:

"The general head of 'public policy' covers a wide range of topics, such as for example, trading with the enemy in time of war, stifling prosecution, champerty and maintenance, and various other matters. But the doctrine of public policy is not to be extended beyond the classes of cases already covered by it. No court can invent a new head of public policy."

Again in *S. Meikole Udayar v. Periasami Konar*, AIR 1967 Mad 449, it was held:

"A contract can be said to be illegal if it is opposed to a statute or public policy. What is public policy is difficult to define. One can easily understand what it is though the range of understanding may vary with individuals."

It cannot be said that public policy is involved in a contract which expressly prohibits assignment or subletting merely because it is made with government authorities. Such a contract is just like any other contract and the fact that the Government is a party thereto would make no difference to the contract.

Therefore, if a partnership is formed to carry on such a contract even though the contract expressly prohibits assignment or subletting, it can never be termed as opposed to public policy and, therefore, illegal.

16. In view of the preponderance of judicial opinion referred to above, we are definitely of the view that the impugned agreement transferring or assigning the rights in the aforesaid lease to the respondent in violation of the aforesaid covenant in the lease deed, though it may be capable of being avoided by the Government which was not a party to the impugned agreement, cannot be held to be against the provisions of law as contemplated by Section 23 of the Contract Act or as opposed to public policy. The contention of Mr. Mehta, is, therefore, overruled.

17. For the foregoing reasons, the appeal fails and is hereby dismissed with costs.

18. It will be open to the appellant to raise by means of an amendment of this pleading a plea to the effect that the impugned agreement is bad as it violates Section 3 of the Registration of Contractors Act.

JALAL-UD-DIN J.:— 19. I have had the advantage of going through the well re-

asoned judgment prepared by my learned Brother Jaswant Singh J. I agree with my learned brother that the impugned agreement transferring the rights in the lease in favour of the respondent in contravention of the relevant clause in the lease agreement does not offend the provisions of Section 23 of the Contract Act and therefore cannot be said to be void on that score. There is no substance in the contention of the appellant that the agreement in favour of the respondent is void on the ground that there is an express covenant in the lease agreement prohibiting the transfer of lease rights and obligations in favour of any one. This covenant has got no statutory bearing or implication and will not therefore render the impugned agreement void. The transfer or assignment in favour of respondent is indeed a violation of the covenant. The same can, however, be taken notice of and appropriately dealt with by the competent authority that has sanctioned the lease. It is for that authority either to recognise the deed of transfer by according permission to it or to reject it by withholding permission.

20. There is however, another aspect of the matter which Mr. Mehta, the learned counsel for the appellant, has brought to our notice that the impugned agreement offends Section 3 of the Registration of Contractors Act and therefore is illegal and unenforceable at law. It, however, appears that the learned Single Judge while deciding issue No. 2 has merely addressed himself to the consideration of the constitutional aspect of the matter and has not gone beyond that in order to find out whether the impugned agreement defeated or did not defeat any other provision of law. Under Section 10 of the Contract Act all agreements are contracts enforceable at law if they fulfil the requirements as laid down in that section. According to the explanation appended to this Section an agreement is not enforceable at law if it does not conform to a law relating to the registration of documents. Therefore, if the plaintiff appellant can successfully establish the proposition that the impugned agreement could not validly be made as the same was in violation of the Registration of Contractors Act or defeated some of its provisions, it would follow that the said agreement is unenforceable at law and would not create any rights or obligations in favour of or against the respondent. This, however, is a matter which the plaintiff appellant can raise before the learned Single Judge by means of an appropriate motion.

21. I, therefore, concur with my learned Brother that the appeal be dismissed.

Appeal dismissed.

AIR 1976 JAMMU & KASHMIR 12

D. D. THAKUR, J.

Sarla Rani Gupta, Petitioner v. Bhushanlal, Respondent.

Civil Revn. No. 122 of 1973, D/- 10-1-1975*.

(A) Civil P. C. (1908), Section 151, Order 3 Rule 1 — Power to direct personal appearance of party in Court and direct his medical examination. (Constitution of India, Article 21). AIR 1955 Andh Pra 207 Dissented from.

Order 3 R. 1 clearly gives the power to the court to direct personal appearance of a party if the circumstances of the case so justify. In the instant case the issue under trial before the court below was whether the respondent was lunatic at the time of the marriage and whether he continued to be so. The lunacy of the respondent, therefore, was directly in issue before the court below. The personal appearance of the respondent under these circumstances was extremely necessary to enable the court to have an opinion formed as to whether the respondent was a lunatic. The court was not required to ask the counsel whether he was prepared to produce the respondent in the court. What was required to be done was to direct the personal appearance of the respondent to enable the court to come to some conclusion regarding his mental state, after putting questions to him. He could further be got examined medically and the evidence of the expert could be recorded even as a court witness to help the court to come to a correct conclusion. Such a power could be available to the court even under Section 151 a direction of the court to a person to submit to a medical examination for purposes of obtaining an evidence regarding his state of mind did not in any way impinge upon the liberty of that person and restrict the enjoyment of his personal liberty. The term "deprivation of life or his personal liberty" in Article 21 of the Constitution cannot include within its ambit a case of medical examination of a person who is a party in the proceedings in the court and whose state of mind is directly in issue in the case, if the medical evidence flowing from such an examination can provide an important material for returning a finding one way or the other. AIR 1955 Andh Pra 207 Dissented from.

(Paras 4, 6, 8)

Cases Referred: Chronological Paras
AIR 1955 Andh Pra 207 = 1955 Andh WR 13 5

S. P. Gupta, for Petitioner; Davinder Parihar, for Respondent.

ORDER:— The petitioner who was married to the respondent on 3-2-1972 filed an application on 25-3-1972 under Sec. 12 of the Hindu Marriage Act in the court of the

(Against order of Dist J. Jammu, D/- 6-11-1974).

DS/DS/B328/75/DHZ

District Judge, Jammu for a decree annulling the marriage on the ground that the respondent was a lunatic at the time of the marriage and continued to be so on the date of the presentation of the petition. The allegation regarding lunacy was denied by the respondent in the written objections filed by him through his guardian. On 28-8-1973 the court framed the following issues in the petition:—

- 1/- Whether the respondent was a lunatic on the date of the marriage and continued to be so at the time of the presentation of the petition? O. P. P.
- 2/- Whether the consent of the petitioner was obtained by fraud? O. P. P.
- 3/- To what relief is the plaintiff entitled? O. P. P.

2. The petitioner was asked to lead evidence on these issues. Some of the witnesses for the petitioner appeared before the court below whose statements were recorded. On 28-8-1973 the petitioner made an application before the court below that the respondent was posted at Srinagar but on account of his lunacy he had left the place of his posting and became violent. A prayer was made in this application that the Advocate for the respondent may be ordered to produce the respondent in person before the court and the court may order his examination by a medical expert. On this application the counsel for the respondent was asked by the court whether he would like to produce the respondent in the court. Mr. R. P. Bakshi, counsel for the respondent, declined to produce the respondent in the court whereupon the court vide its order dated 6-11-1973 directed the petitioner to lead further evidence. The court recorded the fact of Mr. Bakshi having refused to produce the respondent in the court for being medically examined but did not assign any reason whatsoever for not directing the respondent to appear in the court for being medically examined. This order of the learned District Judge is the subject matter of this revision application.

3. The sole question therefore which arises for consideration is whether the court below should have directed the respondent to appear in person in the court and whether he could be asked to submit to a medical examination.

4. Under Order 3 Rule 1 C. P. C. a party can appear through counsel or through an authorised agent unless of course the court directs otherwise. This provision clearly gives the power to the court to direct personal appearance of a party if the circumstances of the case so justify. The issue under trial before the court below was whether the respondent was lunatic at the time of the marriage and whether he continued to be so. The lunacy of the respondent, therefore, was directly in issue before the court below. The personal appearance of the respondent under these circumstances in my opinion was ex-

extremely necessary to enable the court to have an opinion formed as to whether the respondent was a lunatic. The counsel for the respondent could not be conceded the right to produce or to refuse to produce the respondent in the court. The court was not required to ask the counsel whether he was prepared to produce the respondent in the court. What was required to be done was to direct the personal appearance of the respondent to enable the court to come to some conclusion regarding his mental state, after putting questions to him. He could further be got examined medically and the evidence of the expert could be recorded even as a court witness to help the court to come to a correct conclusion. Such a power could be available to the court even under Sec. 151 of the C. P. C. It is not understandable as to how the learned District Judge thought fit to rest his judgment on the choice to be made by the counsel for the respondent.

5. Mr. Davinder Parihar who was appointed as guardian-ad-litem of the respondent in this court submitted that there was no provision in the C. P. C. under which the respondent could be ordered to appear in person or could be got medically examined against his wishes. So far as the personal appearance of the respondent in the court is concerned, as stated earlier, Order 3 Rule 1 C. P. C. provides a complete reply to the argument of Mr. Parihar. So far as the question of medical examination of the respondent is concerned, Mr. Parihar argued that a direction by the court to the respondent to submit to a medical examination brings about an undue restriction on his liberty and therefore under no provision of the C. P. C. could such a direction be issued by the court. According to him, Section 151 of the C. P. C. cannot be called in aid for passing such an order. He has in support of his arguments relied upon a judgment of the Andhra Pradesh High Court in *Pulavarthi Sreeramamurthi v. Pulavarthi Lakshmikantham* reported as AIR 1955 Andh Pra 207. Dealing with a similar question the court in the aforesaid judgment observed as under:—

"In absence of any statutory provision compelling the medical examination of a party and restricting the enjoyment of personal liberty of that person, it is not right to rely upon the general or inherent powers of the court under Section 151, C. P. C. to achieve that purpose."

6. I have considered the facts and the circumstances of that case but I regret my inability to agree with the ratio laid down in the aforesaid judgment. To me, it appears, that a court trying an issue regarding the mental state of a person has to record a positive finding regarding such a mental state. While determining that issue the person whose state of mind is in issue must necessarily be before the court. If the right to have that person medically examined is not conceded to the court it will amount to trying the issue

in abstract on evidence which may be indirect. It is not possible for me to hold that a direction of the court to a person to submit to a medical examination for purposes of obtaining an evidence regarding his state of mind in any way impinges upon the liberty of that person and restricts the enjoyment of his personal liberty. The medical examination of a person whose state of mind is the subject-matter of an issue cannot by any stretch of imagination be deemed to curb his liberty or restrict his freedom so as to violate any law which upholds or maintains the liberty of a person. The courts of law trying a cause of this nature cannot be made helpless by rendering them disabled to get a particular thing done the doing of which is extremely relevant and helpful in the determination of the issue under trial. As a matter of fact the legislature by enacting Section 151 C. P. C. had foreseen the inconceivable contingencies which might arise in the course of the trial of the issue by a Civil Court. It was for that reason that the power was given to the court to do all that, the doing of which was not expressly prohibited by the Code and the doing of which was extremely necessary in the interests of justice to enable the court to come to a correct decision.

7. The concept of personal liberty has to be looked at from a rational and a reasonable point of view and not from the point of view of a hypersensitive mind. If the view taken by the Andhra Pradesh High Court were correct highly anomalous and inconsistent results would follow. In a case of this nature the respondent may not at all choose to be examined medically and there may be no evidence of his state of mind available to the court and his adversary may not be held to have discharged the onus resting on him. The consequences, therefore, flowing from such an interpretation are likely to lead to most unjust results, in some cases defeating the very ends of justice. It has not to be forgotten that the fundamental purpose permeating the whole process of legal proceedings before a court is to arrive at a correct and a just conclusion. It is, therefore, imperative for a court to lean in favour of an interpretation, which promotes the prospects of the attainment of that purpose.

8. It is true that Article 21 of the Constitution of India provides that no person shall be deprived of his life or personal liberty except according to the procedure established by law but to my mind the term "deprivation of life or his personal liberty" cannot include within their ambit a case of medical examination of a person who is a party in the proceedings in the Court and whose state of mind is directly in issue in the case, if the medical evidence flowing from such an examination can provide an important material for returning a finding one way or the other. In a case in which the burden of proving insanity or lunacy of a person rests on his adversary, existence of negative evidence in proof of insanity

or unsoundness of mind cannot have the effect of discharging the petitioner's onus. The court may also in such circumstances feel substantially handicapped in coming to a correct conclusion. The absence of a power therefore to have a party to the cause medically examined shall materially obstruct the course of justice whereas the concession of such a power to the court would promote such ends and facilitate a correct judgment. That being the test under Section 151 C. P. C. I am firmly of the view that the power is implied under that section of the C. P. C.

9. It is a different thing if the court on a consideration of the circumstances of the case declines to exercise that power and rejects the prayer of a party. In a given case the court may not at all feel the difficulty in arriving at a conclusion on the basis of the material available in the absence of a medical examination. In such a case the court may justifiably refuse to grant the prayer but the judicial refusal to exercise a power has to be distinguished from refusal to act on the ground that the Court has no power. In the instant case the court below has assumed that the refusal on the part of the counsel to produce the respondent in the court for medical examination is sufficient to reject the prayer of the petitioner for the respondent's examination and it is here that the error has crept in which has vitiated the order impugned in this revision application.

10. For the foregoing reasons this revision application is allowed and the order of the Court below is set aside. The court below shall consider the prayer of the Petitioner in the right of the observations made above and pass orders accordingly. In the circumstances of the case the parties shall bear their own costs.

Revision allowed.

AIR 1976 JAMMU & KASHMIR 14

S. MURTAZA FAZL ALI, C. J.

Chairman Auqaf Committee, Appellant v. Suraj Ram, Respondent.

Second Appeal No. 126 of 1970, D/- 2-1-1975*.

(A) Jammu and Kashmir Muslim Wakafs Act (1959), Sections 43, 44 — Power vested in Auqaf Committee is not uncanalized or arbitrary.

An analysis of Sections 43 and 44 would show that the power vested in the Auqaf Committee is not uncanalized or arbitrary one but is a controlled one. The legislature has taken all possible precautions against any injustice being caused to any such person and the two sections i. e. Sections: 43 and 44 contain all the important indicia and rules of

*(Against judgment and decree of Dist J., Jammu, D/- 20-12-1969.

AS/ES/B471/75/RSK

natural justice. Not only this, but under Section 48 appeal lies from any order passed by the Committee under S. 44 i. e. the order of eviction to a District Judge, who is undoubtedly a very senior judicial officer so that the District Judge may examine the decision of the Committee in an objective manner. Neither before the District Judge nor before the Committee is there any provision in the statute which bars the unauthorised occupant from being defended through a lawyer. Finally Section 49 makes any order passed by the District Judge final and the jurisdiction of the Civil Court is ousted.

(Para 6)

(B) Jammu and Kashmir Muslim Wakafs Act (1959), Sections 43, 44 and 13 (2) (i) — Provisions are not violative of Article 14 of the Constitution on ground that remedies under Sections 43, 44 and 13 (2) (i) being purely, selective are discriminatory. (Constitution of India, Article 14).

The scope of Sections 43 and 44 and that of Section 13 (2) (i) is entirely different. Sections 43 and 44 deal specifically with the cases of unauthorised occupants whereas Section 13 (2) (i) deals with only the functions of the committee in protecting and defending the Wakf property. When the Committee has been armed with specific powers to deal with a particular situation, there is no reason to suppose that it should abnegate its functions and proceed under Section 13 (2) (i) of the Act. In fact Ss. 43, 44 contain procedure which is almost as effective and as exhaustive as that of a Civil Court. An occupant is given full and complete opportunity to defend himself and appeal is also provided against the order of the Committee to the District Judge, and the appellate order has been made final and cannot be questioned in any civil suit. In these circumstances; therefore, it can hardly be argued with any show of force that Article 14 of the Constitution of India is attracted to this case. AIR 1967 SC 1581 Distinguished. AIR 1974 SC 2009 Rel. on.

(Paras 8, 11))

(C) Constitution of India, Article 14 — Availability of two remedies — Not per se violative of Article 14.

The law emerging out of the Supreme Court decisions may be summarized as follows:—

a) That the mere fact that the power conferred by a statute on an authority is selective and is exposed to two remedies (i) to proceed in a civil suit and (ii) to resort to drastic procedure provided by the Act, is not by itself sufficient to attract Article 14 if the preamble of the Act contains sufficient guidelines and the order passed under the Act is subject to an appeal.

b) Merely because two remedies are left to the discretion of an authority, it is not reasonable to infer that the authority would take recourse to long drawn procedure of a civil suit in preference to a short and effective remedy provided by the Act. It will be

extremely fanciful to imagine that the authority should resort to artificial course of choosing the protracted proceedings unless the needs of the situation so demand in view of the complexities of the questions involved.

c) That there is no special charm contained in the procedure of the civil court and in the growing needs of the modern times if the procedure provided by an Act is reasonable and effective, so as to give sufficient opportunity to the aggrieved party to prove its case and incorporates rules of natural justice that is not discriminatory and can be preferred to the procedure of the Civil Court.

d) That the majority view taken in the Northern India Caterers case (AIR 1967 SC 1581) was not correct and the majority of the judges of the Supreme Court in Chhaganlal's case (AIR 1974 SC 2009) have expressed their dissent from the same.

(Para 11)

Cases	Referred:	Chronological	Paras
AIR 1974 SC 2009	=	(1974) 2 SCC 402	4, 8, 11, 12, 15
AIR 1967 SC 1581	=	(1967) 3 SCR 399	3, 4, 8, 9, 10, 11
AIR 1961 SC 1602	=	(1962) 2 SCR 125	8
AIR 1954 SC 545	=	(1955) 1 SCR 448	8
AIR 1952 SC 75	=	1952 SCR 284	8
AIR 1952 SC 123	=	1952 SCR 435	8

S. A. Salaria, for Appellant; V. S. Mahotra, for Respondent.

JUDGMENT:— This is defendant's second appeal in a suit filed by the plaintiff for an injunction restraining the defendant appellant from evicting him i. e. the plaintiff-tenant. The present suit has arisen in the following circumstances:

2. The plaintiff brought a suit in the court of Sub Registrar, Munsiff, Jammu, on the allegation that he was in possession of the property in question which consists of 3 marlas and 2 sarsaies of land over which the plaintiff had constructed a house. By virtue of an order passed by the Auqaf Committee under Section 44 of the Jammu and Kashmir Muslim Wakafs Act, 1959 (hereinafter referred to as 'the Act') the plaintiff was directed to be evicted from the premises. The plaintiff filed an appeal before the District Judge, Jammu against this final order and a compromise was arrived at between the parties by which the plaintiff agreed to vacate the premises on 31-7-61 and gave a statement in support of the compromise. On the basis of the statement, a compromise decree was passed by the District Judge, on 30-7-60. The plaintiff averred that in fact the property was not a Wakaf property at all and therefore the Committee had no jurisdiction to evict him. It was also pleaded that the admission made by the plaintiff before the District Judge was wrong on a point of fact and was made in ignorance of the rights of the plaintiff. The case was resisted by the defendant-Auqaf Committee who pleaded that the plaintiff was a tenant of the Committee having been induced

by the Committee on the land and the plaintiff had constructed a house thereupon without the permission of the Committee. The defendant further averred that in fact by virtue of the preliminary notice dated 22-11-1959 the plaintiff was asked to show cause why he should not be evicted from the premises because his possession was unlawful and unauthorised. The plaintiff, instead of showing cause to the Committee filed an appeal before the District Judge against this preliminary notice which was however dismissed by the District Judge on 18-12-1959 as being premature. Thereafter the committee continued its proceedings and sent a final notice D/- 6-2-1960 after hearing the plaintiff, directing the plaintiff to vacate the premises. This notice culminated in the final order directing the plaintiff to vacate. Thereafter the plaintiff filed an appeal before the District Judge against the order of eviction which was compromised on 30th July 1960 wherein the plaintiff admitted in tacit terms that he was the tenant of the defendant and he would vacate the premises by end of July 1961. Subsequently an application under S. 148 for extension of time was given by the plaintiff to the District Judge which was also dismissed on 11-8-1961. Thus having found himself unable to remain in possession of the premises, the plaintiff appears to have taken the aid of the Civil Court by filing a most ordinary type of a suit. In the present suit which was filed on 12-8-1961 the plaintiff prayed that the order of the Committee was without jurisdiction and that his admission before the District Judge could not be relied upon as it was made in ignorance of the real facts. The suit was decreed by the Munsiff on 18-3-1969 and the District Judge also dismissed the appeal of the defendant on 20-12-1969. Thereafter the defendant has come up in second appeal to this court and when the case was heard by me, I by my order dated 26-11-1970 remitted the case to the trial court for giving a finding on two issues namely:

- i) Whether the admission made by the plaintiff before the District Judge leading to the consent order dated 30-7-1960 was obtained by undue influence and duress practised by the defendant or the Police?
- ii) Whether the aforesaid admission was made in ignorance of the right of the defendant?

I further ordered that the finding of the Munsiff should come through the District Judge who will also give his opinion. A third issue was also framed by me and was remitted to the court below which related to the validity of the notice under Section 44 of the Act. Both the courts below have concurrently found in their reports that the admission made by the plaintiff was not made under undue influence and duress but was a voluntary one. It has also been found by them that the admission made by the plaintiff, resulting in

the decree for eviction, was not made in ignorance of the rights of the defendants.

3. On the question of the validity of the notice, however it was held that in view of the decision of the Supreme Court in Northern India Caterers (P) Ltd. v. State of Punjab reported in AIR 1967 SC 1581 provisions of Sections 43 and 44 of the Act were ultra vires. The appeal has now been placed before me for hearing and only two points have been argued before me by counsel for the respondent-plaintiff. The reports of the courts below containing the findings of fact have not been challenged before me and therefore it must be held that the decree passed by the District Judge on 30-7-1960 was a legal valid decree and was rightly passed on the admission of the plaintiff. It would also appear that if the admission was voluntary then it was established that the property in question was Wakaf property and the plaintiff was a tenant of the defendant.

4. Mr. V. S. Malhotra appearing for the respondent however submitted that in view of the decision of the Supreme Court in AIR 1967 SC 1581 (supra) which has not been overruled by the Supreme Court in its recent decision in M. Chhaggaanlal v. Greater Bombay Municipality reported in AIR 1974 SC 2009, the findings of the District Judge that Sections 43 and 44 of the Act are ultra vires as being violative of Article 14 of the Constitution of India must stand. Secondly it was argued that even if Sections 43 and 44 are constitutionally valid, then in view of the finding of the courts below, the order of eviction passed by the Committee would be washed out and fresh notice would be required to be given to the plaintiff by the Committee for eviction. I would first examine the argument relating to the constitutionality of Sections 43 and 44 of the Act in the light of the latest decisions of the Supreme Court in M. Chhaggaanlal's case.

5. Before however analysing this decision it may be necessary to examine the scheme and the provisions of the Jammu and Kashmir Muslim Wakfs Act, 1959. To begin with the Act clearly states in its preamble that it is an Act to provide for the better administration and the supervision of Muslim Wakfs. It would appear that in all the States the legislature has passed acts for the proper and better administration of Muslim Wakfs which under the Mohammedan Law have been held to be charitable endowments. In fact the Parliament has now consolidated the Wakafs and has passed one statute which governs all the wakafs in India. In the State also there are huge properties which lie within the administrative control of various Auqafs and it is only necessary in the interests of justice and preservation of charitable trusts that a proper scheme should be devised for the administration of the Wakf properties. It was therefore considered necessary in the betterment of the Wakaf properties that a special committee be constituted and special

powers have been conferred on this Committee to protect the Wakaf properties from being misused by unlawful occupants or trespassers, who may try to put forward hostile title and destroy the purpose of the Wakf itself. Consistent with this object in view, the Act was passed by the State legislature on 4th May 1959 and is called the Jammu and Kashmir Muslim Wakfs Act, 1959, being Act No. X of 1959. The preamble therefore contains in very clear and specific terms the guidelines and the purpose which has led to the conferment of various powers on the Auqaf Committee which is constituted under Section 9 of the Act. Furthermore, it would appear that the Committee to be appointed by the Government under Section 9 of the Act is a very high powered Committee and consists of not only legal experts but also eminent persons from public life such as financial experts, administrative experts, Mutwallis and Nishan Dehanda. In this connection Section 9 may be quoted here:—

"9. Appointment of members.— The members of the committee shall be appointed by the Government by notification in the Government Gazette from any one or more of the following categories of persons, namely;

(a) members of the State Legislature and members of the Parliament of India from the State;

(b) persons having special knowledge of the Muslim law;

(c) persons having special knowledge of the administration, Finance or law;

(d) Mutwallis of the Wakafs situated within the area; and

(e) Nishan Dehanda, if any, of any Dargah;

Provided that in no case shall more than one Mutwalli, Nishan Dehanda be appointed to a Committee."

It is, therefore, clear that the Committee consists of persons chosen from various strata of society and representing different shades of life who are expected to bear upon an independent and objective approach in the proper administration of the Wakf properties. It will also be noticed that Section 11 of the Act disqualifies the following persons from becoming members of the committee:

a) if he is not a Muslim;

b) if he is less than 21 years of age;

c) if he is found to be a person of unsound mind;

d) if he is an undischarged insolvent;

e) if he has on any previous occasion been removed from the office of a member or has been removed by the order of the competent Court from any position of trust either for the mismanagement or other misconduct;

f) if he has been convicted of any offence under this Act; or

g) if he is otherwise ill-reputed or of a bad character or is a habitual offender or is a receiver of a stolen property.

THE All India Reporter

1976

Karnataka High Court

AIR 1976 KARNATAKA 1

**D. M. CHANDRASHEKHAR AND
B. VENKATASWAMI, JJ.**

The Ideal Homes Co-operative Building Society Ltd., Bangalore, Appellant v. P. I. Joseph, Respondent.

Writ Appeal No. 242 of 1975, D/- 18-8-1975.

(A) Constitution of India, Art. 225 — Against whom writs can issue — Writ petition against non-statutory body like Co-operative Society constituted under Karnataka Co-operative Societies Act — Does not lie — Karnataka Co-operative Societies Act (11 of 1959), S. 70. W. P. 6344 of 1974, D/- 5-3-1975 (Kant), Reversed; (1963) 1 Mys LJ 204, Ref.; W. A. 264 of 1974, D/- 17-4-1974 (Kant); AIR 1962 Mad 169, Relied on. (Para 12)

Cases Referred: Chronological
(1974) W. A. No. 264 of 1974, D/- 17-4-1974 (Kant.) 9

(1963) 1 Mys LJ 204 9
AIR 1962 Mad 169 = (1961) 2 Mad LJ 279 11

(1953) 1 All ER 327 = (1953) 1 QB 704 11
(1924) 1 KB 171 = 93 LJKB 390 11

Decision of Karnataka High Court in E. S. Siddappa v. Asst. Registrar, Co-operative Societies 10

G. R. Doreswamy, for Appellant;
M. G. Narasimhaswamy for Raghupathy, for Respondent.

B. VENKATASWAMI, J.:— This appeal is by a Co-operative Society against an order of Jagannatha Shetty, J. in W. P. No. 6344 of 1974 (Kant) whereby a writ in the nature of certiorari had been issued, quashing the order of rejection of the nomination of the petitioner by the Society with a further direction to accept the same and proceed with the election to the Board of Directors of the Society.

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2. The facts, briefly, are as follows:

In connection with the election to the Board of Directors of the Ideal Homes Co-operative Building Society (for convenience, referred to as 'Society'), the respondent herein had submitted his nomination. On an objection by a member, by name Vedavalli, to the effect that the respondent had directly or indirectly an interest in a contract between the Society and a firm by name Bangalore Builders Private Ltd., of which he was the Managing Director, and also on account of a pending litigation between the said firm of builders and the Society, his nomination stood rejected. Aggrieved by the said action, the respondent approached this Court under Art. 226 of the Constitution for the issue of appropriate writ or direction quashing the said order of rejection and for acceptance of his nomination.

3. The petition was contested on behalf of the Society on the ground that such rejection was proper and that the case was not a fit one for the exercise of the discretionary jurisdiction of this Court, in that the petitioner had a speedy, adequate and efficacious alternative remedy under Section 70 of the Karnataka Co-operative Societies Act, 1959 (hereinafter referred to as the Act).

4. The learned Single Judge, in effect, came to the conclusion that the Managing Director of the firm of builders referred to, was a distinct and separate entity from the firm as such and, therefore, the respondent could not be said to be a person who had any interest in any contract between the Society and such firm. He, therefore, concluded that the rejection of nomination complained of was on account of an error of law apparent on the face of the record. In this view, he rejected the other contention urged on

behalf of the Society based on the alternative remedy available under Section 70 of the Act and issued the writ and direction as prayed for. Hence this appeal by the Society.

5. On behalf of the appellant, it was contended as follows: The conclusion of the learned Judge as to the nature of the interest possessed by the respondent in the Bangalore Builders had been arrived at without taking into account all the facts and circumstances bearing on the issue. At any rate, a clear and detailed investigation of all such facts and circumstances was called for, which could only have been possible in a regular enquiry held for the purpose under Section 70 of the Act, thus enabling the parties to adduce oral and documentary evidence for and against such an objection. Further, the contents of the objection statement of Vedavalli was neither detailed nor conclusive enough. In any event, the material already on record would warrant a conclusion that the respondent had indirectly at least sufficient interest in the contract between the Society and the firm of builders, thus entailing his disqualification to stand for the election in question.

6. It was further urged that in view of enunciations contained in certain decisions of Division Benches of this Court, to which we shall presently advert, the respondent ought to have been non-suited and petition dismissed.

7. On behalf of the respondent, it was submitted that the writ issued had almost been rendered infructuous in that the next election to the Board of the Society would be held in the next month (September, 1975) and, therefore, no useful purpose would be served in holding any other election just about one month prior to it. In substance, this submission would imply that if the nomination of the respondent were accepted for the next election, having regard to the law enunciated in the order impugned, the respondent would have no objection if the writ issued herein were not complied with. On the question of the existence of an alternative remedy under the Act, thus rendering it unnecessary to exercise the discretionary jurisdiction of the Court, under Art. 226 of the Constitution, it was contended that the availability of an alternative remedy, even if adequate and efficacious, would not be decisive, each case having to be examined on its own special facts and circumstances. It was also urged that the error of law in the instant case, as noticed by the learned Single Judge, being one plainly apparent on the face of the record, afforded sufficient justification for the exercise of the jurisdiction by the Court as it would clearly exclude any detailed enquiry being held. On the fur-

ther question whether a writ under Article 226 of the Constitution could at all issue against a Society, which was neither a Statutory body nor a Public Authority, it was simply submitted that the practice of this Court had always been to entertain such petitions against Co-operative Societies, as evidenced by some of the decisions.

8. On giving our careful and anxious consideration to the matter, we are clearly of the view that this appeal should succeed, having regard to the authorities cited on behalf of the appellant, nothing to the contrary having been shown on behalf of the respondent.

9. In the case of Lingan Gouda Siddan Gouda Patil v. Returning Officer in Karnataka Central Co-operative Bank. (1963) 1 Mys LJ 204, a Division Bench of the Court, held, inter alia, that any and every type of dispute arising in connection with an election of any office bearers in Section 70 (2) (c) of the Act was wholly within the purview of Section 70 and had to be dealt with as provided therein and all questions of fact and law could be gone into in a proceeding under the said section and where disputed questions of fact were involved, a reference under the said section was more appropriate remedy. It is also observed therein thus:

"Now there can be no doubt that an election referred to in Section 70 (2) (c) (which includes an election to the membership of the Managing Committee) being one necessary for the due conduct of affairs of a Society, the election itself may rightly be described as one of the affairs of the society." (Underlining is ours).

But, for the purpose of application of the above mentioned principles, we do not propose to examine whether in this case such disputed facts exist necessitating an enquiry under Section 70 of the Act, as in our view, having regard to the statement of the law in the case of T. S. Iyengar v. Deputy Registrar of Co-operative Societies, Mandya, (W. A. 264 of 1974 decided on 17-4-1974) (Kant), the petition filed as it is under Art. 226 of the Constitution would not lie against the Society which is a body constituted under the Act. However, we must observe that this point had neither been raised nor argued before the learned single Judge.

10. In the above mentioned case, a Division Bench of this Court has enunciated the position thus:

"We asked Sri B. M. Krishna Bhat, learned counsel for the appellant, as to how a writ petition is maintainable against orders of a society registered under the Co-operative Societies Act. It is not a statutory body nor does it perform any

statutory functions. The learned counsel brought to our notice the decision of this Court in K. S. Siddappa v. The Assistant Registrar of Co-operative Societies. In the said case, the question was not raised and it was never decided. It is now well settled that petitions under Article 226 are not entertained against non-statutory authorities or bodies. So the writ appeal is wholly misconceived and ill-advised." (Underlining is ours).

11. In further support of such a view, our attention was invited to a decision of the Madras High Court in C. Lakshmiah Reddiar v. The Sriperumbudur Taluk Co-operative Marketing Society, (1961) 2 Mad LJ 279 = (AIR 1962 Mad 169) in which a similar question had been raised and decided. After referring to the enunciations occurring in Rex v. Electricity Commr. (LR (1924) 1 KB 171), and R. v. Disputes Committee of Dental Technicians [(1953) 1 All ER 327], Rajamannar, C. J., speaking for the Bench, has observed thus:—

"..... In the case before us the proceedings sought to be quashed were the proceedings of a meeting of the Board of Directors of a Co-operative Society. The Board in considering the objections to the nominations for the election of members of the Board of Directors is not a statutory Tribunal with authority to determine the rights of parties. No doubt, the Directors at a meeting of the Board discharged the functions entrusted to them by the Regulations, but these Regulations are framed by the Society itself and have no statutory force. Clearly, therefore an order of this Court under Art. 226 of the Constitution cannot issue to quash the proceedings of such a body." (Underlining is ours).

12. In the light of the above principles, we hold that the present petition under Art. 226 of the Constitution would not lie against the appellant-Society.

13. In the result, this appeal succeeds and is accordingly allowed. Consequently, and in reversal of the order under appeal, we dismiss W. P. 6344 of 1974 (Karna.), but without costs.

Appeal allowed.

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K. JAGANNATHA SHETTY, J.

Kamaxi Kom Bhikku Shetty, Petitioner v. Vaman Thippayya Bhattageri, Respondent.

Civil Revn. Petn. No. 1944 of 1973, D/- 30-5-1975.*

(A) Civil P. C. (1908), O. 21, R. 84 — Re-sale — 'Forthwith' — Meaning of.

The contention that the re-sale was illegal as it was held on the same day after the abortive sale cannot be accepted in view of the meaning of the word 'forthwith'. The word 'forthwith' ordinarily means immediately or without delay, but how soon it should be, all depends upon the facts and circumstances of each case. The resale should be held as expeditiously as circumstances permit and every case should be taken to avoid all unnecessary delay. As fresh sale proclamation is not called for, the re-sale on the same day immediately following on the abortive sale should always be encouraged if circumstances justify. AIR 1930 Mad 761 (FB), Rel. on. (Para 7)

Cases Referred: Chronological Paras
AIR 1948 Nag 142 = 1948 Nag LJ 15 7
AIR 1930 Mad 761 = 59 Mad LJ 267 (FB) 7

T. S. Ramachandra, for Petitioner; B. V. Krishnaswamy Rao, for Respondent.

ORDER:— This revision petition arises out of an order made on an application under Order XXI, Rule 90 for setting aside a re-sale and is concerned with the scope of the word "forthwith" occurring in Order XXI, Rule 84 of the Code of Civil Procedure.

2. A few more facts are necessary to appreciate the contention urged. In execution of a decree, against the petitioner, his immovable property was brought for sale at 10-45 A. M. on 27th July, 1966. There were several intending purchasers. One Mahabaleshwar offered the highest bid of Rupees 10,000/-. The bid was accepted, but the purchaser did not deposit 25 per cent. of the sale price as required under Order XXI, Rule 84 of the Code of Civil Procedure. The matter was brought to the notice of the Court. The Court cancelled the sale and directed a re-sale. At that time, the decree-holder, the respondent before me, came forward with a prayer for leave to bid and set-off under Order 21, Rule 72. The leave was granted and the sale was held at about 5-45 P. M. on the same day. The decree-holder was the only person present and offered the bid. His bid was accepted, and the property was sold for Rs. 622.81. That was the decretal amount.

3. The re-sale was followed by an application from the judgment-debtor for setting aside the sale under Order XXI, Rule 90,

* (Against order of N. K. Karwar Civil J., in Ex. Appeal No. 36 of 1972, D/- 29-3-1973).

complaining that there was material irregularity or fraud in publishing or conducting it. The evidence regarding the material irregularity consists of the sole testimony of the judgment-debtor, and in rebuttal the decree-holder has examined himself.

4. The executing Court, after considering the evidence, has held that there was no irregularity in conducting the re-sale, and it was not illegal to hold it on the same day. The same was the view taken by the Appellate Judge.

5. Before me, Shri. T. S. Ramachandra, learned counsel for the petitioner, urged that the re-sale held on the same day after the abortive sale was illegal and it should have been held after a reasonable time so that the bidders may come after notice.

6. The contention turns on the meaning of the word 'forthwith' occurring in Order XXI, Rule 84 (1) of the Code of Civil Procedure which reads as follows:—

"On every sale of immovable property the person declared to be the purchaser shall pay immediately after such declaration a deposit of twenty-five per cent. On the amount of his purchase-money to the officer or other person conducting the sale, and in default of such deposit, the property shall forthwith be re-sold."

7. In support of the contention counsel relied upon two decisions: (1) Madhao Narayanrao v. Mt. Watsalabai, (AIR 1948 Nag 142) and (2) Venkatasubbiar v. Akkamma, (AIR 1930 Mad 761) (FB).

In Madhao Narayanrao Ghatate's case, Hidayatullah, J., as he then was, observed that the word 'forthwith' is ordinarily to be understood to mean 'within a reasonable time.'

In (Chintala) Venkatasubbiah's case, Beasley, C. J., who spoke for the Full Bench observed:

"It is very difficult to say how the word 'forthwith' should be defined; but we think that the rendering of it by Jackson J., is probably, as good a one as there can be and that 'as expeditiously as circumstances permit' is probably the correct definition of that word. Another rendering might be "such time as appears to be reasonably early having regard to all the circumstances." Obviously in some cases it might reasonably be held that the re-sale should take place immediately following on the abortive sale."

In both the cases, it has not been observed that a re-sale held after the abortive sale on the same day was illegal or contrary to Order XXI, Rule 84 of the Code of Civil Procedure. If the interpretation proposed for the petitioner is accepted, it would run counter to the plain meaning of the word 'forthwith'. The word 'forthwith' ordinarily means immediately or without delay, but how soon it should be, all depends upon the facts and circumstances of each case. As Beasley, C. J., observed in Venkatasubbiah's case that it should be 'as expeditiously as circumstances

permit', for which I may add that every care should be taken to avoid all unnecessary delay. If I may put it, as fresh sale proclamation is not called for, the re-sale on the same day immediately following on the abortive sale should be encouraged if circumstances justify.

8. Regarding the material irregularity complained of, there is nothing on record to help the case of the petitioner. She has stated in her evidence that there is no evidence to prove that the property sold, was of the value of Rs. 10,000/-. This shows that the highest bid of Rs. 10,000/- offered by Mahabaleshwar at the first sale was not genuine offer. He was none other than the natural father of the adopted son of the petitioner. He had no interest in buying the property except to sabotage the sale. The Courts below were, therefore, right in holding that there was no material irregularity in conducting the sale. That finding cannot be disturbed in this revision petition.

9. In the result, the petition fails and is dismissed; but I make no order as to costs. Petition dismissed.

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D. M. CHANDRASHEKHAR AND
B. VENKATASWAMI, JJ.

N. S. Ganesh Rao, Petitioner v. Sarpina D'Souza Bai and another. Respondents.

Civil Revn. Petn. No. 1618 of 1973,
D/- 11-8-1975.*

(A) Karnataka Rent Control Act (22 of 1961), S. 48 (1) — Appeal first preferred to District Judge, transferred by him to Additional District Judge — Latter Judge has jurisdiction to hear and decide it — (Karnataka Civil Courts Act (21 of 1964), S. 5).

An Additional District Judge of the District Court having jurisdiction over an area in which the premises are situate, has jurisdiction to hear and decide on appeal under Sec. 48 of the Act, when such appeal has been transferred or assigned to him by the District Judge of that Court. (Para 28)

Even though an Additional District Judge has not been conferred under the Karnataka Civil Courts Act, 1964, the powers of the District Court, when once a case is assigned or transferred to him by the District Judge under Sec. 5 (2) of that Act, he has all the powers of the District Judge under that Act or any other law for the time being in force, in respect of that case, and he can hear and

*(Against order of Addl. Dist. J., Mangalore in H. R. C. A. No. 30 of 1969, D/- 18-4-1973.)

decide that case in the same manner as the District Judge could have done. (Para 11)

There is nothing in Sec. 48 of the Rent Control Act, which expressly or by necessary implication, requires that an appeal under that section should be heard and decided by the Principal District Judge only and not by an Additional District Judge. (Para 15)

Though the term "District Judge" has been used in Sec. 48 of the Act, the appeal provided thereunder is in reality to the Court of the District Judge. (Para 23)

Cases Referred: Chronological Paras

AIR 1969 SC 483 = 1969 Cri LJ 803 16
(1968) 1 Mys LJ 573 = 15 Law Rep 81 13
AIR 1964 All 562 = 1964 All LJ 256 (FB) 23
(1964) 2 Mys LJ 458 5, 6, 9, 15
AIR 1961 SC 606 = (1961) 1 Cri LJ 740 22
AIR 1953 SC 357 = 1953 SCR 1028 24, 25
AIR 1949 Nag 408 = ILR (1950) Nag 145 26
AIR 1924 Mad 561 = 46 Mad LJ 201 (FB) 22

P. Ganapathy Bhat for K. Krishna Bhat, for Petitioner; B. V. Acharya, for Respondent No. 2.

CHANDRASHEKHAR, J.:— This revision petition under Section 50 of the Karnataka Rent Control Act, 1961, (hereinafter referred to as the Act) has been referred by one of us to a Division Bench in view of the importance of the question arising for decision, namely, whether an Additional District Judge has jurisdiction to hear and decide an appeal under Section 48 of the Act.

2. The petitioner herein is a tenant. The respondent herein had made an application under Section 21 of the Act for evicting him from the petition premises. The learned Munsiff had dismissed their application. They preferred an appeal to the District Judge, South Kanara, who transferred it to the Additional District Judge of the District Court, South Kanara. The learned Additional District Judge reversed the decision of the learned Munsiff and made a decree for eviction of the tenant. Feeling aggrieved by the decision of the learned Additional District Judge, the tenant has come up in revision.

3. Sri P. Ganapathy Bhat, learned counsel for the petitioner, contended that the judgment of the learned Additional District Judge was void and without jurisdiction as an appeal under Section 48 of the Act can be heard and decided only by the District Judge having jurisdiction over the area in which the petition premises are situate and that that section does not empower an Additional District Judge of a District Court to hear and decide such appeal.

4. Sub-sec. (1) of Section 48 of the Act, reads:

"48. Appeals.— (1) Notwithstanding anything contained in any law for the time being in force, every person aggrieved by an order under Section 14, Section 16, Section 17 or Section 21, passed by the Controller or the Court, may within thirty days from the date of the order, prefer an appeal in writing to the District Judge having jurisdiction over the area in which the premises are situate." (Underlining is ours).

The above sub-section is in pari materia with Sec. 15 (1) (a) of the Mysore House Rent & Accommodation Control Act, 1951, which reads:

"15 (1) (a)..... any person aggrieved by an order..... passed by the court or the Controller may, within fifteen days from the date of the order, prefer an appeal in writing to the District Judge having jurisdiction over the area in which the house is situate." (Underlining is ours).

5. Dealing with a similar contention, namely, that an Additional District Judge had no jurisdiction to hear and decide an appeal under Section 15 of the Mysore House Rent and Accommodation Control Act, 1951, a Division Bench of this Court (of which one of us was a member) held in Haji M. P. Mohammad v. Sheikh Ahmed (1964) 2 Mys LJ 458 that an Additional District Judge of a District Court is as much a District Judge of that Court as the Principal District Judge of that Court, that Section 15 of that Act made no distinction between the Principal District Judge and an Additional District Judge of that Court and that an Additional District Judge of a District Court having jurisdiction over the area in which the house was situated, had jurisdiction to hear and decide an appeal under that section in respect of such premises. The Division Bench repelled the contention that since Section 15 of that Act did not confer appellate authority on the District Court but only on the District Judge, an Additional District Judge could not share that appellate power with the Principal District Judge.

6. However, Mr. Ganapathy Bhat contended that the decision in Haji M. P. Mohammad's case (1964) 2 Mys LJ 458 turned upon the provisions of Sections 4-A and 4-B of the Mysore Civil Courts Act, 1883, which was in force when that case was decided and that the jurisdiction and powers of Additional District Judges are materially different under Section 5 of the Karnataka Civil Courts Act, 1964, which has superseded the Mysore Civil Courts Act, 1883.

7. We have set out below the material portions of Section 4-A and Section (Contd. on Col. 2)

The Mysore Civil Courts Act, 1883.

Sec. 4-A: The State Government may by notification fix, and from time to time vary, the number of Judges to be appointed for a District..... Court.

Sec. 4-B: When more than one Judge is appointed for a District..... Court, one of the Judges shall be appointed the Principal Judge and the others Additional Judges. Each of the Judges appointed to a District..... Court may exercise all or any of the powers conferred on the Court by this Act or any other law for the time being in force.

Subject to the general or special orders of the High Court, the Principal District Judge may from time to time, make such arrangements as he thinks fit for the distribution of the business of the Court among the various Judges thereof.

8. Mr. Ganapathy Bhat is right in contending that there is an important distinction between the powers of an Additional District Judge under Section 4-B of the Mysore Civil Courts Act, 1883, and those under Section 5 (2) of the Karnataka Civil Courts Act, 1964. The former section provided that each of the Additional District Judges appointed to a District Court might exercise all or any of the powers conferred on that Court by that Act or any other law for the time being in force. But Section 5 (2) of the Karnataka Civil Courts Act does not authorise an Additional District Judge appointed to a District Court to exercise all or any of the powers conferred on that Court by that Act or any other law for the time being in force. What that subsection empowers an Additional District Judge of a District Court, is to discharge all or any of the functions of the District Judge of that Court under that Act or any other law for the time being in force which the District Judge may assign to him. Unless the District Judge of a District Court assigns to an Additional District Judge of that Court any of the former's functions, the latter cannot exercise functions of the District Judge even though he is an Additional District Judge of that Court.

9. But, the question is whether the aforesaid distinction between the powers of an Additional District Judge

4-B of the Mysore Civil Courts Act, 1883, and Section 5 of the Karnataka Civil Courts Act, 1964:

The Karnataka Civil Courts Act, 1964:

Sec. 5 (1): The State Government may, on the recommendation of the High Court, appoint one or more Addl. District Judges to a Dist. Court for such period as it may deem necessary.

(2) The Additional District Judge so appointed shall, subject to the general or special orders of the High Court, discharge all or any of the functions of the Dist. Judge under this Act, or any other law for the time being in force which the Dist. Judge may assign to him, and in the discharge of those functions, he shall exercise the same powers as the District Judge.

under Section 4-B of the Mysore Civil Courts Act, 1883, and those under Section 5 (2) of the Karnataka Civil Courts Act, 1964, renders the ruling in Haji M. P. Mohammad's case, (1964) 2 Mys LJ 458 inapplicable after the Mysore Civil Courts Act, 1883, was superseded by the Karnataka Civil Courts Act, 1964.

10. Mr. Ganapathy Bhat laid particular emphasis on the words "having jurisdiction over the area in which the premises are situated" which follow the words "the District Judge" in Section 48 (1) of the Act and he maintained that only the District Judge can be said to have jurisdiction over the area in which any premises are situate and that an Additional District Judge cannot be said to have jurisdiction over any such area, since his (the Additional District Judge's) power under Sec. 5 (2) of the Karnataka Civil Courts Act, is only to exercise such functions as may be assigned to him by the District Judge. In other words, the contention of Mr. Ganapathy Bhat was that since an Additional District Judge under the Karnataka Civil Courts Act, 1964, unlike his counterpart under the Mysore Civil Courts Act, 1883, is not conferred all the powers of the District Court and his power is only to hear such cases as may be assigned to him by the District Judge having jurisdiction over the area in which the premises are situate, the District Judge alone has been authorised

by Section 48 of the Act to entertain and decide appeals.

11. Even though an Additional District Judge has not been conferred under the Karnataka Civil Courts Act, 1964, the powers of the District Court, when once a case is assigned or transferred to him by the District Judge under Section 5 (2) of that Act, he has all the powers of the District Judge under that Act or any other law for the time being in force, in respect of that case, and he can hear and decide that case in the same manner as the District Judge could have done. In the present case, as the District Judge, South Kanara, had transferred the appeal (out of which this revision petition has arisen) to the Additional District Judge, the latter had jurisdiction to hear and decide it.

12. However, Mr. Ganapathy Bhat contended that though Section 5 (2) of the Karnataka Civil Courts Act, 1964 empowers an Additional District Judge to discharge all or any of the functions of the District Judge under that Act or any other law for the time being in force, the Additional District Judge cannot exercise jurisdiction of the District Judge under Section 48 of the Act for two reasons. The first reason, according to Mr. Ganapathy Bhat, is that the Act is a self-contained one and that Section 48 of the Act which confers the appellate power on the District Judge having jurisdiction over the area in which the premises are situate, excludes the application of the general provision in Section 5 (2) of the Karnataka Civil Courts Act, 1964, which empowers an Additional District Judge to discharge all or any of the functions of the District Judge.

13. Support for the above contention was sought to be derived from certain observations of Somanath Iyer, J. (as he then was), in *Winnifred Mathias v. Louisa Correa*, (1968) 1 Mys LJ 573. There it was contended that in spite of Section 15 of the Mysore House Rent & Accommodation Control Act, 1951, providing that an appeal from an order of the Court of the Munsiff lies to the District Judge, an appeal from a decree for eviction passed by the Court of the Munsiff would lie to the Court of the Civil Judge, since Section 20 of the Karnataka Civil Courts Act, 1964, provides that appeals from decrees and orders passed by a Munsiff in original suits and proceedings of a civil nature shall lie to the Court of the Civil Judge and that an appeal from a decree or order of the Court of the Munsiff on an application under Section 21 of the Act, lies to the Court of the Civil Judge and not the District Judge. While repelling that contention, Somanath Iyer, J. (as he then was), observed that the Act is a

complete and exhaustive code with respect to control of rents and eviction and the other matters in regard to which that legislation was enacted, that it is that special law by which all proceedings arising under that Act are governed, and that it is that special law which holds the field to the exclusion of the general law which the Karnataka Civil Courts Act is.

14. Mr. Ganapathy Bhat argued that from the aforesaid observations of His Lordship it follows that the provision in Section 48 of the Act that an appeal shall lie to the District Judge, should hold the field to the exclusion of the provision in Section 5 (2) of the Karnataka Civil Courts Act that an Additional District Judge may exercise all the functions of the District Judge in cases assigned to him by the latter.

15. We are unable to accept the above contention of Mr. Ganapathy Bhat. The aforesaid observations in *Haji M. P. Mohammad's case* (1964) 2 Mys LJ 458 that Section 15 of the Mysore House Rent and Accommodation Control Act, made no distinction between the Principal District Judge of a District Court and an Additional District Judge of that Court, are equally applicable to Section 48 of the Act which also does not make any distinction between the Principal District Judge and an Additional District Judge. As pointed out therein by Somanath Iyer, J. (as he then was), the definite article, 'the', preceding the words 'District Judge', has no other purpose than to identify the particular District Judge having jurisdiction over the area in which the premises are situate and the purpose of that definite article is not to specify the Principal District Judge of the District Court. We are unable to find anything in Section 48 of the Act, which expressly or by necessary implication, requires that an appeal under that section should be heard and decided by the Principal District Judge only and not by an Additional District Judge.

16. The second ground on which Mr. Ganapathy Bhat contended that Section 5 (2) of the Karnataka Civil Courts Act, 1964, cannot clothe an Additional District Judge with the jurisdiction of the District Judge, was that Section 48 of the Act provides for appeal to the District Judge and that an Additional District Judge cannot be regarded as the District Judge. Support for the contention was sought to be derived from certain observations of the Supreme Court in *Hari Chand v. Batala Engineering Company* (AIR 1969 SC 483). There, the validity of an order of requisitioning made by an Additional District Magistrate, in exercise of the powers under the Defence of India Act, 1962, came up for consideration. The

Central Government, by its notification dated 13-12-1962, in exercise of the powers under Section 40 (1) of that Act, had authorised the District Magistrates to exercise the powers of requisitioning under Section 29 of that Act. The exercise of that power by the Additional District Magistrate, was sought to be justified under Section 10 (2) of the Code of Criminal Procedure, 1898. The State Government by a notification had authorised the Additional District Magistrate to exercise all or any of the powers of the District Magistrate under that Code or any other law for the time being in force. The Supreme Court held that even though the Additional District Magistrate had been empowered under Section 10 (2) of the Code of Criminal Procedure, 1898, to exercise all or any of the powers of the District Magistrate, the District Magistrate and the Additional District Magistrate were two different and distinct authorities, that by no stretch of reasoning could an Additional District Magistrate be called the District Magistrate and that the Additional District Magistrate could not be held to be competent to exercise the powers of the District Magistrate under Section 10 (2) of the Code of Criminal Procedure, 1898.

17. The main reason given by the Supreme Court for holding that the Additional District Magistrate was not competent to exercise the powers of the District Magistrate, is contained in para. 9 of the judgment, which reads:

"It has not been disputed that the powers of requisitioning are of a very drastic nature and involve the fundamental rights in respect of property guaranteed under Article 19 (1) (g) of the Constitution. The Central Government while making the delegation of its power under Section 29 of the Act must ordinarily be presumed to be fully conscious of this aspect of the matter and it was for that reason that an officer or authority of the high status of a District Magistrate in the district was empowered to exercise that power."

18. The above reasoning of the Supreme Court has, in our opinion, no application to the exercise of the normal judicial power to hear and decide appeals conferred by Section 48 of the Act.

19. Moreover, the Additional District Magistrate is of a lower rank than the District Magistrate and subordinate to the latter. But in Karnataka State Judicial Service, there is no separate cadre of Additional District Judges. Both the District Judge and the Additional District Judge are of the same cadre. Where there are more than one District Judge in a District Court, the senior of them will be designated as the Principal District Judge

and the others will be designated as Additional District Judge or Judges.

20. There is nothing in Section 48 of the Act which indicates that the appellate jurisdiction conferred on the District Judge thereunder, should be exercised only by the Principal District Judge of a District Court and not by an Additional District Judge of that Court.

21. There is one more reason to hold that an Additional District Judge to whom an appeal under Section 48 of the Act has been transferred by the Principal District Judge, has power to hear and decide such appeal. Though Section 48 of the Act designates the District Judge and not the District Court as the appellate authority, the conferment of the appellate jurisdiction on the District Judge, appears to us to be by virtue of his presiding over the District Court and the District Judge is not a persona designata.

22. In *Central Talkies Ltd. v. Dwarka Prasad* (AIR 1961 SC 606), Hidayatullah, J. (as he then was) who spoke for the Court, said that a persona designata is "a person who is pointed out or described as an individual, as opposed to a person ascertained as a member of a class, or as filling a particular character". His Lordship quoted with approval the observations of Schwabe, C. J., in *Parthasaradhi Naidu v. Koteswara Rao* (AIR 1924 Mad 561) (FB) that persona designata are "persons selected to act in their private capacity and not in their capacity as Judges."

23. In construing the expression 'the Munsiff exercising jurisdiction' under Section 7-E of the U. P. (Temporary) Control of Rent and Eviction Act, 1947, Desai, C. J., who delivered the leading opinion of the Full Bench in *Chatur Mohan v. Ram Behari* (AIR 1964 All 562) observed thus at pages 564 and 565:

"I am not enamoured of the distinction made between 'a Munsiff' and 'a court of Munsiff' and of the argument based upon it to the effect that 'a Munsiff' acts as a persona designata, whereas 'a court of Munsiff' acts as a court constituted under the Bengal, Agra and Assam Civil Courts Act When the Legislature referred in S. 7-E to the 'Munsiff having jurisdiction', it does not seem to have meant the person presiding over a Court of Munsiff as distinct from the Court and to have referred to the fact of his presiding over the court simply to describe him. He seems to have been selected on account of his presiding over a court of Munsiff."

The above observation will, in our opinion, apply with equal force to the expression 'the District Judge having jurisdiction over the area in which the pre-

premises are situate' occurring in Section 48 of the Act. Though the term 'District Judge' has been used in Section 48 of the Act, the appeal provided thereunder is in reality to the Court of the District Judge.

24. As pointed out by the Supreme Court in *National Sewing Thread Co. Ltd. v. James Chadwick & Bros.* (AIR 1953 SC 357), where a new jurisdiction is given to an established Court without more, it imports that the ordinary incidents and the ordinary rules of procedure of that Court are to attach to exercise of such jurisdiction also.

25. Under Section 5 (2) of the Karnataka Civil Courts Act, 1964, the District Judge of a District Court has power to transfer or assign to an Additional District Judge of that Court any suit appeal or proceeding of a civil nature on the former's file. In the light of the aforesaid pronouncement by the Supreme Court in the *National Sewing Thread Co.'s* case, AIR 1953 SC 357 the same power to transfer or assign to an Additional District Judge, must be held to be applicable to the special jurisdiction given by Sec. 48 of the Act to the District Judge, as there is nothing in that Section which, expressly or by necessary implication, forbids transfer or assignment of an appeal thereunder to an Additional District Judge.

26. In *Ganpat v. Mahadeo* (AIR 1949 Nag 408) a question arose whether an Additional District Judge can exercise the powers of a District Judge in the matter of granting probate of a will. The Division Bench (consisting of Bose, C. J. and Mangalmurthy, J.) observed that as the Additional District Judges had been exercising jurisdiction in granting probate, for many years, if there was any doubt on the point, then it should be resolved so as to hold that their jurisdiction was proper. However, their Lordships held that in that case there was not much doubt because in their view the Judges of the District Court include not only the District Judges properly so termed but also all the Additional District Judges appointed to that Court.

27. Additional District Judges have been hearing appeals under Section 48 of the Act ever since the Act came into force in the year 1961. Even if there should be any doubt as to their jurisdiction to hear such appeals, it should be resolved so as to hold that they have such jurisdiction. But, in our opinion, there can be no serious doubt about their jurisdiction.

28. For the reasons stated above, we hold that an Additional District Judge of the District Court having jurisdiction over an area in which the premises are situate, has jurisdiction to hear and decide an appeal under Section 48 of the

Act, when such appeal has been transferred or assigned to him by the District Judge of that Court.

29. We shall now proceed to consider the attack of Mr. Ganapathy Bhat on the merits of the appellate judgment of the learned Additional District Judge.

30. The landlords had prayed for eviction of the tenant (the petitioner herein) on the ground that they reasonably and bona fide require the petition premises for their own occupation. Their case was briefly as follows: Seraphina D'Souza Bai (original respondent 1 herein) had two houses in Mangalore, the petition premises being one of them. She had settled the petition premises on her second son, Pascal D'Souza (respondent 2 herein), reserving her right of residence therein during her lifetime. She had settled another house on her elder son, Herald D'Souza and was living therein along with her second son. Differences had arisen between her and her second son on the one hand and Herald D'Souza on the other hand. Herald D'Souza had issued a notice to them asking them to leave his house. Hence, they required the petition premises for their own occupation and they had no other house in Mangalore.

31. The learned Munsiff did not believe that there was any quarrel between Herald D'Souza on the one hand and his mother and his younger brother on the other and that the latter reasonably and bona fide required the petition premises for their own occupation. In appeal, the learned Additional District Judge held that there was no reason to disbelieve the landlords' case that they had no other premises of their own in Mangalore and that their desire to occupy the petition premises was both reasonable and bona fide.

32. In this petition, Mr. Ganapathy Bhat submitted that the mother had settled the bigger house on Herald D'Souza and the petition house which is smaller on her second son as a mere device to evict the tenant from the petition premises and that if she really intended to reside with her second son, she would have settled the bigger house on him instead of settling it on Herald D'Souza and that hence the landlords cannot be said to require the petition premises bona fide.

33. Seraphina D'Souza Bai, original respondent 1 herein, has since died. The only question that survives now for determination is whether her second son (respondent 2 herein) reasonably and bona fide requires the petition premises for his own occupation.

34. The mere circumstance that the settlor chose to settle the bigger of the two houses on her elder son and the

smaller house on her younger son with whom she intended to reside, is wholly insufficient to infer that the settlement was sham and had no legal effect. Since the younger son (respondent 2 herein) is a married person with children, it is not unnatural for him to desire to set up a separate household instead of continuing to live with his elder brother, Herald D'Souza. The learned Additional District Judge rightly accepted his case that he wanted to occupy the petition premises for his residence.

35. Mr. Ganapathy Bhat next contended that the learned Additional District Judge has not considered the question of comparative hardship to the landlords and the tenant. Mr. Ganapathy Bhat said that in Mangalore it is extremely difficult, if not impossible, for the tenant to find alternative accommodation within his means.

36. It is not correct to say that the learned Additional District Judge has not considered the question of comparative hardship. He has observed in para. 9. of his judgment that the tenant had not deposed that he attempted to secure another house and failed in his attempt or that he had applied to the Controller for allotment of a house and that the landlord could not be expected to look out for a rented house for his occupation. The learned Additional District Judge has rightly held that greater hardship would be caused by refusing a decree for eviction than by granting it.

37. All the contentions of Mr. Ganapathy Bhat therefore fail and we dismiss this petition, but without costs.

38. However, having regard to acute scarcity of accommodation in Mangalore City, we grant time to the tenant (the petitioner herein) till 30-6-1976 to vacate the petition premises.

Petition dismissed.

AIR 1976 KARNATAKA 10

D. M. CHANDRASHEKHAR AND
B. VENKATASWAMI, JJ.

Y. R. Raju and another, Appellants
v. The Karnataka Revenue Appellate Tribunal and others, Respondents.

Writ Appeals Nos. 870 and 871 of 1974, D/- 13-6-1975.*

(A) Karnataka Motor Vehicles Rules (1963). R. 178 — Appeal — Pending appeal against order of Transport Authority on application for grant of permit objector dying — If and when his successor not entitled to hearing in the appeal — (Motor Vehicles Act (1939), S. 64 (2) (as

*(Against order passed by this Court reported in AIR 1975 Kant 171.)

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amended by Act 16 of 1955 of Karnataka).
AIR 1975 Karnataka 171, Reversed.

Section 64 even as amended by Karnataka Act 16 of 1955 does not expressly provide for hearing of objectors in an appeal against the order of the Transport Authority on an application for grant of permit. But the necessary implication of Rule 178 is that objectors are entitled to such hearing. Thus such hearing should be afforded to them. AIR 1957 SC 232 and (1966) 2 Mys LJ 199, Relied on.

(Paras 7, 10 and 11)

When after the death of the permit holder it is transferred to the person succeeding to the possession of the vehicle covered by that permit, the successor takes the place of that deceased holder. When that holder had filed objections to an application for grant of a permit and had therefore a right to be heard in an appeal filed against the order of the Transport Authority on such application, it follows that his successor has a similar right to be heard in that appeal. The appellants therefore have an obligation to bring that successor on record and such obligation cannot be evaded by merely getting the name of the deceased objector deleted from the appeal. AIR 1975 Karnataka 171, Reversed; AIR 1970 SC 759 and AIR 1974 SC 1274, Distinguished.

(Paras 13 and 17)

Cases Referred: Chronological Paras
AIR 1974 SC 1274 = (1974) 3 SCR 931

14, 15

AIR 1970 SC 759 = (1969) 2 SCR 507

14, 15

(1966) 2 Mys LJ 199 = (1966) 7 Law Rep 752

AIR 1957 SC 232 = 1957 SCR 98

H. B. Datar and C. S. Shanthamallappa, for Appellant; M. R. Venkatanarasimhachar, for No. 1; M. Rangaswami, for No. 4 (a) and (b), for Respondents.

JUDGMENT:— These two appeals are from the common order of Jagannatha Shetty, J., in Writ Petitions Nos. 2496 and 2497 of 1972 = (Reported in AIR 1975 Kant 171). The appellants were the petitioners therein.

2. K. Muniswamy and Syed Ibrahim, respondents 4 and 5 respectively, had made an application before the Regional Transport Authority, Bangalore, (hereinafter referred to as the R.T.A.) for grant of a permit to operate a stage carriage between Kelamangala and Bangalore. Kelamangala being in Tamil Nadu, the route between these two places is an inter-State route. When the R.T.A. notified that application, Y. K. Rudrappa, father of the appellant in Writ Appeal No. 870 of 1974, who was one of the operators over a section of that route, and Choodappa, the appellant in Writ Appeal No. 871 of 1974, who was also one of the

operators over a section of that route, filed their objections before the R.T.A. against grant of such permit. After considering the objections, the R.T.A. by its resolution, rejected the application for grant of such permit.

Against that resolution, respondents 4 and 5 herein preferred an appeal to the Karnataka State Transport Appellate Tribunal (hereinafter referred to as the S.T.A.T.), which dismissed that appeal. Against the order of the S.T.A.T., respondents 4 and 5 herein preferred to the Karnataka Revenue Appellate Tribunal (hereinafter referred to as the K.R.A.T.), a further appeal in which notices were issued to the objectors before the R.T.A. including Y. K. Rudrappa and Choodappa. A counsel undertook to appear for Y. K. Rudrappa in that appeal. In the meanwhile Y. K. Rudrappa died on 6-4-1969. His eldest son, Y. R. Raju, the appellant in Writ Appeal No. 870 of 1974, made an application to the R.T.A. for transfer of the permit held by his father. On 3-5-1969, the R.T.A. ordered transfer of that permit to him and such transfer was effected on 24-5-1969. On 6-9-1972, the power of attorney holder for respondents 4 and 5 herein, filed before the K.R.A.T. an application accompanied by an affidavit praying that the name of Y. K. Rudrappa, respondent 11 in that appeal, might be deleted. The material portion of the affidavit reads:

"I submit that the respondent No. 11 in the above appeal Mr. Y. K. Rudrappa died in the year 1969. I hereby gave up that respondent and withdraw my appeal against the said respondent for the reason that he is not interested in the matter because at the time of his making representations opposing my application, he was holding a stage carriage permit between Bangalore and Anekal. That permit was nationalised by the Mysore Government Road Transport Department. Therefore, neither he nor his heirs are any way interested or has any cause of action in the matter.

Therefore, I submit that I hereby withdraw my appeal against that respondent at my own risk."

The K.R.A.T. does not appear to have made any separate order on that application. However in the judgment of the K.R.A.T., there is a note at the foot of the cause title, which reads:

"The appellants withdraw the appeals against respondent No. 11 (Y. K. Rudrappa)."

The K.R.A.T., by its judgment dated 14-9-1972, allowed the appeal, reversed the order of the S.T.A.T. and the resolution of the R.T.A. and ordered that the appellants therein should be granted a permit to operate a stage carriage on the proposed

ed route between Kelamangala and Bangalore.

3. In the writ petitions, the judgment of the K.R.A.T. was assailed on several grounds, the first of which was that it was vitiated on account of the legal representative of deceased Y. K. Rudrappa not having been brought on record in that appeal. It was contended on behalf of Choodappa that the route map appended to the application for the permit, did not correctly set out the actual positions of intermediate places on the route and that hence that application was not a valid one.

4. The learned single Judge took the view that the right to object to an application for grant of a permit, is a right personal to the objector and that his successors cannot claim, as of right, to be heard and that hence they are not necessary parties to an appeal from the decision of the R.T.A. granting or refusing such permit. The learned single Judge held that the error in the application in setting out the intermediate places on the route, had been corrected by the K.R.A.T. and that such error was not fatal to the application for the permit.

5. In these appeals, Mr. H. B. Datar, learned counsel for the appellants, contended that the above views taken by the learned single Judge are clearly unsustainable. Mr. Datar maintained that a person who files objections to an application for grant of a permit, has a right to be heard not only before the Transport Authority, but also in every successive appeal from its decision and that after the death of such objector, his legal representatives are also entitled to be heard before the Transport Authority and also in such appeal especially when they (the legal representatives) are in possession of the vehicle in respect of which such objector held a permit. It was also contended by Mr. Datar that as the appellants before the K.R.A.T., had not chosen to bring on record the legal representatives of deceased Y. K. Rudrappa and had deleted his name, the appeal was liable to be dismissed on the ground that the necessary parties had not been impleaded.

6. On the other hand, Mr. M. Rangaswamy learned counsel for legal representative of deceased respondent 4, and Mr. M. R. Venkatanarasimhachar, learned counsel for respondent 5, sought to support the judgment of the K.R.A.T.

7. Neither in sub-section (1) of Section 64 of the Motor Vehicles Act, 1939, which provides for an appeal from the decision of the Transport Authority, nor in sub-section (2) of that section (added by a local amendment, namely, Karnataka Act No. 16 of 1955) which pro-

vided for a second appeal, do we find any express provision that an objector to a grant of permit before the Transport Authority, should be issued a notice of the appeal and should be heard in such appeal.

8. In the *New Prakash Transport Co. Ltd. v. The New Suwarna Transport Co. Ltd.* (AIR 1957 SC 232), the Supreme Court observed that the substantive Section i.e., Section 64 of the Motor Vehicles Act, creating the right of appeal, does not, in terms, create any right in a respondent to be heard, and that the rules framed providing for the procedure before the appellate authority contemplate that sufficient notice shall be given to "any other person interested in the appeal" which expression must include persons other than the appellant who may be interested in being heard against the points raised in support of the appeal.

9. In *Lakshminarasimhaiah v. Secretary, M.R.A.T.* (1966) 2 Mys LJ 199, a Division Bench of this Court observed that in all matters in which the Motor Vehicles Act does not contain an express provision, a tribunal like the R.T.A., has the power to invent or mould an appropriate procedure which would be necessary for the continuance of a proceeding which does not abate on the death of a party to it.

10. Clause (ii) of sub-rule (4) of Rule 178 of the Karnataka Motor Vehicles Rules, 1963, (hereinafter referred to as the Rules), provides, inter alia, that an appeal shall be accompanied by six copies of the memorandum of appeal with prescribed process fee. Sub-rule (6) of that Rule provides that in an appeal, the S.T.A.T. or the K.R.A.T. may, after hearing the parties concerned, direct that the execution of the order appealed against be stayed pending disposal of the appeal. The necessary implication of these provisions of Rule 178 is, in our opinion, that persons who were objectors before the R.T.A. should be heard in the appeal before the S.T.A.T. or the K.R.A.T. arising out of the decision of the Transport Authority on an application for grant of a permit.

11. In view of the aforesaid observations of the Supreme Court and this Court and the provisions of Rule 178 of the Rules, it is clear that even in the absence of an express provision in Sec. 64 of the Motor Vehicles Act a person who had filed his objections before the Transport Authority for grant of a permit, is entitled to be heard by the appellate authority in an appeal from the decision of the Transport Authority. The more material question is whether on the death of such objector during the pendency of such appeal, his legal representatives are entitled to be heard in such appeal.

12. Sub-sec. (2) of Section 61 of the Motor Vehicles Act provides that the Transport Authority may, on application made to it within three months of the death of the holder of a permit, transfer the permit to the person succeeding to the possession of the vehicles covered by the permit. When after the death of the holder of a permit, it is transferred to the person succeeding to the possession of the vehicle covered by that permit, such person stands in the shoes of the original holder of the permit. If the original holder of a permit had filed his objections to an application of another person for grant of a permit and had therefore a right to be heard in an appeal arising from the decision of the Transport Authority on such application, it follows, in our opinion, that on his death his successor to whom such permit is transferred, has a similar right to be heard in such appeal.

13. As the permit held by Rudrappa was transferred after his death to his eldest son, Raju, (the appellant in Writ Appeal No. 870 of 1974), the latter was entitled to be heard in the appeal before the K.R.A.T. and hence there was, in our opinion, an obligation on the appellants before the K.R.A.T. to bring on record Raju in place of deceased Rudrappa and such obligation could not be evaded by merely deleting the name of deceased Rudrappa in the cause title of the memorandum of appeal.

14. However, Mr. Rangaswamy and Mr. Venkatanarasimhachar contended that in view of the decisions of the Supreme Court in *Dhani Devi v. S. B. Sharma* (AIR 1970 SC 759) and *R. L. Jain v. Maya Kaur* (AIR 1974 SC 1274), on the death of an objector to an application for grant of a permit, the transferee of the permit held by him cannot be regarded as being entitled to be heard either before the Transport Authority or in an appeal from its decision.

15. In *Dhani Devi's* case, AIR 1970 SC 759, the applicant for grant of a permit died before the final disposal of his application by the R.T.A. The question that arose for decision by the Supreme Court, was whether the R.T.A. had power to allow the person succeeding to the possession of his vehicle, to prosecute that application. After pointing out that Section 57 of the Motor Vehicles Act does not deal with the situation arising on the death of an applicant for grant of a permit, nor prescribes any time for making of an application for substitution of the successor, their Lordships observed that in the absence of any statute or statutory rule, the Transport Authority may devise any reasonable procedure for dealing with the situation and has complete discretion in the matter of allowing or refusing sub-

stitution, but that the Transport Authority is not bound to allow substitution if the same would delay the proceedings unreasonably or would otherwise be detrimental to the interests of the public generally. In R. L. Jain's case, AIR 1974 SC 1274 the Supreme Court reiterated its earlier view in Dhani Devi's case, AIR 1970 SC 759 and added that the discretion of the Transport Authority to allow or refuse such substitution, has to be exercised in a judicial manner in the facts and circumstances of each case.

16. In each of the aforesaid two cases, the death was of the applicant for permit and not of the objector to such application and such death was during the pendency of the proceedings before the Transport Authority and not during the pendency of an appeal from its decision. Hence the observations of the Supreme Court in these two decisions, have no application to the questions whether the successor of an objector who dies during the pendency of the appeal from the decision of the Transport Authority, has a right to be heard in such appeal and whether the appellant should bring on record such successor.

17. We are unable to agree with the view taken by the learned single Judge that Raju, the eldest son of Rudrappa, to whom the permit held by Rudrappa had been transferred, was not entitled to be heard in the appeal and that there was no need to bring him on record in place of deceased Rudrappa.

18-21. xx xx =x

22. In the result, we allow these two appeals, reverse the common order of the learned single Judge, set aside the judgment of the K.R.A.T. dated 14-9-1972 in Appeal No. 189 of 1974 (MV) and remand that appeal to the K.R.A.T. with a direction to dispose of it afresh after bringing on record Y. R. Raju in place of Rudrappa.

23. In the circumstances of the case, we direct the parties to bear their own costs in these appeals.

Appeals allowed.

AIR 1976 KARNATAKA 13

M. SADANANDASWAMY, J.

Ahmed Khan, Appellant v. Mohamad Khasim Sab, Respondent.

Execution Second Appeal No. 1 of 1973, D/- 14-7-1975.*

*(Against judgment of Principal Civil J., Shimoga, in Ex. App. No. 18 of 1972, D/- 6-6-1973.)

IS/JS/D407/75/VSS

(A) Civil P. C. (1908), S. 47 — Execution proceedings — Objection that decree is a nullity on ground of want of inherent jurisdiction to make — Objection if and when entertainable for first time in execution — (Evidence Act (1872), S. 115).

Lack of inherent jurisdiction goes to the root of competence of Court to try such a case and renders decree a nullity. When a decree which is a nullity is sought to be executed, an objection in that behalf may be raised in a proceeding for execution. When the decree is made by a Court which has no inherent jurisdiction to make, an objection as to its validity may be raised in an execution proceeding if the objection appears on the face of the record. Where the objection as to the jurisdiction of the Court to pass the decree does not appear on the face of the record and requires examination of the questions raised and decided at the trial or which could have been but have not been raised, the executing Court will have no jurisdiction to entertain an objection as to the validity of the decree even on the ground of absence of jurisdiction. Case law discussed. (Para 8)

The executing Court cannot therefore, hold an investigation in order to determine whether the Court which passed the decree lacked jurisdiction to do so.

(Para 10)

Though an admission made by the party or his counsel on a question of fact is binding on him, a concession made by a counsel on behalf of his party on a question of law will estop him or his client from withdrawing from such concession at later stage of the same proceeding or in appeal or revision therefrom. Case law referred.

(Para 11)

Held on facts and circumstances of the case that the admission made by the counsel for defendant in executing Court amounts to an admission on a question of law, that is open to the decree-holder to take the contention as he did in lower appellate Court that the Mysore House Rent Control Act, 1961, did not apply to suit schedule site and that it is not apparent on the face of record that the court which passed decree for eviction lacked inherent jurisdiction to pass it.

(Para 13)

Cases Referred: Chronological Paras

(1975) 1 Andh WR 60 =	(1974) 2 APLJ	6
200		6
(1974) 2 Mad LJ 122 =	87 Mad LW 333	6
AIR 1973 SC 2391 =	(1974) 1 SCR 290	5
AIR 1972 Madh Pra 217 =	1972 MPLJ	9
347		9
AIR 1970 SC 1475 =	(1971) 1 SCR 66	8
AIR 1969 Bom 24 =	70 Bom LR 37	11
(1966) 1 Mys LJ 162 =	(1966) 5 Law Rep	6
520		6

AIR 1965 Mys 253 = (1965) 1 Mys LJ 26 11

AIR 1962 SC 199 = (1962) 2 SCR 747 3, 6

AIR 1961 Mys 29 = 1960 Mys LJ 106 6

AIR 1954 SC 340 = 1955 SCR 117 2

AIR 1951 Mad 796 = (1951) 1 Mad LJ 244 11

AIR 1928 Mad 900 = 109 Ind Cas 178 11

(1886) 13 Ind App 134 = ILR (1887) 9 All 191 4

R. N. Byra Reddy and Sri Sreerangaiah, for Appellant; M. S. Gopal, for Respondent.

JUDGMENT:— The respondent-decree-holder filed the suit, O. S. No. 317 of 1964 against the appellant-judgment-debtor for declaration of title, for recovery of arrears of rent and for possession of the suit schedule site described as Site No. 1 in Sy. No. 38 of Anehalli Inam Village situated within the municipal limits of Bhadravathi Town. The suit was dismissed by the trial court. The plaintiff's appeal was allowed by the first appellate court in R. A. No. 140 of 65 on the file of the Additional Civil Judge, Shimoga. Thereafter, the respondent took out the present execution petition. The appellant contended that the decree obtained by the respondent is a nullity on the ground that the Munsiff Court, Bhadravathi, did not have jurisdiction to pass a decree for eviction, since the subject-matter of the suit was governed by the provisions of the Mysore House Rent Control Act, 1961. The execution court held that the Rent Control Act applied to the subject-matter of the suit, but that since the judgment-debtor did not raise the plea with regard to lack of jurisdiction in the suit it is not open to him to raise it in the present execution proceeding. The lower appellate Court held that there is no proof that the Mysore Rent Control Act is applicable to the site in question and that the decree cannot be said to be a nullity. It accordingly overruled the objections of the judgment-debtor and ordered the execution to proceed. It is against this order that the present appeal has been filed by the judgment-debtor.

2. In *Kiran Singh v. Chaman Paswan* (AIR 1954 SC 340), it has been observed as follows:—

"It is a fundamental principle well established that a decree passed by a Court without jurisdiction is a nullity, and that its invalidity could be set up whenever and wherever it is sought to be enforced or relied upon, even at the stage of execution and even in collateral proceedings. A defect of jurisdiction, whether it is pecuniary or territorial, or whether it is in respect of the subject-matter of the action, strikes at the very authority of the Court to pass any decree, and such

a defect cannot be cured even by consent of parties."

3. In *Hira Lal Patni v. Sri Kali Nath* (AIR 1962 SC 199), it has been held:

"The validity of a decree can be challenged in execution proceedings only on the ground that the court which passed the decree was lacking in inherent jurisdiction in the sense that it could not have seized of the case because the subject-matter was wholly foreign to its jurisdiction or that the defendant was dead at the time the suit had been instituted or decree passed; or some such other ground which could have the effect of rendering the court entirely lacking in jurisdiction in respect of the subject-matter of the suit or over the parties to it."

4. The principle laid down by the Privy Council in (1886) 13 Ind App 134—that consent or waiver can cure defect of jurisdiction but cannot cure inherent lack of jurisdiction was proved. That was a case where objection was taken during the execution proceedings relating to territorial jurisdiction. It was held that the objection as to local jurisdiction of a court does not stand on the same footing as an objection to the competence of a court to try a case, that competence of a court to try a case goes to the very root of the jurisdiction, and where it is lacking it is a case of inherent lack of jurisdiction. It was held that the conduct of the defendant estopped him from challenging the territorial jurisdiction of the Bombay High Court to entertain the suit and to make a reference to the arbitrator and that he was equally estopped from challenging the authority of the arbitrator to render the award.

5. In *Chandrika Misir v. Bhaiyalal* (AIR 1973 SC 2391), it is held that though the plea with regard to lack of jurisdiction had not been raised in the trial court, since it was a question relating to inherent lack of jurisdiction of the Court, such a plea may be raised at any stage and even in execution proceedings on the ground that the decree was a nullity. The jurisdiction of the Civil Courts was taken away in respect of a suit for ejectment of persons occupying land without title, under Section 209 of U. P. Act No. 1 of 1951. Section 209 related to suits for ejectment of persons occupying land without title where the land formed part of the holding of a bhoomidar. According to the finding of the lower Court, the defendant in that case was retaining possession of the land contrary to law, the land was bhoomidari land and the plaintiffs bhoomidars. In the appeal by Special Leave against the judgment of the High Court in second appeal, the Supreme Court held that since the Civil Court which entertained the suit suffers from an inherent lack of jurisdiction the decree

dismissing the suit must be confirmed though the High Court had dismissed the suit on the ground of limitation.

6. Mr. Byra Reddy relied on the decision in *H. V. Rajan v. C. N. Gopal*, 1960 Mys LJ 106 = (AIR 1961 Mys 29) wherein it has been held that under Section 8 of the Mysore Rent Control Act, 1951 no tenant can be evicted whether in execution of a decree or otherwise, notwithstanding anything contained in any agreement or law to the contrary, excepting in accordance with the provisions of that Section or Section 7 (3) of the same Act and that a landlord who seeks to evict a tenant in possession, will have to apply to the court as defined in Section 2 (2) of the Act.

In *Bipathumma v. Hariam Bibi* (1966) 1 Mys LJ 162, it has been held that the principal mandate of Section 21 of the Mysore Rent Control Act, 1961, is in the form of prohibition towards the Court against making any order or decree for recovery of possession.

He next relied on the decision in *State of Madras v. Charles Harold Simpson*, (1974) 2 Mad LJ 122. In that case the objection taken to the execution of the decree related to the pecuniary jurisdiction of the Court which passed the decree. The observations in AIR 1962 SC 199, were referred to and it was held that the objection as to local jurisdiction of a Court does not stand on the same footing as an objection to the competence of the Court to try a case, that the competence of a Court to try the case goes to the very root of the jurisdiction, and where it is lacking, it is a case of inherent lack of jurisdiction.

He next relied on the decision in *Adapa Gopala Rao v. Bandaru Kabakiah* (1975) 1 Andh WR 60, in which it has been held that in the case of inherent jurisdiction the lack of it goes to the root of the competence of the Court to try such a case and renders the decree a nullity. A decree which is a nullity is void and can be declared to be void by every Court in which it is presented. The executing Court can, therefore, entertain an objection that a decree is a nullity and can refuse to execute the decree. Only in such a case there is really no going behind the decree for there is really no decree at all in the eye of law.

On the basis of these decisions, it is urged by him that the judgment-debtor is entitled to take the plea by way of objections in the execution proceedings as to lack of inherent jurisdiction of the Court which passed the decree and that the executing Court is entitled to investigate into the merits of such a contention and determine the question as to the ju-

risdiction of the Court which passed the decree.

7. It is urged by Mr. Gopal that the suit was not merely for eviction of the judgment-debtor but also one for declaration of title and that in any case the decree passed in the suit cannot be said to be one passed by a Court without jurisdiction. But the objection raised by the judgment-debtor is with regard to the decree being a nullity in so far as it directs eviction. Hence, it is open to the executing Court to refuse to execute the decree in so far as it relates to eviction if the decree appears on the face of the record to be without jurisdiction.

8. It is contended on the other hand, by Mr. Gopal, that since the appellant did not take the plea with regard to lack of jurisdiction in the original suit it is not open to him to urge the same in the execution proceeding and that it is beyond the scope of the executing Court to investigate and determine the question of jurisdiction of the Court which passed the decree. He has relied on the decision in *Vasudeva Danjibhai Modi v. Rajabhai Abdul Rehman* (AIR 1970 SC 1475). In that case a decree for ejectment of a lessee was passed by the Court of Small Causes exercising the power vested in it by the Bombay Rents, Hotel and Lodging House Rates (Control) Act (57 of 1947). Under the said Act the Court exercising power under that Act has no jurisdiction to entertain a suit for possession of land used for agricultural purposes. Also, in ascertaining whether the land demised is used for agricultural purposes the crucial date is the date on which the right conferred by the Act is sought to be exercised. The trial Court dismissed the suit on merits. The decree was reversed by the first appellate Court and that decree was confirmed by the High Court. No objection was raised before the Court of Small Causes that the Court had no jurisdiction to entertain the suit nor was it raised in the first appeal or before the High Court. The objection was raised for the first time when the decree was sought to be executed. The Court executing the decree rejected the contention. The appeal against that order was also unsuccessful. But in a petition under Article 227 of the Constitution, the High Court reversed the order of the Court of Small Causes and ordered that the petition for execution be dismissed. The High Court was of the view that the land leased was on the date of the lease used for agricultural purposes and that it so appeared on an investigation of the terms of the lease and other relevant evidence. The scope of an enquiry by the Court executing the decree as to the question of jurisdiction of the Court which passed the decree was stated as follows:—

"A Court executing a decree cannot go behind the decree between the parties or their representatives; it must take the decree according to its tenor and cannot entertain any objection that the decree was incorrect in law or on facts. Until it is set aside by an appropriate proceeding in appeal or revision, a decree even if it be erroneous is still binding between the parties.

When a decree which is a nullity, for instance, where it is passed without bringing the legal representatives on the record of a person who was dead at the date of the decree, or against a ruling prince without a certificate is sought to be executed an objection in that behalf may be raised in a proceeding for execution. Again, when the decree is made by a Court which has no inherent jurisdiction to make it, objection as to its validity may be raised in an execution proceeding if the objection appears on the face of the record: where the objection as to the jurisdiction of the Court to pass the decree does not appear on the face of the record and requires examination of the questions raised and decided at the trial or which could have been but have not been raised, the executing Court will have no jurisdiction to entertain an objection as to the validity of the decree even on the ground of absence of jurisdiction."

And further,

"In the present case the question whether the Court of Small Causes had jurisdiction to entertain the suit against Munshi depended upon the interpretation of the terms of the agreement of lease, and the user to which the land was put at the date of the grant of the lease. These questions cannot be permitted to be raised in an execution proceeding so as to displace the jurisdiction of the Court which passed the decree. If the decree is on the face of the record without jurisdiction and the question does not relate to the territorial jurisdiction or under Section 11 of the Suits Valuation Act, objection to the jurisdiction of the Court to make the decree may be raised; where it is necessary to investigate facts in order to determine whether the Court which had passed the decree had no jurisdiction to entertain and try the suit, the objection cannot be raised in the execution proceeding."

Since the High Court had determined that the Court of Small Causes had no jurisdiction to pass the decree on the basis of an investigation of the terms of the lease and other relevant evidence, the order of the High Court was set aside and it was held that it had exceeded the powers of a Court executing the decree in entering into an investigation on facts in order to

determine whether the Court which has passed the decree had no jurisdiction to entertain and try the suit.

9. In *Bherusingh v. Ramgopal* (AIR 1972 Madh Pra 217), it is held that

"If the decree is patently illegal, the executing Court may refuse to execute it— But if the alleged illegality is arguable and the judgment-debtor has failed to raise it in the earlier litigation, he cannot question the legality of the decree at the stage of execution."

10. It is clear, therefore, that the executing Court cannot hold an investigation in order to determine whether the Court which passed the decree lacked jurisdiction to do so.

11. It is next contended by Sri Byra Reddy, that according to the admission made by the decree-holder in the execution Court, the admission being one on a question of fact binding on the decree-holder, the Court which passed the decree had jurisdiction to pass it and therefore the decree-holder could not take a contrary stand before the lower appellate Court and that he is estopped from doing so. He relied on the decision in *Ulich Kotayya v. Nallamalli Sreeramulu* (AIR 1928 Mad 900). *Thimmala-palli Virabhadra Rao v. Sokalchand Chunilal* (AIR 1951 Mad 796) and *Sunder Parmanand Lalwani v. Caltex (India) Ltd.* (AIR 1969 Bom 24) which lay down the principle that an admission made by the party or his counsel on a question of fact is binding on him. In *State of Mysore v. B. Chikkavenkatappa*, (1965) 1 Mvs LJ 26 = (AIR 1965 Mys 253), it has been held that a concession made by a counsel on behalf of his party on a question of law will not estop him or his client from withdrawing from such concession at a later stage of the same proceeding or in appeal or revision therefrom.

12. The admission relied on by the appellant is contained in the order of the executing Court and is in the following words:

"It is not denied by the learned counsel for the decree-holder that the schedule site is situated within the municipal limits of Bhadravathi. It is not denied by the decree-holder that the suit schedule site is by the side of B. H. Road within the limits of old Town Municipality Bhadravathi. There is no dispute that Mysore Rent Control Act, 1961 was applicable to the lease of houses and sites situated in Municipal limits of Bhadravathi Town as on the date of filing of the suit. Hence it cannot be disputed that the lease in respect of the suit schedule site was covered under the Mysore Rent Control Act 1961 when the above suit was filed."

THE All India Reporter

1976

Kerala High Court

AIR 1976 KERALA 1

N. D. P. NAMBOODIRIPAD, J.

Vaniamkulam Service Co-operative Bank Ltd., Petitioner v. Raman Nair and others, Respondents.

C. R. P. No. 557 of 1975, D/- 2-7-1975.

(A) Kerala Agriculturists' Debt Relief Act (1970), S. 15 — Debt due to a co-operative society — Not excepted from settlement under S. 15. (S. 2(4).)

The word 'debt' in Sec. 15 cannot be interpreted in the light of the definition of debt given in Sec. 2(4). Section 15 is meant for full settlement of all liabilities of the agriculturist, whether such liability be a debt as defined in the Act or not, and the word 'debt' has to be understood in its broad grammatical sense to include every liability of the agriculturist.

(Para 2)

(B) Kerala Agriculturists' Debt Relief Act (1970), Section 15 (5) — Debt due to a co-operative society under an award — Stay of execution of award cannot be avoided on strength of provisions of Section 100 read with Sections 69, 70, 75 or 76 of the Kerala Co-operative Societies Act, 1969. (Co-operative Societies — Kerala Co-operative Societies Act (1969), Section 100 read with Sections 69, 70, 75, 76).

The Civil Court in considering an application for stay of execution of award obtained by a co-operative society cannot be said to be dealing with any matter provided for in Sections 69 and 70 of the Co-operative Societies Act. Section 76 of that Act deals with the execution of orders, decisions and awards referred to in Sections 68, 73, 75 etc. By passing an order under Section 15 (5) the Civil court is not assuming powers as to the manner of execution of the award obtained by the society. It is to facilitate the working out of the remedies provided for in Sections 15 and

16 that the court is clothed with the powers of staying the trial as well as execution by Section 15 (5). While trying a petition under Section 15 (5) the court is not dealing with any dispute between the society and its members within meaning of Sections 69, 70 and 75 of the Co-operative Societies Act.

(Para 4)

(C) Kerala Agriculturists' Debt Relief Act (1970), Section 15 (5) — Decree — Award obtained by a co-operative society — Is decree in view of deeming provision under Section 76 of the Kerala Co-operative Societies Act (1969).

(Para 5)

Cases Referred: Chronological Paras
1963 Ker LT 653 = 1963 Ker LJ 421 2
1961 Ker LT 377 = (1961) 1 Ker LR 202 2
1960 Ker LT 865 = 1960 Ker LJ 1027 2

T. R. Govinda Warriar and K. Ramakumar, for Petitioner; P. R. Nambiar, for Respondents.

ORDER:— The question arises under the Kerala Agriculturists' Debt Relief Act, 1970 (referred to as Act 11 of 1970). Two agriculturists filed an application as O. P. 188/1970 for a full settlement of their debts in accordance with the provisions of Sec. 15 of Act 11 of 1970. The creditors were arrayed as respondents 1 to 24; and the 10th respondent is a co-operative society within the meaning of the Kerala Co-operative Societies Act 1969 (referred to as Act 21/1969). The applicants debtors filed three interlocutory applications as I. A. Nos. 2459/70, 53/71, and 708/73 for prohibiting the concerned creditors from realising their debts from the petitioners. In this revision we are concerned with I. A. 708/1973 laid against the 10th respondent society. The 10th respondent society had already obtained an award against the petitioners who are members of that society. In execution of the award the society sold certain agricultural property belonging to the petitioners on 19-4-1973, and what remained was confirmation of the sale and consequential proceedings. It was at that stage that the petitioners debtors prayed for an order pro-

hibiting the Circle Officer of Co-operative Societies (Administration), Ottappalam, from proceeding with the sale in enforcement of the award till the disposal of the present petition. It appears that only the 10th respondent opposed the three interlocutory applications referred to above. According to the society the debt involved in the award is not one capable of being settled under Section 15 of Act 11/1970 and that at any rate, in view of Sec. 100 of Act 21/1969 the Civil Court has no jurisdiction to interfere with the sale already conducted. The lower court repelled those contentions and issued the prohibitory order as prayed for by the petitioners. The 10th respondent has, therefore, preferred this revision.

2. The first contention urged on behalf of the revision petitioner is that the debt in question is not one capable of being settled under Section 15 of Act 11/1970; and in support reliance is placed upon the definition of 'debt' contained in Section 2 (4) of Act 11/1970. While defining 'debt' Section 2 (4) of Act 11/1970 enumerates the categories of debts which are excepted from the purview of the definition. Section 2 (4) (v) deals with debt due to any co-operative society including a land mortgage bank registered or deemed to be registered under the Co-operative Societies Act for the time being in force. That the award in question is a debt due to a society admits of no doubt. But the question is whether the expression 'debts' as used in Section 15 of the Act 11/1970 has to be interpreted with the aid of the definition contained in Section 2 (4). That question was already answered in the negative by this court in the decisions reported in *Umbichi Ahmed v. Kalyani Amma* (1960 Ker LT 865), *Meenakshikutty Varasiaramma v. Travancore Forward Bank Ltd* (1961 Ker LT 377), and *Hameed Koya v. Arunachalam Nadar* (1963 Ker LT 653). Though these decisions were concerned with the scope of Sections 15 to 18 of Act 31 of 1958, I do not think that a different principle can apply while interpreting Section 15 of Act 11/1970 because substantially the concerned provisions in the two statutes are similar. While considering the scope of Sections 15 to 18 of Act 31 of 1958 this Court took the view that those sections are meant for a full settlement of all liabilities of the agriculturist, whether such liability be a debt as defined in the Act or not, and for that the word 'debt' used in those sections has to be understood in its broad grammatical sense to include every liability of an agriculturist. It is, therefore, held that the debt due to the 10th respondent is also a liability which could be settled under Section 15 of Act 11 of 1970.

3. If the debt in question could be settled under Section 15 of Act 11/1970 it is only logical to hold that all the relevant provisions of Section 15 and allied sections of the Act could be invoked by the petitioners as against the debt due to the 10th respondent. Sub-section (5) of Section 15 of

Act 11/1970 enjoins that during the pendency of an application under Section 15 the court may stay the trial of any suit or the execution of any decree against the applicant or his properties. It follows, therefore, that when once the debt in dispute is a liability that could be settled under Section 15, the court trying the relevant application has the jurisdiction to stay the trial of any suit or the execution of any decree against the applicant or his properties. In this sense perhaps no other question survives for decision.

4. The revision petitioner seeks avoidance of Section 15 (5) of Act 11/1970 on the strength of Section 100 read with Sections 69, 70, 75 and 76 of Act 21 of 1969. Section 100 of Act 21/1969 provides that no civil or revenue court shall have any jurisdiction in respect of any matter for which provision is made in Act 21/1969. Section 69 of that Act provides that disputes referred to thereunder are to be referred to the Registrar, and Section 70 deals with the decision and award on disputes referred under Section 69. As far as the award obtained by the 10th respondent against the petitioners is concerned it is clear that the stage as contemplated by Sections 69 and 70 is already over; and the Civil Court in considering the present application is not dealing with any matter provided for in Sections 69 and 70 of Act 21/1969. The further question is whether Sections 75 and 76 have any bearing on the matter in dispute. Here also I may state that Section 75 has not much relevance, and it is Section 76 that assumes importance. Section 76 of Act 21/1969 deals with the execution of orders, decisions and awards referred to in Sections 68, 73, 75 etc. The utmost that could be gathered from Section 75 read with Section 100 is that Act 21/1969 itself provides the machinery for executing orders and awards passed under that Act and that the Civil Court cannot exercise that jurisdiction. By passing an order under sub-section (5) of Section 15 of Act 11/1970 the Civil Court is not assuming powers as to the manner of execution of the award obtained by the 10th respondent. Sub-section (7) of Section 15 of Act 11/1970 provides that the procedure prescribed in the Insolvency Act 1955 shall mutatis mutandis be applicable to the proceedings under Section 15. Section 16 of Act 11/1970 sets out the manner of settlement of liability of the agriculturist by Court. It is to facilitate the working out of the remedies provided for in Sections 15 and 16 that the court is clothed with the powers of staying the trial as well as execution by sub-sec. (5) of Section 15. While trying a petition under Section 15 of Act 11/1970 the court in this case is not apparently dealing with any dispute as between the 10th respondent society and its members, the two petitioners, within the meaning of Sections 69, 70 and 75 of Act 21/1969.

5. Yet another alternative contention urged on behalf of the revision petitioner is

that even if the Civil Court has jurisdiction to stay proceedings by virtue of Section 15 (5) of Act 11/1970, in the instant case there is no 'decree', the execution of which could be stayed by the court. It is true that under Section 15 (5) of Act 11/1970 what a court may stay is "the execution of any decree against the applicant or his properties". According to the revision petitioner the award is not a decree within the meaning of Section 15 (5). But I think, the answer to that contention is contained in Section 76 of Act 21 of 1969. Section 76 (a) reads as follows:

"76. Every order may under sub-section (2) of Section 68 or under Section 75, every decision or award made under Sec. 70 every order made by the liquidator under Sec. 73 and every order made by the Tribunal under Sec. 82, Sec. 84, Sec. 85 or Sec. 86 and every order made under Section 83 shall, if not varied out,—

(a) on a certificate signed by the Registrar or any person authorised by him in this behalf, be deemed to be a decree of a Civil Court and shall be executed in the same manner as a decree of such court; or" It is clear from that provision that as far as executability is concerned the various orders, decisions or awards referred to in the opening portion of Section 76 are to be deemed as decree of a Civil Court.

I hold that the lower court had jurisdiction to pass the order that is challenged before me.

I confirm the decision of the lower court and dismiss the revision. No costs.

Revision dismissed.

AIR 1976 KERALA 3

G. VISWANATHA IYER AND
K. BHASKARAN, JJ.

P. Mulji and Sons, Africa, Appellant v. Kerala Produce Exporting Co., and another, Respondents.

A. S. No. 631 of 1972, D/- 17-6-1975.

(A) Arbitration Act (1940), Sections 39 (1) (vi), 17 — Refusing to set aside award — Order under Section 17 — Whether appealable.

Section 17 of the Arbitration Act, 1940, requires the court to be satisfied that there are no grounds to set aside the award, and if so satisfied, to pass a decree. It is not necessary that the order refusing to set aside the award must be an order on the application to set aside the award. Such an order can as well be contained in the order passed under Section 17. Where the court has stayed in the order under Section 17 that there are no grounds to set aside the award, the order comes within the scope of Section 39 (1) (vi) and it is appealable. (Para 2)

IS/JS/D343/75/MBR

(B) Arbitration Act (1940), Section 17 — Suo motu power of Court to set aside an award.

The suo motu power of the court to invalidate the award can be exercised only if there is any patent illegality or voidness or the award directs a party to do an act which is prohibited by law. If this illegality is not patent and requires an enquiry to find that out the Court may not be justified in exercising its suo motu jurisdiction. (Para 3)

The award was challenged on the ground that the appointment of the arbitrator in substitution was invalid and as such the reference to him was invalid. But the arbitration rules which governed the arbitration proceedings did not prohibit the substitution of another arbitrator.

Held, there was no patent illegality in the appointment of the arbitrator and therefore it is not possible to hold that the reference was invalid and as such that the court should set it aside suo motu. In fact Section 9 of the Arbitration Act allows substitution in case previously appointed arbitrator is unwilling to act. (Para 3)

Cases	Referred:	Chronological	Paras
AIR 1967 SC 1233	=	(1967) 3 SCR 147	3
AIR 1960 Pat 201	=	1959 Pat LR 262	3
AIR 1954 Bom 243	=	56 Bom LR 99	3
AIR 1952 Pat 461			3
AIR 1946 PC 72	=	73 Ind App 52	3

Menon and Pai, for Appellant.

VISWANATHA IYER, J.:— This is an appeal by the 2nd counter-petitioner in Arbitration Act Petition No. 1 of 1955 on the file of the Quilon District Court. Under Ext. D3 agreement entered into between the 1st and 2nd counter-petitioners the 2nd counter-petitioner supplied cashewnuts to the 1st counter-petitioner. The same was delivered at Quilon on 17-2-1964. Under the agreement any dispute regarding the quality of the goods has to be referred to an arbitration and the Arbitration Rules which govern the parties provide for appointment of Arbitrators, the time within which that should be done and the procedure which should be followed by Arbitrators. Complaining that the quality of the goods supplied was inferior the 1st counter-petitioner requested the 2nd counter-petitioner to appoint an Arbitrator. There was some attempt at settling the matter otherwise and when that failed the 1st counter-petitioner pressed for a reference to Arbitration. He informed the Secretary, Indian Cashew Exporters' Association and requested him to arrange for the arbitration. He also nominated his Arbitrator. The said Association contacted the appellants and requested them to nominate their Arbitrator. Since that was not done the Arbitrator appointed by the 1st counter-petitioner acted as a sole Arbitrator and proceeded with the arbitration. He made an award to the effect that the appellant should pay Rs. 17,932.33 to be 1st counter-petitioner. This award was filed into court by the petitioner-Arbitrator and notice of it was given to coun-

ter-petitioners 1 and 2. Counter-petitioner No. 1 moved for passing a decree in terms of the award. But, the appellant applied to set aside the award and also filed objection to the passing of the judgment on the award. The application to set aside the award was filed out of time, and so it was rejected. But, the lower court considered the objections on the merits and finding that there are no grounds to set aside the award suo motu passed a decree in terms of the award. The appeal is filed by the 2nd counter-petitioner in these circumstances.

2. A preliminary objection is taken to the maintainability of the appeal. Section 39 of the Arbitration Act, 1940 provides for an appeal against certain orders passed by the court in Arbitration proceedings. Section 39, Clause (vi) provides for an appeal against an order refusing to set aside or setting aside an award. The appellant's counsel relies on this provision to sustain the appeal. No doubt, the application to set aside the award was dismissed on the ground of Limitation and the decision under appeal was rendered under Section 17 of the Arbitration Act. Section 17 requires the Court to be satisfied that there are no grounds to set aside the award, and if so satisfied, to pass a decree. It is not necessary that the order refusing to set aside the award must be an order on the application to set aside the award. Such an order can as well be contained in the order passed under Section 17 of the Act. The lower court has stated in the order under Section 17 that there are no grounds to set aside the award and that comes within the scope of Section 39 (vi) of the Act. Therefore, the preliminary objection is repelled.

3. The award Ext. D1 filed by the Arbitrator may be challenged by the appellant as invalid. But, if the challenge is based on any of the grounds mentioned in Section 30 of the Act it has to be made by an application under Section 33 and that should be filed within a particular time, namely 30 days of the receipt of the notice of the filing of the award (see Article 119 of the Limitation Act). The appellant admittedly filed an application, but it was out of time and so was rightly rejected. The objection filed against accepting the award was also filed beyond the time limit prescribed under the said Article. So, it is not open to the appellant to challenge the award on any of the grounds mentioned in Section 30 of the Arbitration Act (see *Madan Lal v. Sunder Lal*, AIR 1967 SC 1233). But, there are certain decisions which take the view that the court exercising the powers under Section 17 can suo motu consider whether the award is liable to be set aside on other grounds. Reliance is placed by the counsel for the appellant on *Deep Narain Singh v. Dhaneshwari* (AIR 1960 Pat 201) in support of the contention that the court can suo motu set aside an award on the ground of invalidity of reference. At page 206 the law is stated thus:

"where, therefore, the award is found to be a nullity because of invalidity of the arbitration agreement or, for any other reason or the award is *prima facie* illegal and not fit to be maintained, the Court has power under Section 17 of the Act to set it aside without waiting for an objection to the award being filed or without considering any application for setting it aside, if there be any.

These are matters which really go to the root of the award itself and irrespective of any objection by the parties, a duty is cast upon the Court to decide these matters before a decree can be passed on the basis of the award. Therefore, the mere fact that an objection is not filed by any of the parties to the award within the period of limitation does not altogether absolve the Court from its responsibility of deciding whether there was a competent reference or whether the award was a valid award on the face of it. It is obvious that in such a situation the question of limitation is of no materiality. The award has to be set aside because of this inherent infirmity. This view finds ample support from the decision of this Court in *Deo Narain Singh v. Siabar Singh*, AIR 1952 Pat 461 and a Bench decision of the Bombay High Court in *Hastimal Dalichand v. Hira Lal Motichand*, AIR 1954 Bom 243, with the reasonings of which I respectfully agree."

The decision of the Bombay High Court referred to in the above quotation contains the following observation:—

"If the award directs a party to do an act which is prohibited by law or if it is otherwise patently illegal or void it would be open to the Court to consider this patent defect in the award suo motu, and when the Court acts suo motu no question of limitation prescribed by Article 158 can arise."

This latter observation was taken note of by the Supreme Court in (AIR 1967 SC 1233) at p. 1236, paragraph 10, and apparently approved it as correct. The provisions of Section 30 are very wide and every possible kind of objection may possibly come under clause (c) of the said Section. The expression "otherwise invalid" in Section 30 (c) is interpreted in some cases to take in a case of invalidity arising out of an invalid reference. But, in the light of the decision in *Chhabba Lal v. Kallu Lal* (AIR 1946 PC 72) it has to be taken that invalidity arising out of an invalid reference does not come under that clause. If so it may be considered on an application under Section 33 or in exercising the powers suo motu under Section 17 of the Act. But, the suo motu power of the court to invalidate the award can be exercised only if there is any patent illegality or voidness or the award directs a party to do an act which is prohibited by law. If this illegality is not patent and requires an enquiry to find that out the Court may not be justified in exercising its suo motu jurisdiction. That is the position in this case. The attack on the award is bas-

ed on the alleged failure to observe the rules in the matter of appointment of an Arbitrator. As stated earlier, to the contract Ext. 13 is appended the Arbitration Rules which would govern the arbitration proceedings under the contract. Clause 5 of the Arbitration Rules provides for a written notice desiring arbitration to be given to the other party not later than 4 days after the goods under the contract have been completely landed. That such a notice was given by the 1st respondent is evident from Ext. D20, a copy of a letter sent to the appellant by 1st respondent. That refers to the telegram sent by the 1st respondent within 3 days of the landing of the goods desiring an arbitration. That telegram is not disputed. Clause 5 in the Arbitration Rules also requires other formalities to be complied with, namely, forwarding by the party desiring arbitration a copy of the written notice desiring arbitration to the Association and also forwarding to it the consent letter of its Arbitrator. The other party who is served with this notice is also required by the said clause to submit to the nearest Association the consent letter of his Arbitrator within a particular time. Thereafter, as per the rules, it is the function of the Association to contact the respective parties and arbitrators and take the necessary steps to proceed with the arbitration. It is not stated in the rules that the party serving the notice should communicate to the opposite party the name of his Arbitrator within the stipulated time of 4 days. Even if that is required, it is seen from the telegram referred to in Ext. D20 that the 1st respondent had suggested the name of one Shamsuddin as Arbitrator. Ext. D11, the letter issued by the Indian Cashew Exporters' Association to the appellant, mentions that the 1st respondent has appointed the 2nd respondent as the Arbitrator. The argument of the appellant's counsel is that this change amounts to an invalid appointment and as such the reference to him was invalid. Section 9 of the Arbitration Act allows a party to substitute another person as arbitrator if the one appointed previously is unwilling to act. That has what happened in this case. The rule does not prohibit the substitution of another and hence there is no invalidity. In this view there is no patent illegality in the appointment of the Arbitrator by the 1st respondent and therefore it is not possible to hold that the reference was invalid and as such that the court should set it aside *suo motu*.

4. The other objections to the award namely the alleged failure of the Arbitrator to issue notice to the appellant and regarding the manner in which he found that the quality of the goods supplied was inferior and that the damages payable to the 1st respondent will be so much are all objections which come within one or other of the grounds in Section 30 of the Act. The validity of these objections cannot be gone into by the court *suo motu*; and the application to set aside the award on these grounds has been rejected

as out of time. Hence, those objections do not deserve any consideration.

5. In the result, there is no merit in this appeal. It is dismissed with costs to the 1st respondent.

Appeal dismissed.

AIR 1976 KERALA 5

N. D. P. NAMBOODIRIPAD J.

Federal Bank Ltd., Petitioner v. P. S. P. Panicker Simon Carves India Ltd., Respondent.

Civil Revn. Petn. No. 1449 of 1973, D/-9-6-1975.

(A) Negotiable Instruments Act (1881), Sections 36, 43, and 59 — Subsequent holder of cheque — Rights of, against drawer withholding payment.

A cheque was issued by X in the name of Y who assigned it to Z for valid consideration. On Z seeking to encash the cheque from the bank, he found that X had advised the bank to withhold payment. The question was whether a suit for the recovery of the amount was maintainable against X.

Held that the rights of the holder were not to be adjudged under Section 59.

(Para 2)

The provision applicable to the case is Section 43 which has to be read in conjunction with Section 36. The rights conferred to a holder in due course under Section 36 are not intended to be defeated on the ground that a prior transaction relating to the instrument was bad for want of consideration. The latter part of Section 43, thus, is to preserve intact the rights conferred on a holder in due course under the general provision contained in Section 36. Thus, by virtue of Section 36 and the latter part of Section 43 the plaintiff is entitled to recover the amounts due not only from Y but also from X, the drawer, even though as between X and Y there was failure of consideration. AIR 1949 Assam 6 Rel. on.

(Paras 3 and 4)

Cases Referred: Chronological Paras
AIR 1949 Assam 6 = 19 Com Cas 157 3
AIR 1931 Mad 113 = 1930 Mad WN 1232 2

Joseph Augustine, for petitioner; P. K. Kurien and K. A. Nayar, for Respondent.

ORDER:— In view of the pleadings in the case and the concurrent findings entered by the courts below certain facts are beyond dispute. For disbursement of wages to certain workmen, the second defendant, a company, issued Ext. P1 cheque dated 26-6-1964 for an amount of Rs. 593.93 in the name of their employee, the first defendant and drawn on the State Bank of Travancore. The first defendant, who had an account in another bank by name the Federal Bank Limited, assigned the cheque for valid consideration in favour of that bank and collected the proceeds. In the meanwhile, the second defen-

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dant, "the drawer", getting information that the first defendant did not pay off the workmen, advised the drawee bank to withhold payment when Ext. P1 is presented. The result was that Ext. P1 was not honoured by the drawee bank when it was forwarded for collection by the holder bank. The holder bank thereupon sued for realisation of the amount covered by Ext. P1 with interest thereon from defendants 1 and 2, the 'payee' and the 'drawer' respectively of the instrument. The first defendant did not contest. The second defendant resisted the action on the ground of failure of consideration. That contention found favour with the trial Court, which granted a decree only against the first defendant. An appeal by the plaintiff for fastening the liability on the second defendant as well, did not succeed.

2. Through this revision, the plaintiff challenges the correctness of the decision rendered by the court below exonerating the second defendant from liability under the instrument. The decision of the lower court rests on Section 59 of the Negotiable Instruments Act, 26 of 1881 (for brevity, the 'Act'), and the relevant provision is extracted below:—

"59. The holder of a negotiable instrument, who has acquired it after dishonour, whether by non-acceptance or non-payment, with notice thereof, or after maturity, has only, as against the other parties, the rights thereon of his transferor."

The specific contention put forward by the second defendant, the 'drawer' is that since the holder acquired Ext. P1 after maturity, the plaintiff has, as against the drawer, only such rights which the payee had against the 'drawer'. It is obvious that the weight of this contention depends upon the premise that the holder acquired the instrument after 'maturity'. The question is whether the premise is correct? What constitutes "maturity" is dealt with under Section 22 of the Act and according to the courts below Ext. P1 obtained maturity the moment it was executed. That proposition is attacked by the plaintiff as incorrect and reliance is placed upon a decision of the Madras High Court reported in *Uppalapati Hemadri v. Kodali Seshamma* (AIR 1931 Mad 113). While considering the scope of Section 35 of the Act, it was held in that case that the concerned section does not apply to the case of a promissory note payable on demand. The view taken is that in the case of an instrument payable on demand, the question of maturity does not arise. The correctness of that decision was not challenged before me. Ext. P1 being a cheque, that is payable on demand, it cannot be held that it became mature forthwith. That being the situation it is not possible to hold that in the instant case the plaintiff acquired Ext. P1 after maturity especially because it is common case that the instrument was assigned before the payee demanded payment from the drawee. It fol-

lows, therefore, that the rights and the obligations of the holder and the drawee in this case are not to be adjudged on the basis of Section 59 of the Act.

3. The provision that directly deals with instruments unsupported by consideration is Section 43 of the Act. Avoiding exceptions 1 and 2, which are not relevant in this context, the material portion of Section 43 may be read:—

"43. A negotiable instrument made, drawn, accepted, indorsed, or transferred without consideration, or for a consideration which fails, creates no obligation of payment between the parties to the transaction. But if any such party has transferred the instrument with or without indorsement to a holder for consideration, such holder, and every subsequent holder deriving title from him, may recover the amount due on such instrument from the transferor for consideration or any prior party thereto."

The first part of the Section provides that where there is initial want of consideration or where there is subsequent failure of consideration for a negotiable instrument, such instrument does not create an obligation for payment as between the parties to the transaction. The expression 'parties to the transaction' clearly indicates that the plea of avoidance of the liability is available only to the immediate parties to the transaction. The very essence of a negotiable instrument is its negotiability and as is well-known, there may be one or more assignments of the rights under an instrument. Absence of consideration or failure of consideration could avoid the liability only as between the parties to the particular transaction for which there was no initial consideration or there was a subsequent failure of consideration. That the legislature never intended to extend such avoidance of obligation to other transactions pertaining to the same instrument is clear from the second part of the provision. The second part lays down that as far as a holder for consideration or a subsequent assignee for consideration are concerned, any one of them can recover the amount due under the instrument not only from his transferor but from any prior party to the instrument. The expression "prior Party" is found in other provisions of the Act, like Sections 36 and 38. The latter part of Section 43 apparently is to safeguard the rights of a holder in due course. Such a positive provision was necessary because Section 36 of the Act provides that every prior party to the negotiable instrument is liable thereon to a holder in due course until the instrument is duly satisfied. Section 36 of the Act, thus, confers a special right on a holder in due course in the matter of realisation of the amounts due under the instrument, he holds. Section 43 has, therefore, to be read in conjunction with Section 36 of the Act. The rights conferred to a holder in due course under Section 36 are not intended to be defeated on the ground that a prior

transaction relating to the instrument was bad for want of consideration. The latter part of Section 43, thus, is to preserve intact the rights conferred on a holder in due course under the general provision contained in Section 36 of the Act. An analogous position came up for consideration before the Assam High Court in the decision reported in *Jethmal Ganeshmal Firm v. Haridas Roy* AIR 1949 Assam, 6. In that case it was held that the plaintiff, who was the holder in due course, was entitled to recover the amount not only from the payee, but also from the drawer, even though there was failure of consideration for the transaction between the drawer and the payee. The second respondent made a faint attempt to show that the plaintiff is not a holder in due course. Such a contention has no basis in the pleadings in the case. The pleadings as well as the decisions of the Court below proceeded on the basis that the plaintiff is a holder in due course.

4. Thus, by virtue of Section 36 and the latter part of Section 43 of the Act, the plaintiff is entitled to recover the amounts due under Ext. P1 not only from the first defendant payee but also from the second defendant drawer even though as between defendants 1 and 2 there was failure of consideration.

5. In the result, in modification of the decisions rendered by the courts below, the plaintiff is granted a decree against defendants 1 and 2 as prayed for in the plaint. The plaintiff may realise his costs in the trial court from the first defendant and in other respects the plaintiff and the second defendant will suffer their cost throughout. The revision is allowed as shown above.

Revision allowed.

AIR 1976 KERALA 7

K. K. NARENDHAN, J.

M/s. R. K. V. Motors and Timbers (P) Ltd., Petitioner v. M. V. Balachandra Kurup and others, Respondents.

Original Petn. No. 4250 of 1972, D/- 24-8-1975.

(A) Motor Vehicles Act (1939), Section 47 — Grant of stage carriage permit — Interest of the public — Prevention of monopoly and ensuring healthy competition are in the interest of the public.

Prevention of monopoly on a route and ensuring healthy competition are all in the interests of the public. Healthy competition and interests of the public are intimately connected. In allowing the permit to a new entrant in preference to a fleet owner the State Transport Appellate Tribunal has taken the view that in the absence of healthy competition public interests can hardly be served. Hence the basic principles for grant of a

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pucca permit are not given the go-bye in the case and the grant is strictly in accordance with Section 47 of the Act and Rule 1A of the Motor Vehicles Rules 1961. (Case law discussed). (Para 8)

Cases	Referred	Chronological	Paras
(1972) O. P. No. 3005 of 1972 (Ker)			6
(1969) O. P. No. 3304 of 1969 (Ker)			6
(1966) O. P. No. 463 of 1966 (Ker)			6
AIR 1965 SC 107 = (1964) 5 SCR 869			6
1965 Ker LT 1039			6
AIR 1964 SC 477 = (1964) 5 SCR 64			6
AIR 1964 Ker 255			5
1961 Ker LJ 1135 = 1962 Ker LT 269			5

S. A. Nagendran, N. N. Divakaran Pillai, P. C. Abraham and K. Anandavally, for Petitioner; K. C. Sankaran, K. Ravindran and M. Krishnakumar, for Respondents.

ORDER:— The petitioner in this Original Petition is a stage carriage operator and it was operating on the route Attingal-Palode for several years. When sanction for renewal was granted in April 1962, the Kerala State Road Transport Corporation filed Original Petitions before this Court against the renewal of the permit to the petitioner in respect of K. L. T. 1725 and against some other operators in the Trivandrum district to whom also renewals were granted. For reasons stated in the Original petition, the petitioner could not renew the permit which expired on 20-8-1964. Thereupon, the petitioner submitted Ext. P-1 application dated 11-10-1965 before the 2nd respondent-Regional Transport Authority, Trivandrum for re-issue of the permit condoning the delay caused in applying for renewal in time. The 2nd respondent considered Ext. P-1 application at its meeting held on 11-10-1965 and took Ext. P-2 decision stating that the petitioner did not make an application in time for renewal of the permit and the petitioner applied for a fresh permit. By Ext. P-2 the renewal was refused by the 2nd respondent.

2. In 1965 the 2nd respondent by Ext. P-3 decision decided to invite applications for a stage carriage permit on the route in question. The petitioner made a fresh application. Three new entrants including the 1st respondent also submitted applications. The applications came up for consideration before the 2nd respondent at its meeting held on 28-9-1970 and the 2nd respondent by Ext. P-7 decision granted a permit to the 1st respondent. On the very same day, by Ext. P-6 decision the 2nd respondent granted the petitioner a temporary permit on the very same route with an extension upto Vakkom.

3. Against Ext. P-7 the petitioner filed an appeal before the 3rd respondent-State Transport Appellate Tribunal which by Ext. P-8 dated 31-8-1972 dismissed the above appeal and confirmed Ext. P-7 order of the 2nd respondent. It is against Exts. P-7 and P-8 that the petitioner has approached this Court with this Original Petition.

4. A counter-affidavit has been filed by the 1st respondent. The statement in

Para. 2 of the said counter-affidavit is that though the petitioner's permit in respect of vehicle K. L. T. 1725, was renewed on 21-3-1962 for a period of three years from 21-8-61, as the petitioner did not produce the records the renewal granted by the 2nd respondent was not given effect to. From 20-8-1964 the petitioner did not even apply for renewal. Without doing that, the petitioner submitted a *suo motu* application for a pucca permit on the route in question. The 2nd respondent considered that application as per Ext. P-3 and decided to invite applications for the grant of a stage carriage permit on the route in question. Against Exts. P-2 and P-3 the petitioner did not take any further steps. The 2nd respondent granted a temporary permit to the 1st respondent from 8-10-1969 to 7-2-1970 and thereafter a re-issue was granted for four months. The assertion in Para. 7 of the counter-affidavit is that the 1st respondent is better qualified than the petitioner. Moreover, the petitioner is a fleet owner with several buses on the same route. It is also stated in para. 8 of the counter-affidavit that the petitioner was a defaulter at the time of the grant of permit to the 1st respondent and that even thereafter the petitioner continues to be a defaulter on various routes.

5. The learned counsel for the petitioner contends that the 2nd respondent acted arbitrarily in granting the permit to the 1st respondent as per Ext. P-7. The 2nd respondent did not take into consideration any of the matters which are mentioned in Section 47 (1) of the Motor Vehicles Act. The 2nd respondent ought to have held that the petitioner is the only qualified person entitled for the permit among the applicants considered by it. The 3rd respondent failed to consider the question whether the 1st respondent is entitled to get the permit in the light of the provisions contained in the Motor Vehicles Act and the Rules in preference to the petitioner. In support of his contentions, the learned counsel for the petitioner relies on two decisions of this Court in *C. Kunhikutty v. S. T. A. Tribunal*, AIR 1964 Ker 253 and *Anamalais Bus Transport (Pvt.) Ltd. v. Kunhippalu*, 1961 Ker LJ 1135. In *C. Kunhikutty v. S. T. A. Tribunal*, AIR 1964 Ker 253 Govindan Nair J. (as he then was) said:

"Maintaining healthy competition was not a valid ground for ignoring his claims and granting the permit to the applicant who had obtained nearly 50% of the marks obtained by A, unless the conclusion was reached that the grant of a further permit to A would be against public interests."

In the above case the Regional Transport Authority allotted the highest marks among the applicants to applicant No. 7 but denied the permit to him on the ground that in the interest of maintaining healthy competition his claims to the route should be rejected. In *Anamalais Bus Transport (Pvt.) Ltd. v. S. T. A. Tribunal*, 1961 Ker LJ 1135, this Court has said that an applicant can be denied a permit

on the ground of monopoly only when the grant of a further permit to him would be against public interests. The learned counsel for the petitioner points out that the reason given in Ext. P-7 decision granting the permit to the 1st respondent is 'to have healthy competition on the route.' But it is to be noted that the 3rd respondent has taken the view that in the absence of healthy competition public interests can hardly be served.

6. The learned counsel for the 1st respondent points out that the concentration of permits in the hands of the petitioner who is a fleet owner will not be in the public interests. Hence Exts. P-7 and P-8 which reject the petitioner's request for a further permit on the ground that there will be no healthy competition on the route and hence public interests will suffer are perfectly legal and valid. The learned counsel also points out that the route in question being a short route under Rule 177A (3) (a) the first respondent who is a new entrant should be given the permit. Since there is no illegality or irregularity on the part of the Regional Transport Authority or the State Transport Appellate Tribunal there is no error of law apparent on the face of the record to enable this Court to interfere with Exts. P-7 and P-8. The learned counsel for the 1st respondent relies on the decision of the Supreme Court in *Sri Rama Vilas Service v. Chandrasekharan*, AIR 1965 SC 107 wherein Gajendragadkar J. (as he then was) speaking for the Court has said:

"There can be no doubt that in granting a permit, the appropriate authorities under the Motor Vehicles Act are required to consider the interests of the public generally under Section 47 (1) (a), and in assessing the merits of an individual applicant for a permit on any route, it would be open to the appropriate authority to enquire whether the service which the individual applicant would render to the public if he is given a permit would be efficient and satisfactory or not. In dealing with this aspect of the matter, it would not be irrelevant for the appropriate authority to hold that if any applicant is or would be in the position of a monopolist if a permit was granted to him, he would be liable to neglect the interests of the public and may not be very keen on taking all steps to keep his service in good and efficient order. Absence of any competition from another bus-operator on the route is likely to develop a feeling of complacency in the monopolist and that is a factor which the appropriate authority can certainly take into account. Therefore, it cannot be urged that in taking into account the fact that the appellant was a monopolist on a part of the route, the Appellate Tribunal has been influenced by any irrelevant fact."

In support of his contention that there is no reason why this Court should interfere with Exts. P-7 and P-8 in these proceedings, the learned counsel has referred to the decision of the Supreme Court in *Syed Yakoob v. K. S. Radhakrishnan*, AIR 1964 SC 477 wherein the Supreme Court said:

"That though it would have been better if the Tribunal had given reasons for its finding the failure of the Appellate Tribunal to give a reason in that behalf or to refer specifically to the evidence adduced by B would not by itself, constitute such an error in its decision as to justify the issue of a writ of certiorari under Article 226."

The learned counsel then referred to the decision of this Court in *New Kerala Bus Transports v. R. T. A., Cannanore*, 1965 Ke- LT 1039 wherein this Court relying on the decisions of the Supreme Court has said that it will be open to the Tribunal to choose a new entrant in the interests of the public. In the above judgment a passage from the decision of the Madras High Court in *Rama Vilas Service (P) Ltd. v. Chandrasekharan*, AIR 1965 SC 107 wherein it has been held that encouraging bus operators who do not own a fleet of buses and discouraging monopoly on the route is consistent with the interests of the general public, has been extracted. The learned counsel also referred to three unreported decisions of this Court in *V. S. Ramakrishnan v. P. L. John* (O. P. No. 3304 of 1969), *Modern Bus Transports v. Regional Transport Authority* (O. P. No. 463 of 1966) and *K. Thomas v. Regional Transport Authority* (O. P. No. 3005 of 1972). In *V. S. Ramakrishnan v. P. L. John* (O. P. No. 3304 of 1969) my learned brother Balakrishna Eradi J. has said that merely because one has a temporary permit on some route for a short period he will not cease to be a new entrant. In *Modern Bus Transports v. The Regional Transport Authority* (O. P. No. 463 of 1966) an order denying a permit to a fleet owner and granting the same to another operator who had only one other permit was challenged. Govindan Nair J. (as he then was) repelling the contentions of the petitioner held:

"According to the Regional Transport Authority, the 3rd respondent who had only one permit should be preferred because this will help what the Regional Transport Authority termed 'healthy competition'."

The appellate authority decided the case on the ground that the policy of preferring an operator is a method permitted by Section 47 of the Motor Vehicle Act which lays down the paramount consideration in these matters as public interest. The real question has always been the interest of the public. It is not possible to say that extraneous matters weighed with the authorities or that the basic principles have not been borne in mind or have been mis-understood or mis-applied in choosing the 3rd respondent therefore, I do not think there is any ground for interference in these proceedings under Article 226 of the Constitution."

7. The learned counsel for the petitioner answering the contentions of the counsel for the 1st respondent stressed that the reasoning in the orders questioned is bad. The 2nd respondent has stated only one reason, namely, healthy competition. The Regional Transport Authority has not considered the

interests of the public in rejecting the petitioner's application.

8. Admittedly, the route in question is a short route. As long as the 1st respondent does not have a pucca permit, he will not cease to be a new entrant. The petitioner is a fleet owner. Prevention of monopoly on the route and ensuring healthy competition are all in the interests of the public. Not only that it is when there is a healthy competition on the route that the interests of the public are best served. So, healthy competition and interests of the public are intimately connected. Hence the basic principles for the grant of a pucca permit are not given the go-bye in this case by the Regional Transport Authority or the State Transport Appellate Tribunal. The grant in question is strictly in accordance with Section 47 of the Motor Vehicles Act, 1939 and Rule 177A of the Kerala Motor Vehicles Rules, 1961. There is no error of law apparent on the face of the record to warrant an interference by this Court under Article 226 of the Constitution.

9. For the reasons stated above, this Original Petition is dismissed. There will be no order as to costs.

Petition dismissed.

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K. K. NARENDRA, J.

Narayanan and another, Petitioners v. Regional Transport Authority, Cannanore and others, Respondents.

O. P. Nos. 5169 and 5245 of 1974, D/14-3-1975.

(A) Constitution of India, Article 226 — Alternative remedy by way of appeal provided by statute not availed — Impugned Order showing that subordinate authority has misconstrued provision of law — No investigation of disputed facts involved — Order can be interfered with under Article 226 — (i) Motor Vehicles Act (1939), Sec. 47 (1) proviso — (ii) Kerala Motor Vehicles Rules (1961), Rule 177-A (3)).

The High Court has always the jurisdiction under Article 226 of the Constitution to issue a writ of certiorari when there is an error of law apparent on the face of the record in an order of a subordinate authority exercising quasi-judicial functions. This jurisdiction does not depend upon the fact whether there is or there is not an alternative remedy provided by the statute. Normally as a matter of practice when there is an alternative remedy provided by the statute and if the same is not exhausted High Court will decline to interfere. But this is not an inflexible rule. It is only a rule of practice and not a rule of law. Provided the requisite grounds exist, certiorari will lie although a right of appeal has been conferred by the statute.

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Held, in a case where it is clear from the order itself that the subordinate authority has misconstrued a provision of law High Court should not refuse to exercise the discretion vested under Article 226 of the Constitution, simply because the petitioners have not exhausted the remedy of appeal provided by the statute. Moreover, no investigation on disputed questions of facts is necessary for giving a decision. For that reason also, High Court cannot refuse to exercise the discretion vested under Article 226 of the Constitution. On the merits also the order is wrong. The Regional Transport Authority has proceeded on the basis that if a co-operative society is an applicant for a permit, as per Rule 177-A (2) the permit has to be issued to that co-operative society and that co-operative society alone, irrespective of the fact whether the co-operative society has got as much qualification as the other applicants who are not co-operative societies. This is not what is insisted by Section 47 (1) of the Motor Vehicles Act, 1939 and Rule 177-A (2) of the Kerala Motor Vehicles Rules. The fact that an applicant is a co-operative society can be used only to tilt the scales in its favour when they are equally balanced. This is the aspect which has to be kept in mind in granting a permit to a co-operative society. There is no indication in the order that the Regional Transport Authority has adverted to this aspect in granting the permit. On the other hand, whatever indication that is there in the order is that the Regional Transport Authority has not adverted to this aspect of the matter which is the aspect which should be considered. The Regional Transport Authority has misconstrued the relevant provisions of the Act and the Rules. The impugned order quashed. Case law referred. (Para 13)

Cases Referred: Chronological Paras
 AIR 1974 SC 1174 = 1974 SCD 805 8, 11
 (1974) O. P. Nos. 1253 and 1258 of 1974 (Ker) 11
 (1971) 1 SCWR 133 = 27 STC 268. 9, 10
 1970 Ker LT 1102 = 1970 Ker LJ 16 7
 AIR 1967 SC 1401 = (1967) 2 SCR 751 10
 AIR 1967 SC 1815 = (1957) 3 SCR 329 10, 12
 1965 Ker LT 1039 9
 AIR 1964 SC 1419 = (1964) 6 SCR 654 10
 AIR 1964 SC 1573 = (1964) 7 SCR 1 11
 1963 Ker LT 73 7
 AIR 1961 SC 1506 = (1962) 1 SCR 753 8
 1961 Ker LT 553 = 1961 Ker LJ 669
 AIR 1960 SC 1073 = (1960) 3 SCR 742 10
 AIR 1958 SC 86 = 1958 SCR 595 8
 AIR 1957 Trav Co. 254 10

K. Neelakandha Menon, M. P. Menon and M. Ramachandran, for Petitioners; Govt. Pleader, for the State; V. Sivaraman Nair, K. Ravindran, M. Krishnakumar and K. Kanakachandra, for Respondents.

ORDER.— These Original Petitions wherein the very same order of the Regional Transport Authority, Cannanore is questioned were heard together. The grievance of

the petitioners is against the grant of a temporary permit by the Regional Transport Authority, Cannanore-1st respondent. The ambit of the preferential treatment to be given to a co-operative society under section 47 of the Motor Vehicles Act, 1939, arises for consideration in these Original Petitions. The fate of these Original Petitions also depends upon a decision of the question whether the petitioners can invoke the jurisdiction of this Court under Article 226 of the Constitution without exhausting the alternative remedy provided by the Statute.

2. The petitioner in O. P. No. 5169 of 1974 is a Stage Carriage Operator within the jurisdiction of the 1st respondent, holding 9 pucca stage carriage permits and 3 temporary permits. He is operating a regular service in the Kothuparamba-Cannanore route for which the temporary permit in question is also granted. The vacancy arose when one P. Satyabhama who was granted a pucca permit could not put a suitable vehicle on the route. The case of the petitioner is that from 16-10-1971 till 25-11-1974 he was making arrangements for operating this route by sending his spare buses though the permit used to be issued in the name of the said Satyabhama, Proprietress, Anil Roadways, Cannanore for technical reasons. Ext. P-1 series (14 in number) produced in the case shows that temporary permits were issued for the buses mentioned in the Original Petition as belonging to the petitioner in the Cannanore-Kinavakkal route. The petitioner states that for the period 23-3-1974 to 25-11-1974 temporary permits in the route Cannanore-Kothuparamba were issued in his name in respect of vehicle K. L. C. 3747 by the 2nd respondent when the sanction for the grant of a pucca permit to the said P. Satyabhama was again revoked for not producing a suitable vehicle.

3. The petitioner's case is that he purchased a new vehicle K. L. H. 2496 for operating this route. The 1st respondent instead of taking regular steps for the grant of a pucca permit on the route proceeded to grant a temporary permit in the route though the petitioner was operating on the route. Seven applications including those of the petitioner and the 3rd respondent for temporary permits came up for consideration before the 1st respondent on 23-11-1974. The petitioner entered appearance through counsel and pointed out that the petitioner who possessed a 1974 model vehicle was the best qualified applicant and he was already operating the route in question from 16-10-1971. It was also pointed out that the 3rd respondent-Co-operative Society, did not have as much qualification as the petitioner was having. But the 1st respondent granted a temporary permit to the 3rd respondent and it was under the above circumstances that the petitioner filed this Original Petition against the above grant. Subsequent to the filing of this Original Petition, the petitioner has produced the proceedings of the 1st respondent dated

23-11-1974 granting the temporary permit as Ext. P-2. The petitioner has sought for a writ of certiorari to quash Ext. P-2.

4. The 3rd respondent has filed two counter-affidavits, one in the C. M. P. and the other in the Original Petition. The statement in para. 6 of the first counter-affidavit is that the temporary permit was already issued to the 3rd respondent as per Ext. R-1 and the vehicle has commenced operation on 26-11-1974. The statement in paragraph 2 of the above counter-affidavit is that the 3rd respondent is a Stage Carriage Operator with 8 pucca permits covering the entire route by its existing service. It is further alleged that the petitioner applied for the permit in respect of a 1966 model vehicle, that the board sheet showed that the petitioner suffered one punishment and that there were arrears of tax due from the petitioner. The assertion in the second counter-affidavit is that the petitioner was not better qualified than the respondent-society. The petitioner has filed a reply affidavit answering the contentions raised in the counter-affidavits. It is pointed out in paragraph 2 that the 3rd respondent had suffered three punishments during the course of one year.

5. The petitioner in O. P. No. 3245 of 1974 is an operator who possesses no pucca permit on any route. He has got a 1971 model vehicle and he has operated substituted services on various routes on a number of occasions and on the route in question namely Koothuparamba-Cannanore. The petitioner and six others applied for the temporary permit but the 1st respondent by Ext. P-1 proceedings dated 23-11-1974 granted the permit to the 2nd respondent-society. The case of the petitioner is that the route in question being a short one new entrants like the petitioner are to be preferred under Rule 177 (1) of the Kerala Motor Vehicles Rules, 1961 and 2nd respondent being a fleet owner having 8 pucca permits cannot be granted the temporary permit in question. The statement in the counter-affidavit filed by the 2nd respondent is that under Rule 177 (A) (2) of the Kerala Motor Vehicles Rules, 1961 and under Section 47 (1) of the Motor Vehicles Act, 1939 the Regional Transport Authority made the statutory preference in favour of the society assuming that all other applicants had all necessary qualifications. It is pointed out in para. 5 of the counter-affidavit that before invoking the extraordinary jurisdiction of this Court under Article 226 of the Constitution the petitioner ought to have exhausted the alternative remedy available under the Act.

6. The parties and exhibits are referred to in this judgment as they are in C. P. No. 5169 of 1974.

7. Shri K. Neelakanta Menon, learned counsel for the petitioner in O. P. No. 5169 of 1974, refers to the proviso to Section 47 of the Motor Vehicles Act, 1939 (hereinafter referred to as the Act) and Rule 177A (2) of the Kerala Motor Vehicles Rules, 1961 (hereinafter referred to as the Rules) and contends

that an absolute preference to a co-operative society is not contemplated by the Act and in view of the fact that the petitioner is more qualified the 1st respondent went wrong in rejecting the petitioner's application. The proviso to Section 47 (1) of the Act reads:

"Provided that other conditions being equal,—

(a) an application for a stage carriage permit from the Kerala State Road Transport Corporation shall, as far as may be, be given preference over other applications; and

(b) subject to clause (a), an application for a stage carriage permit from a co-operative society registered or deemed to have been registered under any enactment in force for the time being shall, as far as may be, be given preference over applications from individual owners."

Rule 177A (2) of the Rules reads:

"In granting permits, other conditions being equal an application for a stage carriage permit from a Co-operative Society registered or deemed to be registered under any law for the time being in force shall, as far as may be, be given preference over applications from individual owners."

The learned counsel relies on two decisions of this Court in *Private Motor Workers Industrial Co-operative Society v. State Transport Appellate Tribunal* (1961 Ker LT 553) and *Malabar Motor Transport Co-operative Societies Ltd. v. State Transport Appellate Tribunal* (1963 Ker LT 78). In *Malabar Motor Transport Co-operative Societies Ltd. v. State Transport Appellate Tribunal* (1963 Ker LT 78) M. S. Menon C. J., speaking for the Court has said:

"It is clear from the proviso that the fact that an applicant is a co-operative society can be used only to tilt the scales in its favour when they are equally balanced and not for earning marks in a comparative evaluation as indicated in paragraph 2A (5) of the Madras G. O. dated 26-4-1956. In other words there is a clear conflict on this aspect between the G. O. and the proviso."

In *Private Motor Workers Industrial Co-operative Society v. State Transport Appellate Tribunal* (1961 Ker LT 553) this Court said:

"If that be so, the proviso to Section 47 of the Motor Vehicles Act can have no application. What the proviso says is that an application from a Co-operative Society shall, as far as may be, be given preference over applications from individual owners, provided the other conditions are equal. If on considering the merits of the respective claims is found by the S. T. A. T. that respondents 3 and 4 are definitely more qualified, this question of preference on the ground of being a co-operative society does not arise".

The learned counsel points out that the 1st respondent has not compared the rival claims of the applicants and this has greatly affected the rights of the petitioner for a pucca permit in the route. The learned counsel

has relied on the decision of this Court in Joseph v. Senapathi (1970 Ker L. T. 1102) wherein Raman Nayar C. J. speaking for the Court has said:

"Once a permanent need is found, a temporary need pending the grant of a pucca permit would necessarily follow, and operation on the route on a temporary permit would be a qualification for a pucca permit."

8. On the question, that the petitioner has approached this Court without exhausting the alternative remedy provided by the statute the learned counsel relies on the decisions of the Supreme Court in A. V. Venkateswaran v. R. S. Wadhvani (AIR 1961 SC 1506) and State of Uttar Pradesh v. Mohammad Nooh (AIR 1958 SC 86). In A. V. Venkateswaran v. R. S. Wadhvani (AIR 1961 SC 1506) Rajagopala Ayyangar J. speaking for the Court said:

"The rule that the party who applies for the issue of a high prerogative writ should, before he approaches the Court, have exhausted other remedies open to him under the law is not one which bars the jurisdiction of the High Court to entertain the petition or to deal with it, but is rather a rule which courts have laid down for the exercise of their discretion."

In para. 10 of the above judgment the Supreme Court further said:

"..... the two exceptions which the learned Solicitor-General formulated to the normal rule as to the effect of the existence of an adequate alternative remedy were by no means exhaustive, and that even beyond them a discretion vested in the High Court to have entertained the petition and granted the petitioner relief notwithstanding the existence of an alternative remedy. We need only add that the broad lines of the general principles on which the Court should act having been clearly laid down, their application to the facts of each particular case must necessarily be dependent on a variety of individual facts which must govern the proper exercise of the discretion of the Court, and that in a matter which is thus pre-eminently one of discretion, it is not possible or even if it were, it would not be desirable to lay down inflexible rules which should be applied with rigidity in every case which comes up before the Court."

In State of Uttar Pradesh v. Mohammad Nooh (AIR 1958 SC 86) Das C. J. speaking for the Court said:

"It is well established that, provided the requisite grounds exist, certiorari will lie although a right of appeal has been conferred by statute. The fact that the aggrieved party has another and adequate remedy may be taken into consideration by the superior court in arriving at a conclusion as to whether it should in exercise of its discretion, issue a writ of certiorari to quash the proceedings and decisions of inferior courts subordinate to it and ordinarily the superior court will decline to interfere until the ag-

grieved party has exhausted his other statutory remedies, if any. But this rule requiring the exhaustion of statutory remedies before the writ will be granted is a rule of policy, convenience and discretion rather than a rule of law and instances are numerous where writ of certiorari has been issued in spite of the fact that the aggrieved party had other adequate legal remedies."

The learned counsel further contends that the order of the 1st respondent does not contain a discussion of the relevant factors that have to be taken into consideration in granting the permit. The learned counsel has referred to the decision of the Supreme Court in P. B. Pvt. Ltd. v. S. T. A. Tribunal, Punjab (AIR 1974 SC 1174) wherein Bhagavati J. speaking for the Court has said:

"We do not find in the order of the State Transport Appellate Tribunal any discussion of the question as to what the interest of the public in general requires and who from amongst the rival claimants would be able to provide the most efficient and satisfactory service to the public The question that has to be considered is not as to what would be fair as between the appellant and the 3rd respondent, but what does the interest of the public, which is to be provided with an efficient and satisfactory service, demand."

9. Shri M. P. Menon, the learned counsel for the petitioner in O. P. No. 5245 of 1974 contends that Rule 177A does not provide that when a co-operative society is an applicant the permit should invariably be given to it. What the rule says is that the grant in favour of the co-operative society should be made only when other qualifications are equal. Rule 177A has to be interpreted in the light of Section 47 of the Act and the words used in Section 47 are "as far as may be". The route in question being a short route, the preference must be in favour of the petitioner who is a new entrant. It is also submitted that the order granting the permit should show that the 1st respondent applied its mind to the real question involved. The learned counsel relies on a decision of this Court in New Kerala Bus Transports v. Regional Transport Authority, Cannanore (1965 Ker LT 1039). In this decision, Govindan Nair J. (as he then was) speaking for the Court said:

"Speaking generally and in a broad way, it could not be seriously denied that encouraging bus operators who do not own a fleet of buses and discouraging monopoly on the route is consistent with the interests of the general public which is of paramount importance under Section 47 (1) (a). It follows that it will be open to the Tribunal to choose a new entrant in the interests of the public". On the question of not exhausting the alternative remedy provided by the statute the learned counsel relies on the decision of the Supreme Court in State of West Bengal v. North Adajai Coal Co. Ltd. (1971) 1 SCWR

133). In the above decision, J. C. Shah C. J. speaking for the Court has said:

"It is urged that the High Court was incompetent to entertain the writ petition because the respondent had failed to exhaust the statutory remedies permissible under the Bengal Finance (Sales Tax) Act. It was submitted that a revision application lay to the Board of Revenue and without moving the Board of Revenue, the respondent could not file petition before the High Court. There is no substance in this contention. It is true that normally before a petition under Article 226 is entertained the High Court would insist that the Party aggrieved by the order of a quasi-judicial Tribunal should have recourse to the statutory authorities, which have power to give relief. But that is a rule of practice and not of jurisdiction. In appropriate cases the High Court may entertain a petition even if the aggrieved party has not exhausted the remedies available under a statute before the departmental authorities. In the present case, in the view of the High Court, a case was made out for its interference with the order passed by the Deputy Commissioner and there is no reason to hold that the High Court had not properly exercised jurisdiction in this case. The facts were apparently not in dispute, and the only question was whether in the facts and circumstances of the case, the respondents were entitled to the exemption claimed by them. In the circumstances the High Court cannot be said to have acted improperly in entertaining the petition under Article 226."

The learned counsel points out that there are no disputed questions of fact to be decided in deciding the validity of the order of the 1st respondent dated 23-11-1974. That the route in question is a short route and that the petitioner in O. P. No. 5245 of 1974 is a new entrant are not facts which are in dispute. It is also clear from the order of the 1st respondent that the 1st respondent has not ever adverted to the fact that only when other conditions are equal an applicant who is a co-operative society can tilt the scales in its favour.

10. Shri V. Sivaraman Nair, learned counsel for the 3rd respondent in O. P. No. 5169 of 1974 and respondent No. 2 in O. P. No. 5245 of 1974, contends that it is immaterial whether the 1st respondent has stated in the order that other conditions of the grantee-society and the petitioners in the two original petitions are equal or not. Unless it is shown to be otherwise, the presumption will be that other conditions are equal. The learned counsel relies on the decision of the Supreme Court in *C. M. P. Co-operative Societies v. State of Madhya Pradesh* (AIR 1967 SC 1815) and contends that no express finding that other conditions are equal is necessary to make the order valid. The above case arose from an order of the Government of Madhya Pradesh modifying a scheme for State Transport undertakings under Sections

68-C and 68-D of the Act. A contention was taken that the orders approving or modifying the schemes do not show that the authority had applied its mind to the question whether the schemes were such as to subserve the purposes of providing an efficient, adequate, economical and properly co-ordinated transport service. The Supreme Court repelling the above contention said:

"There is no express provision in these two sections laying down that the authority hearing objections must come to some finding of fact as a condition precedent to its final order. As such no express finding as envisaged in the American cases is necessary under Section 68-C read with Section 68-D that the scheme provides an efficient, adequate, economical and properly co-ordinated road transport service. Besides, we are of opinion that the whole object of hearing objections under Section 68-D is to consider whether the scheme provides an efficient, adequate, economical and properly co-ordinated road transport service. After hearing objections the State Government, or the officer authorised by it has either to approve or modify or if necessary, to reject the scheme. Where the scheme is approved or modified it necessarily follows in our opinion that it has been found to provide an efficient, adequate, economical and properly co-ordinated transport service; if it is not of that type, the State Government or the authority appointed to hear objections would reject it. In the absence of a provision requiring an express finding in these two sections it seems to us that the very order of the State Government or the authority appointed by it to hear objections must be held to mean either, where the scheme is approved or modified, that it subserves the purposes mentioned in Section 68-C, or, where it is rejected, that it does not subserve the purposes. Section 68-D (2) does not require in our opinion any express finding, and even if there is none in the present case, it would not invalidate the orders passed by the authority hearing the objections".

Referring to the decision of the Supreme Court in *State of West Bengal v. North Adajai Coal Co. Ltd.* ((1971) 1 SCWR 133) relied on by the petitioner's counsel, the learned counsel for the respondent submits that if an investigation of facts is necessary the remedy is by way of a regular appeal. The learned counsel further submits that no indication of the subjective satisfaction of the authority need be there in the order and a presumption can be there that the authority was satisfied on the facts and circumstances of the case before the order was issued. The learned counsel also relies on the following decisions of the Supreme Court in *Thansingh v. Superintendent of Taxes* (AIR 1964 SC 1419) and *Tata Engineering and Locomotive Co. Ltd. v. Assistant Commr. Commercial Taxes* (AIR 1967 SC 1401). In *Thansingh v. Superintendent of Taxes* (AIR 1964 SC 1419) Shah J. (as he then was) speaking for the Court said:

"Ordinarily the Court will not entertain a petition for a writ under Article 226, where the petitioner has an alternative remedy, which without being unduly onerous, provides an equally efficacious remedy. Again the High Court does not generally enter upon a determination of questions which demand an elaborate examination of evidence to establish the right to enforce which the writ is claimed. The High Court does not therefore act as a court of appeal against the decision of a court or tribunal to correct errors of fact and does not by assuming jurisdiction under Article 226 trench upon an alternative remedy provided by statute for obtaining relief. Where it is open to the aggrieved petitioner to move another tribunal, or even itself in another jurisdiction for obtaining redress in the manner provided by a statute, the High Court normally will not permit by entertaining a petition under Article 226 of the Constitution the machinery created under the statute to be by-passed, and will leave the party applying to it to seek resort to the machinery so set up."

In *Tata Engineering and Locomotive Co. Ltd. v. Assistant Commr. of Commercial Taxes* (AIR 1967 SC 1401) Hidayatullah J. (as he then was) speaking for the Supreme Court said:

"In spite of the very wide terms in which this jurisdiction is conferred, the High Courts have rightly recognised certain limitations on this power. The jurisdiction is not appellate and it is obvious that it cannot be a substitute for the ordinary remedies at law. Nor is its exercise desirable if facts have to be found on evidence. The High Court, therefore, leaves the party aggrieved to take recourse to the remedies available under the ordinary law if they are equally efficacious and declines to assume jurisdiction to enable such remedies to be by-passed. To these there are certain exceptions. One such exception is where action is being taken under an invalid law or arbitrarily without the sanction of law. In such a case, the High Court may interfere to avoid hardship to a party which will be unavoidable if the quick and more efficacious remedy envisaged by Article 226 were not allowed to be invoked."

The learned counsel also referred to the decision of the Supreme Court in *H. C. Narayanappa v. State of Mysore* (AIR 1960 SC 1073) and contends that though under Section 68-D of the Act the State Government is to act judicially, absence of detailed reasons in the order cannot be reason for challenge in Supreme Court. The learned counsel also has a case that no interference can be made as long as there is no manifest injustice and in this case no manifest injustice is caused. It is also pointed out that under Rule 177A of the rules all orders granting permits are to be accompanied by a tabular statement containing the marks awarded to each applicant and the reasons for awarding marks and in view of this fact the absence of reasons in the

order is immaterial. Moreover, Section 62 does not insist that reasons should be given in the order. The learned counsel contends that reasons need be given only when a permit is refused and even in that case absence of detailed reasons cannot be a reason for interference. In support of this contention the learned counsel relies on the decision of the Travancore-Cochin High Court in *Kunju Menon v. Secretary, R. T. B. Trichur* (AIR 1957 Trav Co. 254) wherein it has been said:

"Where reasons are given by the Road Traffic Board in the order refusing an application for permit the fact that the order could with advantage have been written in a more detailed and elaborate fashion is no reason to hold that it does not comply with the provisions of sub-section (7) of Section 57 of the Motor Vehicles Act, 1939".

11. Shri K. Neelakanta Menon, learned counsel for the petitioner, in his reply refers to the decision of the Supreme Court in *P. B. Pvt. Ltd. v. S. T. A. Tribunal, Punjab* (AIR 1974 SC 1174) and contends that the main considerations in the grant of both pucca permits and temporary permits are the same and the failure to take into account any of these considerations and proceeding as if the stage carriage permits are a largesse to be divided fairly and equitably among the rival claimants is a wholly erroneous approach. The learned counsel also referred to the decision of the Supreme Court in *B. Rajagopala v. S. T. A. Tribunal* (AIR 1964 SC 1578) in support of his contention that the quasi-judicial function exercised by the Regional Transport Authority is subject to the jurisdiction of this Court. A decision of my learned brother George Vadakkal J. in *P. E. George v. R. T. A. Palghat* (O. P. Nos. 1256 and 1258 of 1974 (Ker)) was also pressed into service by the learned counsel. In the above decision George Vadakkal J. said:

"The order is a cryptic and laconic order. It is not a speaking order. The Regional Transport Authority has failed to consider the rival claims of the applicants Nos. 2, 4 to 6 (both inclusive) and 8 to 12 (both inclusive). In the nature of the order it has to be set aside."

In the above case the petitioner in one of the original petitions approached this Court without filing an appeal from the order of the Regional Transport Authority.

12. Shri M. P. Menon, learned counsel for the petitioner, points out that the relief claimed in the original petition is a writ of certiorari to quash Ext. P-1. Rule 177A (2) of the rules does not mean that irrespective of qualifications a co-operative society should be given preference in the grant of permits. Section 47 of the Act also does not insist so. So, the Regional Transport Authority has really misconstrued the provisions of law when it grants the permit to the respondent-society saying that as per R. 177A (2) preference has to be given to the co-operative society. This is an error of law apparent

on the face of the record. The learned counsel also points out that the decision of the Supreme Court in *C. M. P. Co-operative Societies v. State of Madhya Pradesh* (AIR 1967 SC 1815) relied on by the counsel for the respondent-society is not applicable to the facts of this case as the decision questioned in that case was a policy decision of the Government.

13. On a consideration of the contentions advanced by the counsel appearing in the case in the light of the facts and circumstances of the case, I come to the following conclusions. The High Court has always the jurisdiction under Article 226 of the Constitution to issue a writ of certiorari when there is an error of law apparent on the face of the record in an order of a subordinate authority exercising quasi-judicial functions. This jurisdiction does not depend upon the fact whether there is or there is not an alternative remedy provided by the statute. Normally as a matter of practice when there is an alternative remedy provided by the statute and if the same is not exhausted this Court will decline to interfere. But this is not an inflexible rule. It is only a rule of practice and not a rule of law. As said by Das C. J., provided the requisite grounds exist, certiorari will lie although a right of appeal has been conferred by the statute. In a case like this where it is clear from the order itself that the subordinate authority has misconstrued a provision of law there is no reason why this Court should refuse to exercise the discretion vested under Article 226 of the Constitution, simply because the petitioners have not exhausted the remedy of appeal provided by the statute. Moreover, no investigation on disputed questions of facts is necessary for giving a decision. For that reason also, this Court cannot refuse to exercise the discretion vested under Article 226 of the Constitution. On the merits also the order is wrong. The Regional Transport Authority has proceeded on the basis that if a co-operative society is an applicant for a permit, as per Rule 177A (2) the permit has to be issued to that co-operative society and that co-operative society alone irrespective of the fact whether the co-operative society has got as much qualification as the other applicants who are not co-operative societies. This is not what is insisted by Section 47 (1) of the Motor Vehicles Act, 1939. As per Section 47 (1) of the Act, the matters that are to be given due regard in considering the application for a permit are those enumerated in clauses (a) to (f) of the subsection. The proviso to Section 47 (1) only says that an application by a co-operative society shall, as far as may be, be given preference over applications from individual owners. Rule 177A of the Kerala Motor Vehicles Rules, 1961 contains the guiding principles to be followed in the matter of grant of permits. As per Rule 177A (2) other conditions being equal an application for a permit from a co-operative society shall, as far as may be, be given preference over ap-

plications from individual owners. So it goes without saying that an applicant who is a co-operative society cannot have a simple walk-over over applicants who are not co-operative societies. In the words of M. S. Menon C. J., the fact that an applicant is a co-operative society can be used only to tilt the scales in its favour when they are equally balanced. This is the aspect which has to be kept in mind in granting a permit to a co-operative society. There is no indication in the order that the Regional Transport Authority has adverted to this aspect in granting the permit. On the other hand, whatever indication that is there in the order is that the Regional Transport Authority has not adverted to this aspect of the matter which is the aspect which should be considered. The Regional Transport Authority has misconstrued the relevant provisions of the Act and the Rules.

14. For the reasons stated above, I quash Ext. P-2 in O. P. No. 5169 of 1974 and Ext. P-1 in O. P. No. 5245 of 1974. The 1st respondent-Regional Transport Authority, Cannanore is directed to consider the question of granting the temporary permit in question afresh and pass orders in accordance with law. The Original Petitions are allowed. There will be no order as to costs.

Petitions allowed.

AIR 1976 KERALA 15

V. P. GOPALAN NAMBIYAR, J.

K. K. Kuruvila, Petitioner v. Union of India and another, Respondents.

Original Petns. Nos. 5087 and 5281 of 1972, D/- 31-1-1975.

(A) Telegraph Rules (1951), Rule 2 (w) — Power to vary limits of local area — Telegraph authority has such power even in absence of express provision in Telegraph Act.

Due to limiting local area from a radius of five miles to five Kilometres, a subscriber's connection went beyond the local area and he was required to pay more. He challenged the powers of the Department to change the limits. Held: From the power to initially declare a local area there should be a power to cancel, modify or vary the same. This is clear from the provisions of the General Clauses Act. The Telegraph authority has therefore, power to vary limits of local area and, a subscriber can have no grievance. (AIR 1971 Andh Pra 166, Rel. on). (Para 3)

(B) Telegraph Rules (1951), Rule 2 (w) — Notice — Variation of local area — Even public notice is sufficient.

It is inconceivable that individual notices should be served on all the persons concerned, when there is variation of local area. In such a case, public notice would meet requirements of justice. (Para 4)

Cases Referred: Chronological Paras
AIR 1971 Andh Pra 166 3

FS/GS/C59/75/MBR

K. Sukumaran and K. K. Usha, for Petitioner in both the Petns.; Central Govt. Pleader and K. Prabhakaran, for Respondents.

ORDER:— These are petitions by two different petitioners who were given telephone connections by the telegraph authorities within a 'local area' originally demarcated as included within a radius of five miles from the Telephone Exchange, and who, by reason of the reduction of the local area to one within a radius of five kilometres from the Telephone Exchange have been prejudicially affected in regard to the charges payable by them for the use of the telephones. This difference arises by reason of the fact that under the provisions of the statute, those within the 'local area' are liable to pay charges at more favourable rates than those outside the local area. As a result of this variation of local area the petitioners in these two cases ceased to be within the local area and therefore were liable to pay the telephone charges at the increased rates on the ground of their being persons outside the local area.

2. Section 7 of the Telegraph Act, 1885 in so far as it is relevant reads:—

"7. Power to make rules for the conduct of telegraphs— (1) The Central Government may, from time to time, by notification in the Official Gazette, make rules consistent with this Act for the conduct of all or any telegraphs established, maintained or worked by the Government or by persons licensed under this Act.

(2) Rules under this section may provide for all or any of the following, among other matters, that is to say:—

(a) the rates at which, and the other conditions and restrictions subject to which, messages shall be transmitted;

xx

xx

xx

(it is unnecessary to quote the remaining clauses although some of them may not be altogether irrelevant for the purposes of this case).

The rules framed in pursuance of the above Section are the Indian Telegraph Rules, 1951. Rule 2 (w) of the Rules defines 'local area' thus:—

"2 (w) local area means the area within 5 kilometres radial distance from a telephone exchange or where the Telegraph Authority has declared any area served by an exchange system to be a local area for the purpose of telephone connection, such area;" Rule 413 of the Act reads:—

"TELEPHONE CONNECTIONS AND OTHER SERVICES

413. All services subject to rules.— All telephone connections and other similar services provided or authorised by the Department shall, unless governed by a separate contract, be subject to the conditions set forth in these rules."

Rule 434 provides for the charges for various services. The rule is a fairly long one and need not be quoted in full. It is plain from

the scheme of the provisions of Rule 434 that a more favoured system of charge obtains within the local area and a more onerous system, outside the local area. The petitioners were granted telephone connections in the year 1966; and the local area, for their purpose at that time was within a radius of five miles from the Telephone Exchange. They were therefore entitled to beneficial rates in regard to the payment of charges. But the local area was varied some time in 1971 so as to change the same into an area within a radius of five kilometres from the Telephone Exchange. The result is they were subjected to a more burdensome rate of charges in respect of the telephones installed.

3. The petitioners' objection is that the local area cannot be changed by the authorities concerned under the provisions of the statute and the Rules; and even if it can be, the same can be done only after notice to the petitioners and after affording them opportunities for explanation. The petitioners' counsel stressed that there was no provision under the Act or the Rules for variation of a local area. But the very decision on which the petitioners rely, and which the petitioner's counsel very fairly brought to my notice, viz., in *A. Sriramareddy v. The District Manager, Telephones, Hyderabad*, AIR 1971 Andh Pra 166 recognizes the requisite power. Therein it was ruled that having regard to the definition of 'local area' contained in the Telegraph Rules, the telegraph authority which has power to initially determine and declare a local area within the meaning of Rule 2 (w) of the Rules is also empowered to vary the local area from time to time. Even if there is no express provision in the Act and the Rules for varying the local area, it seems to me that from the power to initially declare a local area there should be a power to cancel, modify or vary the same. This is clear at least on the strength of the provisions of the General Clauses Act. I cannot, therefore, accept the contention of the petitioners that there is no power at all for the telegraph authority to vary the limits of the local area as defined by Rule 2 (w) of the Rules.

4. The next question is whether the power of variation can be exercised without notice to persons like the petitioners in these writ petitions who are affected by such variation. The Andhra Pradesh decision noticed supra holds that there cannot be a unilateral variation of local area without notice to the persons who are prejudicially affected. It is unnecessary in this case to consider the correctness or otherwise of this, as, on the facts placed, it is clear that there has been a proper notice and sufficient opportunity afforded to the petitioners. Paragraph 2 of the counter affidavit states:—

"The local area of Kottayam Exchange was fixed as the area within a radial distance of 5 Kms. from the Kottayam Telephone Exchange with effect from 1-8-1971 as per

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Madhya Pradesh High Court

AIR 1976 MADHYA PRADESH 1
FULL BENCH

G. P. SINGH, S. M. N. RAINA AND
M. L. MALIK, JJ.

Rambai Vottery and others, Appellants v.
Shivaprasad Vottery, Jabalpur, Respondent.

First Appeal No. 114 of 1972, D/- 12-9-1975.

(A) Court-fees Act (1870), Section 7 (iv) (f) — Suit for dissolution of partnership and rendition of accounts — Preliminary decree passed — Appeal — Defendant whether bound to value relief on the valuation on the plaint.

In an appeal against a preliminary decree declaring dissolution of partnership and directing accounts, the defendant is bound to value the relief in appeal according to the value put by the plaintiff on the plaint unless, on an objection by the defendant, a different valuation has been determined by the Court. It is not open to the defendant to put a different valuation in appeal for purposes of court-fee under Section 7 (iv) (f), unless such valuation is determined by the Court to be proper valuation for purposes of the suit itself. (Conflict of decisions indicated). (Para 15)

The expression "according to the amount at which the relief sought is valued in the plaint or memorandum of appeal" merely implies that the valuation has to be indicated in the plaint as well as in the memorandum of appeal and the Court-fee is to be computed accordingly. How the claim is to be valued is a separate matter. The plaintiff has been expressly given the right to state the amount at which he values the relief sought. Thus, it is for the plaintiff primarily to state the value of the claim in suits falling within the purview of clause (iv) of Section 7 of the Act and the court-fee payable shall be computed according to such valuation. In case the valuation put by the plaintiff is arbitrary or unreasonable, it may be challenged by the

defendant and, then it would be for the Court to determine the proper valuation. Once the value of the claim has been determined, it would be the proper valuation for purposes of appeal but if the valuation put by the plaintiff is not challenged by the defendant, it shall be deemed to be accepted by implication and it shall have to be treated as the proper valuation of the claim for purposes of appeal. It is significant that it has not been expressly provided in Section 7 that the defendant is free to put his own valuation on the memorandum of appeal against a decree in suits falling under sub-clauses (a) to (f) of clause (iv). In the absence of such a provision, there is no justification for giving the defendant a right which has not been expressly conferred on him by the statute.

(Paras 12, 13)

It appears that the words "memorandum of appeal" were introduced in the expression below sub-clause (f) merely to indicate that in the case of a memorandum of appeal arising out of a suit of this nature, the court-fee has to be computed according to the amount at which the relief sought is valued in the memorandum of appeal. An appeal by the defendant may not necessarily be directed against the entire claim as laid in the plaint. In such a case the valuation of the memorandum of appeal may differ from the value of the claim in suit; but where the appeal is directed against a preliminary decree for accounts, the defendant cannot be permitted to put a different valuation than the one put by the plaintiff on the plaint. A claim for accounts is of an indefinite character because it is not clear at that stage as to what amount may ultimately be found due to the plaintiff on going through the accounts.

(Para 12)

Cases	Referred:	Chronological	Paras
AIR 1959 Bom 495	=	61 Bom LR 599	6
AIR 1958 Raj 144	=	1958 Raj LW 177	7
AIR 1946 Lah 280	=	(1946) 48 Pun LR 176	7
(FB)			6, 7
AIR 1943 Nag 13	=	1942 Nag LJ 557	5

JS/KS/D911/75/MVJ

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AIR 1938 Mad 435 = (1938) 1 Mad LJ 628 (FB) 6
 AIR 1937 Lah 694 = ILR (1937) Lah 196 5
 AIR 1935 Pat 396 = 16 Pat LT 433 (SB) 7
 AIR 1933 Nag 127 = 16 NLJ 10 5
 AIR 1931 Rang 146 = ILR 9 Rang 165 (FB) 7
 AIR 1929 PC 147 = (1929) 57 Mad LJ 281 8
 AIR 1925 All 787 = 28 All LJ 725 7
 (1910) 6 Nag LR 164 5

M. Adhikari with S. Awasthy, for Appellants; Rameshwarprasad Verma, for Respondent.

RAINA, J.— The following question has been referred to this Bench for opinion :

“Whether in an appeal against a preliminary decree declaring dissolution of partnership and directing accounts a defendant is bound to value the relief in appeal on the valuation that was put by the plaintiff on the plaint, or whether it is open to the defendant to put a different valuation in appeal for purposes of court-fee under Section 7 (iv) (f) of the Court-fees Act?”

2. The respondent filed a suit against the appellant for rendition of accounts of a dissolved partnership firm or, in the alternative, for dissolution of the firm and rendition of accounts in the Court of First Additional District Judge, Jabalpur. The claim was valued at Rs. 75,000/-. The defendant (who has since died and is now represented by the appellants) resisted the suit; but ultimately a decree was passed declaring that the partnership stood dissolved with effect from 29-10-1970 and directing the defendant to render accounts of the partnership to the plaintiff. The defendant preferred an appeal in this Court valuing the relief at Rs. 300/- only on the ground that the appeal was in respect of dissolution of the partnership alone and not in respect of accounts because the plaintiff-respondent himself was an accounting party. On an objection raised by the respondent regarding proper valuation of the claim for purposes of the appeal, a question arose whether, in an appeal by the defendant arising out of a suit for accounts, it is open to the defendant to put his own valuation on the claim. As the matter was not free from difficulty and there has been some divergence of opinion on the point, the Division Bench hearing the appeal referred the aforesaid question to this Bench for opinion.

3. Before we proceed to take into consideration the divergent views expressed by different High Courts on this question, it would be pertinent to refer to the relevant provisions of the Court-fees Act. It is not disputed that a suit for dissolution of partnership and accounts falls under Section 7 (iv) (f) of the Act. Section 7 of the Act reads as under:

“7. Computation of fees payable in certain suits.— The amount of fee payable under this Act in the suits next hereinafter mentioned shall be computed as follows:

(i) For money.— In suits for money (including suits for damages or compensation, or arrears of maintenance, of annuities, or of other sums payable periodically) — according to the amount claimed;

(ii) For maintenance and annuities.— In suits for maintenance and annuities or other sums payable periodically—according to the value of the subject-matter of the suit, and such value shall be deemed to be ten times the amount claimed to be payable for one year;

(iii) For movable property having a market value.— In suits for movable property other than money, where the subject-matter has a market value—according to such value at the date of presenting the plaint;

(iv) In suits—

(a) For movable property of no market value.— For movable property where the subject-matter has no market-value, as for instance, in the case of documents relating to title;

(b) [Omitted]

(c) For a declaratory decree and consequential relief.— To obtain a declaratory decree or order, where consequential relief is prayed;

(d) For an injunction.— To obtain an injunction;

(e) For easements.— For a right to some benefit (not herein otherwise provided for) to arise out of land; and

(f) For accounts.— For accounts— according to the amount at which the relief sought is valued in the plaint or memorandum of appeal with a minimum fee of Twenty Rupees.

In all such suits the plaintiff shall state the amount at which he values the relief sought.

4. From the provisions of sub-clause (f) of clause (iv) of Section 7 of the Act it is clear that in a suit for accounts the plaintiff has to state the amount at which he values the relief sought and the amount of fee payable on such a suit has to be computed according to the said amount. The question that arises for consideration is whether, on a memorandum of appeal arising out of a suit for accounts, the defendant is free to put his own valuation or whether he is bound by the valuation put by the plaintiff on the claim in the plaint.

5. It would be pertinent here to refer to the divergent views expressed by the different High Courts on the question. In *Binjraj v. Kisanlal* AIR 1933 Nag 127 it was held that in an appeal by the defendant against a preliminary decree in a suit for partnership accounts it is open to him to fix his own valuation provisionally for the purpose of court-fee which may be different from the one put by the plaintiff on the plaint. In *Sheoram v. Atmaram* AIR 1943 Nag 13 the Nagpur High Court, however, took a different view without noticing the earlier case. In this case it was

held that in a suit for partnership accounts the valuation of the claim in the trial Court continues throughout the litigation and the defendant-appellant has no right to value the relief arbitrarily at a lesser figure. In arriving at this conclusion, reliance was placed on *Dhirajsingh v. Rajaram* (1910) 6 Nag LR 164 and *Feroze Din v. Mohammad Din* ILR (1937) Lah 196 = (AIR 1937 Lah 694). The question of proper valuation in such a case was not, however, discussed and no reasons were given for the view expressed therein apparently under the impression that the law on the point was settled in view of the earlier decisions relied upon.

6. A proper construction of Section 7 (iv) (f) of the Act in the context of an appeal by the defendant arising out of a suit for accounts was considered by a Full Bench of the Madras High Court in *In re Dhanukodi Nayakkar* AIR 1938 Mad 435 (FB). It was held in that case that the defendant appealing from a preliminary decree for accounts has ordinarily to stamp his memorandum according to the plaintiff's valuation. A similar view was expressed by a majority of the Full Bench of the Lahore High Court in *Meghrai v. Rupchand Uttamchand* AIR 1946 Lah 280 (FB). *Tejasingh, J.* in his dissenting judgment expressed a contrary view that the defendant-appellant is free to value his memorandum of appeal in such a case regardless of the plaintiff's valuation in the plaint. In *Dattatraya v. Ganesh* AIR 1959 Bom 495 the Bombay High Court adopted the view taken by the Madras High Court in *In re Dhanukodi Nayakkar* (supra) and by the Nagpur High Court in *Sheoram v. Atmaram* (supra). It was held in that case that the privilege of fixing the value of the subject-matter of a suit for accounts is with the plaintiff and it is not open to the defendant in an appeal against the preliminary decree for accounts to alter the valuation made by the plaintiff of the subject-matter for purposes of court-fees. The minority view expressed by *Tejasingh, J.* in the Full Bench decision of the Lahore High Court in AIR 1946 Lah 280 (FB) (supra) is, however, supported by certain decisions of other High Courts.

7. In *Chunnilal v. Sheocharanlal* AIR 1925 All 787 a Division Bench of the Allahabad High Court held that in an appeal from a preliminary decree in a suit for accounts, the appellant (defendant) is entitled to fix his own value for the relief he claims and is not bound by the valuation put by the plaintiff on his suit. A similar view was expressed by a Full Bench of Rangoon High Court in *C. K. Umar v. C. K. Ali Umar* AIR 1931 Rang 146 (FB). A Full Bench of the Patna High Court also took the same view in *Deoji Gaa v. Tricumji Jivandas* AIR 1935 Pat 396 (SB), and the Rajasthan High Court adopted it in *Jegannath v. Kundal Mal* AIR 1958 Raj 144.

8. If we carefully analyse the logic and reasoning in support of the view that the defendant-appellant is free to put his own

valuation on a memorandum of appeal against a preliminary decree for accounts, we would find that two considerations have considerably weighed in adopting this view. The first consideration arises out of the following observations of Lord Tomlin made in the course of arguments in *Faizullah Khan v. Mauladad Khan* (1929) 57 Mad LJ 281 at p. 283 = (AIR 1929 PC 147 at p. 148).

"In Section 7, the amount of the fee is to be computed, in suits for accounts, according to the amount at which the relief sought is valued in the plaint or memorandum of appeal. If, therefore, the appellant values the relief in the memorandum of appeal and pays a fee thereon, that is the amount of fee properly payable. Of course, if the appellant recovers more, he pays the extra fee under Section 11 of the Act. But you cannot complain that the amount valued in the memorandum of appeal is not the proper amount." Apart from the fact that the aforesaid observations were made casually in the course of arguments and not in the course of judgment, it would appear that the question before us was not at all in issue in that case. The case before their Lordships of the Privy Council arose out of a suit for rendition of accounts. The suit was valued in the plaint at Rs 3,000/- for purposes of court-fees, Defendant No. 1 asked for a decree in his own favour for Rs. 29,000/-. The Subordinate Judge passed a final decree with costs and interest. Under that decree Rs. 19,991/- were declared to be due to defendant No. 1 by the plaintiffs. In the appeal filed by the plaintiffs, they challenged the decree against them and prayed that their own claim of Rs. 3,000/- should be allowed. They valued the appeal at Rupees 19,991/- and that was held to be the proper valuation.

9. As regards the question as to what was the intention or purpose of the legislature in introducing the expression "memorandum of appeal" in the sentence just below sub-clause (f), it is necessary to remove one confusion, which seems to have been largely responsible for the divergence of views on the subject. The expression "according to the amount at which the relief sought is valued in the plaint or memorandum of appeal with a minimum fee of Twenty Rupees" not only governs the said sub-clause but all the preceding sub-clauses in clause (iv) of Section 7. This is clear from the language of Section 7. So far as suits falling under clauses (i), (ii) and (iii) of the section are concerned, it is indicated in each clause how the amount of fee payable shall be computed in respect of a suit falling thereunder. In clause (iv) a number of suits are grouped together and for all the suits specified in sub-clauses (a) to (f) it has been provided that court-fee shall be computed according to the amount at which the relief sought is valued in the plaint or memorandum of appeal. The confusion that the aforesaid expression relates only to sub-clause (f) and not to the other sub-clauses of clause (iv) has arisen because of a printing error in some

of the books on the Court-fees Act. However, if we carefully examine the language of Section 7 as a whole, there will be no doubt that the expression relates to all the sub-clauses, (a) to (f), and not merely to sub-clause (f) because otherwise there would be nothing to indicate how the amount of fee payable shall be computed in suits specified in sub-clauses (a) to (e) of clause (iv).

10. It is, therefore, clear that in all the suits specified in sub-clauses (a) to (f) of clause (iv) of Section 7 the amount of court-fee is to be computed according to the amount at which the relief sought is valued in the plaint or memorandum of appeal. In the context of suits falling under sub-clauses (a) to (e) it has been consistently held that the valuation put by the plaintiff is the valuation which must remain constant throughout the litigation and when the defendant, prefers an appeal against a decree in such a suit, he must value his relief at the amount at which the suit was valued in the plaint by the plaintiff.

11. Learned counsel for either side was unable to point out to us any case in which a controversy such as has arisen in the context of a suit for accounts may have arisen in the context of suits of other categories as specified in sub-clauses (a) to (e) of clause (iv) of Section 7. There appears to be no reason whatsoever for distinguishing a suit for accounts from suits falling under sub-clauses (a) to (e) of clause (iv) in the matter of proper valuation of an appeal preferred by the defendant from a decree in such suits; and whatever view we may adopt must apply uniformly to such suits, including a suit for accounts. It was not disputed before us that it has been the consistent and unquestioned view that in suits falling under sub-clauses (a) to (e) of clause (iv), the valuation of the claim in the trial Court will govern the valuation of an appeal by the defendant against a decree in such suit. There is, therefore, apparently no reason to take a different view in the context of a suit for accounts.

12. We may now proceed to consider why the words "memorandum of appeal" were introduced in the aforesaid expression below sub-clause (f). It appears to us that these words were introduced merely to indicate that in the case of a memorandum of appeal arising out of a suit of this nature, the court-fee has to be computed according to the amount at which the relief sought is valued in the memorandum of appeal. An appeal by the defendant may not necessarily be directed against the entire claim as laid in the plaint. In such a case the valuation of the memorandum of appeal may differ from the value of the claim in suit; but where the appeal is directed against a preliminary decree for accounts, the defendant cannot be permitted to put a different valuation than the one put by the plaintiff on the plaint. A claim for accounts, to begin with, is of an indefinite character because it is not clear at that stage as to what amount may ultimately be found

due to the plaintiff on going through the accounts. The plaintiff has, therefore, been permitted to put his own valuation on the relief sought; and for this purpose the following provision has been made at the end of clause (iv):

"In all such suits the plaintiff shall state the amount at which he values the relief sought."

This provision is equally applicable to suits falling under sub-clauses (a) to (e) of clause (iv); but it is clear that liberty is given to the plaintiff alone to value the relief sought in such suits. It is, however, open to the defendant to challenge the valuation put by the plaintiff and invite a decision. If he does not challenge the valuation put on the claim by the plaintiff in the trial Court, he would not be at liberty to put a different valuation in appeal. It is significant that it has not been expressly provided in Section 7 that the defendant is free to put his own valuation on the memorandum of appeal against a decree in suits falling under sub-clauses (a) to (f) of clause (iv). In the absence of such a provision, there is no justification for giving the defendant a right which has not been expressly conferred on him by the statute.

13. To sum up, the position appears to be as follows. The expression "according to the amount at which the relief sought is valued in the plaint or memorandum of appeal" merely implies that the valuation has to be indicated in the plaint as well as in the memorandum of appeal and the court-fee is to be computed accordingly. How the claim is to be valued is a separate matter. The plaintiff has been expressly given the right to state the amount at which he values the relief sought. Thus, it is for the plaintiff primarily to state the value of the claim in suits falling within the purview of clause (iv) of Section 7 of the Act and the court-fee payable shall be computed according to such valuation. In case the valuation put by the plaintiff is arbitrary or unreasonable, it may be challenged by the defendant and, then it would be for the Court to determine the proper valuation. Once the value of the claim has been determined, it would be the proper valuation for purposes of appeal but if the valuation put by the plaintiff is not challenged by the defendant, it shall be deemed to be accepted by implication and it shall have to be treated as the proper valuation of the claim for purposes of appeal.

14. From a careful scrutiny of the language of Section 7 of the Act we find no force in the suggestion that it is open to the defendant to put his own valuation on the memorandum of appeal in the case of suits falling within the purview of clause (iv) thereof. As we have already pointed out above, no controversy ever arose regarding valuation of suits falling under sub-clauses (a) to (e) of clause (iv) and it has been a settled proposition that in an appeal arising out of such

suits, the valuation of the relief in the memorandum of appeal shall be the same as stated in the plaint by the plaintiff. The controversy arose only in regard to a suit for accounts falling under sub-clause (f) of clause (iv). Looking to the language of the section we do not find any justification for treating a suit account differently from suits falling under the other sub-clauses of clause (iv) in the context of valuation of the claim in appeal.

15. We, therefore, answer the question posed for consideration before us as under:

"In an appeal against a preliminary decree declaring dissolution of partnership and directing accounts, the defendant is bound to value the relief in appeal according to the value put by the plaintiff on the plaint unless, on an objection by the defendant, a different valuation has been determined by the Court. It is not open to the defendant to put a different valuation in appeal for purposes of court-fee under sub-clause (f) of clause (iv) of Section 7 of the Court-fees Act, unless such valuation is determined by the Court to be proper valuation for purposes of the suit itself."

Answer accordingly.

AIR 1976 MADHYA PRADESH 5 FULL BENCH

P. K. TARE C. J. G. P. SINGH AND
S. S. SHARMA, JJ.

Chhoglal, Appellant v. Idol of Bhagwan Shri Satyanarayan Through Pujari Kamaldas Guru, Narayandas Bairagi, Respondent.

Second Appeal No. 410 of 1965 D/-
13-8-1975.

(A) M. P. Accommodation Control Act (41 of 1961), Sec. 13 — Construction — Dispute as to rate and amount of rent payable by defendant-tenant raised in his written statement — Operation of Section 13 (1) is arrested so far as deposit of rent according to it is concerned until provisional rent is fixed by Court — Separate application for its fixation not necessary. AIR 1971 Madh Pra 104, Overruled. AIR 1973 MP 165, Approved.

Section 13 (2) is silent regarding manner in which dispute should be raised. Having regard to its language if the tenant had raised the dispute as to the rate and amount of rent payable by him in the written statement, that would be sufficient for purposes of the sub-section. A dispute so raised will make it obligatory on the Court to fix the reasonable provisional rent. No further action on the part of the tenant, such as making of an application or inviting the attention of the Court to the specific dispute or specifically asking the Court to fix the provisional rent, is needed to cast an obligation on the Court to fix the reasonable provisional rent, for the simple reason that the sub-section does not say that

the tenant should file a separate application or specifically pray for fixation of provisional rent. Raising of a dispute in the written statement by itself amounts to an implied request, if any request is at all needed, for fixation of provisional rent. (Para 8)

When a dispute is raised as to the amount of rent payable by the tenant or as to the person to whom it is payable, sub-section (1) gets controlled by sub-sections (2) and (3). If the dispute is as to the amount of rent the Court under sub-section (2) fixes a reasonable provisional rent and it is this rent which is to be deposited or paid under sub-section (1). As the obligation on the tenant in case of dispute is to deposit or pay the reasonable provisional rent fixed by the Court, it is implicit that the obligation to deposit or pay the rent arises only when the Court fixes the reasonable provisional rent and till then the obligation to deposit rent in accordance with sub-section (1) remains suspended. It is conceivable that there may be delay in some cases making it impossible for the tenant to adhere to the time schedule under sub-section (1) for depositing or paying rent for the period before the fixation of provisional rent. It is implicit, therefore, that the Court at the time of fixing the reasonable provisional rent will have the necessary power to fix the time for making deposit or payment under sub-section (1) for any period prior to the fixation of provisional rent so that the time taken by the Court in passing its order may not prejudice any party. So if the Court omits to fix the provisional rent during the entire trial, it cannot be said that there has been any failure on the part of the tenant to deposit or pay rent in accordance with section 13. In such a case as there is nothing to be paid or deposited it would be said that "the tenant has made payment or deposit as required by Section 13" within the meaning of Section 12 (3) and Section 13 (5). AIR 1973 Madh Pra 165 Approved, AIR 1971 Madh Pra 104 Overruled. (Para 6)

Cases Referred:	Chronological	Paras
AIR 1973 Madh Pra 165 = 1972 MPLJ 785		1, 6, 8
AIR 1971 Madh Pra 104 = 1970 MPLJ 902		1, 6, 8
AIR 1970 Madh Pra 1 = 1969 MPLJ 672 (FB)		4

M. P. Avadhoot, for Appellant.

SINGH, J.:— This appeal was first heard by Bachawat, J. sitting singly. He found difficulty in reconciling two Division Bench decisions of this Court on the construction of Section 13 of the Madhya Pradesh Accommodation Control Act, 1961. These Division Bench cases are: Firm Ganeshram Harivilas v. Ramchandra 1970 MPLJ 902 = (AIR 1971 Madh Pra 104) and Jivrambhai v. Amarsingh 1972 MPLJ 785 = (AIR 1973 Madh Pra 165). The learned Judge, therefore referred to a Division Bench the following question of law:

"Whether the operation of Section 13 (1) of the Madhya Pradesh Accommodation Control Act, 1961 is arrested so far as the deposit of rent according to it, is concerned and it remains in suspense until the Court fixes a provisional rent since when the dispute is raised by the defendant-tenant in his written statement, or it would be so since when the defendant-tenant makes an application inviting the attention of the Court to the specific dispute and asks the Courts to fix the provisional rent?"

When the reference came up before a Division Bench (Oza and Sohani, JJ.), the learned Judges considered that as the question required reconsideration of two Division Bench decisions, the reference should be heard by a Full Bench. On their recommendation this Full Bench was constituted to hear the reference.

2. The material facts pertaining to the question referred to us are that the defendant-appellant is a tenant of the plaintiff-respondent and is in occupation in that capacity of a part of house No. 716 situated at Nee-much. The suit giving rise to this appeal was instituted on 8th July 1963 by the respondent for eviction of the appellant and for arrears of rent. The appellant's ejection was sought on various grounds one of them being under Section 12 (1) (a) of the Act. The respondent's case was that the appellant was a tenant on a monthly rent of Rs. 5/-, and that there was failure on his part to pay the arrears of rent within two months from the service of the notice of demand. The suit was decreed ex parte on 13th December 1963. On the appellant's application that he was not served with the summons of the suit, the ex parte decree was set aside. The appellant, soon thereafter, filed his written statement on 2nd April 1964. In his written statement the appellant pleaded that the rent of the house to begin with was Rs. 2/- per month and it was first enhanced to Rs. 2/8/- per month and then to Rs. 3/- per month and that there was never any agreement to pay the rent of Rs. 5/- per month. It was also pleaded that the appellant on receiving notice sent all the arrears at the rate of Rs. 3/- per month, and that some amount of rent was deposited in the Court of the Rent Controller. The appellant deposited a sum of Rs. 132/- as arrears of rent, calculated at the rate of Rs. 3/- per month, on the very date he filed his written statement and in that context pleaded that as all the arrears were deposited within one month as required by Section 13 (1) of the Act, the suit was liable to be dismissed. The trial Court did not fix any reasonable provisional rent as required by Section 13 (2) of the Act. The appellant continued to deposit rent at the rate of Rs. 3/- per month during the pendency of the suit.

3. The trial Court in its final judgment came to the conclusion that the rent of the house was Rs. 5/- per month and not Rs. 3/- per month as alleged by the appellant and

that the appellant was liable to eviction under Section 12 (1) (a) of the Act. In appeal the appellate Court agreed with the finding that the rent was Rs. 5/- per month and that as the appellant tendered arrears of rent after notice of demand at the rate of Rs. 3/- per month and not at the rate of Rs. 5/- per month, the ground under Section 12 (1) (a) was made out. The appellate Court, however, held that the appellant by depositing the arrears of rent at the rate of Rs. 3/- per month and by continuing to deposit rent at that rate during the pendency of the suit in the trial Court complied with Section 13 of the Act in so far as that Court was concerned. In this context it was observed that when an ex parte decree is set aside on the ground of non-service of summons, "the service of the writ of summons" within the meaning of Section 13 (1) cannot be held to have taken place earlier to the date when the ex parte decree is set aside. But the appellate Court further held that the appellant by failing to deposit rent in that Court during the pendency of appeal was liable to eviction and was not entitled to protection under Section 12 (3) or Section 13 (5) of the Act. In this view of the matter, the decree of eviction passed by the trial Court was confirmed. It is against the decree of the appellate Court that the appellant filed this second appeal.

4. Bachawat, J. in his order of reference, has rightly pointed out that the view taken by the appellate Court that the appellant was bound to deposit rent in appeal was erroneous being in direct conflict with the view of the Full Bench in *Ratanchand Firm v. Rajendra Kumar* 1969 MPLJ 672 = (AIR 1970 Madh Pra 1) (FB). Thus the particular non-compliance of Section 13 on which the decree of the trial Court was upheld by the first appellate Court could not be supported. It was, however, argued before Bachawat, J. by the respondent that as the appellant did not deposit arrears and monthly rent at the rate of Rs. 5/- per month in the trial Court and as he did not specifically and separately apply for fixation of provisional rent, he was not entitled to protection under Section 13 of the Act and on this ground the decree for eviction should be maintained. In reply it appears to have been contended that the operation of Section 13 (1) was suspended immediately the appellant raised a dispute as to the rate and quantum of rent in his written statement; that it was obligatory for the Court to fix a provisional rent under Sec. 13 (2); and that it was not incumbent upon the appellant to make a separate application or to pray specifically for fixation of provisional rent. It appears that it was in connection with this argument that Bachawat, J. found difficulty in reconciling the two Division Bench decisions and referred the question which we have earlier set out.

5. A suit for eviction against a tenant can be filed only on one or more of the grounds mentioned in Section 12 (1). Clause (a) of the section permits a suit on the ground

"that the tenant has neither paid nor tendered the whole of the arrears of rent legally recoverable from him within two months of the date on which a notice of demand for the arrears of the rent has been served on him by the landlord in the prescribed manner" Section 12 (3), however, directs that no decree for eviction on this ground shall be made "if the tenant makes payment or deposit as required by Section 13." Section 13 reads as follows :

"13. When tenant can get benefit of protection against eviction.— (1) On a suit or proceeding being instituted by the landlord on any of the grounds referred to in Section 12, the tenant shall, within one month of the service of the writ of summons on him or within such further time as the Court may, on an application made to it, allow in this behalf, deposit in the Court or pay to the landlord an amount calculated at the rate of rent at which it was paid, for the period for which the tenant may have made default including the period subsequent thereto upto the end of the month previous to that in which deposit or payment is made and shall thereafter continue to deposit or pay, month by month, by the 15th of each succeeding month a sum equivalent to the rent at that rate.

(2) If in any suit or proceeding referred to sub-section (1), there is any dispute as to the amount of rent payable by the tenant, the Court shall fix a reasonable provisional rent in relation to the accommodation to be deposited or paid in accordance with the provisions of sub-section (1) till the decision of the suit or appeal.

(3) If, in any proceeding referred to in sub-section (1), there is any dispute as to the person or persons to whom the rent is payable, the Court may direct the tenant to deposit with the Court the amount payable by him under sub-section (1) or sub-section (2) and in a case, no person shall be entitled to withdraw the amount in deposit until the Court decides the dispute and makes an order for payment of the same.

(4) If the Court is satisfied that any dispute referred to in sub-section (3) has been raised by a tenant for reasons which are false or frivolous the Court may order the defence against eviction to be struck out and proceed with the hearing of the suit.

(5) If a tenant makes deposit or payment as required by sub-section (1) or sub-section (2), no decree or order shall be made by the Court for the recovery of possession of the accommodation on the ground of default in the payment of rent by the tenant, but the Court may allow such cost as it may deem fit to the landlord.

(6) If a tenant fails to deposit or pay any amount as required by this section, the Court may order the defence against eviction to be struck out and shall proceed with the hearing of the suit."

6. If there is no dispute between the parties as to the amount or rate of rent or

as to the person to whom it is payable, the deposit or payment of arrears and monthly rent has to be made by the tenant in accordance with sub-section (1) of Section 13. But when a dispute is raised as to the amount of rent payable by the tenant or as to the person to whom it is payable, sub-section (1) gets controlled by sub-sections (2) and (3). If the dispute is as to the amount of rent, the Court under sub-section (2) fixes a reasonable provisional rent and it is this rent which is to be deposited or paid under sub-section (1). As the obligation on the tenant in case of dispute is to deposit or pay the reasonable provisional rent fixed by the Court, it is implicit that the obligation to deposit or pay the rent arises only when the Court fixes the reasonable provisional rent and till then the obligation to deposit rent in accordance with sub-section (1) remains suspended. This is also the view expressed in AIR 1973 Madh Pra 165 (supra). Similarly, when a dispute is raised as to the person to whom the rent is payable, there is no obligation to deposit or pay the rent but "the Court may (under sub-section (3)) direct the tenant to deposit with the Court the amount payable by him" and it is then that the tenant has to make the deposit. Further, although the Court must fix the reasonable provisional rent under sub-section (2) expeditiously, it is conceivable that there may be delay in some cases making it impossible for the tenant to adhere to the time schedule under sub-section (1) for depositing or paying rent for the period before the fixation of provisional rent. It is implicit, therefore, that the Court at the time of fixing the reasonable provisional rent will have the necessary power to fix the time for making deposit or payment under sub-section (1) for any period prior to the fixation of provisional rent so that the time taken by the Court in passing its order may not prejudice any party. Again, there may be cases where although a dispute is raised as to the amount of rent within the meaning of sub-section (2), yet the Court omits to fix reasonable provisional rent during the entire trial of the suit. Indeed, this is actually what happened in the instant case. In such a situation, the tenant cannot be allowed to suffer for the failure of the Court to do its duty. The maxim *Actus Curiae Neminem Gravabit*, which is founded upon justice and good sense, would apply to such a case. As a result of the dispute raised by the tenant, the obligation to deposit or pay rent, as already seen, gets suspended until the fixation of provisional rent by the Court. So if the Court omits to fix the provisional rent during the entire trial, it cannot be said that there has been any failure on the part of the tenant to deposit or pay rent in accordance with Section 13. In such a case as there is nothing to be paid or deposited, it would be said that "the tenant has made payment or deposit as required by S. 13" within the meaning of S. 12 (3) and S. 13 (5). This question was formulated as question No. 4 in 1970 MPLJ 902 (supra) in paragraph 6 (pp. 903, 904) = AIR

1971 Madh Pra 104 (at pp. 105, 106), but in our opinion, was wrongly answered against the tenant in the conclusion No. 6 formulated in paragraph 22 at p. 908 of the report (at p. 108 of AIR).

7. The question referred to us thus rightly assumes that the operation of sub-section (1) of Section 13 is arrested and this provision remains in suspense when a dispute is raised by the tenant under sub-section (2), and that the obligation to deposit rent remains so suspended until the Court fixes the provisional rent and the tenant is not in default if no provisional rent is fixed by the Court. The point that we are required to decide is whether it is sufficient for the tenant to raise the dispute in his written statement or whether he must make an application inviting the attention of the Court to the specific dispute and ask the Court to fix the provisional rent.

8. Sub-section (2) of Section 13, in so far as material, provides that "if there is any dispute as to the amount of rent payable by the tenant, the Court shall fix a reasonable provisional rent in relation to the accommodation." The sub-section is silent regarding the manner in which the dispute should be raised. The only requirement of this provision is that there should be a dispute as to the amount of rent payable by the tenant. The moment this requirement is fulfilled, it becomes the duty of the Court to fix a reasonable provisional rent. Having regard to the language of the provision, if the tenant has raised the dispute as to the amount of rent payable by him in the written statement, that would be sufficient for purposes of the sub-section. A dispute so raised will make it obligatory on the Court to fix the reasonable provisional rent. No further action on the part of the tenant, such as making of an application or inviting the attention of the Court to the specific dispute or specifically asking the Court to fix the provisional rent, is needed to cast an obligation on the Court to fix the reasonable provisional rent, for the simple reason that the sub-section does not say that the tenant should file a separate application or specifically pray for fixation of provisional rent. In 1972 MPLJ 785 at p. 789 = (AIR 1973 Madh Pra 165 at p. 167) (supra), it has been rightly observed that "if the dispute has been raised in the written statement the Court cannot refuse to determine provisional rent on the ground that a separate application has not been made". There are certain observations in 1970 MPLJ 902 proposition No. 1 at p. 907 = (AIR 1971 Madh Pra 104 at pp. 107, 108) (supra) that it is not enough for the tenant to raise the dispute and in addition he must invite the attention of the Court to the dispute and the Court must be asked to fix a reasonable provisional rent. In our opinion, these observations do not lay down the law correctly as they add certain requirements in sub-section (2) which are not there. If the tenant disputes the rate and amount of rent in his written statement, as was done

in the instant case, there arises a dispute within the meaning of sub-section (2) casting a duty on the Court to fix a reasonable provisional rent. The Court is expected to go through the pleadings of the parties for eliciting the matters in dispute and it is not necessary for the tenant to specially draw the attention of the court that he has disputed the amount or rate of rent. Similarly, it is not necessary for him to specifically ask for fixation of provisional rent. Raising of a dispute in the written statement by itself amounts to an implied request, if any request is at all needed, for fixation of provisional rent.

9. For the reasons stated above, we answer the question referred to us as follows:

"The operation of sub-section (1) of Section 13 of the Madhya Pradesh Accommodation Control Act, 1961, is arrested when a dispute as is referred to in sub-section (2) raised by the defendant tenant in his written statement and it is not necessary that he should make an application inviting the attention of the Court to the specific dispute and asking the Court to fix provisional rent".

10. The second appeal shall now be placed before a Single Judge for final disposal. There shall be no order as to costs of this reference.

Answered accordingly.

AIR 1976 MADHYA PRADESH 8

SHIV DAYAL J.

Bachchoobhai, Applicant v. Premanand Bhigodhe, Non-applicant.

Civil Revn. No. 993 of 1974, D/- 21-7-1975.*

(A) M. P. Accommodation Control Act (41 of 1961), Section 13 (1) and (6) — Non-compliance with provisions of Section 13 (1) either part — Consequences:

Striking out the defence is not a necessary consequence of non-compliance with the provisions of Section 13 (1), either part.

(Para 8)

The consequences of non-compliance with either the first part or the second part of Section 13 (1) are two:—

(a) The defendant automatically forfeits the protection under Section 12 (3) and Section 13 (5), even when there is a single default. The Court has no power to condone any delay or default for the purposes of Section 12 (3) or Section 13 (5).

(b) His defence is liable to be struck out under Section 13 (6). But it is not automatic. The provisions are not mandatory. The Court has been given a wide discretion to strike out the defence or not to strike it

*Against order of N. S. Rajput, Civil J. 2nd class, Bilaspur, in Civil Suit No. 5-A of 1973, D/- 5-7-1974).

out, in case where there is one default or more than one default, or any amount of delay in depositing the amount due under the first part and the second part of Section 13 (1). If, at the time that the Court is disposing of the application under Section 13 (6), rent has been deposited, or the tenant seeks a reasonable time to deposit all amount of rent due under both the parts of Section 13 (1) the Court shall not strike out the defence, except when there is:—

(i) contumacy, or

(ii) positive mala fide. 1966 Jab LJ 1028; AIR 1968 Madh Pra 1 (FB), AIR 1971 Madh Pra 104, AIR 1973 Madh Pra 165, AIR 1970 SC 981, Rel. on. (Paras 9, 11)

Cases Referred: Chronological Paras
AIR 1973 Madh Pra 165 = 1972 MPLJ 785 5, 9
AIR 1971 Madh Pra 104 = 1970 MPLJ 902 5, 9
AIR 1970 SC 981 = 1970 MPLJ 544 = 1970 UJ (SC) 437 10
AIR 1968 Madh Pra 1 = 1967 Jab LJ 859 (FB) 9
1966 Jab LJ 1028 = ILR (1966) MP 620 9

Ravindra Kumar Verma, for Applicant
P. G. Pathak, for Non-applicant.

ORDER:— Premanand (respondent) has instituted a suit against Bachchoobhai (revision-petitioner) for eviction under S. 12 of the M. P. Accommodation Control Act, 1961, (hereinafter called 'the Act'). Under Section 13 (1) of the Act, the tenant was required to deposit rent on the dates specified therein. He did not deposit rent within one month of the service of the writ of summons on him as required by the first part of Section 13 (1). Further, he did not regularly comply with the second part of Section 13 (1). He did not apply for extension of time. He did not raise any dispute within the meaning of Section 13 (2) within that one month. He was served with the writ of summons on July 1, 1973. It was only in the written statement, which he filed on January 7, 1974, that he raised a dispute about the amount of arrears of rent due by him.

2. According to the plaintiff, the following sums were due by the defendant:—

Rs. 1626/- as rent from 12-9-67 to 11-3-72 at Rs. 37 per month.

Rs. 550/- as damages from 12-3-72 to the date of the suit at Rs. 50/- per month.

In the written statement, the following payments were alleged:—

28-7-1971 Rent from June to November 1970. Rs. 222/-; 10-10-1971 Rent for December 1970 and January 71 Rs. 74/- by M. O.

18-11-1971 Rent for February and March 1971. Rs. 74/- by M. O.

17-1-72 Rent for April and May 1971 Rs. 74 by M. O.

It is further alleged in the written statement that on February 16, 1972, the defendant

remitted Rs. 74/- by money order as rent for June and July 1971, but the plaintiff refused to accept it.

3. Then, during the pendency of the suit, it was on March 2, 1974, that the tenant deposited Rs. 898/- calculated as follows:—

Rs. 1184/- as rent from June 1971 to February 1974, less Rs. 286/- incurred on repairs.

4. The plaintiff made an application under Section 13 (6) of the Act for striking out the defence contending that the defendant did not comply with the provisions of Section 13 (1) of the Act. The trial court found that the deposit of Rs. 898/- abovesaid was not in full, nor was it made within the time prescribed in the section. It also observed that no application was made for extension of time. In the result, the trial Court ordered the defence to be struck out.

5. Shri Verma, learned counsel for the defendant-petitioner, contends in this revision that, firstly, as there was a dispute raised about the amount of arrears of rent due by the tenant, the Court was bound to fix a provisional rent within the meaning of Section 13 (2). Learned counsel relies on *Firm Ganeshram Harvilas v. Ramchandra* 1970 MPLJ 902 = (AIR 1971 Madh Pra 104) and *Jivrambhai v. Amarsingh* 1972 MPLJ 785 = (AIR 1973 Madh Pra 165). The second contention is that as there was no positive mala fide or contumacy on the part of the defendant, the defence could not be struck out and the trial Court has not at all exercised its discretion.

6. Shri Pathak, learned counsel for the plaintiff, in opposing this revision, argues that the dispute about the amount of arrears of rent was not raised within one month of the service of the writ of summons on the defendant so that the application of the provisions of the first part of Section 13 (1) was not arrested. Secondly, the defendant did not pay rent even at Rupees 37/- per month which was not in dispute, during the pendency of the suit, as required by the second part of Section 13 (1).

7. In my opinion, Shri Pathak is right; the first contention of Shri Verma cannot be accepted. It is true that the defendant raised a dispute about the amount of arrears of rent due by him, but this dispute he did not raise within one month of the service of the writ of summons on him. He raised the dispute as late as on January 7, 1974 while the writ of summons had been served on him on July 1, 1973. He did not comply with the first part of Section 13 (1) upto the date of raising the dispute. He did not apply for extension of time. Shri Pathak is also right that the defendant did not comply with the second part of Section 13 (1), as he did not regularly deposit, month by month, the rent due for the preceding month. Accordingly, the first contention of Shri Verma is rejected.

8. But the learned trial Judge has been in error in striking out the defence merely on the ground that the provisions of Section 13

(1) were not complied with by the defendant. Striking out the defence is not a necessary consequence of non-compliance with the provisions of Section 13 (1), either part. The learned trial Judge has confused between the consequence of non-compliance, with Section 13 (1), so far as it relates to the benefit which has been provided by the statute under Section 12 (3) and Section 13 (5), and the penalty with which the defendant may be visited as a consequence of such default. The two are separate and distinct. The first is a necessary consequence, the second is not.

9. The legal position may be recapitulated and summed up as follows:—

(1) There are two parts in Section 13 (1) each of which is mandatory and each of which is to be complied with by the tenant on the dates specified in it.

(2) The following will be compliance with the first part of Section 13 (1):—

(a) The tenant deposits all arrears of rent within one month of the service of the writ of summons on him; or

(b) The tenant deposits all arrears of rent within such time as the Court may extend. This can be done only on an application by the tenant, but not *suo motu*. Such an application can be made at any time but to allow or not to allow it will be in the discretion of the Court to which it is made. However, it cannot be rejected merely on the ground that it was not made within one month of the service of the writ of summons on the defendant; or

(c) The tenant raises a dispute within the meaning of Section 13 (2) of the Act within one month of the service of the writ of summons on him and then deposits the provisional rent, as fixed by the Court, without any delay.

(3) It will be compliance with the second part of Sec. 13 (1) in the following cases.—The Court has no power to extend time for compliance with this part of Section 13 (1) the obvious reason being that unlike the first part of Section 13 (1), the tenant, under the second part, has not to deposit any accumulated arrears of rent. That is the reason for the distinction.

(a) The tenant goes on depositing month by month by the 15th day of every calendar month, until the disposal of the suit, rent for the preceding month, or

(b) The tenant raises a dispute within the meaning of Section 13 (2) of the Act, after the expiry of one month of the service of the writ of summons on him, but complies with both the parts of Section 13 (1) up to the date of raising such dispute and pays rent thereafter according to the provisional rent fixed by the Court under Section 13 (2).

(4) The effect of compliance with both the parts of Section 13 (1), as above, will be that the defendant will earn a special protection afforded to him under Section 12 (3) and Section 13 (5) of the Act.

(5) The consequences of non-compliance with either the first part or the second part of Section 13 (1) are two:—

(a) The defendant automatically forfeits the protection under section 12 (3) and section 13 (5), even when there is a single default. The Court has no power to condone any delay or default for the purposes of Section 12 (3) or Section 13 (5).

(b) His defence is liable to be struck out under Section 13 (6). But it is not automatic. The provisions are not mandatory. The Court has been given a wide discretion to strike out the defence or not to strike it out, in case where there is one default or more than one default, or any amount of delay in depositing the amounts due under the first part and the second part of Sec. 13 (1). If at the time that the Court is disposing of the application under Section 13 (3), rent has been deposited, or the tenant seeks a reasonable time to deposit all amount of rent due under both the parts of Section 13 (1), the Court shall not strike out the defence, except when there is:—

(i) contumacy, or

(ii) positive *mala fide*.

(6) The Court must always bear in mind the above distinction between the consequences of delay or default in complying with the provisions of Section 13 (1) for the purposes of Section 12 (3), or Section 13 (5), on the one hand, and Section 13 (6) on the other hand. The reason for the stringency and rigidity of the consequences of non-compliance with Section 13 (1) for the purposes of Section 12 (3) and the reason for the leniency and latitude for bestowing wide discretion on the Court in case of delay or default in compliance with the provisions of Section 13 (1) for the purposes of Section 13 (6), are very clear.

(i) Section 12 (3) and Section 13 (5) afford a special protection to the tenant against eviction even when the landlord has earned the right of eviction under section 12 (1) (a). The landlord is deprived of that valuable right, if the tenant strictly complies with both the parts of Section 13 (1) throughout the trial and punctually; otherwise, the tenant loses that protection.

(ii) The other object of Section 13 (1) is that the amount of rent is deposited for the benefit of the landlord and the tenant is prevented from litigating without depositing rent. This significant purpose of Section 13 (1) is served when the tenant deposits all arrears of rent whether on the date specified in Section 13 (1) or later on. This provision is in *terrorem*. It is not as if any special or additional right is conferred on the landlord by the default committed by the tenant. It is a penalty incurred by the tenant. To strike out the defence is an extreme penalty with which the defendant can be visited, so that it has been held by the Court that that extreme step must not be taken by the Court. However, that extreme step may be taken in the case of contumacy or positive *mala fide*.

7. As soon as a dispute is raised under Section 13 (2) the operation of Section 13 (1) gets arrested; however, the lost right is not revived. As soon as the provisional rent is determined under Sec. 13 (2), the operation of Section 13 (1) is resumed. The provisions of Section 13 (2) are mandatory and the Court has to deal with the dispute whenever it is raised. If it is raised after one month of the service of the writ of summons on the defendant and without complying with the provisions of both the parts of Section 13 (1) upto the date of raising the dispute then also the Court has to determine a provisional rent, although the protection under Section 12 (3) and Section 13 (5) may have been lost by the tenant.

8. The same is the effect and consequence where a dispute is raised under Section 13 (3) *mutatis mutandis*.

9. The above propositions are deducible from *Chitrakumar Tiwari v. Gangaram* 1966 J LJ 1028; *Jagdish Kapoor v. New Education Society*, 1967 Jab LJ 859 = (AIR 1968 Madh Pra 1) (FB); 1970 MPLJ 942 = (AIR 1971 MP 104) and 1972 MPLJ 745 = (AIR 1973 Madh Pra 165).

10. In the decision of the Supreme Court in *B. C. Kame v. Nemichand* AIR 1970 SC 981 their Lordships considered the effect of Section 13 (5), when rent is not deposited as required by Section 13 (1) and there is no application for extension of time. In that case, their Lordships have not stated that the default under Section 13 (1) will necessarily entail striking out the defence under Sec. 13 (6). In fact, in paragraph 7 of the Supreme Court decision, there is an indication of the distinction between striking out the defence and the effect of non-compliance with section 13 (1) for the purposes of section 13 (5) of the Act.

11. In the present case, the learned trial judge did not bear in mind the said distinction and thought that the default under Section 13 (1) necessarily entails the penalty provided in Section 13 (5). He, therefore, did not apply his mind at all to the facts and circumstances of the case in order to apply the tests when the defence should be struck out.

12. In the result, this revision is allowed. The order of the trial Court dated July 5, 1974, is set aside. The trial Court is directed to consider afresh the plaintiffs application under Section 13 (6) of the Act in the light of this order and in view of the facts and circumstances of the case. Parties shall bear their own costs.

Revision allowed.

AIR 1976 MADHYA PRADESH 11

S. M. N. RAINA AND R. L. MURAB, JJ.

Lacchi alias Laxminarayan, Applicant v. The State of M. P. and another, Opposite Party.

Miscellaneous Petition (Habeas Corpus)
Case No. 123 of 1975, D/- 11-6-1975.

(A) Maintenance of Internal Security Act (1971), Section 3 (1) (a) (ii) — Breaches of law and order and disturbance of public order — Distinction.

The breaches of law and order are to be distinguished from disturbances of public order; and the distinction between the two is to be made on the basis of the following principles:

(1) A contravention of law always affects order; but before it can be said to affect public order, it must affect the community or public at large.

(2) Public order is the even tempo of the life of the community taking the country as a whole or even a specified locality.

(3) It is the degree of disturbance and its effect upon the life of the community in general or in a particular locality which determines whether the disturbance amounts only to a breach of law and order or a disturbance of public order.

(4) It is the potentiality of the act to disturb the even tempo of the life of the community which makes it prejudicial to the maintenance of public order.

(5) If the contravention in its effect is confined only to a few individuals directly involved as distinguished from a wide spectrum of the public, it would raise a problem of law and order only. (Para 9)

(B) Maintenance of Internal Security Act (1971), Section 3 (1) (a) (ii) — Offending acts and order of detention — Time lag between the two.

The question of delay is material only for the purpose of determining whether the alleged criminal activities of the detenu can be considered as a reasonable basis for the subjective satisfaction of the detaining authority as regards necessity of detention. The satisfaction must be based on a reasonable prognosis of the future behaviour of the detenu based on his past conduct. The object of passing a detention order is mainly to prevent the detenu from indulging in criminal activities of a particular nature. The Court has to see whether the detaining authority could form a reasonable apprehension regarding the participation of the detenu in such activities in future as judged from his past conduct. (Para 21)

(C) Maintenance of Internal Security Act (1971), Section 3 (1) (a) (ii) — Prosecution in respect of offending acts ending in acquittal — Relevancy in passing detention order.

The mere fact that the prosecution ended in acquittal is no bar to action being taken

by the detaining authority for the alleged criminal activities of the detenu.

(Para 29)

(D) Maintenance of Internal Security Act (1971), Section 3 — Detention order — Grounds — Vagueness.

Where the date, time and place of the incidents were specified and the particulars regarding the nature of the activities of the detenu were mentioned in the grounds, the grounds cannot be said to be suffering from the infirmity of vagueness.

(Para 30)

(E) Maintenance of Internal Security Act (1971), Section 3 — Detention order — Grounds — Names of associates of detenu not specified — Order is not bad on ground of vagueness.

(Para 31)

(F) Maintenance of Internal Security Act (1971), Section 3 — Order of preventive detention — Pendency of prosecution is no bar.

An order of detention is a precautionary measure being based on a prognosis of the past activities of the detenu. Merely because a detenu was liable to be tried in a criminal Court for the commission of a criminal offence or to be proceeded against for preventing him from committing an offence under Chapter VIII of the Code of Criminal Procedure it would not debar the Government from taking action for his detention under the Act. It is, therefore, clear that an order of preventive detention can be made with or without prosecution, and even in anticipation, or after discharge or acquittal; and the pendency of a prosecution is no bar to an order of preventive detention. (Case Law discussed).

(Para 33)

Cases Referred Chronological Paras

AIR 1975 SC 90 = 1975 SC Cri R 290 23

AIR 1975 SC 473 = 1975 Cri LR (SC) 99 20

AIR 1975 SC 609 = 1975 UJ (SC) 398 8

AIR 1975 SC 983 = 1975 UJ (SC) 106 31

AIR 1974 SC 1161 = (1974) 3 SCR 813 33

AIR 1974 SC 1214 = (1974) 3 SCR 789 8, 30

AIR 1974 SC 1336 = (1974) 3 SCR 613 19, 29

AIR 1974 SC 2154 = (1975) 1 SCR 773 32

AIR 1973 SC 197 = 1973 SCC (Cri) 353 =

1974 Cri LJ 395. 7

AIR 1973 SC 207 = (1973) 2 SCR 990 29

AIR 1972 SC 1670 = 1972 UJ (SC) 943 29

AIR 1972 SC 1924 = (1972) 2 SCR 787 31

AIR 1972 SC 2561 = 1973 UJ (SC) 431 32

AIR 1970 SC 814 = (1970) 3 SCR 360 6

AIR 1970 SC 1228 = (1970) 3 SCR 288 7

AIR 1966 SC 740 = (1966) 1 SCR 709 5

S. K. Dubey, A. K. Barua, for Applicant;
R. S. Bajpai, for State Opposite Party.

RAINA, J.:— This is a petition for a writ of habeas corpus under article 226 of the Constitution.

2. The petitioner carries on the business of embroidery at Naya Sarafa, Lashkar, Gwalior. On 29-10-1974, the District Magistrate, Gwalior, passed an order of detention against the petitioner under sub-clause (ii) of clause (a) of sub-section (1) of Section 3 of

the Maintenance of Internal Security Act, 1971 (hereinafter referred to as 'the Act') vide Annexure P-1. On 29-10-74, the petitioner was furnished with the grounds of detention vide Annexure P-2. He submitted a representation against the order of detention to the Government. Thereupon, the case of the petitioner was referred to the Advisory Board. The Board approved the order of detention and, after considering the report of the Advisory Board, the State Government confirmed the order of detention. So far, the facts are not in dispute.

3. The petitioner has challenged the order of detention on a number of grounds in this petition and has prayed that the order be quashed and the petitioner be set at liberty.

4. In the return filed on behalf of the State it is submitted that the order of detention is definitely valid and justified and the petition is liable to be dismissed.

5. Shri S. K. Dube, learned counsel for the petitioner, has challenged the detention on a number of grounds. The first point urged by him was that the alleged activities of the petitioner referred to in the grounds of detention may be considered as breaches of law and order, but they cannot be considered as prejudicial to the maintenance of public order within the meaning of sub-clause (ii) of clause (a) of sub-section (1) of Section 3 of the Act. There can be no doubt that there is a clear distinction between a mere contravention of law and the disturbance of public order. While dealing with a case of detention under Rule 31 (a) (b) of the Defence of India Rules, 1962 in *Ram Manohar v. State of Bihar* AIR 1966 SC 740, their Lordships observed in paragraph 51 as under:

"The contravention of law always affects order but before it can be said to affect public order, it must affect the community or the public at large. A mere disturbance of law and order leading to disorder is thus not necessarily sufficient for action under the Defence of India Act but disturbances, which subvert the public order, are."

6. In *Sudhir Kumar Saha v. Commr. of Police Calcutta* (AIR 1970 SC 814), their Lordships, while dealing with a case of detention under the Preventive Detention Act, 1950, held that maintenance of 'law and order' is a conception much wider than the conception of maintenance of 'public order'. Every act that affects 'law and order' need not affect 'public order'. 'Public order' is the even tempo of the life of the community taking the country as a whole or even a specified locality; and disturbance of public order is to be distinguished from acts directed against individuals which do not disturb the society to the extent of causing a general disturbance of public tranquillity.

7. In *Arun Ghosh v. State of West Bengal* AIR 1970 SC 1228 their Lordships, while dealing with a case of detention under the Act, held that the question whether a man has only committed a breach of law

and order or has acted in a manner likely to cause a disturbance of the public order is a question of degree and the extent of the reach of the act upon the society; and an individual act can be a ground for detention only if it leads to disturbance of the current of life of the community so as to amount to a disturbance of the public order and not if it affects merely an individual leaving the tranquillity of the society undisturbed. This decision was followed by their Lordships in *Babul Mitra v. State of West Bengal* AIR 1973 SC 197).

8. In *Milan Banik v. The State of West Bengal* (AIR 1974 SC 1214) their Lordships observed as under in paragraph 3, while dealing with the question of public order:

"The test for determining whether a particular activity affects law and order or whether it impinges upon public order is: Does it interfere with the current of life of the community so as to amount to disturbance of public order or does it affect merely an individual leaving the tranquillity of the society undisturbed, in which case it would be an activity affecting law and order." Similar view was expressed by their Lordships in *Ram Ranjan v. State of West Bengal* AIR 1975 SC 609. It was held in that case that it is the potentiality of the act to disturb the even tempo of the life of the community which makes it prejudicial to the maintenance of public order. If the contravention in its effect is confined to a few individuals directly involved as distinguished from a wide spectrum of the public, it would raise a problem of law and order only.

9. From the aforesaid decisions it would appear that breaches of law and order are to be distinguished from disturbances of public order; and the distinction between the two is to be made on the basis of the following principles:

(1) A contravention of law always affects order, but before it can be said to affect public order, it must affect the community or public at large.

(2) Public order is the even tempo of the life of the community taking the country as a whole or even a specified locality.

(3) It is the degree of disturbance and its effect upon the life of the community in general or in a particular locality which determines whether the disturbance amounts only to a breach of law and order or a disturbance of public order.

(4) It is the potentiality of the act to disturb the even tempo of the life of the community which makes it prejudicial to the maintenance of public order.

(5) If the contravention in its effect is confined only to a few individuals directly involved as distinguished from a wide spectrum of the public, it would raise a problem of law and order only.

10. If we carefully examine the activities of the petitioner as alleged in the grounds of detention in the light of the prin-

ciples set out above, it would be clear that they pertain to disturbance of public order and not merely to a contravention of law as affecting law and order.

11. Ground No. 1 pertains to an incident which is said to have taken place on 28-1-1969. It is stated that the petitioner, along with the members of the gang, obstructed members of the police force in the discharge of their duties and assaulted them causing injuries to them as a result of which a feeling of fear and insecurity was caused in the minds of the people in the locality.

12. Ground No. 2 relates to another incident which is said to have taken place on 14-6-1974. It is stated that the petitioner and his associates who were armed with lathis and knives, assaulted Laxmandas Sindhi and his brother Dhanraj and when some people of the locality tried to rescue them, the petitioner threatened to kill them with the result that a sense of insecurity and panic was created among the people of the locality.

13. Ground No. 3 relates to an incident which took place on 9-9-1971 at 9.45 p. m. It is stated that the petitioner and his associates entered the Sangita restaurant and assaulted Ramprakash, owner of the restaurant, because he had made a report against the petitioner. The window-panes and other articles were also damaged in this incident which created a sense of fear and insecurity amongst the people in the locality.

14. Ground No. 4 relates to an incident dated 15-5-1973. It is stated that at 11.00 p. m. on that date the petitioner and his associates took the law into their hands and drove away a tonga of Samad Khan. When Samad Khan and some others followed the petitioner and his associates and prevented the petitioner from taking away the tonga, the petitioner and his associates abused and assaulted them. It is stated that this wanton act of the petitioner created fear and insecurity among the people of the locality.

15. Ground No. 5 relates to an incident dated 18-3-1974; it is stated that on that date the petitioner along with his associates kidnapped Mahendra Kumar in an Ambassador Car and took him towards Morena. Mahendra Kumar was ultimately rescued by the police but this act caused a sensation and created a sense of fear in the locality.

16. Ground No. 6 relates to an incident dated 9-2-1974. It is stated that on that date the petitioner and his associates armed with lathis and hockey sticks surrounded Subhash driver of a tempo. He was dragged out and assaulted and the petitioner gave threats that people of Morar will be taken to task and assaulted. This conduct of the petitioner created fear and a sense of insecurity in the minds of the people of Morar.

17. Ground No. 7 relates to an incident dated 25-8-1974. It is stated that on that date the petitioner and his associates visited Regal Lodge at about 10.30 p. m. and consumed liquor there. When they were asked

to pay the bill of Rs. 172/- the petitioner and his associates started robbing indiscriminately the customers present in the lodge. Amar-singh Waiter who tried to intervene was stabbed and Kishanchand Proprietor of the Hotel was also attacked and the window panes and the articles in the hotel were damaged. As a result of this incident, there was panic among the customers and members of the locality.

18. From the nature of the incidents as given in the aforesaid grounds it is clear that they affected the community as a whole and not merely individuals. As such they relate to disturbance of public order and not merely to breaches of law and order.

19. The next point urged by Shri S. K. Dube, learned counsel for the petitioner, was that most of the grounds could not be taken into consideration because they relate to incidents which took place long before the order of detention was passed. The question as to how long after the offending criminal activity of the detenu an order of detention can be passed has been considered by the Supreme Court in a number of cases. In *Gulam Hussain v. The Police Commissioner Calcutta* (AIR 1974 SC 1336) their Lordships, while dealing with the question of delay, made the following pertinent observations in paragraph 5:

"It is true that there must be a live link between the grounds of criminal activity alleged by the detaining authority and the purpose of detention, namely, inhibition of prejudicial activity of the species specified in the statute. This credible chain is snapped if there is too long and unexplained an interval between the offending acts and the order of detention."

20. In *Gora v. State of Bengal* (AIR 1975 SC 473) their Lordships laid down that the test of proximity is not a rigid or mechanical test to be blindly applied by merely counting the number of months between the offending acts and the order of detention. It is a subsidiary test evolved by the Court for the purpose of determining the main question whether the past activities of the detenu are such that from them a reasonable prognosis can be made as to the future conduct of the detenu.

21. It is, therefore, clear that the question of delay is material only for the purpose of determining whether the alleged criminal activities of the detenu can be considered as a reasonable basis for the subjective satisfaction of the detaining authority as regards necessity of detention. The satisfaction must be based on a reasonable prognosis of the future behaviour of the detenu based on his past conduct. The object of passing a detention order is mainly to prevent the detenu from indulging in criminal activities of a particular nature. The Court has to see whether the detaining authority could form a reasonable apprehension regarding the parti-

cipation of the detenu in such activities in future as judged from his past conduct.

22. In the instant case the order of detention was passed on 29th October 1974; while ground No. 7 pertains to certain criminal acts committed by the petitioner on 25-8-1974. The earlier criminal acts referred to in the other grounds merely form a chain of events indicating the criminal tendencies of the petitioner which confirm the apprehension, in regard to his future conduct which arose from the incident of 25-8-1974. Thus, all the grounds appear to be germane and none of them can be said to have no nexus with the question relating to the expectation of future unlawful activities of the petitioner.

23. The next point urged by Shri Dube was that some of the grounds are non-existent, inasmuch as the statements contained in them are false and the incidents referred to thereunder never took place. It is necessary to examine this contention carefully. It may be pointed out, at the outset, that it is not necessary for this Court to embark on an enquiry into the truth or otherwise of the allegations forming the subject-matter of the grounds. All that has to be seen is that the action of the detaining authority is bona fide and that the alleged incidents are not purely imaginary. We may here quote the following observations of their Lordships of the Supreme Court in *Ramakrishna v. District Magistrate, Jabalpur* (AIR 1975 SC 90).

"The contents of paragraph 10 are to be read as a whole and as a part of the series of incidents enumerated in the preceding paragraphs 7, 8 and 9. The truth or otherwise of what is mentioned in those paragraphs cannot be tested objectively by judicial standards. We have to accept the correctness of the incidents and the facts stated therein."

24. It was urged by Shri Dube that no such incident occurred on 28-1-1969 as is referred to in ground no. 1; but from ground No. 4 of the petition it would appear that the petitioner merely pleaded that the ground was vague. It has not been alleged that it was non-existent and, therefore, it was not necessary for the State to place necessary material before this Court which formed the basis of the ground. It is, no doubt, true that no prosecution seems to have been launched in respect of this incident; but this may be because the incident was not of a very serious nature. Moreover, the order of detention is not based on this ground alone. It is referred to mainly to indicate the antecedents of the petitioner.

25. As regards ground No. 2, it has, no doubt, been alleged that it is a false ground; and in support of this contention an affidavit of the complainant Laxman Das (Annexure P. 5) has been filed. Shri Bajpai, learned Government Advocate, however, produced before us the confidential file of the District Magistrate pertaining to this case. It appears therefrom that before passing the order of detention the District Magistrate had examin-

ed as many as twelve witnesses, including Laxman Das, who fully supported the incident as narrated in ground No. 2. Shri Bajpai urged that the people of the area, being a raid of the petitioner, his friends and relatives seem to have secured the affidavit of Laxman Das under threat or coercion. This contention does not appear to be without force in the circumstances of the case.

26. As regards ground No. 4 it is stated that the incident narrated therein is false and an affidavit of Samman Khan (Annexure P-6) has been filed in support of this contention. From the file of the District Magistrate it appears that Samman Khan was examined by the District Magistrate and he had fully supported the incident as narrated in ground No. 4.

27. It has been urged that the incident referred to in ground No. 6 is also false and imaginary; and in support of this contention an affidavit of complainant Subhash (Annexure P-7) has been filed. We, however, find that Subhash was examined by the District Magistrate and he fully supported the incident as narrated in the said grounds.

28. It is not difficult for a person, who is a bully and of a desparate character, to obtain affidavits of his choice from persons who are afraid of him. It appears that police reports were lodged in respect of these incidents and criminal prosecutions were started; but the proceedings terminated as the complainants compounded the offences or settled the matters amicably for fear of the petitioner.

29. Another point urged by Shri Dube was that since the petitioner was acquitted in the criminal case instituted in connection with the incident referred to in ground No. 5, it could not be taken into consideration by the detaining authority: vide judgment of acquittal (Annexure P-3). In *Mohammad Salim Khan v. C. C. Bose, Deputy Secretary to Government of West Bengal* AIR 1972 SC 1670 it was held that the mere fact that the petitioner was discharged in a criminal case relating to certain incidents does not mean that no valid order of detention could be passed against him in connection with those very incidents, or that such an order can be characterised as mala fide. A similar view was expressed in *Mohammad Subrati alias Mohammad Karim v. State of West Bengal* (AIR 1973 SC 207). It is, therefore, clear that the mere fact that the prosecution ended in acquittal is no bar to action being taken by the detaining authority for the alleged criminal activities of the detenu. In AIR 1974 SC 1336 (supra) their Lordships held that the basic imperative of proof beyond reasonable doubt does not apply to the subjective satisfaction component of imprisonment for reasons of internal security. Their Lordships, however, added that where a Court has held a criminal case to be false, the detaining authority with that judicial pronouncement before him may not reasonably

claim to be satisfied about the prospective prejudicial activities based on what a Court has found to be baseless. In the instant case, it would appear from the judgment of the Additional Sessions Judge, dated 16-12-1974, that the petitioner was acquitted on being given the benefit of doubt: vide paragraphs 29 and 30 of the judgment (Annexure P-3).

30. Another point urged by Shri Dube was that the grounds are vague. We are, however, unable to accept this contention because the date, time and place of the alleged incidents are mentioned in the grounds. In AIR 1974 SC 1214 it was held that where the date, time and place of the incidents were specified and the particulars regarding the nature of the activities of the detenu were mentioned in the grounds, the grounds cannot be said to be suffering from the infirmity of vagueness.

31. Learned counsel for the petitioner also urged that the grounds were vague, inasmuch as the names of the associates of the petitioner were not given, but this contention too has no force. Merely because the names of the associates of the detenu have not been specified in the grounds of detention, they cannot be said to suffer from the vice of vagueness vide: *D. S. Roy v. State of W. B.*, (AIR 1972 SC 1924) and *Daroga Ray v. State of W. B.*, (AIR 1975 SC 983).

32. The last point urged by Shri Dube, learned counsel for the petitioner, was that it was not open to the detaining authority to prosecute the petitioner in connection with the incident which formed the subject-matter of ground No. 7 and also to pass an order of detention on the basis of the alleged criminal activities pertaining to this ground. This contention too is without force. In *Ashim Kumar Ray v. State of W. B.* AIR 1972 SC 2561 it was held that initiation of prosecution is no bar to an order of preventive detention. No doubt, a contrary view was expressed by their Lordships of the Supreme Court in *Biranchand v. State of U. P.*, (AIR 1974 SC 1161) but this decision was apparently dissented from in a later decision of the Supreme Court in *H. Saha v. State of W. B.*, (AIR 1974 SC 2154).

33. An order of detention is a precautionary measure being based on a prognosis of the past activities of the detenu. Merely because a detenu was liable to be tried in a criminal Court for the commission of a criminal offence or to be proceeded against for preventing him from committing an offence under Chapter VIII of the Code of Criminal Procedure it would not debar the Government from taking action for his detention under the Act. It is, therefore, clear that an order of preventive detention can be made with or without prosecution, and even in anticipation, or after discharge or acquittal; and the pendency of a prosecution is no bar to an order of preventive detention.

34. Thus, after carefully considering the entire case, we find no merit in this

petition. The grounds, on which the detention is based, are germane and can reasonably form the basis of subjective satisfaction of the District Magistrate regarding the future criminal activities of the petitioner as affecting public order. We do not, therefore, find any good reason to interfere with the order of detention.

35. The petition, therefore, fails and is hereby dismissed.

Petition dismissed.

AIR 1976 MADHYA PRADESH 16

SHIV DAYAL AND J. P. BAJPAI JJ.

Ramnarain and another, Applicants v. The State of Madh Pra, Respondent.

Misc. Petn. No. 186 of 1970 D/- 12-8-1975.

(A) M. P. Panchayats Act (7 of 1962), Section 360 — Applicability — Applies only to those cases which fall within purview of sub-section (1) — Where entire area of Gram Sabha is being included in the area of Municipality, Section 360 (1) is inapplicable and it is not obligatory on State Government to issue notification in manner prescribed by Section 360. (Para 6)

(B) M. P. Panchayats Act (7 of 1962), Section 12 — Requirements of — Expression of intention, how to be made.

The three requirements of Section 12 are: (1) An intention which falls within the purview of the proviso to Section 12 (2) must be expressed by a notification (2) the intention must be in public interest, and (3) reasons must be recorded in writing.

The contention that where law requires an intention to be expressed by a notification in the gazette, it necessarily implies an opportunity to be given to persons interested to file objections and it further contemplates a decision on those objections has been rejected having regard to the context in which Section 12 (2) has been enacted along with its proviso and having regard to the scheme of the Act. (Paras 7, 8)

M. P. Mittal, for Applicants; R. S. Baipai, Govt, Advocate, for Opposite Party.

SHIV DAYAL, J.:— In Tahasil Ashoknagar (district Guna), there is a Gram Sabha area called "Anwari Mafi". The Gram Sabha is for a group of villages, namely Padariya, Anwari, Barkhedi, Bansapur, Parasari, Tikaram, Gora Singwasa and Pachchadi Kheda. Under S. 10 of the M. P. Panchayats Act 1962, (hereinafter called the Act,) a Gram Panchayat was constituted for the said group of villages and was known as "Anwari Mafi Gram Panchayat" consisting of 16 elected members; two women co-opted members; and one representative of Adivasis.

2. By a notification dated June 26, 1970, (published in the M. P. Rajpatra dated

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July 10, 1970), the State Government expressed an intention to exclude from the area of the Gram Panchayat Anwari Mafi a certain portion of one of the above villages comprising the said Gram Panchayat (annexure C). It was issued in exercise of powers under Section 360 (1) of the Act. However, the Gram Panchayat, Anwari Mafi, by a resolution dated March 15, 1970, (annexure-D) objected to the said intention of the State Government. The Sarpanch of the Panchayat filed a revision.

3. Later on, the State Government by another notification dated September 24, 1970, expressed their intention to give over the entire area of the said Gram Panchayat to the administration of the Municipality (annexure F), and, further, the State Government, in exercise of their power under Section 12 (2) of the Act, cancelled the election of the said Gram Panchayat.

4. Aggrieved by the subsequent notification, the petitioners, who are from village Padariya, which is included in the area of the said Gram Panchayat, filed this petition under Articles 226 and 227 of the Constitution.

5. Learned counsel for the petitioners contends that under Section 12 (2) of the Act, by virtue of its proviso, an election can be cancelled, but before that is done, the State Government must express an intention. Learned counsel urges that it is obligatory to express an intention by a notification under Section 360 of the Act. His argument is that when a manner is prescribed for expressing the intention contemplated by Section 12 (2) of the Act, that intention must be expressed in the prescribed manner, or not at all. Since, in the present case, there was no expression of the intention in the mode prescribed in Section 360 of the Act, the proceedings are invalid.

6. In our opinion, this contention is misconceived. Section 330 of the Act reads thus:—

"360. Notification of intention to alter limits of or to amalgamate or to split up Gram Sabhas.—

(1) The State Government may by notification, signify its intention,

(a) to alter the limits of a Gram Sabha area by including within it any local area in the vicinity thereof or by excluding therefrom any local area comprised therein; or

(b) to amalgamate two or more Gram Sabhas and constitute one Gram Sabha in their place; or

(c) to split up a Gram Sabha and to constitute two or more Gram Sabhas in its place.

(2) Every such notification shall define the limits of the local area which is intended to be included in or excluded from a Gram Sabha area, or of the areas of the Gram Sabhas intended to be amalgamated into one, or of the area of each of the Gram Sabha intended to be constituted after splitting up an existing Gram Sabha, as the case may be and shall also specify the period which shall not be less than thirty days within which

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Madras High Court

AIR 1976 MADRAS 1

MOHAN, J.

Krishnaswami Gounder, Appellant v.
A.2190 Jambuthurai Kottai Co-operative
Society and others, Respondents.

Second Appeal No. 1187 of 1973. D/-
18-7-1975.*

(A) Civil P. C. (1908), O. 21, R. 64 —
Sale — Prior sale in execution of award under
Tamil Nadu Co-operative Societies Act, 1961
— Prevails over subsequent court sale.

(Para 6)

(B) Tamil Nadu Co-operative Societies
Act (53 of 1961), S. 100 — Tamil Nadu Co-
operative Societies Rules 1963, R. 69 (7) —
Bar of jurisdiction of Civil Court — Sale in
execution of award under Act cannot be chal-
lenged by suit. (1963) 1 Andh WR 323; AIR
1952 Mad 266 and AIR 1945 Mad 370,
Followed. (Civil P. C. (1908), S. 9).

(Para 7)

Cases Referred: Chronological Paras
AIR 1971 SC 71 = (1970) 2 SCR 714 4, 7
(1963) 1 Andh WR 323 7
AIR 1952 Mad 266 = (1951) 2 Mad L.J. 269 7
AIR 1945 Mad 370 = ILR (1946) Mad 330 7

Balasubramaniam, for Appellant; N. S.
Srinivasan, for Respondents.

JUDGMENT:— O. S. No. 579 of 1971
was preferred before the file of District Munsif,
Madurai, for declaration and mandatory
injunction and the plaintiff's allegations are
briefly as follows—

The suit properties originally belonged to
F. Malaya Gounder the 3rd defendant. The
second defendant had obtained a decree against
the 3rd defendant in O. S. 359 of 1963 on
the file of the District Munsif Court, Madurai.

*(Against decree of Sub. J. Madurai in
A. S. No. 332 of 1972).

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The suit properties were attached in execu-
tion of his decree in E. P. 85 of 1969 on
8-3-1969 and were brought to sale on 23-2-
1970. The plaintiff purchased it for Rupees
1300 subject to the encumbrance and the sale
was confirmed on 30-4-1970. E. A. No. 564
of 1970 was filed for delivery of the properties
and the same was effected on 6-6-1970, and
the delivery was also recorded as on 8-6-1970.
Ever since the date he had been in posses-
sion and enjoyment of the properties is seen
from the patta and kist receipts. While that
being so, the first defendant obtained an
award decree in A. R. C. 141 of 1968 before
the Deputy Registrar of Co-operative Socie-
ties and in execution of that award he came
to purchase the property on 24-11-1969 itself.
When the plaintiff wanted to take delivery of
the possession he was obstructed by the first
defendant and his men and hence the suit.

2. The first defendant filed a written
statement stating as follows. The property
has been purchased by this society on 24-11-
1969 itself in execution of the award decree
obtained against the 3rd defendant and that
therefore any subsequent sale in favour of
the plaintiff, be it a court sale, will not divest
the title of the first defendant and as between
the competing titles, the title of the society
ought to be preferred it being earlier in point
of time. It is a valid sale, by which the prop-
erty had already been sold and therefore
the plaintiff derived no title. The learned
District Munsif of Madurai who tried the suit
decreed in favour of the plaintiff holding
that the court sale ought to be preferred to
that for the sale in execution of the award
obtained under the Co-operative Societies Act.
He also held that the bar under Section 100
of the Co-operative Societies Act 1961 could
not oust jurisdiction of the civil court.

3. On appeal, in A. S. No. 332 of
1972, the learned Subordinate Judge of
Madurai reversed the finding and set aside the
decree. Against this, the present second ap-
peal has come to be preferred.

4. Mr. Balasubramaniam, learned counsel for the appellant, contends that the finding of the lower appellate court about the bar of jurisdiction under Section 100 is incorrect in view of the later judgments of the Supreme Court and one such is in *Raja Kandregula Srinivasa Jagannadharao Pantulu Bahadur Garu v. State of Andhra Pradesh*, AIR 1971 SC 71. At page 73 their Lordships of the Supreme Court set out the grounds on which the jurisdiction of the civil court should be excluded. The first ground mentioned is:

"1. Where the statute gives a finality to the orders of the special tribunal the civil court's jurisdiction must be held to be excluded if there is adequate remedy to do what the civil courts would normally do in a suit. Such provision, however, does not exclude those cases where the provisions of the particular Act have not been complied with or the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure."

Relying on the above principles, it is contended that the provisions of the Act have not been complied with and therefore the bar under Section 100 of the Co-operative Societies Act cannot be invoked as against the appellant. It is further submitted by the learned counsel that his sale ought to be preferred since the sale by the Society, in favour of itself, is vitiated by fraud and illegality. Lastly it is submitted that from the date of purchase, the plaintiff was alone in possession and enjoyment as seen from Exs. A.15 to A.18, the patta issued in his favour and Exs. A.19 to A.22 the kist receipts.

5. Per contra Mr. N. S. Srinivasan submits that his sale is prior in point of time, namely, 24-11-1969 while that of the plaintiff is later. There is absolutely no evidence to show that the sale is in any way vitiated by fraud or illegality. The bar under Sec. 100 read with R. 69 (7) could be validly invoked in this case.

6. On a careful consideration of the above submissions, I come to the following conclusions:

1. The sale in favour of the Co-operative Society is dated 24-11-1969 while the sale under which the plaintiff got title is dated 30-4-1970. Undoubtedly therefore the prior sale in favour of the Co-operative Society has to prevail. If the civil court had been informed of the earlier sale there would not have been an occasion for the court sale at all because in view of the previous sale in favour of the Co-operative Society the judgment debtor namely 3rd defendant had lost all his rights, title and interest in the suit property and therefore the court sale could not convey any right in favour of the plaintiff. So on merits, there is no difficulty in concluding that the first sale has to prevail, irrespective of the fact whether the civil court has jurisdiction or not.

7. Inasmuch as the point relating to the jurisdiction has been elaborately argued I also think it necessary to deal with the same. The reliance placed in *Sree Raja Kandregula Srinivasa Jagannadharao Pantulu Bahadur Garu v. State of Andhra Pradesh*, AIR 1971 SC 71, by the learned counsel for the appellant is misconceived. This is not a case in which there is any non-compliance with provisions of rule nor again is this the case where statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure. In fact, the first half of the provision extracted above will clearly govern this case. It is stated there—

"Where the statute gives a finality to the orders of the special tribunal the civil courts' jurisdiction must be held to be excluded if there is adequate remedy to do what the civil courts would normally do in a suit....."

In this connection, I find the reliance placed on Section 100 read with Rule 69 (7) by the learned counsel for the respondent is well founded. Section 100 states as follows—

"No order of award passed, decision or action taken or direction issued under this Act by an arbitrator, a liquidator, the Registrar or an officer authorised or empowered by him, the Tribunal or the Government or any officer subordinate to them, shall be liable to be called in question in any court."

Rule 69 (7) is to the following effect—

"All orders made under the rule shall subject only to the provisions of Section 97 be final and shall not be liable to be questioned in any suit or other legal proceeding."

Apart from there being a finality, there is an ouster of the jurisdiction of the civil court. In a case reported in *K. Sanyanarayana v. Motu Industries, (P) Ltd.*, (1963) 1 Andh WR 323, the provisions of the previous Act came up for interpretation. Section 48 of the old Act corresponded to the present Section 100 while Rule 22 was similar to Rule 69. In such a case, after referring to various decisions regarding exclusion of the jurisdiction of the civil court it was held as follows—

"It is not open to the plaintiff to challenge the correctness of the award passed by the Deputy Registrar under Section 51 of the Madras Co-operative Societies Act, or the sale held pursuant to the said award. The Act has, under Section 57 empowered the Registrar and the State Government to correct the decisions embodied in awards under Section 51. Section 51 (6) expressly bars the jurisdiction of civil and revenue courts to call in question the decision under Section 51. Likewise, Rule 22 of the rules made under the Act provides the procedure to be followed in execution of an award passed under Section 51, and also for setting aside the sales on the ground of material irregularity or fraud. The jurisdiction of the civil courts to set aside the sale is also barred. Therefore, suit for declaration that the sale is void and not binding on the plaintiff and other creditors

is barred by the provisions of the Co-operative Societies Act."

It may be noted that the learned Judge who decided the case relied on the decision of this court in Venkata Subbiah v. Perriah, 1951-2 Mad LJ 269 = (AIR 1952 Mad 266) wherein Panchapagesa Sastri, J. following the earlier decision in Ramayya v. Chittoor Dt. Co-operative Dy. Registrar, ILR (1946) Mad 320 = (AIR 1945 Mad 370) held—

"that a sale in execution of awards of Co-operative Societies cannot be attacked by a suit in a civil court either on the ground of fraud or irregularity in the conduct of the sale or even illegality, and the civil court has no jurisdiction to go into such matters."

I find the court below has relied upon the last of the decisions namely Ramabakthula Ramayya v. Chittoor Dt. Co-operative Registrar, ILR (1946) Mad 330 = (AIR 1945 Mad 370) which is also on point. In this view I have no hesitation in holding that the jurisdiction of the civil court is excluded in the present case. Assuming that the civil court has jurisdiction I find that no evidence whatsoever has been let in on behalf of the plaintiff to prove that the sale in favour of the Co-operative Society was vitiated by fraud, illegality or irregularity. On this aspect of this matter I am in entire agreement with the finding of the lower appellate court which states in paragraph 8 of its judgment:

"In the first place I may point out that there is absolutely no evidence worth the name on the side of the plaintiffs to show that the sale was vitiated by any fraud, illegality or irregularity."

Further it is contended by the learned counsel for the appellant that the president of the first defendant Society and the third defendant are close relations and therefore it can easily be inferred that the sale was done in a clandestine way and fraudulent manner. This is too tall a statement and I cannot accept the same. In the absence of evidence regarding fraud, illegality or irregularity it must be held that the sale in favour of the Co-operative Society is valid one.

8. For the above reasons I hold that the second appeal is liable to be dismissed. Accordingly the same is dismissed. There will be no order as to costs. No leave.

Appeal dismissed.

AIR 1976 MADRAS 3

VEERASWAMI, C. J. AND
NATARAJAN, J.

K. Yusuf Sheriff and others, Appellants
v. K. Akbar Sheriff and others, Respondents.

A. A. O. No. 73 of 1975, D/- 2-4-1975.*

*(Against order of Sub. J., Vellore, I. A. No. 1524 of 1974).

HS/IS/C749/75/RSK

(A) Arbitration Act (1940), S. 34 — Stay of proceedings — Suit for dissolution of partnership — Arbitrator's wife as a member of partnership alleged to be responsible for expelling plaintiffs — Not per se a ground for stay of proceedings.

Where the parties have, with open eyes, and knowing the fact of the relationship, named the husband of one of the partners as arbitrator there is no reason for allowing the parties to get out of this agreement if nothing has been said or proved against him either by his conduct or by expression or other circumstances that he would be partial or would act with bias — as arbitrator. It cannot be assumed from mere relationship that the Arbitrator would act otherwise than impartially. AIR 1960 SC 1156, Distinguished.

(Para 2)

Cases Referred : Chronological Paras
AIR 1967 SC 249 = (1966) Supp SCR 215 2
AIR 1960 SC 1156 = (1960) 3 SCR 713 2

R. Krishnamurthi and A. R. Lakshmanan, for Appellants; O. R. Abdul Kalam, for Respondents.

VEERASWAMI, C. J. :— This appeal by defendants 1 and 3 to 8 is from an order of the Subordinate Judge, Vellore. He declined to grant stay under Section 34 of the Arbitration Act, 1940. On 5-3-1972, a partnership deed was entered into between the parties which provided for settlement, by arbitration, of all disputes arising between the parties in the partnership. The husband of one of the partners was named as the Arbitrator. This relationship, and there is no dispute about it, was known to all the parties concerned at the time the partnership agreement was entered into. Notwithstanding the arbitration clause, the plaintiffs-respondents instituted a suit for partition and also dissolution of the partnership. The appellants have no objection to the suit being proceeded with so far as it related to partition, but resisted the suit in respect of the relief for dissolution of the partnership, on the ground that it should be dealt with in arbitration. The Subordinate Judge declined to grant stay, as, in his view, the arbitrator's wife, who was one of the partners, according to the plaintiffs, was responsible for expelling the plaintiffs from the firm and the arbitrator was not likely to be impartial and also that the suit was a composite one since there was also the relief for partition asked for.

2. In our opinion, the order of the Subordinate Judge cannot be supported. As we already indicated, the partners knew full well when the partnership agreement was entered into the relationship between the Arbitrator and one of the partners. Nothing has been said or proved against the named Arbitrator either by his conduct or by expression or other circumstance that he would be partial or would act with bias — as arbitrator. The allegation that the arbitrator's wife, as a member of the partnership, was responsible for expelling the plaintiffs, could not

reasonably give rise to the inference that her husband would not act impartially when he was called upon to serve as an arbitrator. *U. P. Co-operative Federation v. Sunder Bros, Delhi*, AIR 1967 SC 249 relied on by the respondents is distinguishable. In that case, the Registrar of Co-operative Societies himself was the ex-officio President of the Society and it was with his approval the agreement in dispute there was terminated. That being so, the Supreme Court was of opinion that the Registrar could not possibly be impartial as he was a party to the cancellation of the agreement. The relationship, here was already known, there is nothing to point to the Arbitrator being likely to be based in any way against the plaintiffs. We cannot assume from the mere relationship of the Arbitrator with one of the members of the partnership that the Arbitrator would act otherwise than impartially. *Printers (Mys) Pvt. Ltd. v. P. Joseph*, AIR 1960 SC 1156, to which our attention was invited for the respondents, lays down the general principle which should govern exercise of the discretionary power under Section 34 of the Arbitration Act. In that case, the following observation is pertinent to the view we have taken in this case :

"In exercising its discretion under Section 34 the court should not refuse to stay the legal proceedings merely because one of the parties to the arbitration agreement is unwilling to go before an arbitrator and in effect wants to resile from the said agreement nor can stay be refused merely on the ground that the relations between the parties to the dispute have been embittered....."

In this case, there is not even an allegation that there was any such embitterment. The parties have, with open eyes, and knowing the fact of the relationship, named the husband of one of the partners as arbitrator, and we do not see why the plaintiffs-respondents could be allowed to get out of the agreement. If any foundation had been laid for their alleged apprehension that the arbitrator might not be impartial, one can understand that. But that is not the case here.

3. The other ground is that the suit is a composite one and, therefore, no stay should be granted. But that circumstance, in our opinion, will not help the plaintiffs. As already mentioned, the appellants have no objection the suit being proceeded with in so far as it related to partition. If there should be any difficulty in making partition without the dissolution of the partnership is decided upon and the rights are arbitrated, that part of it will, of course, have to wait. On the ground, we do not see why stay should be refused. The appeal is allowed with costs.

Appeal allowed.

AIR 1976 MADRAS 4

ISMAIL, J.

Rajammal, Appellant v. Chinnathal; Respondent.

Appeal No. 681 of 1971 and Memo of Objections, D/- 18-3-1975.*

(A) Evidence Act (1872), S. 68 — Execution and attestation of document specifically denied — Examination of scribe is not enough — Must be proved by at least one attesting witness.

The language of Section 68 is clear and categorical and therefore once the execution of the document is denied by the alleged executant, the document cannot be admitted in evidence, unless one attesting witness at least has been called for proving the execution of the document, if alive, and subject to process of the court. (Para 5)

The attesting witness must subscribe his signature with the intention that it should be complete attestation of the document and if this animus attestandi is not present the giving of evidence by scribe as to his having written the document cannot be a valid attestation. AIR 1969 SC 1147; 1970-2 Andh WR 88, Rel. on. (Para 3)

Cases Referred : Chronological Paras
(1970) 2 Andh WR 88 4
AIR 1969 SC 1147 = (1969) 3 SCR 513 4
AIR 1956 Andh Pra 195 = 1956 Andh WR 1, 4
632

JUDGMENT :— The plaintiff in O. S. No. 29 of 1969 on the file of the Court of the Subordinate Judge of Pudukottai is the appellant herein. She instituted the suit against the respondent on a mortgage Ex. A-1 dated 16-11-1964 said to have been executed by the respondent for a sum of Rs. 8000. The plaintiff itself stated that the respondent had repaid four sums of Rs. 50 each on 15-4-68, 30-4-68, 21-6-68 and 30-7-68 towards interest and the suit was filed for recovery of the balance. One of the several defences that was put forward by the respondent was that she was not aware of the execution and due attestation of the document and that she had not even seen the appellant herein. She also denied the due execution and valid attestation of the mortgage Ex. A-1. On this question, admittedly no attesting witness was examined as required by Section 68 of the Indian Evidence Act, in view of the denial of execution by the respondent P. W. 2, who is the scribe of the document, was examined. Having regard to this position, the learned trial Judge has stated that the effect of Section 68 of the Indian Evidence Act, which requires the examination of at least one attesting witness to a document, which under the law requires to be attested, has been considered in *Venkatasubbiah v. Subbamma*, AIR 1956 Andh Pra

* (Against decree of Sub. J., Pudukottai in O. S. No. 29 of 1969).

195 and that it has been held in that case that "the proof contemplated under Section 68 can be furnished by the scribe of the document who could speak to the execution of it and it is not essential that it should be proved only by at least one of the attesting witnesses." It is on this basis only that the learned trial Judge decreed the suit to the extent of Rupees 5,000 on his finding that the mortgage was supported by consideration only to that extent.

2. The plaintiff has filed the appeal contending that she is entitled to the entire mortgage amount due under the mortgage deed and not merely to the sum of Rs. 5,000 as held by the learned trial Judge, while the defendant has preferred a memorandum of cross-objections contending that even the decree for the sum of Rs. 5,000 ought not to have been granted by the learned Subordinate Judge.

3. I am clearly of the opinion that the conclusion of the learned Subordinate Judge on the admissibility of Ex. A.1 as a mortgage deed is erroneous. As I have pointed out already, in paragraph 2 of the written statement the respondent categorically denied the due execution and valid attestation of the document. Therefore, Section 68 of the Indian Evidence Act is immediately attracted. According to that section, if a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive and subject to the process of the court and capable of giving evidence. The section contains a proviso that it shall not be necessary to call an attesting witness in proof of the execution of any document, not being a will, which has been registered in accordance with the provisions of the Indian Registration Act, 1908, unless its execution by the person by whom it purports to have been executed is specifically denied. In this case, as I have pointed out already, the defendant specifically denied the due execution and attestation of the document and therefore the proviso does not apply and the main part of Section 68 alone applies. I am of the opinion that the requirement of that section has not been satisfied in the present case. P. W. 2 is the scribe of Ex. A.1 and he has given evidence to his having written the document. Nowhere in the course of his evidence he has stated that he was one of the attesting witnesses to the document in question. It has been held by this court as well as the Supreme Court that an attesting witness must subscribe his signature with the intention that it should be complete attestation of the document and that if the animo attestandi is not present, there cannot be a valid attestation. P. W. 2 does not appear to be a witness in Ex. A.1, and in his evidence also he has not stated that he attested the document with the intention of attesting the same. Under these circumstances, it is clear that the requirement of Section 68 of the Indian Evidence Act has not been complied with.

4. With reference to the decision of the Andhra Pradesh High Court relied on by the learned trial Judge, namely, Venkatasubbiah v. Subbamma, AIR 1956 Andh Pra 195, the very same High Court in a subsequent decision in Gandham Rajyalakshamma v. Rayanapati Satyavani, 1970-2 Andh WR 88, held that the said decision of that High Court was no longer good law after the decision of the Supreme Court in Abdul Jabbar Sahib v. Venkata Sastri and Sons., AIR 1969 SC 1147, wherein the Supreme Court, as I have already pointed out, took the view that the animo attestandi must be present before a person can be said to be an attesting witness.

5. Apart from the above, the language of Section 68 is clear and categorical and therefore once the execution of the document is denied by the alleged executant, the document cannot be admitted in evidence, unless one attesting witness at least has been called for proving the execution of the document, if alive, and subject to process of the court. In this case, there is no evidence to show that the attesting witnesses were not alive, and in such circumstances, it is clear that the requirement of Section 68 of the Indian Evidence Act has not been complied with and that therefore Ex. A.1 cannot be used in evidence. The suit being one on the mortgage, Ex. A.1, and that mortgage document being inadmissible in evidence, it will have to be dismissed.

6. Accordingly the appeal filed by the plaintiff is dismissed and the memorandum of cross-objections filed by the respondent is allowed and the suit will stand dismissed on that ground. There will be no order as to costs both here and in the trial court.

Order accordingly.

AIR 1976 MADRAS 5 GOKULAKRISHNAN, J.

K. Karuppanna Mudaliar, Petitioner v. Kuttianna Mudaliar, Respondent.

C. R. P. No. 703 of 1974, D/- 14-3-1975.*

(A) Civil P. C. (1908), O. 6, R. 7 — Amendment of plaint — Amendment sought to correct patent mistake in stating the boundary of the plaintiff's property — Amendment not changing nature of suit in any way — Amendment though sought at appellate stage has to be allowed.

Where the plaintiff has misstated the real state of affairs and inadvertently filed a plan not revealing the real state of affairs and having come to know the patent mistake wants to correct himself so that justice may be rendered to the respective parties, amendment though sought at appellate stage cannot be refused. (Para 5)

* (To revise order of Sub. J., Erode, in I. A. No. 143 of 1973).

The court cannot shirk its duties because by amendment the pleadings have to be amended and fresh evidence has to be let in. The predominant interest of the court should be to render justice and allow amendments for such purposes in order to determine the real question in controversy between the parties.

(Para 3)

Cases Referred :	Chronological	Paras
AIR 1950 Mad 32 = (1949) 2 Mad LJ 421		5
AIR 1940 Oudh 367 = 1940 OWN 500		6
AIR 1938 Lah 270 = 178 Ind Cas 176		7
AIR 1936 Pat 191 = 1936 Pat WN 155		8
AIR 1935 Pat 463 = 157 Ind Cas 764		6
AIR 1927 PC 18 = 52 Mad LJ 402		6

P. S. Srisaillam, for Petitioner; S. Palaniswami, for Respondent.

ORDER :— This revision petition arises out of an order refusing to permit the petitioner to amend the plaint and the plan attached thereto. The petitioner herein who is the plaintiff in O. S. 153 of 1969 filed the said suit for declaring the plaintiff's right to drain wash water of the kitchen and bath room and rain water falling from the eaves of his house through the vent towards east through the drain, for restraining the defendant, his men, heirs and assigns etc. from interfering with and disturbing in any manner with the peaceful enjoyment of the said right by means of a permanent injunction and for directing the defendant to remove the obstruction to the vent on the east and in case the defendant fails to comply with the decree, the same may be removed by court and the defendant may be made liable for the expenses. Along with the plaint, the petitioner herein filed a plan showing the location of the respective houses of the parties and the vent alleged in the plaint. The trial court decreed the suit as prayed for. Aggrieved by the decision of the trial court, the respondent herein preferred A. S. 53 of 1973 on the file of the Additional Sub Court, Erode. While that matter was being argued, the plaintiff, that is the petitioner herein, thought it necessary to amend the plaint since the description of the plaintiff's property and also the plan drawn are not in accordance with the actual state of affairs. It is the case of the plaintiff in the petition for amendment that his house does not extend upto the north to south road on the west and that in between the north-south on the west and his house, there is a lane and building belonging to one Sengoda Mudaliar. Even the Commissioner appointed by the trial court points out this mistake. The Commissioner has also filed his plan and report. No objection was taken by the petitioner herein at that time. Nevertheless he has come forward by way of a petition to amend, in I. A. No. 143 of 1973, in A. S. 53 of 1973, praying to amend paragraph 4 of the plaint and read the first sentence as follows—

"The plaintiff's house is shown as A B C D bounded on the west by the house of one Sengoda Mudaliar and common passage."

It is also prayed that the plaint plan also may be suitably amended. The said petition was contested by the respondent herein stating that it is too late in the day for the plaintiff to amend the plaint, that since the plaintiff has not objected to the Commissioner's plan, he cannot be allowed to overcome the same by way of amendment as prayed for now and that such an amendment will be in the nature of putting up a new case which in all material particulars contradicts the original case put up by the plaintiff.

2. The Additional Subordinate Judge of Erode, observing that such an amendment will involve various other complications and also affect the veracity of the defendant's allegation and also will complicate matters, in that, if the amendment is allowed, naturally the rebuttal pleadings pertaining to this aspect of the case would have to be let in and fresh issues also might crop up for decision, dismissed the petition. Aggrieved by the said decision, the plaintiff-petitioner has come forward with the abovesaid revision petition.

3. I have been taken through the pleadings in this case and also the affidavit in support of the amendment application. It is patently clear that the plaint plan does not indicate the correct topography of the plaintiff's house, inasmuch as the Commissioner, in his report, has clearly stated that ABCX portion in his plan belongs to third party, and not to the plaintiff. If that is the state of affairs, a mistake has crept in the plan filed by the plaintiff inadvertently. Such a mistake, in the interest of justice, has to be allowed to be rectified lest the party has to suffer on account of a patent mistake committed by him in the plan attached to the plaint. No doubt, the present amendment goes against the Commissioner's plan in respect of the portion ABCD alleged to be that of the plaintiff in the Commissioner's plan. The plaintiff, by way of amendment, wants to make out that his house portion does not at all touch the mud road on the West. It is always open to the plaintiffs to substantiate his contention by way of amendment if he genuinely has a grievance as to the correctness of the plan he has submitted along with the plaint. The Commissioner's plan and report, to a certain extent go to support the plaintiff's allegation in the application to amend the plaint, though they do not support the plaintiff to the full extent. Relying on the report of the Commissioner and also the state of affairs, the learned counsel for the petitioner submits that the Court below has failed to exercise the jurisdiction vested in it in law under Order VI, Rule 17, C. P. Code.

4. Thiru Palaniswami, the learned counsel for the respondent opposed the application for amendment on the ground that the plaintiff had these facts when he filed the plaint and that inasmuch as he has failed to mention the exact boundaries in his plaint, he should not be allowed to amend the plaint and the plaint plan at the appellate stage.

The learned counsel cited a number of decisions to support his contention.

5. In *Gopalakrishna Murthi v. Sreedhara Rao*, AIR 1950 Mad 32, the High Court set aside an order allowing amendment made by the lower Court. There, it was held that no doubt subsequent events would give the right to the plaintiff to have the plaint amended, but if he had the facts at the time of filing the plaint and failed to state them originally in the plaint, he cannot be allowed to amend the plaint later. I do not think that the facts in that decision are similar to those in the present case, and the principles therein can govern the case on hand. Here is a case where the plaintiff has misstated the real state of affairs and inadvertently filed a plan not revealing the real state of affairs; and having come to know the patent mistake, he wants to correct himself so that justice may be rendered to the respective parties. It cannot be said that new facts are being stated by the plaintiff at the appellate stage by way of amendment. On the other hand, real facts are sought to be stated for the purpose of helping the court to render justice to the parties concerned.

6. The other cases relied on are *Mt. Lachmin v. Bhairon Baksh Singh*, AIR 1940 Oudh 367; *G. McKenzie and Co. v. Tatanlal Surajmal*, AIR 1935 Pat 463 and *Ramsaran Mandar v. Mahabir Sahu*, 52 Mad LJ 402 = (AIR 1927 PC 18). The Oudh High Court held—

“The amendments allowed were undoubtedly very drastic and changed the nature of the suit inasmuch as the allegations on which the claim was based were not only changed but contradictory allegations were put in their place and therefore could not be allowed.” To the same effect, are the other two decisions above referred to. I do not think the present case comes under the observations above extracted. There is absolutely no question of changing the nature of the suit or putting contradictory allegations by way of the amendment. In the present case, as far as the vent through which water has to be let out, is concerned, the case has not been changed excepting seeking to correct the western boundary of the plaintiff's property.

7. *Thiru Palaniswami* next cited *Jaini Bros. and Co. v. Shankarlal*, AIR 1938 Lah 270 which lays down as to when the High Court can, under Section 115, Civil P. C., interfere with an order passed by the lower court under Order XI, Rule 17, Civil P. C.

8. In *Apurba Krishna v. Ram Bahadur*, AIR 1936 Pat 191, the High Court refused to interfere in revision with regard to the discretion used by the trial court which refused to amend the plaint adding interest pendente lite. The facts are distinguishable and the decision cannot apply to the present case. Order VI, Rule 17, Civil P. C. states—

“The court may at any stage of the proceedings allow either party to alter or amend

his pleadings in such manner and on such terms as may be just and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties.”

The court below has not properly exercised the discretion vested in it by law under O. VI, R. 17, Civil P. C. The basis on which it refused the amendment is that the application for amendment was highly belated and it was likely to cause great prejudice to the defendant in his defence and such an amendment would also complicate the matter, in that, if the amendment were allowed, naturally the rebuttal pleadings pertaining to this aspect of the case would have to be amended and in that case fresh evidence might have to be let in and fresh issues also might crop up for decision. The court cannot shirk its duties because by amendment the pleadings have to be amended and fresh evidence has to be let in. The predominant interest of the court should be to render justice and allow amendments for such purposes in order to determine the real question in controversy between the parties. From the facts of the case it is clear that the amendment is necessary in the interests of justice and also to determine the real question in controversy between the parties. There is absolutely no question of a contradictory case being sought to be set up by the plaintiff by way of the amendment, nor has he sought to change the cause of action thereby. Thus it is clear that the court below has failed to exercise the power vested in it by law under Order VI, Rule 17, Civil P. C.

9. In these circumstances, the civil revision petition is allowed. No costs.

Revision allowed.

AIR 1976 MADRAS 7

RAMANUJAM, J.

P. Durairaju, Petitioner v. The Board of Revenue Madras, and others, Respondents.

W. P. No. 428 of 1975, D/- 5-3-1975.

(A) *Madras Cinemas (Regulation) Act (9 of 1955), S. 5 (1) (d) — Madras Cinemas (Regulation) Rules, R. 14 (1) — No objection certificate — Matters to be considered.*

In considering whether no objection certificate should be granted to a touring Cinema, the Collector has to consider the adequacy of the existing places for exhibition of the films. The question of adequacy is one of fact depending upon the situation of the village and its population in around the locality and the decision of the Collector cannot be interfered with in the writ petition. (Para 3)

T. N. Anandanayaki, for Petitioner.

ORDER :— The petitioner applied for a no objection certificate for locating a touring cinema in Kilpallipattu village, North Arcot Dt. The Collector of North Arcot, the licens-

GS/IS/C672/75/KNA

ing authority, refused to grant the no objection certificate for various grounds. One of the grounds on which the said refusal was based is that there is already a touring cinema in the village, that there are other touring cinemas nearby, and that, therefore, there is no warrant for locating another touring cinema in that place.

2. When the order of rejection passed by the collector was challenged before the Board of Revenue, the Board of Revenue also agreed with the Collector and held that the village being a small one, the existing touring cinema is sufficient. Thus though the Board of Revenue disagreed with the Collector in respect of other matters, it upheld the order of the Collector on the question of adequacy. In this view, the Board of Revenue dismissed the appeal filed by the petitioner.

3. In this writ petition, the learned counsel for the petitioner contends that the finding of the Collector as well as the Board of Revenue, that the village cannot accommodate more than one touring cinema is contrary to Rule 14 (1) of the Madras Cinemas (Regulation) Rules, which directs the licensing authority to take into account the population only while considering the grant of No objection certificate for a permanent cinema and even that only in towns. It is true as contended by the learned counsel, that under Rule 14, the population of a particular place cannot be an exclusive matter to be taken note of at the time of grant of No Objection certificate for a touring cinema. Section 5 (1) (d) of the Madras Cinemas (Regulation) Act, 1955, however, directs the licensing authority to take into account the adequacy of the existing places for exhibition of cinematograph films in the locality. From this it is clear that the third respondent (licensing authority in this case) has to necessarily consider the question of adequacy at the time of the grant of the No objection Certificate. In this case, both the Collector as well as the Board of Revenue have found that the existing touring cinema in the village as well as the other touring cinemas in and around the locality are adequate and the touring cinema proposed by the petitioner cannot, therefore, be allowed. The question of adequacy is admittedly one of fact depending upon the situation of the village, the population in and around the locality etc. Respondents 1 and 3, having decided that question and found that the existing places for exhibition of cinematography films in the locality are adequate, this Court cannot go behind that finding of fact.

4. The writ petition, therefore, fails and the same is dismissed.

Petition dismissed.

AIR 1976 MADRAS 8

RAMAPRASADA RAO AND
RATNAVEL PANDIAN, JJ.

Muthu Bhattar v. D. Chokku Bhattar and others.

Application No. 39 of 1968, D/-7-3-1975.

(A) Hindu Succession Act (1956), S. 14

(1) — Interpretation of — Maintenance right — Components of — Widow in possession of property in lieu of her maintenance — Whether her qualified right is enlarged.

The components of maintenance are many and varied. Maintenance right, *inter alia*, contains the right to claim food, attire and shelter. These and other ingredients of the right of maintenance are to be consolidated and not to be treated disjunctively. The right to maintenance of a Hindu female is not a bare personal right to enjoy the property for life. One accepted ingredient of maintenance is the right of residence.

(Para 7)

The distinguishing feature between the women's estate or limited estate and an estate or property acquired by a female Hindu in lieu of maintenance is whilst the latter could never be the subject-matter of any alienation even for necessity, the former could be. In this context the words deployed in Section 14 (1). "Shall be held by her as full owner thereof and not as a limited owner", should be interpreted.

(Para 8)

The property possessed by a female Hindu as contemplated in this section read with explanation to Sec. 14 (1) is clearly the property to which she has acquired some kind of title. Such title however inchoate and restricted it may be, is enlarged by reason of the operation of the statutory provisions and such enlargement is automatic. AIR 1966 SC 1879, Explained and Rel. on.

Each case has to be decided on its own merits and it is therefore necessary to study the basis and the hypothesis under which the particular Hindu female obtained the property in lieu of maintenance and if under the circumstances of a particular case such acquisition included a right to possess immovable property in lieu of maintenance and if such possession continued till the commencement of Act 30 of 1956 and continued thereafter, then such an inchoate right enlarges itself into an absolute right by virtue of the text of Section 14 (1).

(Para 8)

A maintenance right acquired by a Hindu female always enures for her life. The legislature was conscious of it. But they included this in the explanation to S 14 (1) deliberately so as to expand that right and to make it an absolute right in the female concerned after the commencement of the Hindu Succession Act. It cannot be argued that unless the prior estate held by the female is either a limited estate or a widow's estate within the meaning of the orthodox Hindu Law, there cannot be an automatic enlarge-

ment of that estate by reason of Act 2 of 1956. (Para 9)

A maintenance right is a right in re: ((1889) ILR-12 Mad 260 (FB), Rel. on). This right which is inchoate in a female is attributable to her status as a female member of the family. It is undoubtedly therefore a right and if that right has an impingement or impact on immovable property in the sense that while granting such maintenance to a Hindu female certain rights in immovable property are also created, it follows axiomatically that she has acquired a right in the property in lieu of her maintenance. Such a right, therefore has to be dealt under Section 14 (1). (Para 10)

Section 14 (1) takes into its fold judicial possession also. AIR 1967 SC 1786, Rel. on. (Para 10)

Where a widow of joint Hindu family got possession of property (house) in lieu of her maintenance without any restriction or limitation attached to the enjoyment of the property and the property was given to her though she had no pre-existing right to a share in the property and she continued in possession of property till the Act came into force, held that there is automatic expansion of her qualified interest in the property into an absolute interest. S. A. 1415 of 1965 (Mad); Approved; S. A. No. 1203 of 1973 (Mad); (1970) 2 Mad LJ 620; (1968) 81 Mad LW 399, Distinguished. (Para 12)

Cases Referred: Chronological Paras

(1973) Second Appeal No. 1203 of 1973 (Mad)

AIR 1972 Mad 279 = (1972) 85 Mad LW 202 11, 12

AIR 1972 Raj 191 = 1972 Raj LW 133 11

(1971) S. A. No. 1558 of 1971 (Mad) 6

(1971) 1 Mad LJ 439 12

(1970) 2 Mad LJ 620 = (1970) 83 Mad LW 541 12

(1968) 81 Mad LW 399 = (1969) 1 Mad LJ 181 13

AIR 1967 SC 1786 = (1967) 3 SCR 454 11

AIR 1966 SC 1879 = (1966) 2 SCR 626 9, 11, 14

(1965) Second App. No. 1415 of 1965 (Mad) 12

AIR 1937 Mad 193 = 1936 Mad WN 1276 7

(1889) ILR 12 Mad 260 (FB) 7, 10

RAMAPRASADA RAO, J.:— The unsuccessful plaintiff in O. S. No. 151 of 1965 on the file of the learned Principal Subordinate Judge of Madurai is the appellant. The dispute is about the right which one of the widows of a joint family acquired in relation to one of the properties of the family. Chinnasami Bhattar had five sons. Three amongst them died issueless. The other two sons were Subbu Bhattar and Chokku Bhattar. Subbu Bhattar died leaving behind him his son Chinnaswami Bhattar, who, in turn, died on December 31, 1937, leaving behind him his widow Ammani Ammal. The other son Chokku Bhattar died in 1935 leaving behind him Subbammal as his widow. Ammani

Ammal died on February 22, 1945, after having taken the plaintiff in adoption. Subbammal, however, lived till September 3, 1965. Subbammal was therefore admittedly a pre-1937 widow in the sense that she became widow prior to the passing of the Hindu Women's Rights to Property Act of 1937. In 1940, she filed the suit O. S. No. 202 of 1940 on the file of the District Munsif of Madurai, seeking for her accredited maintenance rights. It is common ground that in the pleadings in that suit, Subbammal stated that she was living in one of the family houses and in consequence thereof, she claimed a sum of Rs. 75/- on account of her maintenance. She however made it clear that she was in occupation of the above immovable property belonging to the joint family and that she was claiming in that suit the additional money claim which was in addition to her right to reside in the family house which was also under her occupation under an arrangement with the other members of the joint family and that right of occupation coupled with the decree sought for in money for her living and existence would be in full quit and satisfaction of her claim to maintenance as against the other members of the family. The learned District Munsif referred to this fact and observed that Subbammal was not claiming any independent relief in respect of her right to residence and that the money sought for other purposes of her living may be computed independent of such right of residence which she was already enjoying as above. The learned District Munsif also said that, in addition to the residence in regard to which no relief was claimed in the plaint and as to which no provision was made in the judgment, the plaintiff Subbammal would be entitled to a sum of Rupees 25/- per month on account of her maintenance after the date of the judgment. This judgment and decree of the Court below which went up in appeal was confirmed excepting to the extent that the quantum of maintenance granted was increased by Rs. 5/-. After the said judgment was so rendered by a competent Court, Subbammal continued to reside in the property which is the subject matter of this suit and, as already stated, lived till September 3, 1965, which is posterior in point of time to the date of the induction of the Hindu Succession Act, 1956. Consequently, upon the provisions contained in the Hindu Succession Act of 1956 and in the view that her limited interest which was a qualified interest in the property in which she was residing and which she acquired in lieu of maintenance enlarged itself into an absolute estate, Subbammal executed a registered will (Ex. B-57) bequeathing the property in favour of defendants 1 and 2 who are her near relations. It is also not in dispute that defendants 1 and 2 continued in possession of the suit property by virtue of the testament after the death of Subbammal. Whilst matters stood thus, the plaintiff, soon after the death of Subbam-

mal, filed the present action for a declaration of his title to the suit property as the immediate reversioner of Subbammal and sought for a permanent injunction restraining the defendants from interfering with his alleged possession of the suit property or, in the alternative, for possession with mesne profits.

2. The defendants in their written statement, after having referred to the relevant facts which led to Subbammal executing the testament in question maintained that at no time, the plaintiff was in possession of the suit property and, therefore, was not entitled to the preventive injunction against them. On the other prayer of the plaintiff that he should be declared as the owner of the suit property and entitled to possession thereof, the defence was that the plaintiff did have no manner of right, title or interest in it and that by virtue of Ex. B-57 they were entitled to the suit property in their own right and in consequence, they were entitled to be in possession of the same without being disturbed by the alleged claim or right projected by the plaintiff.

3. On the above relevant pleadings, the following issues were framed:—

- (1) Whether the plaintiff has title to the suit house?
- (2) Whether plaintiff is in possession of the suit house to warrant the relief of injunction against the defendants?
- (3) Whether Subbammal became entitled absolutely to the suit house by reason of the Hindu Succession Act, 1956?
- (4) Whether the Will dated 27-12-1957 of Subbammal is true, valid, binding on the plaintiff having been executed by her, when she was in a sound disposing state of mind?
- (5) Whether defendants 1 and 2 have acquired right to the suit house under the said Will?
- (6) Whether the suit has been properly valued and correct court-fee has not been paid?
- (7) To what relief, if any, is the plaintiff entitled?

Following additional issues were also framed:

- (8) What is the market value of the suit property?
- (9) To what future mesne profits is plaintiff entitled, if any?

4. On issues 6 and 8, the learned Subordinate Judge held that, as the suit has been properly valued in the course of trial and as proper court-fee has been paid, the issues need not be answered one way or the other. On Issue No. 2, he held that the plaintiff was never in possession of the suit house and, therefore not entitled to the relief of injunctions as prayed for. On issues Nos. 1 and 3 which are the material issues which arose for consideration before him, he held that by reason of Section 14 (1) of the Hindu Succession Act and in the facts and circumstances of this case, Subbammal became a fresh stock

of descent under the Act and she having died not intestate, had absolute title to the suit property and that she had in consequence the incidental right and capacity to deal with it in any manner she desired. The learned Subordinate Judge considered the import of the judgment of the learned District Munsif referred to earlier and found that the right acquired by the plaintiff in that suit, viz., Subbammal in or about 1940 as was seen from the recitals in the pleadings in that suit and as was obvious from the facts disclosed during its trial was a right which she acquired to the suit property in lieu of her maintenance, that she was in possession of the same on the date when the Hindu Succession Act, 1956, came into force and that the charge created by the decree as regards the secured payment of the money decree passed therein would not in any way alter the situation. On Issues Nos. 4 and 5, he held that Ex. B-57 was executed by Subbammal whilst she had the necessary testamentary capacity to do so and that the will has been proved in solemn form in accordance with the law and that, therefore, the defendants 1 and 2 could base their claim on Ex. B-57. He was also of the view that there were no suspicious circumstances surrounding the execution of the will and that Subbammal had the *JUS DISPONENDI* not only to write the will, but also to dispose of the property which is the subject-matter of the testament as she purported to do. Ultimately, he upheld the title of defendants 1 and 2 to the suit property and therefore dismissed the suit of the plaintiff. It is as against this, the present appeal has been filed.

5. The learned counsel for the appellant reiterated the contentions raised in the lower Court. Mr. S. Sitarama Iyer would seriously contend that the contents of Section 14 (1) of the Hindu Succession Act, literally taken give the impression that in order to enlarge the nature of a property held by a Hindu pre-1937 widow, it is necessary that the character of title which such lady had at or about the time when Act 30 of 1956 was introduced should be in the nature of a widow's estate or as is popularly known as a limited estate under the orthodox Hindu Law and Subbammal not having had such an interest at or about the time when the Hindu Succession Act was introduced, her right, whatever may be the nature of it, cannot be deemed to have been enlarged by reason of Section 14 (1) of the Act. He would also state that, though under the explanation, the property acquired by a female Hindu in lieu of maintenance or arrears of maintenance would also be property within the meaning of Section 14 (1), yet, according to him, the nature of title and right which a female heir could be said to have possessed or owned in relation to that property in question not being equatable to that of a widow's estate and not being equivalent to the right of a limited owner, it cannot be said that there has been an automatic expansion of that right into full owner-

ship. It is also said that by a reading of the judgment of the learned District Munsif in the original suit referred to above, the right could only be said to be a right of residence as is commonly known and not any other right known to jurisprudence. But, on the other hand, Mr. R. Gopalaswami Iyanger, learned Counsel for the respondents, would say that the language of the explanation, read in conjunction with the purport of Section 14 (1), gives the undoubted impression that any property possessed by a female Hindu in lieu of maintenance or arrears of maintenance shall be held by her as the full owner thereof, if only two conditions are satisfied; firstly, she should have been in possession of the property on the date of the commencement of the Act and, secondly, there must be cogent proof that that property came in her possession by virtue of an unqualified arrangement as regards her maintenance as a widow of the joint family. Once these two conditions are satisfied, then the statutory provision is attracted on its own force and the result is that there is an automatic enlargement of the estate of the female Hindu into a full ownership thereof.

6. Though a number of decisions have been cited by both the sides, the question whether a property possessed by a female Hindu whether acquired before or after the commencement of the Act in connection with her maintenance right or arrears of maintenance should be held by her as full owner thereof after the Hindu Succession Act came into force is not free from doubt. There is, of course, a pronouncement of Ramaswami, J. in Second Appeal No. 1203 of 1973 (Mad) and that of Ramaswami, J. in S. A. 1558 of 1971 (Mad) both of which probably squarely govern the issue. But the other decisions cited by the learned counsel for the appellant in particular would cover cases where the maintenance grant is subject to an instrument, decree, order of court or a document prescribing a restricted estate in such a property in relation to the maintenance holder. As such a contingency such as the grant of a maintenance right with a contemporaneous restriction attached to it is governed by Section 14 (2) of the Act, such decisions cited by the learned counsel for the appellant may not be apposite for the situation. We shall, however, consider the import of such decisions.

7. Before doing so, it is necessary to understand as to what is a maintenance right. The components of maintenance understood both in civil and criminal law are many and varied. Inter alia, it contains the right to claim food, attire and shelter. These and other ingredients of the right of maintenance are to be consolidated and not to be treated disjunctively. In the case of the right of maintenance of a Hindu Female or a Hindu widow, until the passing of the Hindu Adoptions and Maintenance Act, 1956, this was governed by the personal law of the parties.

A peculiar situation, however, is always demonstrable with reference to the pre-1937 widows. In the case of such widows or female members, when a maintenance right is recognised either by the act of parties or by an involuntary measure, such as a decree of court, then that right so secured by the Hindu female has to be understood with reference to the facts and circumstances under which the grant was made. But, as was stated by a Full Bench of our Court in *Ramanadan v. Rengammal*, (1889) ILR 12 Mad 260 at p. 268 (FB):

"The correct view is that the obligation to maintain the mother is strengthened by giving her an interest in immovable property and thereby enabling her to constitute that interest into a specific charge, or an actual existing proprietary interest for the term of her life, and to protect her right of maintenance against improvident alienation of the fund from which it is to be satisfied. To this extent, the right of maintenance is a right in re or an interest in ancestral property." (The underlining is ours).

The right to maintenance of a Hindu female is not a bare personal right to enjoy the property for life. It is in this context, we should understand the decree and judgment which the learned District Munsif passed in favour of Subbammal in O. S. 202/1940 as early as 1940. We have already excerpted the relevant portions. The learned District Munsif in uncanny terms observed—

"in addition to residence in regard to which no relief is claimed in the plaint and as to which no provision is made in the judgment or decree in this suit, the plaintiff is entitled to be paid Rs. 25/-."

There was, therefore, a conscious application of the mind of the court as well as the parties before it when the maintenance right to which Subbammal was entitled to as a member of the joint family was reckoned and quantified. There was absolutely no doubt that the possession of the property which is the suit property was in her own right as maintenance holder of the family and that such possession was not attributable to any act of trespass or illegality on the part of Subbammal. In exercise of a right, however restricted it may be and however small may be its content, Subbammal was in possession of the suit property in lieu of her maintenance. As we said, the facts of maintenance are varied in nature and one such accepted ingredient of maintenance is the right of residence. It is therefore fairly clear that, when the decree for maintenance was passed in 1940, the various components of maintenance, such as shelter, food and clothing, were taken into consideration and as Subbammal was already having her residence in one of the family properties, the other components of the maintenance right were reckoned in terms of money and the decree was rendered by the learned District Munsif. In fact that this

is the position is not disputed by the plaintiff himself. The plaintiff, when he instituted the suit, interpreted the scope of O. S. No. 202 of 1940 on the file of the District Munsif, Madurai and averred in the present action as follows:—

‘Subbammal has clearly stated that in lieu of her right of residence, she was occupying the aforesaid house.’

As the right of residence is one of the limbs of the right to claim maintenance, it cannot be said that as and from the time when Subbammal possessed the property in question and was in occupation of it, she did not acquire that property in lieu of maintenance. As was stated by Venkataramana Rao, J. in *Bayyapparaju v. Lakshamma*, (AIR 1937 Mad 193) the right of a female member to reside in the family dwelling house as well as her right of maintenance is based upon her husband's right to share in the family property.

8. It would be convenient at this stage to refer to the relevant provisions in the Hindu Succession Act which are apposite for our discussion:

“14. (1) Any property possessed by a female Hindu, whether acquired before or after the commencement of this Act, shall be held by her as full owner thereof and not as a limited owner.

Explanation:— In this sub-section, “property” includes both movable and immovable property acquired by a female Hindu by inheritance or devise, or at a partition, or in lieu of maintenance or arrears of maintenance, or by gift from any person, whether a relative or not, before, at or after her marriage, or by her own skill or exertion, or by purchase or by prescription, or in any other manner whatsoever, and also any such property held by her as stridhana immediately before the commencement of this Act.

(2) Nothing contained in sub-section (1) shall apply to any property acquired by way of gift or under a will or any other instrument or under a decree or order of a Civil Court or under an award where the terms of the gift, will or other instrument or the decree, order or award prescribe a restricted estate in such property.”

In the orthodox Hindu Law, a widow's estate was understood in a peculiar way having regard to the Sastri edicts which generally govern the ownership and the treatment of such estate of widows. Very early, the Privy Council recognised that even though the estate held by a widow is what is legally and popularly understood as widow's estate, even then for justifiable necessity and for other causes she had the power to alienate the same. There were, therefore, certain particular rights which were attached to and incidental to a widow's estate. Such widow's estate, which was later on by usage was described as limited ownership, was also understood and interpreted in the same light. The concept of limited ownership or widow's estate (if they are interchange-

able at all) projected a particular circumstance whereby the limited owner could alienate the property for necessity etc. But in the case of property acquired by a female Hindu either before or after the commencement of the Act in lieu of maintenance or arrears of maintenance which obviously enures for her life cannot be the subject-matter of any alienation at all. This distinguishing feature compartmentalises the two estates, namely the women's estate or a limited estate, and an estate or property acquired by a female Hindu in lieu of maintenance. Whilst the latter could never be the subject-matter of any alienation even for necessity, the former could be. In this context, the words deployed in Section 14 (1) “shall be held by her as full owner thereof and not as a limited owner” should be interpreted. In our view, the words ‘limited owner’ appearing in the latter part of Section 14 (1) are mere positive expatiation of the situation and they have therefore no impact upon the concept in the orthodox Hindu Law which deals with limited ownership or widow's estate. In any event, the argument of the learned counsel that the words ‘limited owner’ used in Section 14 (1) of the Act should be understood in that light and a Hindu female acquiring property in lieu of maintenance would also be placed in that plane of limited owners or females owning widow's estate is not acceptable to us. No doubt, the learned counsel has referred to certain decisions which we shall presently refer to and as in the opinion of the Supreme Court the position is not that canvassed for by the learned counsel for the appellant, we are unable to subscribe to that view. Each case has to be decided on its own merits and it is therefore necessary to study the basis and the hypothesis under which the particular Hindu female obtained the property in lieu of maintenance and if under the circumstances of a particular case such acquisition included a right to possess immovable property in lieu of maintenance and if such possession continued till the commencement of Act 30 of 1956 and continued thereafter, then such an inchoate right enlarges itself into an absolute right by virtue of the text of Section 14 (1).

9. We shall now consider the citations made by the counsel at the bar. Before referring to the various cases referred to by the learned counsel for the appellant, we may immediately refer to the treatment of the subject by the Supreme Court in *Eramma v. Veerupana*, (AIR 1966 SC 1879). The Supreme Court said:

“The property possessed by a female Hindu, as contemplated in the section, is clearly property to which she has acquired some kind of title whether before or after the commencement of the Act. It may be noticed that the Explanation to Section 14 (1) sets out the various modes of acquisition of the property by a female Hindu and indicates that the section applies only to property to

which the female Hindu has acquired some kind of title, however restricted the nature of her interest may be. The words "as full owner thereof and not as a limited owner" as given in the last portion of sub-section (1) of S. 14 clearly suggest that the legislature intended that the limited ownership of a Hindu female should be changed into full ownership. In other words, Section 14 (1) of the Act contemplates that a Hindu female who, in the absence of this provision, would have been limited owner of the property, will now become full owner of the same by virtue of this section. The object of the section is to extinguish the estate called 'limited estate' or 'widow's estate' in Hindu Law and to make a Hindu woman, who under the old law would have been only a limited owner, a full owner of the property with all powers of disposition and to make estate heritable by her own heirs and not revertible to the heirs of the last male holder."

The learned counsel for the appellant very strongly relies upon the latter part of the passage as excerpted above and would vehemently contend that what was intended by the Act as interpreted by the Supreme Court is that unless the female heir had in her what was called a 'limited estate' or 'widow's estate' there cannot be any expansion or absolution of such estate by virtue of the explanation. It should not be forgotten that the case in (AIR 1966 SC 1879) referred to above was not dealing with a case of maintenance. But, the earlier part of the quotation cited above, in our view, makes it very clear that the property possessed by a female Hindu as contemplated in this section read with explanation to Section 14 (1) is clearly the property to which she has acquired some kind of title. The Supreme Court, with the greatest respect to the learned Judges, has very rightly placed the accent on 'some kind of title, however restricted the nature of her interest may be'. It, therefore, follows that such title, however inchoate or restricted it may be, is enlarged by reason of the operation of the statutory provisions and such enlargement is automatic. The words 'limited estate' or 'widow's estate' used by the Supreme Court in the above judgment, no doubt, refer to the facts of that case. But, as they have laid down categorically that even a restricted title to the property, which sprang from the application of the provisions of Section 14 (1) of the Hindu Succession Act, would automatically expand itself into an absolute right, it is this proposition which applies to the facts of this case. Subbammal acquired the property in lieu of maintenance. That is not even seriously disputed before us. Then, it follows that the Hindu Succession Act made a particular departure from the accredited norms of the personal law of Hindus by including that imperfect restricted right in property acquired by a Hindu female in lieu of her maintenance as a right which should be enlarged by reason of Sec. 14 (1).

This is a specific departure from the personal law as well as the common law. A maintenance right acquired by a Hindu female always enures for her life. The legislature was conscious of it. But they included this in the explanation to Section 14 (1) deliberately so as to expand that right and to make it an absolute right in the female concerned after the commencement of the Hindu Succession Act. We are, therefore, unable to agree with the learned counsel for the appellant that unless the prior estate held by the female is either a limited estate or a widow's estate within the meaning of the orthodox Hindu Law, there cannot be an automatic enlargement of that estate by reason of Act 30 of 1956.

10. We have already referred to the fact that a maintenance right is a right in re (vide (1889) ILR 12 Mad 260 at 268) (FB). This right which is inchoate in a female Hindu is attributable to her status as a female member of the family. It is undoubtedly therefore a right and if that right has an impingement or impact on immovable property in the sense that while granting such maintenance to a Hindu female certain rights in immovable property are also created, it follows axiomatically that she has acquired a right in the property in lieu of her maintenance. Such a right, therefore, has to be dealt with under Section 14 (1) and so viewed, Subbammal's right over the suit property has enlarged after the induction of Section 14 (1) of the Hindu Succession Act.

11. The next question to be considered is whether Subbammal had barely a right of residence over the property or she was having that right which is contemplated in Section 14 (1). There is absolutely no basis for the contention that Subbammal was residing in the suit property only because she was granted a right of residence. In *Tej Singh v. Hastimal*, (AIR 1972 Raj 191) relied upon by the learned counsel for the appellant, a bare right of residence was granted to the female Hindu. In that context, the learned Judge said that the word 'acquire' occurring in Section 14 is important, and that the person who has only a right of residence in the property cannot be said to have acquired the property. There cannot be a dispute over this proposition. But the Supreme Court in *Mangal Singh v. Rattno*, (AIR 1967 SC 1786) observed as follows:—

"The expression used in Section 14 (1) of the Act was intended to cover cases of possession in law also, where lands may have descended to a female Hindu and she has not actually entered into them. It would, of course, cover the other cases of actual or constructive possession. On the language of Section 14 (1), therefore, this provision will become applicable to any property which is owned by a female Hindu, even though she is not in actual, physical or constructive possession of that property."

It, therefore, follows that Section 14 (1) takes in to its fold juridical possession also. But, in the case under consideration, it was physical possession which Subbammal had in the property, ever since the decree for maintenance was granted and she died possessed of it on the date when the Act came into force. It is in this context we have to refer to the Judgment of Ramanujam, J. in Second Appeal No. 1203 of 1973 (Mad). In that case, there was originally a controversy as to whether the property acquired by the female Hindu there, was by virtue of a partition or a grant. The case of the plaintiff in that case was that the suit items were given to the widow in lieu of maintenance somewhere in 1937 without any right of alienation and on condition that the property should revert to the heirs of the last full owner. But, this was however controverted later. This controversy as regards the origin of title of the female owner in that case probably was the basic cause for the decision of the learned Judge. In one portion of the judgment, the learned Judge said that:—

"In view of the Explanation the property given to Nevvi (the widow) in lieu of her claim for maintenance will also be property contemplated by Section 14 (1)."

Relying upon the observations of the Supreme Court in (AIR 1966 SC 1879) already referred to above and in particular reference to the expatiation of the object of the legislature referred to by the Supreme Court in that decision, the learned Judge was inclined to take the view that unless the estate held by the female owner was a limited one or a widow's estate in Hindu Law, there could not be any enlargement of it, notwithstanding the provisions of Section 14 (1). With great respect to the learned Judge, we are unable to agree and we have already given the reasons. The Supreme Court in the above case, in our view, laid down in unequivocal terms the proposition that any kind of right secured by a female Hindu which resulted in the acquisition of rights over property by her and which continued in her possession on the date of commencement of Act 30 of 1956 would automatically be enlarged by reason of the norm and principle contained in Sec. 14 (1). This observation of the Supreme Court however was not squarely referred to by the learned Judge.

12. Santhanam Kachapalaya Gurukkal v. Subramania Gurukkal, (1972) 85 Mad LW 202 = (AIR 1972 Mad 279) relied upon by Ramanujam, J. was a case where the widow trespassed into the property and she has no vestige of title or right in it. It is obvious, therefore, that she did not acquire any right over the property in a manner known to law for such right to be enlarged by reason of operation of Section 14 (1). In the said case, the learned Judges have no doubt referred to the fact that the widow therein did not have any pre-existing title to the property. But in the facts and circumstances of that case, as

the widow did not have any title or right over the immovable property at all, then it could not be comprehended that such a non-existent right could have expanded in any sense whatsoever and much less in the sense contemplated under Section 14 (1), Ramanujam, J. also referred to the decision in Chellammal v. Nallammal, (1971) 1 Mad LJ 439. There, the learned Judges correctly laid down the proposition that maintenance grants in each case have to be understood with reference to the facts and circumstances of each case. In the light of the facts disclosed in that case, they were of the view that there was no enlargement. But the decision of Natesan, J. in Lakshmi Ammal v. Sappantmuthu Nadar, (Second Appeal No. 1415 of 1965) (Mad) was quoted with approval by the Division Bench in ((1971) 1 Mad LJ 439). Natesan, J. in S. A. 1415 of 1965 inter alia states:—

"Now under Section 14 (1) read with explanation, a land given to a female Hindu who has no pre-existing right to a share in the property, without any express terms limiting her estate in the land, would become her absolute property."

We approve of this statement of Natesan, J. Adopting this and applying the same to the facts and circumstances of our case, the property given to Subbammal who had no pre-existing right to a share in the property, without any express terms limiting her estate in the property, would become her absolute property under Section 14 (1). It is not contended that under the decree of court or by any other arrangement, the mode of enjoyment of the right to possess the property was in any way curtailed or limited. It would appear to us that Subbammal got possession of this property in lieu of her maintenance without any restriction or limitation attached to the enjoyment of that property and she continued in possession of the property till Act 30 of 1956 came into force and therefore, in our view, there is an automatic expansion of her qualified interest in the property into an absolute interest.

13. The decision in Rangammal v. Muthuraia, (1970) 2 Mad LJ 620 has also no application to the facts of this case. Therein, it was held that mere possession was not sufficient to attract Section 14 (1). That is also admitted to be not a case of maintenance grant. Presumably on the ground that possession of the female owner of the properties was neither juridical, positive or constructive, the learned Judges were of the view that there was no enlargement of the estate. But these are not the facts in the instant case. The case reported in Dharma Udayar v. Ramchandra Mudaliar, (1968) 81 Mad LW 399 is a case where under the maintenance grant, a property was given to a female with a specific direction that she should enjoy it for her life and that it should revert back to the persons named under the grant. This case, therefore, has no application as Section 14 (2) would cover the same.

14. We have already referred to the fact that the Supreme Court in *Eramma v. Veerupana*, (AIR 1966 SC 1879) has made the position very clear. When the Supreme Court referred to the object of the section, they were probably referring to it with reference to the facts of that case and we are of the view that having regard to the principles and the ratio therein, it cannot be said automatically and generally that it is only a limited estate of a female which would enlarge itself into absolute estate and not other estates. We have pointed out a distinction between the limited estate of a widow's estate and the estate, if one such expression could be used, which a female acquires in lieu of her maintenance. The former could be the subject-matter of an alienation and the latter cannot be. There are very many facts of distinction between the two estates. The legislature has included the right covered by the latter under Section 14 (1). To this extent, there has been a specific departure from the application or invocation of the personal law of the parties. Undoubtedly, a maintenance right acquired by a female would enure for her life. The Parliament was conscious of it. But yet they made it clear that if such right had an impact on immovable property and if, as a result of the vesting of such a right in a female, she acquired the property in lieu of maintenance and continued to be in possession of it till the commencement of the Act and thereafter, then it would be her absolute property.

15. The only other question that remains for consideration is whether Ex. B-57 which was a registered will propounded by Subbammal creating a vested interest in defendants 1 and 2 is valid. A hesitant argument was addressed by the learned counsel for the appellant that the will has not been properly proved. The will is a registered will. D. W. 3 was the attester of the will. D. W. 2 who was the Advocate's clerk came and deposed that the will was prepared under instructions from Subbammal and that his master drafted the will after having advised her that by reason of the Hindu Succession Act, she became an absolute owner of the property and she had, therefore, the capacity to execute the will in the manner she desired. Nothing is said about D. Ws. 2 and 3 excepting a bare suggestion that the draft said to have been prepared has not been produced. Whatever may be the force of that contention, in cases where an unregistered will is propounded for acceptance by a Civil Court, that would not stand in a case where registered will, is brought into existence and that is the subject-matter of interpretation. We can fairly assume that in the case of registered will, Subbammal had the requisite testamentary capacity, she went to the Registrar's office and got the will registered after having proved it before a public officer that the thumb impression affixed to the Will was hers, and so on. Besides the normal inference that registered wills have a greater force in the matter of prompting the courts to accept and

avoid any suspicion about it, in the instant case the attester also has been examined and the learned Judge, after considering their evidence, found that the will was properly executed in due form and when Subbammal had the requisite testamentary capacity to do so. One other factor is that Subbammal lived for 8 years thereafter and there was no controversy about this will at all. We accept the findings of the trial court that Subbammal executed the will voluntarily as a free agent, when she was in a sound disposing state of mind and Ex. B-57 is a valid instrument binding on the plaintiff.

16. The appeal, therefore, fails and is dismissed.

17. There will be no order as to costs.
Appeal dismissed.

AIR 1976 MADRAS 15

SETHURAMAN, J.

S. A. Ramiah Nadar and another, Appellants v. Rajalakshmi Ammal, and another Respondents.

Second Appeal No. 287 of 1972, D/- 28-2-1975.*

(A) Limitation Act (1963), Art. 62 — Usufructuary mortgage of house dated 19-11-1951 — Mortgagor to redeem mortgage on or before 14-12-1952 — In default mortgagor to pay mortgage money whenever demanded and redeem mortgage — Mortgage money held became due within Art. 62 on 14-12-1952 when period fixed for redemption expired. (1906) 16 Mad LJ 364 held not good law in view of AIR 1945 Mad 157 (FB).

Where under a mortgage deed dated 19-11-1951 a house was usufructually mortgaged and the mortgagor was given the right to redeem the mortgage on or before 14-12-1952 and in default of such redemption on that date it was agreed that the mortgagor would pay the mortgage money whenever demanded and redeem or discharge the mortgage and the mortgagee filed a suit on 19-7-1969 to recover the mortgage money, it was held that the mortgage money became due within Article 62 on 14-12-1952 when the period fixed for redemption expired and the agreement to pay whenever demanded did not mean that demand was a condition so that it became due only on the date of demand and the suit not having been filed within 12 years from 14-12-1952 was barred. AIR 1945 Mad 157 (FB) and (1968) 2 Mad LJ 445, Rel. on; (1906) 16 Mad LJ 364 held not good law in view of AIR 1945 Mad 157 (FB). (Paras 1, 2, 9)

Cases Referred: Chronological Paras
(1968) 2 Mad LJ 445 = 81 Mad LW 166 3, 8
AIR 1945 Mad 157 = ILR (1945) Mad 758 7
(FB)

*(Against decree of Sub. J., Madurai, in A. S. No. 10 of 1970).

HS/IS/C808/75/GNB

(1906) 16 Mad LJ 364

3, 4, 6, 7

A. Varadarajan, for Appellants; M. V. Krishnan, for Respondents.

JUDGMENT:— The defendants have filed this appeal. The plaintiffs filed the suit for recovery of a sum of Rs. 600 due on a mortgage deed dated 19-11-1951, which is Ex. A.1 in the case. It recites that the house property described in the schedule was usufructually mortgaged for a loan for discharging certain debts incurred in connection with the business. It gives a right to redeem the mortgage to the mortgagor on or before 30th Kartikai of next year which corresponds to 14-12-52. In default of such redemption on that date, it is agreed that the mortgagor will pay the amount whenever demanded and redeem or discharge the mortgage.

2. The present suit was filed on 19-7-1969. The defendants-appellants objected to the maintainability of the suit on the ground that it was barred by limitation under Art. 62 of the Limitation Act, 1963.

3. The trial court accepted the objection of the defendants and dismissed the suit. On appeal the learned Subordinate Judge, following the decision in *Vaithilinga Nadar v. Narayanaswami Ayyan*, (1906) 16 Mad LJ 364 held the period of limitation would start running only from the date of demand, that in the present case the demand was on 25-7-1968, and that therefore the suit was within time. He distinguished the decision in 1968-2 Mad LJ 445 on the ground that it was inconsistent with the earlier Bench decision in *Narayana Chettiar v. Rangaswami Naidu*, 1968-2 Mad LJ 445. He therefore, passed a preliminary decree for the amount due and fixed the time for payment as three months.

4. In the present appeal the learned counsel for the appellant submitted that the Court below was wrong in proceeding as if the suit was within time, that the suit should have been filed either within the period of 12 years from 19-11-1951, when the mortgage deed was executed, or within the period of 12 years from 14-12-1952, the date fixed for redemption and that as the suit had been filed much later than the period of 12 years from either of these two dates, it was barred by limitation under Art. 62 of the Limitation Act. The learned counsel for the respondents supported the decision of the Learned Subordinate Judge on the ground that the decision in 16 Mad LJ 364 was rightly applied.

5. Article 62 of the Limitation Act deals with suits to enforce payment of money secured by mortgage or otherwise charged upon immovable property. The period of limitation is 12 years from the date when the money sued for became due. I have thus, first to see as to when the money sued for became due. If the demand made by the mortgagee is to be the starting point of limitation, then certainly the suit would be within time. It is on this aspect that I have to consider the decisions brought to my notice.

6. In *Vaithilinga Nadar v. Narayanaswami Ayyan*, 16 Mad LJ 364, a Bench of this court was concerned with the construction of the words 'on demand'. That was a case of a mortgage document dated 15-9-1878, providing for payment of interest on the 15th of September each year and payment of the principal on the fifth year. If the amount was not paid then, the mortgagor undertook to pay the amount on demand. The default in payment took place in 1879 and the plaint was presented on 14-9-1895. It was held that the words 'on demand' were intended to import a condition that the demand fell within the period, and that, therefore, the suit was not barred by the law of limitation.

7. The same question came up for consideration in a number of cases later on and there was some difference of opinion, so that the matter came to be referred to a Full Bench, whose decision is reported in *Vali Venkatasami Chettiar v. Ramalingam*, ILR (1945) Mad 758=(AIR 1945 Mad 157) (FB). In that case the mortgage bond provided that the mortgage money would be payable whenever demanded. The mortgaged property was sold, but the amount realised was not sufficient to discharge the full liability. The mortgage deed had been executed on 2-6-1931, and the suit to enforce the payment was filed on 22-2-1938. As more than six years had elapsed from the date of the mortgage deed, the trial court dismissed the suit on the ground that the application for a personal decree had been filed out of time. The question before the Full Bench was whether the suit filed beyond the period of six years from the date of the instrument was within time. After noticing the earlier decisions on the point, at page 770 (of ILR Mad) = (at p. 161 of AIR) it was observed—

"Without hesitation we accept as being correct the decisions of this court which say that when a mortgage bond provides that the mortgage money shall be payable on demand it becomes repayable at once and limitation starts from the date of the bond."

The decision in (1906) 16 Mad LJ 364 is inconsistent with this decision of the Full Bench and cannot, therefore, be treated as good law.

8. Though it is unnecessary to cite any further decision after the Full Bench decision mentioned above, I may, however, refer to a decision of a learned single Judge of this court in *Narayana Chettiar v. Rangaswami Naidu*, 1968-2 Mad LJ 445. In that case the mortgage document was a combination of a simple mortgage and usufructuary mortgage containing a personal covenant for payment. On the date of the mortgage itself the mortgaged properties were leased by the mortgagee to the mortgagor for a period of five years from 17-5-1927. The mortgagee demanded the amount in 1959, that is, 32 years after the execution of the mortgage deed. Thereafter he filed a suit. It was held that the starting point of limitation under Article 132, which

was the corresponding Article under the Limitation Act, 1908, was when the money sued for became due. It was contended that so far as the personal covenant was concerned the money did not become due till demand for the money was made. It was held that the money became payable on the expiry of the five year period. If the contention that the money became due only on demand by the mortgagee, was accepted, it was pointed out that the mortgagee, by not making the demand, could postpone redemption and that the clause would then become a clog on redemption. This contention was, therefore, rejected.

9. The result of the above discussion is that the mortgage money became due at the time when the period fixed for redemption by the mortgagor expired. The agreement to pay whenever demanded did not mean that demand was a condition so that it became due only on that date. In the present case, the amount became due on 14-12-1952, when the period fixed for redemption came to an end. The suit should have been filed within a period of 12 years thereafter. As it was not so filed, the suit was rightly dismissed by the trial court. The decision to the contrary by the learned Subordinate Judge is, therefore not correct. This appeal is, therefore, allowed and the judgment and decree of the trial court are restored. No costs in second appeal. No leave.

Appeal allowed.

AIR 1976 MADRAS 17

ISMAIL, J.

Jayarama Chandra Iyer, Applicant v. Thulasi Ammal and others, Respondents.

App. No. 103 of 1971, D/- 11-2-1975.

(A) Hindu Law — Joint family — Sale of some lands belonging to joint family property — Subsequent purchase of a house by a member D — Sale deed attested by his brother J — Partition suit by J — Property acquired whether joint family property — Burden lies on J to prove that notwithstanding the sale deed standing in the name of D the house was purchased out of the sale proceeds of family lands and it was for the benefit of both the brothers — Failure to discharge the burden — Held on facts that J's claim in the house was not sustainable — Attestation of J at the instance of D could only be for the purpose of making J bound by purchase of property in the name of D. (1971) 1 Mad LJ 392 and ILR (1913) 36 Mad 564 and AIR 1915 Mad 800, Rel. on.

(Paras 6, 9, 10, 11)

Cases Referred: Chronological Paras
(1971) 1 Mad LJ 392 = (1971) 84 Mad LW 176 5

AIR 1915 Mad 800 = ILR (1915) 38 Mad 396 5

HS/JS/D159/75/SGK

1976 Mad /2 I G—34

ILR (1913) 36 Mad 564 = (1912) 23 Mad LJ 301 5

P. S. Ramachandran, for Appellant.

JUDGMENT :— The plaintiff in O. S. No. 36 of 1968 on the file of the Court of the Subordinate Judge, Chidambaram, is the appellant herein. The suit was instituted by him for partition and separate possession of his half share in the suit properties which consist of five items and for recovery of his share of income from items 4 and 5 of the plaint A schedule properties. Since the plaintiff has been granted a decree in respect of items 2 to 5, the appeal is confined only to item 1, a residential house in Vriddhachalam. There were two brothers, Krishnaswami Iyer and Kuppuswami Iyer. Krishnaswami Iyer, in his turn, had two sons, the appellant herein and one Dandapani Iyer, who died on 18-10-1963, whose widow is the first respondent, whose sons are respondents 2 and 6, whose daughters are respondents 3, 4, 5 and 7 and whose grandson through a predeceased daughter is the 8th respondent. Respondents 9 and 10 are strangers claiming some interest in the property. As far as item 1 of the A schedule property is concerned, the case of the plaintiff was that Dandapani Iyer and Krishnaswami Iyer constituted a joint family, that under the original of Ex. A.4, dated 15-5-1963 certain lands belonging to the joint family were sold for Rs. 3,000, and out of the sale proceeds a house was purchased under Ex. B.1 dated 20-6-1963, for a consideration of Rs. 1,600 and that consequently the plaintiff (appellant) representing Krishnaswami Iyer's branch was entitled to a half share in the property. Certain other facts have to be set out with reference to this claim of the appellant. The original of Ex. A.4 dated 15-5-1963 was executed by Dandapani Iyer himself and his two sons, Ganesan and Krishnamurthi as well as by the appellant in favour of one Pachamuthu Odayar. On the date of the document Dandapani Iyer received Rs. 200 by way of advance. The document itself was registered only on 17-6-1963. The case of the appellant was that the balance of consideration for the sale deed under Ex. A.4, viz., Rs. 2,800 was received only on 19-6-1963 i.e., even after the registration of Ex. A.4 itself. The next day the suit item was purchased under Ex. B.1, dated 20-6-1963, after paying Rs. 1,600 to Ratnasabapathi Pillai, the vendor. Ratnasabapathi Pillai is no other than the son of one Rangasami Pillai, an advocate under whom Dandapani Iyer was working as a clerk. It is on the basis that the sale proceeds under Ex. A.4 were utilised for the purchase of the property under Ex. B.1, that the appellant claimed a half share in the suit property.

2. This claim was resisted by the defendants 1 to 8 putting forward the contention that the property under Ex. B.1, was not purchased out of the sale proceeds under Ex. A.4, but from separate moneys belonging to Dandapani Iyer and his wife as well as

Dandapani Iyer's son, who was working. It must be pointed out that the sale deed, Ex. B.1, itself stands only in the name of Dandapani Iyer, and the sale deed has been attested by the appellant himself. Having regard to the fact that the sale deed stands in the name of Dandapani Iyer, the burden was on the appellant to prove that, notwithstanding the sale deed standing in the name of Dandapani Iyer, the property was purchased for the benefit of both the brothers, viz. Dandapani Iyer and the appellant herein. In support of this case, the only witness who has given evidence is the appellant himself, as P. W. 1. Having gone through the entire evidence of the appellant, I am clearly of the opinion that the appellant has not discharged the burden of proving that the property purchased under Ex. B.1, was for the benefit of both Dandapani Iyer and the appellant, and not for the exclusive benefit of Dandapani Iyer. There are certain circumstances which are clinching in this behalf. The first is that the appellant has stated in his evidence that the balance of consideration for the sale of the property under Ex. A.4 was received only on 19-6-1963, even though the document itself was registered on 17-6-1963. It must be pointed out that the vendee under Ex. A.4 is not any person who was closely connected with the vendor, but a stranger, and how the money was received after the registration of the sale deed passes one's comprehension. It is, therefore, clear that the appellant has put forward the case that the balance of consideration under Ex. A.4, was received only on 19-6-1963, for the purpose of connecting the same with the purchase of the suit house under Ex. B.1. Apart from the ipse dixit of the appellant, there is no independent evidence also in this case. Neither the vendee under Ex. A.4 nor the vendor under Ex. B.1 has been examined to show that the balance of consideration under Ex. A.4 was received only on 19-6-1963 and that the consideration for the purchase of the property under Ex. B.1 was paid to the vendor under Ex. B.1 under the circumstances stated by the appellant herein.

3. The second circumstance is that the property has been purchased in the name of Dandapani Iyer alone. Even the appellant as P. W. 1 has admitted that at the time when the property was purchased Dandapani Iyer was suffering from giddiness and oedema of legs and was not able to attend to his work, and, as a matter of fact, he was even confined to bed. If so having regard to the fact that Dandapani Iyer was seriously ill and he had his own children, it is not probable at all that the appellant would have allowed Dandapani Iyer to purchase the property in his name, when, according to the appellant, the consideration belonged to both himself and Dandapani Iyer. The only explanation which he offered was that he had such a great trust in his brother, that he did not expect his brother to deceive him or dupe him: and that therefore he allowed the prop-

erty to be purchased in the name of Dandapani Iyer. Having regard to the admitted fact that Dandapani Iyer was very ill at the relevant time and admittedly died about a few months thereafter, the appellant, who himself was a clerk in a co-operative bank, would not have allowed the property to be purchased in the name of Dandapani Iyer alone, having regard to the state of his health and the fact that he had a large number of children.

4. The third circumstance is that the appellant has admittedly attested Ex. B.1. It is again admitted by P. W. 1, that Dandapani Iyer asked him to attest the document and that therefore he attested it. Here again, the only explanation offered by the appellant is that his brother asked him to attest the document and that therefore he simply attested it. It is not possible to accept this explanation at all. Dandapani Iyer would not have asked the appellant to attest the document without a purpose for the same. It is not as if there was nobody else available to attest the document, the only person available was the appellant himself and therefore Dandapani Iyer asked the appellant to attest the document. It is clear that Dandapani Iyer asked the appellant to attest the document only with a view to bind him with regard to the purchase of the property in his name.

5. With regard to such an attestation, it has been held by this Court in *Ramaswami Gounder v. Ananthapadmanabha Iyer*, (1971) 1 Mad LJ 392, that such an attestation was purposely taken in order to bind the person so attesting. As a matter of fact, in that judgment, the observations of Sadasiva Iyer, J. in *Narayana v. Rama*, ILR 38 Mad 396 = (AIR 1915 Mad 800) to the following effect were quoted—

"I may respectfully add that, in my pretty long experience as a judicial officer, if the attester of the document has an existing interest in the property dealt with in the document, it has been always the case that this 'attestation' has been taken in order to bind him as to the correctness of the recitals therein."

That was also the view of the learned Judge in an earlier judgment, namely, *Kandasami v. Nagalinga*, ILR (1913) 36 Mad 564.

6. Having regard to this legal position, the attestation of the appellant in Ex. B.1, at the instance of the vendee therein, viz. Dandapani Iyer, could only be for the purpose of making the appellant bound by the purchase of the property in the name of Dandapani Iyer.

7. The fourth circumstance to which reference may be made is that, if the purchase of the property under Ex. B.1, was made out of the sale proceeds under Ex. A.4, the question would naturally arise as to what happened to the balance of the sale proceeds. The appellant has not offered any explanation whatever with regard to this: If he had claimed a half share in the concerned item

on the ground that it was purchased out of the sale proceeds of Ex. A-4, naturally he would have put forward the same claim with regard to the balance of the sale proceeds also, but there is absolutely no evidence to show that he put forward any such claim and there is no explanation as to what happened to that money also.

8. Having regard to these factors, which are relevant and also significant I am clearly of the opinion that the appellant has not made out his case that the property purchased under Ex. B-1, in the name of Dandapani Iyer was really meant for the benefit of Dandapani Iyer and the appellant herein.

9. Mr. P. S. Ramachandran, learned counsel for the appellant, took me through the evidence of D. Ws. 1 and 2, D. W. 1 being the first defendant in the suit and D. W. 2 being the father of the eighth defendant, viz. son-in-law of the deceased Dandapani Iyer. The said son-in-law himself was a vakil's clerk. On the basis of this evidence the learned counsel contended that they put forward the case of a different source of consideration for the purchase of the property under Ex. B-1, and that even the source of consideration had not been established. I am of the opinion that this argument is really of no assistance to the appellant herein. Erratically D. W. 1 has stated "I do not know" to many questions put to her. Dandapani Iyer having died, and the defendants being only his legal representatives, it is not unlikely that they had no personal knowledge of the transactions and the final affairs of Dandapani Iyer and that consequently D. W. 1 stated "I do not know" to many questions put to her, though she put forward the contention that the consideration for the purchase of the property under Ex. B-1, was made up of Dandapani Iyer's earnings and the second defendant's earnings as well as the money which D. W. 1 herself provided by the sale of her jewellery. This may or may not be true. Still, as I pointed out already, the burden was on the appellant, who came to court with the specific case that the property purchased under Ex. B-1 was purchased with the sale proceeds under Ex. A-4 and therefore belonged to Dandapani Iyer and the appellant. As I pointed out already, Dandapani Iyer himself was a vakil's clerk and it is the admitted case of the appellant himself that he was also a job typist. If so, it is not impossible that Dandapani Iyer was able to find the sum of Rs. 1,600 for the purchase of the property under Ex. B-1.

10. Mr. P. S. Ramachandra Iyer contended that Dandapani Iyer himself was in debts and that therefore he could not have found the money for the purchase of the property under Ex. B-1. Here again, having regard to the fact that the burden lay on the appellant himself, I am unable to draw any inference in favour of the appellant, even

if it is established that Dandapani Iyer was in debts.

11. Under these circumstances, I am of the opinion that the conclusion of the learned Subordinate Judge, that the appellant has not established his case that the property purchased under Ex. B-1 in the name of Dandapani Iyer was for the benefit of both Dandapani Iyer and the appellant, is correct and does not call for interference. Hence the appeal fails and is dismissed. Having regard to the relationship between the parties, I make no order as to costs.

Appeal dismissed.

AIR 1976 MADRAS 19

GOKULAKRISHNAN, J.

Shanmughasundaram, Petitioner v. Janagarajan, Respondent.

C. R. P. No. 1888 of 1974, D/- 11-2-1975.

(A) Civil P. C. (1908), S. 11 — Matter not finally decided or heard in prior suit — Suit dismissed as settled out of court even before written statement was filed — Second suit is not barred by res judicata. (Para 6)

Cases Referred :	Chronological	Paras
(1971) 1 Mad LJ 293 =	(1970) 83 Mad LW	4
383		4
AIR 1967 SC 591 =	(1964) 2 SCR 510	5
AIR 1967 Pat 101		4
AIR 1966 SC 1332 =	(1966) 3 SCR 300	6

ORDER :— The first defendant in O. S. No. 294 of 1972, on the file of the Court of the District Munsif, Udumalpet, is the petitioner herein. The suit having been filed for a declaration that the plaintiff is the cultivating tenant of the suit property and for the consequential relief of permanent injunction against the defendants in order to restrain them from in any way interfering with the peaceful possession and enjoyment of the suit property by the plaintiff. Apart from various other contentions, the first defendant put forth the contention that the suit claim is barred by res judicata in view of the decision in O. S. 919 of 1970, on the file of the Court below, and as such the suit is not maintainable. The trial Court framed as many as six issues and took up for decision, as a preliminary issue, issue No. 1, as to whether the suit is barred by res judicata. The trial Court, after elaborately discussing the facts of the case, gave the finding that the suit is not barred by res judicata. Aggrieved by the said decision, the first defendant has preferred the present civil revision petition.

2. It is clear from the facts of the case that the plaintiff had filed O. S. 919 of 1970 to get himself declared as the cultivating tenant and for consequential relief. In the suit, a compromise was effected between the parties and the plaintiff agreed to vacate the suit land within six months from the date

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of the compromise if the defendant paid him a sum of Rs. 5,000 towards the cultivation expenses. Since the compromise did not come into effect due to the failure of the first defendant to pay the agreed amount, the plaintiff continued to be in possession and enjoyment of the suit property as tenant. In view of this, the first defendant raised the plea of *res judicata*.

3. From Exs. B-2 and B-3 it is clear that the suit O. S. 919 of 1970 was dismissed as settled out of court and that half of the court fee paid on that plaint was refunded. Ex. B-4 shows that consequent to such dismissal of the suit, the *ad interim* injunction granted in favour of the plaintiff was vacated on the date of the dismissal of the suit. No written statement had been filed by the defendant in O. S. 919 of 1970 either denying or admitting the plea put forth by the plaintiff. It cannot therefore be said that the matter in issue in the present case was directly and substantially in issue in the former suit. The court below has correctly observed that in view of the fact that the former suit was dismissed as settled out of court on an alleged compromise between the parties it cannot be said that the court had opportunity to apply its mind to an issue that could have been raised in that suit, even though it can be said that the parties had applied their mind to that matter between themselves.

4. Sri T. Rangaswami Iyengar, the learned counsel appearing for the petitioner, submitted that the doctrine of Estoppel by *res judicata* will apply to the facts of the present case. In support of his contention, he cited the decisions in Subbathal v. Kittammal, (1971) 1 Mad LJ 293 and Girjanand v. Bhagwan, AIR 1967 Pat 101. I have been taken through the judgments in those citations. The facts in those decisions are not similar to those in the present one. In the present case, no written statement was filed by the first defendant in O. S. 919 of 1970 apart from the fact of that suit having been dismissed as settled out of court. Such is not the case in the above two decisions.

5. Sri Palaniswami, learned counsel appearing for the plaintiff-respondent cited the decision in Subba Rao v. Jagannadha Rao, AIR 1967 SC 591, wherein it has been stated—

“A compromise decree is not a decision by the court. It is the acceptance by the court of something to which the parties had agreed. A compromise decree merely sets the seal of the court on the agreement of the parties. The court does not decide anything. Nor can it be said that a decision of the court was implicit in it. Only a decision by the court can be *res judicata*, whether statutory under Section 11, Civil P. C. or constructive as a matter of public policy on which the entire doctrine rests. Such a decree cannot strictly be regarded as decision on a matter which was heard and finally decided and cannot operate as *res judicata*. Such a decree might create an estoppel by conduct between

the parties, but such an estoppel must be specifically pleaded.”

It is submitted by Sri Palaniswami that there is no such specific pleading of estoppel in the present case.

6. The next case cited by Sri Palaniswami is Sheodan Singh v. Daryao Kunwar, AIR 1966 SC 1332. The Supreme Court held in that case—

“Where the trial court has decided two suits having common issues on the merits and there are two appeals therefrom and one of them is dismissed on some preliminary ground, like limitation or default in printing with the result that the trial court's decision stands confirmed, the decision of the appeal court will be *res judicata* and the appeal court must be deemed to have heard and finally decided the matter. In such a case the result of the decision of the appeal court is to confirm the decision of the trial court given on merits, and if that is so, the decision of the appeal court will be *res judicata*.”

As far as the present case is concerned, the matter was not finally heard or decided in the prior suit on merits excepting that the court dismissed that suit as settled out of court even before the defendant filed the written statement. It is clear from the above two Supreme Court decisions that there cannot be any *res judicata* if the former suit had been dismissed as settled out of court. The court below has correctly appreciated the facts and has held that the suit is not barred by *res judicata*. There is absolutely no question of jurisdiction involved in the civil revision petition for me to interfere with the decision arrived at by the court below. The civil revision petition is dismissed. No costs.

Revision dismissed.

AIR 1976 MADRAS 20

ISMAIL, J.

The Union of India, Appellant v. M/s. Devanagere Cotton Mills Ltd. and another, Respondents.

Appeal No. 368 of 1971, D/- 21-1-1975.*

(A) Civil P. C. (1908), S. 80 — Suit during currency of notice — Service of notice on 12-6-1968 — Presentation of plaint on 12-8-1968 — Suit is hit by S. 80.

Under Section 80, Civil P. C., there must be an expiration of two months period after the service of notice on the Government or the officer concerned before the institution of the suit. Thus where the notice was served on 12-6-1968 and the plaint was presented on 12-8-1968, the suit is hit by Section 80. (AIR 1971 Mad 34, Followed). (Para 3)

(B) Civil P. C. (1908), S. 80 read with S. 26 — “No suit shall be instituted” — Date

*(Against decree of City Civil Court, Madras in O. S. No. 4570 of 1968).

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of presentation of plaint for first time is date of institution of suit.

The fact that the plaint was returned and was subsequently re-presented will have no effect whatever on the plea that by the time the plaint was represented, the two months period contemplated by Section 80, Civil P. C. had expired. The reason is that a suit is instituted when the plaint is presented for the first time. (Para 4)

Cases Referred: Chronological Paras
AIR 1971 Mad 34 = 83 Mad LW 164 3

JUDGMENT :— The Union of India owning the Southern Railway, represented by the General Manager, Southern Railway, Madras, the defendant in O. S. No. 4570 of 1968 on the file of the City Civil Court, is the appellant herein. The suit was instituted by the respondents herein for recovery of a sum of Rs. 17,000 being the damages alleged to have been suffered in relation to a boiler consigned by A. C. C. Baccok Ltd., Durgapur, for carriage to Davanagere in June 1955 to the first respondent herein. Among the various defences set up by the appellant herein, one was that the suit was premature, since the period prescribed in Section 80, Civil P. C. for institution of the suit had not expired on the date when the suit was instituted. Overruling this defence, the trial court by its judgment and decree dated 14-9-1970, decreed the suit for the respondents. Hence the present appeal by the defendant in the suit.

2. Since I am reversing the decision of the trial court on this point which goes to the root of the matter, it is unnecessary for me to consider the other points dealt with by the trial court. Admittedly, in this case, the notice contemplated by Section 80, Civil P. C. was sent by the respondents to the appellant on 10-6-1968 and a copy of the notice has been marked as Ex. A.11. The said notice was received by the appellant on 12-6-1968 as evidenced by Ex. A.12, the postal acknowledgment. Equally admittedly, the plaint in the present suit was presented to the court on 12-8-68. It is with reference to these facts, the appellant contended before the trial court that the two months provided for in Section 80, Civil P. C. had not expired on the date when the plaint was presented, namely, on 12-8-1968 and therefore, the suit was premature and was liable to be dismissed on that ground. The Learned trial judge fully realised this position and as a matter of fact has pointed out in para. 8 of the judgment that on the facts of the case, it was, no doubt true that the suit should have been filed on 13-8-1968, but had been filed on 12-8-1968. Notwithstanding this observation of the learned trial Judge, he purported to decree the suit by referring to certain observations of the Supreme Court as to how the contents of the notice should be construed. I am clearly of the opinion that the learned Judge erred in his conclusion in this behalf.

3. Section 80, Civil P. C. clearly and categorically states that no suit shall be in-

stituted against a public officer in respect of any act purporting to be done by such public officer in his official capacity, until the expiration of two months next after notice in writing has been delivered to or left at the office of the officers specified in this section. Thus, the section contemplates the expiration of two months next after notice in writing had been delivered. As I pointed out already, the notice in this case was served on the appellant on 12-6-1968 and therefore by 12-8-1968 when the plaint was presented, the expiration of two months after delivery of notice had not taken place. Consequently, on the face of it the suit instituted on 12-8-1968 was hit by Section 80, Civil P. C. This aspect of the matter is directly covered by a decision of this court in *M/s. Madurai K. Rengiah Chettiar and Co. v. Union of India*, 83 Mad LW 164 = (AIR 1971 Mad 34). In that case, the notice under Section 80, Civil P. C., was issued on 7-8-1963 and was received by the Chief Commercial Manager, Southern Railway, on 8-8-1963, and the plaint was presented on 8-10-1963. This court held that after the service of the notice on 8-8-1963, two months period had not expired by 8-10-1963, when the suit was instituted and therefore, the suit was hit by Section 80, Civil P. C. This decision of this court was cited before the learned trial Judge. But the learned trial Judge held erroneously that that decision did not apply to the facts of this case. The point of distinction, according to the learned trial Judge, is that as per the reported decision of this court, the suit would have been barred by limitation, if it was filed on 13-8-1968. In my opinion, the construction of Section 80, Civil P. C. is not dependent upon the question whether the suit is filed after the expiration of two months would be barred by limitation or not. As a matter of fact, the period of two months provided for in Section 80, Civil P. C. is eligible to be excluded in calculating the period of limitation prescribed in the Limitation Act and therefore, the question whether if the suit filed after the expiration of two months period would be barred by limitation or not will have no effect or influence, and should have no effect or influence on the construction of Section 80, Civil P. C. As far as Section 80, Civil P. C. is concerned, the language is unambiguous, express and explicit that there must be an expiration of two months period after the service of the notice on the Government or the officers concerned before the institution of the suit. Thus, it is clear that the suit in the present case was hit by Section 80, Civil P. C. and therefore, ought to have been dismissed.

4. Mr. Rangarajan, the learned counsel for the respondents, sought to contend that though the plaint was presented on 12-8-1968, it was returned and subsequently re-presented and by the time the plaint was re-presented, the two months period contemplated by Section 80, Civil P. C. had expired. I am unable to draw any inference in favour of the respondents from this fact. Section 26, Civil

P. C. provides that every suit shall be instituted by the presentation of a plaint or in such other manner as may be prescribed. Therefore, a suit is instituted, when the plaint is presented for the first time. Section 80 also uses the expression "no suit shall be instituted." Therefore, a combined reading of Ss. 26 and 80, C. P. C. can lead to the only one conclusion, namely, the date on which a plaint is presented for the first time, is the date of institution of the suit. Consequently, the fact that the plaint was returned in this case and was subsequently re-presented will have no effect whatever on the plea of the appellant based on Section 80, Civil P. C.

5. Under these circumstances, the appeal is allowed and the judgment and decree of the learned trial Judge are set aside and the suit instituted by the respondents will stand dismissed.

6. The learned trial Judge has decreed the suit with costs. Having regard to the fact that the suit is now being dismissed only on a technical ground, I consider it is only proper and just that both parties should be directed to bear their respective costs throughout.

Appeal allowed.

AIR 1976 MADRAS 22
VEERASWAMI, C. J. AND
NATARAJAN, J.

M/s. Manojah Cine Productions, Appellant v. A. Sundaresan and another, Respondents.

O. S. Appeal No. 62 of 1971, D/- 21-1-1975.*

(A) Copyright Act (1957), Ss. 13, 14, 45 and 48 — Registration is not condition precedent for acquiring copyright — Non-registration of copyright does not bar suit. AIR 1970 Madh Pra 261, Dissented.

It is clear from the provisions of Sections 13, 14, 45 and 48 that the only effect of registration is what is stated in Section 48, to wit, that it shall be prima facie evidence of particulars entered in the register. There is no indication in any of the provisions of the Act, read individually or as a whole to suggest that registration is a condition precedent to acquiring copyright. AIR 1970 Madh Pra 261, Dissented.; AIR 1972 Cal 533, Rel. on; (1973) 86 Mad LW 556, Affirmed.

(Para 2)

Section 45 does not qualify Section 13 or 14 and makes registration as a condition for the subsistence of copyright or acquisition of ownership thereof. Registration is optional and provides only rule of evidence.

(Paras 2, 3)

* (Against order of Maharajan, J. reported in (1973) 86 Mad LW 556).

Cases Referred : **Chronological** **Paras**
AIR 1972 Cal 533 = ILR (1974) 1 Cal 498 3
AIR 1970 Madh Pra 261 = 1970 Jab I.J 723 2, 3

VEERASWAMI, C. J.:— This appeal comes before us from an order of Maharajan, J. on a preliminary issue in a suit brought by the first respondent for certain reliefs on an alleged infringement of his copyright in a Tamil story "Nazhuval" written by him. He asked for a permanent injunction restraining the appellant from exploiting a film 'Iru Malargal' which, according to the first respondent, was a reproduction of his story. In addition to the relief of injunction, he also asked for damages. An additional issue was settled to the effect — "Whether the plaintiff's suit is not maintainable for non-registration of his copyright in the story 'Nazhuval'?"

2. It seems to us that the view of Maharajan, J. is correct. We have carefully looked into the Copyright Act, 1957, and nowhere in it do we find any justification for holding that registration is a sine qua non or a condition precedent to the subsistence of copyright or acquisition of ownership thereof or reliefs for infraction of copyright. Mishra Bandhu Karyalaya v. S. Koshal, AIR 1970 Madh Pra 261, took a contrary view but, with due respect, we are unable to agree with it. The Copyright Act, 1957, amended and consolidated the law relating to copyright. Chapter III relates to copyright. Section 13 lists out works in which copyright may subsist, as for instance original literary, dramatic, musical and artistic works, cinematograph films and records. Sub-section (1) of Section 13 states in which cases copyright shall not subsist subject to exceptions. Section 14 is important which defines copyright. 'Copyright' means the exclusive right in one or other of the works specified in the sub-section. This is, of course, copyright by virtue of and subject to the provisions of the Act. Section 15 declares that no copyright shall subsist in any design registered under the Indian Patents and Designs Act, 1911. Sub-section (2) of this section deals with a particular design which is capable of being registered under the Indian Patents and Designs Act, 1911, but, which has not been so registered. Such design shall cease as soon as any article to which the design has been applied has been reproduced more than 50 times by an industrial process by the owner of the copyright or, with his licence, by any other person. Then we have Section 16 which makes it clear that there shall be no copyright except as provided in the Act. Copyright, therefore, is a creation of the statute. Might be that it originally subsisted under the common law. But has been replaced by the statute law and copyright subsists as provided by the Copyright Act, 1957, and by virtue of and subject to its provisions. No person under Section 16 shall be entitled to copyright or any similar right in any work, whether published or unpublished, otherwise than under and in accordance with the provisions of the

Act or of any other law for the time being in force. Chapter IV deals with ownership of copyright and the rights of the owner, Chapter V with term of copyright, Chapter VI with licences, Chapter VII with performing rights of societies and Chapter VIII, with rights of Broadcasting authorities. We have then Chapter IX dealing with international copyright. Registration of copyright is dealt with by Chapter X. It provides for the procedure for registration of copyright. A register shall be kept for that purpose and entries in the register shall be made of copyrights. A system of index should be maintained. Form and inspection of register are contemplated. Section 48 which seems to throw considerable light on the question we have to decide, is this:

"The Register of Copyrights shall be prima facie evidence of the particulars entered therein and documents purporting to be copies of any entries therein, or extracts therefrom certified by the Registrar of Copyrights and sealed with the seal of the Copyright Office shall be admissible in evidence in all Courts without further proof of production of the original."

Power is given to the Registrar of Copyrights by the next section to amend or alter Register of Copyrights subject to the prescribed conditions. Anyone disputing the register may apply under Section 45 to have his copyright registered. Chapter XI deals with infringement of copyright. The next section deals with civil remedies. Section 55 is to the effect that, where copyright has been infringed, the owner of the copyright shall, except as otherwise provided by the Act, be entitled to all remedies by way of injunction, damages, accounts and otherwise as are or may be conferred by law for the infringement of a right. Chapter XIII deals with offences, Chapter XIV, with appeals and Chapter XV, the final Chapter, with miscellaneous provisions. It may be seen from the provisions which we have just now noticed that the only effect of registration is what is stated in Section 48, to wit, that it shall be prima facie evidence of the particulars entered in the register. Hardly is there any indication in any of the provisions of the Act, read individually or as a whole, to suggest that registration is a condition precedent to subsistence of copyright or acquisition of ownership thereof.

3. Learned counsel for the appellant relied on Section 45, in particular and contended that the provision, namely, that the author or publisher or the owner of copyright may make an application for registration, means that the registration is compulsory and that without registration there is no copyright and no infringement thereof can be complained against. He also places reliance on *Mishra Bandhu Karyalaya v. S. Koshal*, AIR 1970 Madh Pra 261, which, no

doubt, supports his contention. In that case, the learned Judges of the Madhya Pradesh High Court observed:—

"The Indian Copyright Act 1914, had nowhere made any provision for the registration of copyrights. Under the Copyright Act, 1957, it appears that under Sections 13 and 45, the registration of a book with the Registrar of Copyrights is a condition for acquiring copyright with respect to it. A plain reading of the several provisions of the Act leaves no doubt in our minds that a copyright in a book now is only secured if it is an original compilation and has been fully registered according to the provisions of the 1957 Act."

We fail to see anything in Sections 13 and 45 to justify this view. Section 13 does not speak about registration. As we have already mentioned, it only lists out the works in which copyright may subsist. It also indicates works in which no copyright can exist unless certain conditions are satisfied. Section 45 is an enabling section. Any one who is so minded, may apply for registration. Section 45 does not go further. The only effect of registration is that it serves as evidence of particulars entered in the register. Just as Section 48 lays down a rule of evidence, Section 45 does not qualify Section 13 or Section 14 or even Section 15 of the Act and makes registration as a condition for the subsistence of copyright or acquisition of ownership thereof, *Maharajan, J.* was of the view that the observations of the Madhya Pradesh High Court were obiter. Even so, the observations do deserve due weight; but, in our opinion, those observations are not justified by the language of Sections 13 and 45 referred to. The view we are inclined to take that registration is but optional and provides a rule of evidence, is supported by *Satsang v. Kironchandra*, AIR 1972 Cal 533.

4. Learned counsel for the appellant referred us to S. 16. As we have mentioned already, it merely says that no person shall be entitled to copyright or any similar right in any work, whether published or unpublished, otherwise than under and in accordance with the Act. This is merely to say that copyright is a creation of the statute. Unless the person who claims copyright can point out to Section 14 and then substantiate that he comes thereunder, he fails to establish copyright. That is all the effect of Section 16.

5. The appeal fails and is dismissed. Costs in the appeal will abide the result of the suit.

Appeal dismissed.

AIR 1976 MADRAS 24

VEERASWAMI, C. J. AND
NATARAJAN, J.Peramatha and another, Appellants v.
Ramswami and others, Respondents.Letters Patent Appeal No. 76 of 1969, D/-
8-1-1975.*

(A) Hindu Women's Rights to Property Act (1937), S. 3 (2) — Applicability — Under family settlement joint family split up into two units — Joint properties also divided and allotted separately to each unit — Husband and son by first wife constituting one unit — Second wife and her sons constituting other unit — Death of husband — Second wife cannot claim her husband's interest under Section 3 (2).

Section 3 (2) can be applied only to an interest of her husband in the properties of the joint family of which the widow is a member and hence where under a family settlement the joint family was split up into two units and the husband and his son by the first wife constituted one unit and the second wife and her sons constituted the other unit and the joint family properties were also divided and allotted separately to each of the units and the two units were to live separately and neither unit was to have any claim to the properties allotted to the other, the second wife on the husband's death cannot claim his interest under Section 3 (2) and even otherwise on the terms of the settlement she would be disentitled from claiming her husband's interest. AIR 1964 Andh Pra 380, Dist. (Paras 3, 5)

Cases Referred : Chronological Paras
AIR 1964 Andh Pra 380 = (1964) 1 Andh
WR 231 2, 6
AIR 1952 SC 29 = 1952 SCR 241 2

N. Appu Rao, for Appellants.

VEERASWAMI, C. J.:— This appeal arises under the Letters Patent from the judgment Alagiriswami, J., who, concurring with the first appellate court, dismissed the second appeal by the appellant who was the plaintiff. Her husband died intestate on 14-7-1952. She was the second wife and had two sons by him. Years back, as a result of misunderstandings between her and her husband, the appellant instituted maintenance proceedings under the Criminal P. C. and obtained a maintenance order. A suit brought by the husband to have that order cancelled, ended in a compromise which resulted in what we regard as a family settlement dated 24-12-1930. The substance of this document was that the husband and his son by his first wife should take certain properties and live as joint Hindu family and the second wife and the two sons by her represented by their mother as guardian should take certain properties

mentioned in the schedule to the document and live as a separate family. Basing her claim on the Hindu Women's Rights to Property Act, 1937, she brought the suit out of which the second appeal arose for partition and separate possession of the share of her husband in the joint family consisting of himself and his son by the first wife. The trial court granted a preliminary decree which was, however, reversed in appeal with which Alagiriswami, J. agreed.

2. The question for decision is somewhat not free from doubt, but on the whole we have come to the conclusion that the present appeal should be dismissed. Counsel for the appellant presses upon us a literal reading of sub-section (2) of S. 3 of the Act. He says that the appellant's husband having died intestate, and as a member of Hindu joint family, she would be entitled, as his widow, to the same share as her husband had. On the first flush the argument appeared to be attractive and even received support from Ranganayakamma v. Rajeswaramma, AIR 1964 Andh Pra 380. Chandra Reddy, C. J. speaking for the Division Bench, referred to the observations of the Supreme Court in Chinnathayi v. Pandiya Naicker, AIR 1952 SC 29 "general words of a release do not mean release of rights other than those then put up and have to be limited to the circumstances which were in the contemplation of the parties when it was executed" and was of the view that if, on the date of release of maintenance right, the right under the provisions of the Hindu Women's Rights to Property Act was not in contemplation, the earlier release would not be a bar to a claim under the Act. No exception can be taken, as we consider, to that approach.

3. But there are two reasons which weigh with us in not accepting the appellant's contention. What has happened in this case on facts is this. The family settlement resulted in a division not only of the joint family but also the joint family properties. The joint family originally consisted of the husband, his son by the first wife, the second wife and his two sons by her. There was a separation by the document, the husband and his son by the first wife remaining as one unit of the joint Hindu family with certain properties allotted to the unit and the second wife and her two sons by him, as another unit of the joint family with certain other properties allotted to the second unit with a provision that they should live separately. This court has held that a widow, though not a coparcener, is a member of Hindu joint family. But, in view of the family settlement just now referred to, we are inclined to think that she could no longer, after that settlement, be regarded as a part of the joint family consisting of the husband and his son by the first wife. In our view, sub-section (2) of S. 3 of the Hindu Women's Rights to Property Act, 1937, can be applied only to an interest of her husband in the properties of a joint

* (Against order of Alagiriswami, J., in S. A. No. 305 of 1965 etc., D/- 20-1-1969).

family of which the widow is a member. The whole intention of the document was to bring a separation of not only of the joint family to be split up into two units, as we mentioned, but to have the joint family properties, which originally belonged to the joint family, divided and allotted separately to each of the units. To such a case, we think that sub-section (2) of S. 3 cannot be applied.

4. The second ground is that, if the appellant by a literal reading and application of sub-section (2) of Section 3 is allotted a share of her husband in the Hindu joint family properties which belonged to the joint family consisting of the husband and his son by the first wife, the result would be to leave the division of the original joint family properties and allotment to the second unit completely undisturbed and deprive the son by the first wife of the benefit of a share in the entirety of the properties belonging to the family, as it existed before 24-12-30. It seems to us that that result was not under the contemplation of the Hindu Women's Rights to Property Act, 1937. In fact, the second ground we have mentioned derives validity from the first ground, namely, that the widow in order to enable her to claim her husband's interest should continue to be a member of such family.

5. Alagiriswami, J., no doubt, disposed of the appeal before him on a different ground. He says that the document dated 24-12-1930, read as a whole disentitled the appellant to her claim. We agree with this aspect as well, more particularly because the document itself provides that neither of the units of the joint family brought about by it would have any claim personally or with regard to the properties allotted to one or other of the units. The first appellate court has extracted the relevant passages from the document for this view and we hardly need to reiterate.

6. Though, therefore, we do not dissent from Ranganayakamma v. Rajeswaramma, AIR 1964 Andh Pra 380 on the view we are inclined to take on the effect of sub-sec. (2) of S. 3 of the Act and also the terms of the family settlement, the appeal, in our opinion, should fail. We would like to point out that in Ranganayakamma v. Rajeswaramma, AIR 1964 Andh Pra 380, there was no splitting up of the joint family and the widow there continued as a member of the joint family at the time she made the claim under Section 3 of the Hindu Women's Rights to Property Act, 1937.

7. The appeal is dismissed. No costs.

Appeal dismissed.

AIR 1976 MADRAS 25

VEERASWAMI, C. J. AND
NATARAJAN, J.

Abraham Nadar and others, Petitioners v. The Special Deputy Collector, (Land Acquisition) Harbour Project Tuticorin, and others, Respondents.

W. P. No. 2975 of 1972 etc., D/- 7-1-1975.

(A) Constitution of India, Art. 226 —
Laches — Absence of diligence.

In the instant case, the impugned Section 4 (1) notification under the Land Acquisition Act was made in 1962. In answer thereto, objections were filed under Section 5-A, but no plea of vagueness of the public purpose was taken. The impugned Section 6 declaration followed in 1968 and in January 1969, but the challenge to the validity of the notification and the declaration was made only in 1973, after a long lapse of time. On the basis that the petitioners were not vigilant and had failed to take the precise plea at the earlier stage, the petitions were dismissed. (AIR 1974 SC 2077, Applied).

(Paras 3, 4)

Cases Referred :	Chronological	Paras
AIR 1974 SC 2077 = 1974 UJ (SC) 765		2.
		3, 4, 5
AIR 1973 SC 1150 = (1973) 1 SCR 973		2
(1973) W. P. No. 2346 of 1973 (Mad)		5

K. K. Venugopal for V. Shanmugham and Riaz Ali Khan, R. Ganesan, M. J. Abdul Razak and R. Krishnamachari, for Petitioners; The Govt. Pleader and K. Parasaran, Central Govt. Standing Sr. Counsel, for Respondents.

VEERASWAMI, C. J.:— This batch of petitions under Article 226 of the Constitution and the writ appeals are directed against the notifications under Section 4 (1) as well as the declaration under Section 6 of the Land Acquisition Act, the first made in 1962 and the second in 1968 and January 1969. The public purpose mentioned in Section 4 (1) notifications was the development of Tuticorin Port or Tuticorin Harbour, establishment of industries, industrial estates, training centre and construction of residential quarters. But in the declaration under Section 6 the purpose described was industrial development of Tuticorin area connected with Tuticorin Harbour project. The land sought to be acquired extended to several thousands of acres. The short grounds on which the validity of the notifications as well as the declaration are challenged, are that the public purpose mentioned in the notifications under Section 4 (1) was vague and lacked in particulars so as to enable the owners of lands to effectively file their objections to the purpose of acquisition under Section 5-A, and that there was a change in the purpose of acquisition as mentioned in the declaration under Section 6.

2. Munshi Singh v. Union of India, AIR 1973 SC 1150, held that the whole object

of Section 5-A would be defeated, if the public purpose was stated vaguely and without any indication of the nature of the purpose for which the land was being or was intended to be acquired. In that case, all that was mentioned as public purpose in the notification under Section 4 (1) was 'for planned development of the area.' The Supreme Court by an unanimous verdict held that the notification under Section 4 (1) was vitiated on account of vagueness. This judgment was noticed by a larger Bench in *Aflatoon v. Lt. Governor, Delhi*, AIR 1974 SC 2077. The view in the earlier judgment was quoted apparently with approval, but with the observation that the question whether the purpose specified in a notification under Sec. 4 was sufficient to enable an objection to be filed under Section 5-A, would depend upon the facts and circumstances of each case. Actually, however, the second decision was rested not on the view in *Munsif Singh v. Union of India*, AIR 1973 SC 1150 but on the ground of delay and laches or want of a plea at the earliest possible time. The court pointed out that the plea as to the vagueness of public purpose in the notification under Section 4 (1) was not raised in the writ petition, and that the writ petitions themselves were filed after a long delay. So, on the basis that the appellants before the Supreme Court were not vigilant and had failed to take the precise plea at the earlier stage, the appeals were dismissed.

3. In our opinion, the basis of *Aflatoon v. Lt. Governor, Delhi*, AIR 1974 SC 2077 will apply to the present cases. The notification under Section 4 (1) in the matters before us was made in 1962. In answer thereto, objections were filed under Sec. 5-A, but no plea of vagueness of the public purpose was taken. The declaration under Section 6 followed in 1968 and in January 1969, but the challenge to the validity of the notifications and the declaration was made in the objections filed only in 1973, after a long lapse of time. In justification of the delay, we are informed that, unlike in *Aflatoon v. Lt. Governor, Delhi*, AIR 1974 SC 2077, in the instant cases there was an alteration of the public purpose in the declaration which was different from the one in the notification under Section 4 (1). This is hardly an explanation, because even after the declaration under Section 6 there was a delay of more than 3½ years. Also, the ground of the State that no plea was taken as to the vagueness of the public purpose in Section 5-A objections stands unchallenged.

4. Applying *Aflatoon v. Lt. Governor, Delhi*, AIR 1974 SC 2077 the petitions as well as the appeals are dismissed. No costs. For the purpose of assessing the fee as between counsel and party, we fix fee Rs. 200 in each case.

5. W. P. 2346 of 1973: This too is like the other petitions and appeals which

we have dismissed on the ground of delay and laches and for want of taking the precise plea. Nevertheless it is said that the extent of 39 acres 24 cents covered by the notification in this petition could not serve any purpose indicated in the S. 4 (1) notification unless the immediately neighbouring lands of an extent of 440 acres belonging to the Central Government are also acquired. Counsel, for the purpose of meeting the objection on the ground of delay and want of a plea, is willing to accept the validity of the notification under Section 4 (1) and the declaration under Section 6. Even so, he says that, since the purpose mentioned in the notification under Section 4 (1) and in the declaration under Section 6 could not be implemented unless the neighbouring lands are acquired which apparently has not been done so far, there is no longer any need for proceeding with the acquisition. The answer in our opinion, is that, once the validity of the notification under Section 4 (1) and also the declaration under Section 6 remains unchallenged on any ground whatever, the rest of the matter is procedural under the Land Acquisition Act. If ultimately Government find that the land in question is not required for the public purpose it is always open to them at the appropriate stage to give up the acquisition under Section 48 and, for that purpose, it is also open to the petitioner to apply to Government. But what is urged cannot furnish a ground for our interference, notwithstanding the objection based on the delay and laches on which we have held *Aflatoon v. Lt. Governor, Delhi*, AIR 1974 SC 2077, was disposed of.

6. The writ petition too is dismissed. No costs. For the purpose of assessing the fee as between counsel and party, we fix Rs. 200/-.

Petition dismissed.

AIR 1976 MADRAS 26
RAMAPRASADA RAO AND
RATNAVEL PANDIAN JJ.

Thanumalayaperumal Mudaliar and others, Appellants v. The Commissioner, Hindu Religious and Charitable Endowments (Admn.) Dept. Madras and others, Respondents.

Appeal No. 787 of 1969, D/- 28-2-1975*.

(A) Tamil Nadu Hindu Religious and Charitable Endowments Act (22 of 1959), Section 6 (20) — Whether a temple is public or private — Determination — Test — On facts, held temple in question was private.

The ancestors of Periaiveettu Mudliar Family about 1000 years ago constructed Shiva temple at Aloor on sites belonging to them with their private funds. The Ashtaban-

*(Against decree of Sub. J., Nagarcoil in O. S. No. 7 of 1966).

JS/KS/D919/75/SSG

dhan Prathishtan was made by the ancestors. There was no evidence expressly as to dedication, but from time immemorial these temples were recognised as the private temples of the Periaveettu Mudaliar family. The State of Travancore as it then was recognised private ownership of religious institutions. There was no pavement on the prakaram as in the case of other temples. There was no gopuram for the temple. There was neither the permanent flag itself (Dwajasthambam) nor was there even a structure for installing a temporary flag staff for celebrating periclical utsavam of the temple. No provision had been made for taking out the idols of the temple on procession to any place outside the inner compound of the temple. There was no hundi for collection from worshippers of the temple. There was no bell and when the Commissioner visited the temple at the time of Deeparadhana, there were no outsiders excepting himself and the two inspectors of the department. The provision of the door and the compound wall and the site of the temple was such that it was incapable of attracting members of the public to resort therein as of right either for worship or for participating in any celebration therein. The question was whether such a temple was a public temple or a private one.

Held that the temple was a private one. (Paras 10, 12, 13)

The three guidelines which enable the courts to decide whether a particular religious institution comes within the scope or the meaning of the above definition are that it should be a place of public worship, there should be acceptable proof of dedication for the benefit of the Hindu community or a section thereof and incidentally it should also be established that the worshippers have been using as of right the religious institution as a place of public religious worship. The other inspiring norms to decide whether a temple is a private or public temple is dependent upon the features of the institution. Norms to decide whether a temple is a private or public temple on basis of decided cases pointed. Case law referred. (Paras 7, 8)

Cases	Referred:	Chronological	Paras
(1975) CMP No. 822 of 1975 (Mad)			8
(1974) 87 Mad LW 595 = (1974) 2 Mad LJ 133			8
(1974) 87 Mad LW 675			8
(1973) 2 Mad LJ 442			8
AIR 1972 SC 1716 = 1972 SCD 685			8
AIR 1971 SC 2057 = (1971) 3 SCR 522			8
(1971) App No. 409 of 1971 (Mad)			8
AIR 1970 SC 2025 = (1970) 2 SCR 275			8
(1969) App No. 405 of 1969 (Mad)			8
AIR 1966 Mad 99 = (1966) 1 Mad LJ 109			6
AIR 1964 Mad 317 = (1963) 2 Mad LJ 280			8
AIR 1963 SC 1638 = (1964) 1 SCR 561			12
AIR 1940 PC 7 = 67 Ind App 1			7
AIR 1934 PC 230 = 61 Ind App 405			7

S. Padmanabhan, for Appellant; T. R. Ramachandran, for Respondents.

RAMAPRASADA RAO, J.— The unsuccessful plaintiffs in O. S. 1 of 1966 on the file of the Subordinate Judge, Nagarcoil, appeal against the judgment and decree of the learned Judge, who did not agree that the suit temple was a private one, but in whose opinion it was a public temple. The relevant pleadings may be summarised.

2. Periaveettu Mudaliars about 1000 years ago founded two siva temples, one at Azhakiapandiapuram and the other at Aloor. The temple at Azhakiapandiapuram is known as Ambalathaduvur temple and the Aloor temple is popularly known as Chera Chola Pandia Mahadevar temple. They were built on the sites belonging to the ancestors of the plaintiffs and were constructed with their private funds. There is no evidence expressly as to dedication, but from time immemorial these temples were recognised as the private temples of the Periaveettu Mudaliar family. It is claimed that the inscription in the Aloor temple, which is the subject matter of this litigation, bears ample proof as to the private nature of the temple. Reliance is placed on a printed book Ex. A.22 written by Tamil Vidwan Chidambara Kuttalam Pillai under the caption of "Moovarasar veerennum aanaar deivā vinavagar Magimai". Contemporary records, but which are, ancient are also relied upon to show that the suit temple was built with private funds and was treated as such by the rulers of Travancore. Ex. A.4 of the year 1896 is an order issued in the name of the Dewan.

The proceedings obviously were initiated when a complaint was received about its mismanagement by the then trustees. The point, however, is that on the undertaking given by the then trustees to maintain the accounts and look after the temple affairs properly, the complaint was dismissed; but there is a recognition about the status of the temple as a private temple, in this document. Long afterwards under Ex. A.12, and in the year 1962, the Palace officer of the Travancore devaswom refers to the quondam grants given to this temple as a private temple, but makes it clear that on and after the date of issue of Ex. A.18 such grants for all private temples including the suit Aloor temple were discontinued. Ex. A.5 is a copy of the settlement register in Aloor Pakuthy showing that many on the suit properties stood in the name of the then trustees, but for the benefit of the deities installed in the temple. There is no dispute that the temple was built on private land. Ex. A.6 is also incidentally pressed into service, which shows that three strangers also provided properties to the temple, but incidentally recognised that it was a private temple.

The temple was never dedicated to the public and the members of the public did not have access to the temple and worship the deity therein as a matter of right, nor

did they claim any such right in a legally conceivable manner. The plaintiffs themselves referred to a suit filed by the second plaintiff as O. S. 22 of 1932, on the file of the same court for a declaration that the temple was a private one. Without going into the merits but on the question whether the suit was maintainable, the court held against the second plaintiff in that suit, as the enquiry relating to the nature of the institution has to be decided by the statutory tribunal under the provisions of the Tamil Nadu Hindu Religious and Charitable Endowments Act 1959. It is also claimed that an application was filed under the appropriate section before the appropriate authority contending that the suit temple in question was not a religious institution and that the plaintiffs held office hereditarily. The Deputy Commissioner, Hindu Religious and Charitable endowments department, Madurai, held the hereditary trusteeship in favour of of the plaintiffs, but held that the temple was a public religious institution. Thereafter, the further appeal by the plaintiffs to the Commissioner was dismissed and hence, they had to file the present suit under Section 70 of Tamil Nadu Act 22 of 1959.

3. The Hindu Religious and Charitable Endowments Department represented by its Commissioner, who is the first respondent in the suit, contends that the temples mentioned in the plaint were not founded by the ancestors, that the members of the Hindu public have been freely offering worship on almost all the days, that they contributed towards the maintenance and sustenance of the institution and that it has all the characteristics of public temples. Reliance is placed upon the judgment in O. S. 22 of 1962, on the file of the same court wherein a casual finding to the effect that the institution was a public religious institution was given and that, therefore, it is not open to the plaintiffs to re-agitate the issue once again. The donations given by the strangers as evidenced by Ex. A.5 is very strongly pressed into service to show the public character of the suit temple that at best the plaintiffs were only managing the temples and they were not proprietors thereof and that the public were visiting the temple as of right.

According to the department there were deities inside the temple and the features of the temple such as availability of utsavavighrams, existence of inner and outer prakarams, vimanam, outer madil three entrances and balipeetam, are all indicia that go to prove that the institution is a public religious institution. It is to be noticed that the Endowments department was the only defendant when the plaintiffs came to court. Later, defendants 2 to 8 got themselves impleaded and filed a written statement. They would say that the temple and its premises are in sarcar poromboke and that ever since its inception the suit temple has been a public temple where the Hindu public have been freely offering worship without let or hindrance. The temple has been consecrated for the

benefit of the Hindu public and at no time the plaintiffs' ancestors and for a greater reason the plaintiffs, did exercise any right of proprietorship over the temple. It is said that the rulers of State and the members of the public mainly contributed the properties now annexed to the temple and that the mode of construction and the other features already referred to by the first defendant would negative the plea that the institution is a private temple. On these contentions the following issues and additional issues were framed—

1. Whether the temple and its properties constitute a private family trust as alleged by the plaintiffs or a public trust as contended by the defendant?

2. Whether the right of management of the temple and the trust rests solely with the plaintiff?

3. Whether the Madras H. R. and C. E. Act 1959 will govern the administration of the trust?

4. Whether the order of the Commissioner is liable to be set aside on the grounds stated in paragraph 7 of the plaint?

5. Whether the temple is a private temple?

6. Whether the plaintiffs are entitled to the declaration prayed for in the plaint?

7. To what reliefs are the plaintiffs entitled?

8. What is the order as to costs?

9. Whether the plaintiffs are estopped from contending that the suit temple and its properties belong to the private family of the plaintiffs?

10. Whether the suit is barred by res judicata in view of the findings in O. S. 22 of 1962 of the Sub Court, Nagarcoil?

Mr. Padmanabhan, learned counsel for the plaintiffs reiterated the arguments and took us through the oral and documentary evidence let in this case to sustain his contention that the temple is a private temple. Mr. T. R. Ramachandran for the respondent contending contra would sustain the judgment of the court below on the ground that the plaintiffs did not produce the account books maintained by them to show that at all material times the ancestors of the plaintiffs and thereafter the plaintiffs, owned the temple. Reliance is placed upon the endowment by strangers and the features of the Aloor temple and it is said that the overall impression one gains from the evidence on record is to the effect that there was at no time a private temple at the site which belonged to the plaintiffs' ancestors. The learned counsel would rely upon one singular feature in the case. A copper plate said to contain the history of the temple and referred to in one of the pamphlets produced by the plaintiffs themselves (Ex. A.22) not having been produced, it is said, that there is a suppression of material and therefore, the suit has to be dismissed.

4. The question whether an institution or a temple is a public religious institu-

tion or a public temple or a private one has been the subject-matter of many decisions of this Court and that of the Supreme Court and it is easy, therefore, at this stage to deduce from them the well set norms, guidelines and principles on which a decision, one way or the other could be rendered on the principal issue in question.

5. In the State of Travancore, there were a number of temples under private management and there were other temples in which the Sarcar had been exercising the right of supervision in exercise of its sovereign power. It was always possible for the Sarcar or the Government under the then regulations in force which were to provide for the better administration of Hindu Religious encowments in Travancore to assume management of the same in case of mismanagement.

6. A Bench of our High Court in *Sri Chidambareswara Sivagami Ambigai Temple v. Commr. H. R. and C. E. Madras*, (1966) 1 Mad LJ 109 = (AIR 1966 Mad 99), recognised the existence of private temples in Travancore and would not invoke the usual presumption that in the case of temples in South India, they are public unless the person, who asserts it is private, discharges the onus of proof which is on him to the satisfaction of the judicial authority. They observed—

"It is now well settled that unlike, the temple in Kerala, there is a presumption that temples in south India are public and the onus of proof is on the person asserting it to prove that it is a private temple."

We have referred to this judgment only to show that in Kerala under the regulations concerning religious endowments then in force, there were many private temples; in the State of Travancore as it then was and that the State recognised such private ownership of religious institutions.

7. The 'temple' as defined in Tamil Nadu Act 22 of 1959, in Section 6, clause 20, means a place by whatever designation known, used as a place of public religious worship, and dedicated to, or for the benefit of, or used as of right, by, the Hindu community or any section thereof as a public religious worship. The three guidelines which enable the courts to decide whether a particular religious institution comes within the scope of the meaning of the above definition are that it should be a place of public worship, there should be acceptable proof of dedication for the benefit of the Hindu community or a section thereof and incidentally it should also be established that the worshippers have been using as of right the religious institution as a place of public religious worship. In so far as temples in malabar are concerned, the presumption was that a temple was a private Council in *Mundancheri Koman v. Achuthan Nair*, AIR 1934 PC 230 and reiterated by it in *Babu Bhagwan Din v. Gir Har Saroop*, AIR 1940 P. C. 7.

8. The other inspiring norms to decide whether a temple is a private or public temple is dependent upon the features of the institution. They could be conveniently summarised with reference to decided cases.

(a) "The existence of Moolasthanam, Mahamandapam, Prakaram, idols or chief and other deities, utsavamurthies, daily poojas, special poojas and procession during festive occasions, worship by the local public belonging to different communities without any let or hindrance, are all factors which give the impression that the temple is a public one." Vide—*Ramaswami Naidu v. Commr. H. R. and C. E. Madras*, (1974) 87 Mad LW 595.

(b) "If the temple is being used as a place of public religious worship, if there is no dedication of the temple to and for the benefit of the Hindu community or any Section thereof, if it is not used generally by the Hindu community as of right as a place of public religious worship, if there is not hundi and no collections are made from the public for the performance of any festival connected with the temple or for its maintenance and no member of the public has come forward to say that he has contributed any amount for the maintenance or any of the related poojas to the deity therein, the temple will not be a public temple, but a private one." Vide—*Commissioner, H. R. and C. E. v. Jaganath Rao*, (1974) 87 Mad LW 675 and *Ramaswami Jadaya Gounder v. Commr. H. R. and C. E.*, (1963) 2 Mad LJ 280 = (AIR 1964 Mad 317).

(c) "The origin of the temple, the manner in which its affairs are managed, the nature and extent of the gifts received by it, rights exercised by devotees in regard to worship, therein, the consciousness of the manager and the consciousness of the devotees themselves as to the public character of the temple are factors that go to establish whether a temple is a public or a private one and in each case both the documentary and oral evidence have to be considered as a whole while keeping in view the above principles".

Vide—*Gosami Sri Mahalakshmi Vahuji v. Rannchhoddas Kalidas* AIR 1970 SC 2025 and *T. D. Gopalan v. Commr. H. R. and C. E. Madras* AIR 1972 SC 1716.

(d) "An inference whether a religious institution is a public one or a private one can be drawn from the usage and customs of the institution or from the mode in which the properties have been dealt with as also the other established circumstances." Vide—*State of Bihar v. Bisheshwar Das*, AIR 1971 SC 2057.

(e) "The essential sine qua non to make a temple a public temple appears to be that the public should claim the right to worship the deity installed therein as of right. If the origin of the temple is very well known as a private temple, then the clearest possible evidence is necessary for converting that temple into a public temple. As worshippers are naturally welcome and as the sentiment of a

Hindu would not prevent another from making offerings or to turn away a worshipper and as there is an innate desire in persons in charge of the private temples not to discourage popularity of deity, the mere circumstance that the people in the locality were visiting the temple and were worshipping the deity may not take away the character of the temple from a private temple to a public temple. In all such cases worship of outsiders is referable to the leave and licence granted by the owner and cannot be indicative of any dedication to the public."

Vide—Chennammal v. Commr. H. R. and C. E. (1973) 2 Mad LJ 442.

(f) "A temple will not be a public temple within the scope of the Act because in the absence of an express dedication for the benefit of the public, user by the public as of right must be established and such user as of right is far different from the trustees being willing to welcome the public to come and worship in the temple. If temple had no Garbagraham, Mahamandapam and if there was no dwajasthambam, no prakaram, no hundi and if no Kanikai or any collection was made by the temple and if the utsava idols were not taken in procession in the street, then the temple is not a public one." Vide Kuppi Sanjeevi Reddi v. Commr. H. R. and C. E. Madras, Appeal No. 405 of 1969 (Mad).

(g) "If the public do not worship the idol as of right and simply because some poojas are performed in a temple and certain members of the public are allowed to participate in the pooja, the temple cannot be said to be a public temple."

Vide App. No. 409 of 1971 (Mad) and CMP No. 822 of 1975 (Mad).

9. In the light of the above principles, the oral and documentary evidence have to be considered in the instant case. No doubt, there is no evidence as to express dedication, but by long user and the custom prevailing in Malabar and by virtue of the regulations that governed such temples in Kerala, it cannot be lightly said that the suit temple is a public one. The inscription in Ex. A.1 coupled with the treatment of the temple by the Sarcar or the Government or the State of Travancore or by the rulers of Travancore as seen from Ex. A.4, and Ex. A.12 give also the same impression. That the properties of the temple were dedicated by Periaveettu Mudaliar family is clear from the pattas produced. Reliance, however, is placed on certain donations made by strangers which were annexed as properties of the temple. Such sporadic donations by strangers would not militate against the original characteristic of the temple which sprung from private bounty and endowments made by private individuals. The one factor, which was very greatly pressed into service by Mr. Ramachandran, is that the copper plate referred to in Ex. A.22 has not been produced. It is by now well established that dedication to a temple could be proved

by direct evidence or by acceptable indirect evidence. There is ample indirect evidence in this case to show that for several centuries, this temple was the private property of the periaveettu Mudaliar family. Ex. A.8 is a partition deed between the family members. One branch of the members of the family, who decided to remain in Aloor obtained the right to own, manage and administer the temple in Aloor (Chera Chola Pandia Mahadevar temple Aloor) and they got the property as well as the temple allotted to them and to their share in the said partition deed. This is an ancient document. There is nothing said against it. The force of it should not be lightly ignored. We have again a very important document in the nature of a Commissioner's report, which has been marked as Ex. A-26 in this case. The inspection of the temple was made by the Commissioner in the presence of the Inspector of the Hindu Religious and Charitable Endowments Department. He noted the inscription evidenced by Ex. A.1. He inferred from it that Ashtabandhana Prathishta ceremony was made by the inscription also speaks to the fact of the consecration of the image of Sivakami Amman adjacent to the Murthi of Lord Nataraja.

There are only open verandahs on all four sides and there are various idols like Lord Vigneswara, Lord Sastha, Nagarajanand Bhoothathan and Lord Krishna. To some idols no roofing is provided for. There is also the image of Lord Chandikeswarar. There is no pavement on the prakaram as in the case of other temples. There is no gopuram for the temple. There is neither the permanent flag itself (Dwajasthambam) nor is there even a structure for installing a temporary flag staff for celebrating periodical utsavam of the temple. There is nothing to indicate that such a ceremony was performed in that temple at all. No provision has been made for taking out the idols of the temple on procession to any place outside the inner compound of the temple. There is no hundi for collection from worshippers of the temple. There is no bell and when the Commissioner visited the temple, there was Deepaaradhana and there were no outsiders excepting himself and the two inspectors of the department. The provision of the door and the compound wall and the site of the temple is such that it is incapable of attracting members of the public to resort therein as of right either for worship or for participating in any celebration therein. The cocoanut grove near the temple belongs to the temple.

10. The inspection report of the Commissioner, which is to the effect that there is no gopuram, no dwajasthambam, no procession of the utsava idols, no hundi, no vahanam and no bell, cumulatively taken give the impression that the temple is a private one. The non-production of the copper plate may be for reasons beyond the control of the plaintiffs. One could expect that

if there was a copper plate at all, as mentioned in Ex. A.22, it ought to have been there in 1786, which is the year which the inscription Ex. A.1 bears. Due to lapse of time, the copper plate might have been misplaced and no one has given any specific evidence about this. But on this slender accident which does not outweigh the abundant documentary evidence already referred to, we are unable to accept the contention of Mr. T. R. Ramachandran, that the temple is a public one.

11. Before considering the oral evidence, it is necessary to make a comment. D. Ws. 2 to 8 got themselves impleaded as parties to the action on their own request. The purpose of such an attempt to become parties to the litigation is obvious. The first witness examined on the side of the defendants is a resident of Azhukiapandiapuram and not Aloor. He is a relation of the plaintiffs and he is a veteran litigant. He has filed as many as ten suits and the trend of his examination shows that everything was not well with him in so far as the plaintiffs were concerned. He claimed the amount payable by the Government to the Aloor temple and was unsuccessful. He has been, therefore, brought to court by the defendants so as to conveniently speak against the plaintiffs. He refers to the fact that the members of the general public were not prevented by the plaintiffs or any of his ancestors in the matter of worshipping of the deity inside the temple. Excepting for his bare statement that the public were worshipping as a matter of right, there is nothing in his evidence to substantiate the same. D. W. 2 a manager of the Deputy Commissioner's office, Hindu Religious and Charitable endowments Department.

(evidence omitted)*

We have no hesitation in rejecting the evidence of D. Ws. 1 and 2 as interested testimony and as persons who had an axe to grind and who were not favourably disposed towards the plaintiffs and their ancestors.

12. In *Tilkayat Sri Govindalaji Mishra v. State of Rajasthan*, AIR 1963 SC 1638 = (1964) 1 SCR 561, the Supreme Court held that grants posterior to the initial grants would not affect the nature of the initial grants made to the temple. There is unimpeachable evidence in his case that all the properties standing in the name of the deities were provided with funds of the Periaveettu Mudaliar community. The fact that at one particular point of time a small extent of two acres odd was additionally granted to the deity by some strangers cannot alter the nature of the initial grant or the character of the institution from a private one to a public. The plaintiffs in paragraph 5 of the plaint state that all the properties mentioned in the schedule excepting an extent of two acres 57 cents are the properties purchased by the funds belonging to their family and endowed for the temple at

different times by the ancestors of their family.

The first defendant in the written statement would simply deny this allegation and would aver that contributions have been made by the members of the public and even the rulers of the State for the temple, its upkeep and performance of ceremonies. Besides stating this, nobody spoke to it or proved the allegation. In the written statement of defendants 2 to 8 again there is a bare allegation that the temple has not been constructed by the plaintiff's ancestors, nor was any property endowed in the name of the temple. D. W. 3 would only refer to the donation made by some strangers which bears a very small proportion to the totality of the properties owned by the suit temple. No Sasanam has been produced, no deed of dedication has been marked and we are yet to know the circumstances under which the strangers dedicated such properties. No nexus has been established between the so-called endowments and the properties of the temple. The answer to this specific allegation in the plaint is vague. We are unable, therefore, to accept the contention of the learned counsel for the respondent that by reason of the supervening endowments made by strangers the temple ought not to be treated as a private temple.

13. In the beginning, we have set out the principles which have to be borne in mind in deciding whether a temple is a private one or a public one. At the outset we have to mention that the indicia and the necessary features, which ought to be present in a temple is absent in the instant case. Utsavamurthies are not taken in procession. There is no gopuram. There is proof of Ashtabandhan Prathishta having been made by the ancestors. There is no external indicia which is ordinarily present in public temples in South India. The compound wall is not to be equated to a prakaram. There were no worshippers at the time when the Deeparadhanan was done. Excepting the representative of the Commissioner and the two Inspectors, there is no proof that any member of the public participated in it.

D. Ws. 1 and 2 who readily responded to the call of the defendants, were inimically disposed towards the plaintiffs. No independent witness or member of the public has come to say that he was visiting the temple as of right and performing the poojas pursuant thereto. The mere presence of the worshippers on certain occasions by itself is not conclusive to show that the generality of the public were having ingress into the temple as of right. Though there is no express dedication, the passage of time and the course of conduct of the members of the family have clearly established that it was the Periaveethu Mudaliar of Aloor with private funds, consecrated the idols and built the temple and its surroundings and endowed properties in the name of the deity. The defendants want-

ed to fish information by asking the plaintiffs to produce account books relating to the temple. If a person alleges that a particular religious institution is a public temple, it is for him to establish it.

The plaintiffs allege that it is a private temple and that they have fairly established by reasonable oral and documentary evidence that it is such an institution. The defendants have failed to discharge the onus or proof. When they wanted the plaintiffs to produce the account books, they were fishing for information, as they were not armed with materials to discharge the burden of proof, which is on them. Having regard to the essential principles which should govern the facts while rendering a decision whether a religious institution or a temple is a public or a private one, we are not satisfied that in the instant case the defendants have produced such clinching and acceptable material which should prompt us to hold that the temple is a public one. The learned Subordinate Judge, who was not very clear in the treatment of the materials, came to a different conclusion. But after analysing the evidence both oral and documentary, we are unable to agree with the decision of the learned Subordinate Judge.

14. The appeal is, therefore, allowed with costs.

Appeal allowed.

AIR 1976 MADRAS 32

MAHARAJAN, J.

Adaikappa Chettiar, Appellant v. Ayesha Natchiar, Respondent.

Appeal No. 12 of 1972 (P), D/- 20-2-1975*.

(A) Evidence Act (1872), Sec. 3 — Appreciation of evidence — Entry in account book of defendant of payment made by him.

Where in a suit on a mortgage the defendant pleaded payment of a sum to the mortgagee, held that the uncorroborated and unilateral entry to the effect made by the defendant in his own account has no evidentiary value. (Para 4)

(B) Pondicherry (Extension of Laws) Act (1968) Section 4 — Mortgage executed before Notaire executable under the French law without recourse to suit — Indian enactments extended to Pondicherry by the Pondicherry (Extension of Laws) Act 1968 Section 4 (1), (2) — Subsequent suit on the mortgage in Indian Court — Maintainability. (Civil P. C. (1908) Section 9 — Mortgage under French law in Pondicherry — Jurisdiction).

Under French Law a grosse copy of a notarial mortgage could be executed as if it

* (Against order of Sub. J., Karaikkal, in O. S. No. 22 of 1970).

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were a decree without a suit on the mortgage. This right is a substantive and not a procedural one and could even after the merger of Pondicherry in India, it could be exercised in the Indian Court praying for sale of the hypotheca straightway. AIR 1973 Cal 295, Rel. on. (Para 6)

But the existence of such a remedy does not bar a Civil suit on the mortgage in the Indian Court after the merger. What Sec. 4 does is not to shut out the erstwhile French Citizen from having resort to the Indian Civil Court, but to protect and preserve whatever rights and privileges he might have had under the French law, which has been repealed. When a person, who enjoyed such a privilege, filed a suit in the ordinary Civil Court on foot of a notarial mortgage deed, it is the plain duty of the Court to entertain it under Section 9 of the Indian Civil Procedure Code. (Para 6)

(C) Civil P. C. (1908), Section 35 — Award of costs — Discretion of Court — Interference by High Court.

Where it cannot be said that the lower Court exercised its discretion unjustifiably in allowing costs to the plaintiff, the High Court will not interfere in revision.

(Para 6)

Cases Referred: Chronological Paras
AIR 1973 Cal 295 = 76 Cal WN 1091 6

JUDGMENT:— This is an appeal filed by the defendant against the judgment of the learned Subordinate Judge, Karaikkal decreeing the plaintiff's suit on foot of a mortgage executed by the defendant in favour of the plaintiff, and granting a preliminary decree in her favour. The defendant in his answer contended that the mortgage was unsupported by consideration to the extent of Rs. 1400. He also pleaded a partial discharge. The Court below rejected the evidence of the defendant, accepted that of the plaintiff and fully decreed the plaintiff's claim.

2. The first point that arises for determination is whether the suit mortgage is unsupported by consideration to the tune of Rs. 1400. Ex. A.1 is the notarial deed of mortgage admittedly executed by the defendant in favour of the plaintiff on 29-9-1965 for Rs. 11400. In this document the defendant has clearly admitted that he received the entirety of this amount 'out of the view' of the Notair and the attestors to the document. His present contention is that a sum of Rs. 1400 out of the sum of Rs. 11400 was retained by the plaintiff for adjustment of future interest at a higher rate plea was not put forward by him, on his receipt of the notice, which the plaintiff sent the defendant prior to the suit. In fact, the defendant did not care to reply to the plaintiff's notice at all. What is worse, the defendant's own account book Ex. B.2 says that on 28-9-1965, that is to say, a day prior to the execution of Ex. A.1 he received the entire sum of Rs. 11400 from the plaintiff. Nothing could be more disastrous than this written admission in the defendant's

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Orissa High Court

AIR 1976 ORISSA 1
FULL BENCH

G. K. MISRA C. J., R. N. MISRA AND
B. K. RAY JJ.

Mahendar Prasad Rout, Petitioner v. The
Election Officer and others, Opposite Parties.

Original Jurisdiction Case No. 1163 of
1975, D/- 7-8-1975.

(A) Orissa Grama Panchayat Act (1 of
1965), Section 25 (1) (i) — Disqualification
under — When arises — “Accrued to him”
— Interpretation. (Interpretation of Statutes)
— (Words and Phrases — “Accrued to him”).

Disqualification under Section 25 (1) (i),
arises when the dispute relating to arrears had
been adjudicated and quantified arrears re-
main unpaid in spite of notice duly served
upon the debtor candidate. AIR 1970 Orissa,
15; 1972 (2) Cut W. R. 1506, 1972 (2) Cut
W. R. 2020 and O. J. C. No. 1184 of 1975
Dt. 16-6-1975 (Orissa) Approved. AIR 1951
SC 155 Rel. on. (Para 10)

The words “accrued due by him” cannot,
be considered as redundant and full meaning
must be given to these words. AIR 1952 SC
369 and AIR 1920 PC 181 Rel. on.

(Para 7)

In absence of definition, the meaning
attributed to the word in common parlance
has to be adopted and where a word has
shades of meanings, in a particular context,
the meaning may be different from what it
would be when used in a different context. In
Section 25 (1) (i), the disqualification was
intended to arise only when there was an
adjudicated arrear and in spite of demand
it remained unsatisfied. (Para 8)

In the absence of adjudicatory jurisdic-
tion conferred on the Election Officer and in
view of the fact that jurisdiction of the com-
mon law courts has been excluded and dis-
putes relating to arrears have been reserved
for determination by the machinery prescrib-
ed under the Orissa Co-operative Societies

Act, the Legislature must be taken to have
intended to cover cases of only adjudged
arrears and defaults following demands there-
after. (Para 9)

Cases	Referred:	Chronological	Paras
(1975) O. J. C. No. 1184 of 1975 D/-		16-6-	
1975 (Orissa)			5
(1972) 2 Cut WR 1506 = 39 Cut LT 31			5
(1972) 2 Cut WR 2020 = ILR (1973) Cut			5
1			5
AIR 1970 Orissa 15 = 35 Cut LT 1108		5, 6	
AIR 1959 Mad 126 = (1959) 2 Mad LJ			5
358.			5
AIR 1954 SC 470 = 1955 SCR 313			5
AIR 1953 SC 527 = 1954 SCR 258			5
AIR 1952 SC 369 = 1953 SCR 1			7
AIR 1951 SC 155 = 1951 SCR 138			6
AIR 1920 PC 181			7

S. Misra (2), for Petitioner; R. K. Moha-
patra, Govt. Advocate, for Opposite Parties.

R. N. MISRA, J.:— Petitioner and oppo-
site parties 2 to 5 were candidates for election
to the post of Sarpanch of the Kasaba Jaipur
Grama Panchayat in the district of Balasore.
Nomination papers were filed on 9th of
March, 1975 and on the same day scrutiny
thereof was taken up by the Election Officer.
Opposite party No. 5 claimed at the time of
scrutiny that petitioner was disqualified under
Section 25 (1) (i) of the Orissa Grama Pan-
chayat Act (hereafter referred to as the
“Act”) as he being a member of the Khanta-
pada Service Co-operative Society had failed
to pay paddy loan of the year 1955 together
with interest in spite of service of notice on
him. The objection was upheld and peti-
tioner's nomination paper was rejected. Peti-
tioner has asked for writ of certiorari to quash
the order of rejection of the nomination.

2. Counter affidavits have been filed
on behalf of the Election Officer (opposite
party No. 1) and by opposite party No. 2
justifying the rejection of the nomination
paper on the basis that petitioner was dis-
qualified under the provisions of Section 25
(1) (i) of the Act. It was claimed that relief
by way of an election petition was available

under the Act and since the fact as to whether petitioner was in arrears was in dispute, the matter should be left to be adjudicated on the basis of evidence in the prescribed forum.

3. Mr. Misra for petitioner claimed that the factual dispute need not be examined as petitioner would succeed on the admitted position that there has been no adjudication in regard to the default. He placed reliance on three reported decisions of this Court in support of his claim.

4. When this application came up before a Division Bench for hearing, for petitioner reliance was placed on the said three decisions wherein it has been held that in order to attract the disqualification under S. 25 (1) (i) of the Act that arrears are due they must have been adjudicated by a competent forum and a notice of demand served upon the candidate following such adjudication must have remained unsatisfied after the time specified therein for payment has expired. Learned Government Advocate disputed the correctness of these decisions and claimed that the matter should be examined by a larger Bench on the basis that the meaning given to the words "accrued due" was contrary to binding authorities.

5. Section 25 (1) (i) of the Act provides:—

"(1) A person shall be disqualified for being elected or nominated as a Sarpanch or any other member of the Grama Panchayat constituted under this Act, if he—

xx xx xx
(i) being a member of a Co-operative Society, has failed to pay any arrears of any kind accrued due by him to such society before filing of the nomination paper in accordance with the provisions of this Act and the rules made thereunder:

Provided that in respect of such arrears a bill or a notice has been duly served upon him and the time, if any specified therein has expired;

This provision came to be construed by three Division Benches of this Court. In the case of Gobind v. Darsan, AIR 1970 Ori 15, the learned Chief Justice and R. N. Misra, J., took the view that:

"In terms of the requirements of Section 25 (1) (i), the arrears must have accrued due in order that the disqualification may arise. The use of the word 'accrued' clearly goes to indicate that the legislature intended to provide that there must have been a due on the basis of a determination. 'Accrued' means, according to the dictionary, 'to arise or spring as a natural growth or result; coming as a natural accession or result; arising in due course'. It refers to 'the existence of a present enforceable right' or 'fixed' or 'assessed and determined'. Tax accrues when all events have occurred which fix the amount of tax and determine the tax payer's liability to pay the tax. The use of the word 'accrued' in the aforesaid clause of the Gram

Panchayat Act, therefore, clearly gives indication that the disqualification is contemplated to arise only when there has been an ascertainment of dues and the Society has the right in praesenti to recover the said amount and in spite of quantification of the liability and consequent notice of demand to pay, the concerned person has defaulted. A mere demand raised by the Co-operative Stores on the basis that a certain sum of money is payable by the petitioner when he refuses his liability to pay the same cannot give rise to a position when it can be said that a certain amount has 'accrued due' to the Stores."

The decision was followed in terms by a Bench consisting of R. N. Misra and B. K. Ray, JJ. in the case of Radhakanta Dandasena v. Sub-Divisional Officer, Parlakhemundi, 1972 (2) Cut WR 1506.

In the case of Narayan Swain v. Narendra Kumar Sahu, 1972 (2) Cut WR 2020, the learned Chief Justice and S. K. Ray, J., examined the position without referring to the two decisions referred to above and stated that the following requirements were to be satisfied for upholding the disqualification under Section 25 (1) (i):—

"(i) The person has failed to pay any arrears of any kind, being a member of a co-operative society, to such society before filing of the nomination paper;

(ii) The arrears of any kind must have accrued due by the person which means not only there would be arrears, but the arrears must have been determined under the Act to be payable;

(iii) In respect of such arrears a bill or a notice has been served upon the person; and

(iv) If any time for payment was prescribed in the bill or notice, such time must have expired."

In an unreported decision in the case of Basudev Bariha v. Election Officer, Dungi-ripalli (O. J. C. No. 1184 of 1975 disposed of by R. N. Misra and Panda, JJ., on 16-6-1975 (Orissa)), the provisions under Sec. 25 (1) (i) of the Act came up for consideration. During hearing of that case, learned Government Advocate claimed that the matter should be referred to a larger Bench almost on the same reasons on which he wants review of the earlier decisions contending those to have been erroneously decided. Relying upon the decisions in the case of I. T. Commr v. Thigaraja, AIR 1953 SC 527 and E. D. Sassoon and Co. Ltd. v. I. T. Commissioner, Bombay AIR 1954 SC 470, the learned Government Advocate contended that "accrual of income" had nothing to do with "computation" thereof. "Computation" required determination while "accrual" did not. A decision of the Madras High Court in the case of V. Ramaswami v. I. T. Commr., AIR 1959 Mad 126 was also relied upon to show the difference in the meanings of the terms "accrues", "arises" and "is received". The Division

Bench declined to refer the matter to a larger Bench by saying:—

“These two words ‘accrue’ and ‘due’ have various meanings and in a given case where both of them are used together, the true meaning thereof has to be ascertained.

‘Accrued due’ used in Section 25 (1) (i) of the Act cannot be given any other meaning than has been adopted in the three decisions of this Court referred to above. The Election Officer has no jurisdiction to determine whether the debt has accrued due. Under the Co-operative Law, a machinery has been provided to decide all disputes in relation to dues. In fact, Section 68 of the Co-operative Societies Act makes clear provisions for it and has even ousted the jurisdiction of the common law court in regard to such a dispute. The State Legislature must be deemed to have had due notice of such an existing statutory provision. Therefore, when a plea of disqualification is raised and the candidate whose nomination is assailed disputes the claim of the objector, the Election Officer cannot enter into an adjudicating process because he has none. The decisions of this Court have, therefore, rightly taken the view that the Legislature intended that the disqualification on the basis of non-payment of accrued dues will be confined to cases where there had been an adjudication and the liability had become final following quantification. If any other meaning is given to the term, the purpose of the statute would be frustrated and a power would be conferred on the Election Officer which he does not have”

6. The first decision on the point was rendered by this Court as early as 1-8-69 (AIR 1970 Ori 15). The interpretation of the provision made in the aforesaid decision has been consistently followed by the Court. The State Legislature must have been aware of the interpretation put by this Court on the said provision. Though extensive amendments to the Act were undertaken in 1974 and 1975 (vide Orissa Acts 6 and 9 respectively), the Legislature has not thought it appropriate to amend the law and declare its intention in case it was otherwise. In the case of Ram Nandan v. Kapildeo, AIR 1951 SC 155, it has been pointed out:—

“.....If the interpretation does not carry out the intentions of the framers of the Act by reason of unhappy or ambiguous phrasing, it is for the Legislature to intervene. But far from doing so, it has acquiesced, during all these years, in the construction, which the Patna H. C. has been placing upon the section from the very next year after the enactment of the statute. Having regard to the great obscurity in the language employed in the relevant provisions and the inaction of the Legislature, it is, in our opinion, legitimate to infer that the view expressed by the Patna H. C. is in accord with the intention of the Legislature.”

Since the rendering of the judgment by this Court in the case reported in AIR 1970 Ori 15, there has been a general election to all Grama Panchayats apart from several bye-elections and the decisions rendered by this Court have been consistently followed by the authorities entrusted with the conduct of elections and the Legislature having not intervened to alter the law, it must follow that the interpretation put by the Court is in accord with the intention of the Legislature.

7. If clause (1) was to be interpreted the way learned Government Advocate wants us to do, the words ‘accrued due by him’ would be wholly unnecessary and without them the meaning contended for would be available. With the omission of these words, the impugned clause would read thus:—

“being a member of a Co-operative Society, has failed to pay any arrears of any kind (.....) to such society before filing of the nomination paper in accordance with the provisions of this Act and the rules made thereunder”
It has been pointed out by Patanjali Sastri C. J. in the case of Aswini Kumar v. Arabinda Bose, AIR 1952 SC 369:

“...It is not a sound principle of construction to brush aside words in a statute as being inapposite surplusage, if they can have appropriate application in circumstances conceivable within the contemplation of the statute.”
In the case of Onebec Railway v. Vendry, AIR 1920 PC 181, the Judicial Committee in clear terms indicated that the Legislature is deemed not to waste its words or to say anything in vain. A construction which attributes redundancy to the Legislature will not be accepted except for compelling reasons. The words ‘accrued due by him’ cannot, therefore, be considered as redundant and full meaning must be given to these words.

8. Undoubtedly in taxing statutes, the word ‘accrue’ has been given a meaning. In absence of definition, the meaning attributed to the word in common parlance has to be adopted and where a word has shades of meanings, in a particular context, the meaning may be different from what it would be when used in a different context. In Section 25 (1) (i), the disqualification was intended to arise only when there was an adjudicated arrear and in spite of demand it remained unsatisfied. The Legislature has used the words in that clause with a view to giving effect to such an intention.

9. This Court has consistently interpreted the provision to cover cases of only adjudged arrears and defaults following demands thereafter. In the absence of adjudicatory jurisdiction conferred on the Election Officer and in view of the fact that jurisdiction of the common law courts has been excluded and disputes relating to arrears have been reserved for determination by the machinery prescribed under the Orissa Co-operative Societies Act, the Legislature must be taken to have intended, the position as has been

interpreted by this Court to be the true meaning of the provision.

10. Disqualification under Section 25 (1) (i), therefore, arises when the dispute relating to arrears had been adjudicated and quantified arrears remain unpaid in spite of notice duly served upon the debtor candidate. The view taken in the four earlier decisions of this Court, therefore, is correct.

11. The writ application is accordingly allowed and the order of the Election Officer rejecting the nomination paper petitioner is quashed. Petitioner was excluded from the election. The election which has been held in the meantime is, therefore, vitiated and the same is also vacated. We direct that a writ of mandamus be issued to opposite party No. 1 to hold fresh election in accordance with law. Petitioner shall have costs of this application. Hearing fee is assessed at rupees one hundred.

G. K. MISRA C. J.:— I agree.

B. K. RAY, J.:— I agree.

Petition allowed.

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G. K. MISRA, C. J. AND N. K. DAS, J.

Bikram Kishore Parida and others, Appellants v. Benudhar Jena, Respondent.

A. H. O. Nos. 25 of 1974 and 28 of 1974, D/- 28-2-1975.*

(A) Specific Relief Act (1963), Sec. 20 — Specific performance — Discretion — Contract to transfer shares in Company — Transfer possible only on approval of Board of Directors and consent of Government — Declaration of right to get transfer in future cannot be made.

The plaintiff sued for specific performance of a contract to transfer certain shares in a Company. Transfer of shares in the Company was subject to the decision of the Board of Directors and subject to the terms of the Memorandum of Association, which provided that no shares could be transferred without the sanction of the Government. Held: that the relief to be granted in a suit for specific performance of a contract was a discretionary one and that under the circumstances a declaration could not be given to the plaintiff of his right of future transfer of shares.

(Para 11)

(B) Contract Act (1872) Section 10 — Construction — Intention of parties.

Intention of parties to a contract is matter of inference from their conduct. If a reasonable man would infer from the conduct that the party intended to contract in a particular way then he will be bound to make good his promise.

(Para 10)

M. N. Das and S. C. Ghosh, for Appellants: B. M. Patnaik and K. M. Jena, for Respondent.

*(From decision of B. K. Ray J. in F. A. No. 23 of 1967, 1967. D/- 18-4-1974).

GS/IS/C687/75/KNA

DAS, J.:— Plaintiff's case may be stated in short. Plaintiffs and defendant No. 1 were well acquainted with one another since a long time and they proposed to start a foundry business under the Pilot Project Scheme of the Government of Orissa. In pursuance of that they agreed to start a company under the name and style of 'Utkal Foundry and Engineering Co.' The Government insisted that there would be difficulty in having a number of partners from private entrepreneurs. Accordingly, an agreement was entered into by the plaintiff and the defendant No. 1. The essential terms were that the name of the defendant No. 1 would be shown as the private entrepreneur, but the money for the shares was to be advanced by the plaintiffs; defendant No. 1 shall transfer 26,250 shares out of 35,000 shares ostensibly held in his name; each of the plaintiffs and defendant No. 1 would have 1/4th interest in the shares standing in the name of defendant No. 1. Plaintiffs would invest according to their ability and the excess investment by any of the plaintiffs over and above Rs. 8750/- would carry interest at the rate of 6½ p. c. p. a. till such excess investment is repaid in cash or by adjustment; the money due from defendant No. 1 as his share would be repaid by him to the plaintiffs out of the amount to which he may be entitled along with interest thereon at the rate of 6½ p. c. p. a. In pursuance of the agreement the plaintiffs allowed the name of defendant No. 1 to be shown ostensibly as the private entrepreneur so that the work would be carried out smoothly at the Government level. This was done as defendant No. 1 had influence with the political party then in power. The company was registered and the plaintiffs paid the entire money. The plaintiffs have fully paid the money for the 35,000 shares allotted in the name of defendant No. 1 and after subscribing the money, the plaintiffs carried on the work of the business of the company and continued to manage the work jointly as agreed upon by them. Defendant No. 1 became the Managing Director of the Board of Directors and got a resolution passed for transfer of 7000 shares in name of plaintiff No. 1 and 7000 share in the name of plaintiff No. 2 and 3000 shares in the name of plaintiff No. 3 and the same was sent for sanction of the Government. Defendant No. 1 assured that further shares would be transferred to the plaintiffs. On a resolution of the meeting of the Board of Directors after approval of the Government for transfer of 17000 shares, the defendant No. 1 did not transfer the same.

2. Defendant No. 1 in his written statement has denied the agreement said to have been executed by him and averred that the agreement is false and fabricated and he never put his signature to such a document. At one time he thought of promoting the business along with plaintiffs and others and this was not practicable. The plaintiffs filed application for transfer of some shares in their favour which was approved by the

Board of Directors. But subsequently, the Board of Directors withdrew that resolution on the ground that it will not be beneficial to the interest of the company. Defendant No. 1 further stated in the written statement that he had great trust in plaintiff No. 1 and the other two plaintiffs are associates of plaintiff No. 1. On the suggestion of plaintiff No. 1 he had thought of promoting a company with all the plaintiffs, and some other persons as members but the same could not materialise. Subsequently he allowed the plaintiffs 1 and 2 as partners in the Pilot Project Scheme and he described himself as partner in all correspondence. But the attempts were not preceded or succeeded by any agreement oral or written. The plaintiff No. 1 was assisting him in the affairs of the company. Plaintiff No. 1 was expecting that the defendant No. 1 would persuade the Board of Directors to take him as share-holder in the company. He had full confidence in plaintiff No. 1 and very often left papers of the company and other papers with him.

3. The trial court decreed the plaintiffs' suit and ordered that each of plaintiffs is entitled to hold 8750 shares out of 35000 held by defendant No. 1 and directed defendant No. 1 to execute an instrument of transfer in respect of 17,000 shares the title of which had already passed at the rate of 7000, 7000 and 3000 in favour of the plaintiffs nos. 1, 2 and 3 respectively.

4. Defendant No. 1 came up in appeal. The learned Single Judge came to conclusion that the agreement (Ex. 5) is not genuine, but the plaintiffs have paid Rupees 35,000/- to defendant No. 1 as per Exs. 4, 6, 8, 9 and 30 which has been invested by the defendant No. 1 in the company towards shares worth Rs. 35000/- and that there has been an agreement between the parties for transfer of 17,000 shares by the defendant No. 1 in favour of the plaintiffs and the plaintiffs are entitled to transfer 17000 shares in their favour. As against the decision of the learned Single Judge the plaintiffs have filed A. H. O. No. 25/74 challenging the finding that agreement (Ex. 5) is not genuine, and the defendant No. 1 has filed A. H. O. No. 28/74 challenging the decision of the learned Single Judge directing transfer of 17000 shares in favour of the plaintiffs and also against the finding that the plaintiffs have contributed Rs. 35000/- towards share money. Both the appeals have been heard analogously.

5. The contention on behalf of defendant No. 1 in this court is that the agreement (Ex. 5) and receipts, Exs. 3, 4, 6, 8, 9 and 30 are not genuine and the payment of Rs. 15,000/- to defendant No. 1 by the plaintiffs was not towards share money but towards loan and besides this amount plaintiffs have not paid anything more.

5A. The disputed agreement (Ex. 5) was typed by P. W. 5 an employee of the National Foundry and Rolling Mills since

1948 who was also working as the Typist in the company that was formed for the Pilot Project. He has stated that he typed out the agreement on 23-3-1959 out of the draft supplied by defendant No. 1 and defendant No. 1 signed it in his presence. He is an independent witness and nothing has been brought out on record to discredit his statement. He supports the version of P. Ws. 8, 12 and 13 who were plaintiffs in this suit. Defendant No. 1 had not the courage to deny the signatures in his statement in court. We accept the statement of P. W. 5 in this regard.

Mr. Fatnaik contended that the signature of defendant No. 1 on this document does not tally with his signature in the two cheques (Exs. 1 and 2) which were encashed by him in bank and he has drawn our attention to some difference in the signature. We have compared the signature of defendant No. 1 on this document with a large number of undisputed signatures on documents which consist of resolutions of the Board of Directors in Ex. A series, notices issued by defendant No. 1 for holding meeting and correspondences by defendant No. 1 with the Government such as Exs. 32, 42, 46/c-1, X-11/a, X-13, X-14, X-15/a, X-17, X-18, X-19/X-20, X-25, X-26, X-27, Z-6/a, Z-8, Z-9, Z-5 and Z-1. We are of opinion that the signature of defendant No. 1 in ex. 5 tallies with his signatures on those admitted documents. The signature on the cheques relating to bank transaction may be of different type from the signatures relating to other transactions. We, therefore, hold that signatures of defendant No. 1 on Exts. 5, 6, 8, 9, 3, 4 and 30 are genuine.

Mr. Fatnaik also contends that the letter head used for Ex. 5 was not in existence at the time of execution of Ex. 5. He has drawn our attention to Ex. V and contends that this was the letter head which was in use then. P. W. 5 asserted that the letter head on which Ex. 5 was engrossed was in existence at the time of its execution. Excepting denial by defendant No. 1 there is no other evidence available from the defence side to support defendant No. 1. P. W. 5 asserted that on this particular letter head he typed the contents of Ex. 5 on 23-3-1959. He supports the statement of the plaintiffs in this respect. Admittedly defendant No. 1 is in possession of the accounts which will throw light about payments relating to printing of letter heads. He could have produced the accounts to show when different letter pads were printed. He issued notice in his name as the Managing Director for production of the registers and account books. In his statement in court he states that he telephoned to the Accountant and came to know that those documents are not traced out. Accountant has not been examined. The evidence of non-production of those documents is not satisfactory. We accept the statement of P. W. 5 which supports the evidence of the plaintiffs and we hold that the letter head was in existence in March, 1950.

Mr. Patnaik has contended that the recitals in Ex. 5 show that this document was not in existence in March 1950. He contends that the recital in Ex. 5 that shares worth Rs. 35000/- were "held by him now" shows that it was a subsequent concoction inasmuch as by that time defendant No. 1 had not held any shares. Ex. H dated 17/18-3-1959 would show that the Government had already intimated that shares worth Rs. 35,000/- had been allotted to defendant No. 1. It is contended by Mr. Das that the expression 'held by him' refers to the letter Ex. H in which it has been mentioned that the shares were allotted to defendant No. 1. It is contended by Mr. Patnaik that in Ex. 5 it is mentioned that the remuneration which "was" fixed for the Managing Director would show that this document was not in existence at that date inasmuch as the Board of Directors fixed the remuneration of the Managing Director by its resolution dated 23-4-1962 as per Ex. A/4. The contention of the plaintiffs in this regard is that the word "was" has been wrongly mentioned and relates to the memorandum of association (Ex. M), a sample copy of which had already been sent to defendant No. 1 prior to that date containing an article to the effect that the Board of Directors are to fix the remuneration of Managing Director. According to plaintiffs the fact of remuneration of the Managing Director in Ex. 5 relates to the remuneration that would be as per Ex. M. We have already held that Ex. 5 was typed out and was signed on 23-3-1959. We accept the explanation of the plaintiffs to the effect that the expression 'held' refers to the allotment of share in Ex. H and the fixing of remuneration of the Managing directors refers to the provisions in the memorandum of association (Ex. M).

Mr. Patnaik further contends that Ex. 5 has not been mentioned in the receipts (Exs. 6, 8 and 9) that followed Ex. 5 and also it has not been mentioned in the notices sent by the plaintiffs to defendant No. 1 prior to the institution of the suit. The receipts relate to acknowledgment of payment of money and the notices are to the effect that the money had been advanced by the plaintiffs for transfer of shares and the defendant No. 1 did not transfer the shares which resulted in blocking of money for a long time. It is not necessary that the agreement should be referred to in these documents.

6. For the reasons stated above, we hold that Ex. 5 is a genuine document. For the very same reasons also we hold Exs. 6, 8 and 9 are genuine documents.

7. The second contention of defendant No. 1 is that the payment of Rs. 15,000/- by the plaintiffs is not share money but it is by way of loan. The payment of Rs. 15,000/- by the plaintiffs is admitted. Even though defendant No. 1 had filed an additional written statement, nowhere it has been asserted in the written statement that this advance of

Rs. 15,000/- was by way of loan. It is an admitted fact that since March, 1958 the plaintiffs, defendant No. 1 and some others decided to start a company under the Pilot Project Scheme. In all correspondence to the Government defendant No. 1 was mentioning "we" which shows that he was all along writing letters on behalf of the plaintiffs and others and the defendant No. 1 was describing himself as a partner in those letters. In the beginning defendant No. 1 had written to the Government the names of 8 persons as share holders including his name as well as the names of 3 plaintiffs mentioning different shares to be held by each of the plaintiffs. He had also sent an application to this effect to the Senior Research Officer, Ministry of Commerce and Industries, Department of Company Law Administration Research and Statistics Division, New Delhi. But the Government did not want to have so many persons in a firm of Pilot Project and selected defendant No. 1 as the entrepreneur and expressed its intention that defendant No. 1 would be appointed as the Managing Director. It was also intimated by the Government that in case there are a number of entrepreneurs in one scheme each having some shares in the company they will naturally have the right to say as to who will be the Managing Director from among them; and it may so happen that though defendant No. 1 has been selected on his merit due to his technical abilities to manage the proposed company, the other share holders whose total shares would be much higher than that of defendant No. 1 may not choose defendant No. 1 to be the Managing director and the person whom they will choose may not be up to the expectation of the committee, and accordingly advised that defendant No. 1 would try to contribute the entire share allotted to the entrepreneur and in case he is not able to do so, he should try to take a major portion of it and take in one or two more partners whose shares put together may be less than that of defendant No. 1. In response to the above letter defendant No. 1 intimated that he would take plaintiff No. 1 having a share of worth Rs. 10,000/- and plaintiff No. 2 Rs. 5000/- and he would contribute towards share of Rs. 20,000/-. After sanction of the scheme defendant No. 1 describing himself as a partner wrote to the Director of Industries stating;

"We have to inform you that we are willing to invest Rs. 15000/- in the proposed company towards the contribution of entrepreneur immediately and the balance of Rupees 20,000/- within six months from the formation of the company. We would, therefore, request you to kindly approve the above and oblige."

Thereafter, defendant No. 1 was informed that shares worth Rs. 35,000/- had been allotted to him and the terms stated above had been accepted. Defendant No. 1 was directed to get the memorandum and articles of association printed as per the sample copy enclosed

and to take further instructions of the company. He was directed to comply with all the above requirements by 30-3-1959. These correspondences would show that defendant No. 1 has all along admitted himself to be a partner along with plaintiffs and all letters he was writing on behalf of the firm and not for himself only. Further undisputed documentary evidence is that the Board of Directors passed resolution for transfer of 17000 shares in favour of plaintiffs and defendant No. 1 also repeatedly stressed on the Government to approve such transfer. The documentary evidence in this case also reveals that after 15-4-1959 the date on which the amount was deposited, plaintiffs were all along working as partners in the firm. They also show that not only all the plaintiffs were working in the management of the company but also plaintiff No. 1 was running the business as if he was the Managing Director and he was signing letters on behalf of the Managing Director. In view of these undisputed circumstances and in absence of any pleading as to loan we hold that the amount of Rupees 15000/- was advanced towards share money.

In this connection it is argued by Mr. Patnaik that plaintiff No. 2 paid Rs. 8000/- but the receipt Ext. 9 is for Rs. 7000/-. The explanation on behalf of the plaintiffs is that for purchase of shares plaintiff No. 2 is to contribute Rs. 7000/- and receipt was made accordingly. The excess of Rs. 1000/- was to be returned subsequently because as it was meant for completing the amount of Rs. 15000/-. It also appears to be reasonably probable from the fact that subsequently while plaintiff No. 2 paid Rs. 8000/- only, a receipt of Rs. 9000/- was given by defendant No. 1- vide Ex. 1- vide Ex. 4. We hold that the receipt Ex. 9 has been sufficiently explained by the plaintiffs.

8. The next contention of Mr. Patnaik is that the balance amount of Rs. 20,000/- was not advanced by the plaintiffs. This amount of Rs. 20,000/- was paid in two instalments. The first instalment of Rupees 10,000/-, according to plaintiffs, has been paid by them under receipts Exts. 3 and 4. P. W. 2, the Accounts Clerk of the company who is an independent witness has typed out those receipts and he also says that defendant No. 1 has signed these receipts. He corroborated the statement of the plaintiffs to this effect. Moreover, defendant No. 1 himself has also admitted in Ex. Z-1 dated 29-11-60, the letter written by him to the Chairman of the Board of Directors that the amount of Rupees 10,000/- deposited on that day was towards the share amount from private shareholders. We have already held that under Ex. 4 though plaintiff No. 2 paid Rs. 8000/-; receipt has been granted for Rs. 9000/- which is the excess amount while Ex. 9 was granted.

Mr. Patnaik further contends that plaintiff No. 1 has stated that he had paid the amount at Sambalpur and in that connection he has drawn our attention to a letter said to

have been signed by plaintiff No. 1 on 29-11-1960 and also photographic copies of some entries in the account books said to have been made by plaintiff No. 1 on that date and also that there was no bank account at Sambalpur on that date. The Accounts book had not been produced and we have already held that there is no satisfactory evidence for non-production of the accounts book by defendant No. 1. As such reliance cannot be placed on these photographic copies. In view of the admission of defendant No. 1 in Ex. Z-1 that the amount has been advanced by the private share holders the question whether the amount was paid at Sambalpur or at Cuttack is not of much importance. So also whether there was any bank account at that time at Sambalpur or not, loses importance.

The second instalment of Rs. 10,000/- according to plaintiffs was advanced by plaintiff No. 1 on 3 occasions which is supported by the receipt Ex. 30.

To appreciate the statement of witnesses for the plaintiffs regarding the genuineness of signatures on Exts. 3, 4 and 30 we hold, for the reason we have already given for Exts. 5, 6, 8 and 9, that the signatures of defendant No. 1 on these documents are also genuine signatures, we have also compared the undisputed signatures in order to appreciate the statement of the witnesses.

Ex. 36 series, correspondences between plaintiff No. 1 and defendant No. 1, clearly establish that defendant No. 1 was all along depending on plaintiff No. 1 for management and progress of affairs of the company, so much so, that on various occasions defendant No. 1 had intimated plaintiff No. 1 from Sambalpur to go with money otherwise defendant No. 1 would be placed at a very difficult situation for want of funds. The evidence of defendant No. 1 (D. W. 1) also reveals that his financial condition was not at all good at that time. He has not shown as to wherefrom he got the amount of Rupees 10,000/- which he deposited. His evidence also shows that he had no capacity at that time to be ready with Rs. 10,000/-. Ex. 40, a letter dated 6-3-1962 shows that defendant No. 1 had written to the plaintiffs to come with Rs. 3,000/- as there was nothing in the bank and defendant No. 1 was in a difficult position about financial affairs. The conduct of defendant No. 1 during that period that he was insisting on the Government to approve transfer of shares in favour of plaintiffs and Government was insisting on him for full payment of the balance money and the fact that the defendant No. 1 was not in a sound financial position to deposit the money and plaintiffs were taking active part in the management without any remuneration clearly establish that the amount of Rs. 10,000/- was also advanced by the plaintiffs.

9. On the above findings we hold that receipts Exts. 3, 4 and 30 are genuine documents and the amount of Rs. 20,000/-

was contributed by plaintiffs towards share money.

10. The question then arises as to whether plaintiffs will be entitled to have 8750 shares to be transferred to each of them or they are entitled to transfer of only 17000 shares in their favour as resolved by Board of Directors and approved by Government. Admitted fact is that, Board of Directors resolved that defendant No. 1 would transfer 17000 shares out of 35000 shares to plaintiffs. Defendant No. 1 also wrote to the Chairman to move Government for sanction and chairman also moved Government for such sanction and defendant No. 1 repeatedly pressed on Government for sanction. It is contended on behalf of defendant No. 1 that as there is no agreement for transfer of 17000 shares in favour of plaintiff, the relief to that extent cannot be granted. The recitals in plaint would show that not only plaintiffs have claimed $\frac{1}{4}$ th each out of 35000 shares but also they have narrated the subsequent developments as per the conditions laid down by Government and as per the provisions of the memorandum of association (Ex. M) the Board of Directors have resolved for transfer of 17000 shares in favour of plaintiffs and Government have accorded sanction to this, but in spite of that, defendant No. 1 was not transferring the said shares. It will thus appear that plaintiffs' claim is not based only on the claim of $\frac{1}{4}$ th share each out of 35000 shares, but also they claim transfer of 17000 shares as decided by the Board Directors and sanction by Government. From the statement of defendant No. 1 in Court it would appear that he and plaintiffs sat together and decided that plaintiff No. 1 would have 7000 shares, plaintiff No. 2 would have 7000 shares and plaintiff No. 3 would have 3000 shares and thereafter plaintiffs put application for shares at this rate. This clearly shows that it was agreed upon between plaintiffs on one hand and defendant No. 1 on the other, that plaintiffs Nos. 1 and 2 would get 7000 shares each and plaintiff No. 3 would get 3000 shares. It has been stated in Anson's Law of Contract at page 29:—

"The intention of the parties is a matter of inference from their conduct, and the inference is more or less easily drawn according to the circumstances of the case."

At page 32 it has also been stated that:—

"The test of an intention to effect legal relations is an objective one. It may be that the promisor never anticipated that his promise would give rise to any legal obligation, but if a reasonable man would consider that he intended so to contract, then he will be bound to make good his promise."

In this case the conduct of the parties especially of defendant No. 1 clearly establishes that there was a contract for transfer of 17000 shares. Therefore we hold that there was an agreement between the parties that defendant No. 1 is liable to transfer 17000/- shares in favour of plaintiffs.

11. In the prayer in plaint plaintiffs have asked for transfer of shares as resolved by the Board of Directors and approved by Government and they have also claimed transfer of shares to the extent of 8750 each according to terms in Ex. 5. The transfer of shares is subject to the decision of the Board of Directors and also subject to the terms of memorandum of association. In the memorandum of association (Ex. M) it has been provided that without the sanction of the Governor no share can be transferred and Government can release its share only in favour of the entrepreneur. The intention of Government all along is that defendants would continue as the Managing Director and would have a maximum number of shares. In view of this position, it cannot be definitely said at this stage, whether Government will release any share in future and that will also depend on several other contingencies. The position is thus indefinite and declaration as prayed for by plaintiffs cannot be given under such circumstances in a suit for specific performance of contract. The relief to be granted in such a suit is discretionary and is based on principles of equity and thus prayer for declaration of future transfer of shares cannot be granted. The plaintiffs are, therefore, entitled to have a transfer of 17000 shares by defendant No. 1.

12. Accordingly, it is held that plaintiffs are entitled to have 17000 shares transferred in their favour by defendant No. 1. The suit be decreed accordingly, with proportionate costs.

13. A. H. O. No. 25/74 is allowed in part with proportionate costs and A. H. O. No. 28/74 is dismissed with costs.

G. K. MISRA, C. J.:— I agree.
Order accordingly.

AIR 1976 ORISSA 8

G. K. MISRA, C. J.

Purusottam Pani, Petitioner v. Dhruba Charan Panda and others, Opposite Parties.

Civil Revn. No. 169 of 1974, D/- 29-4-1975.*

(A) Civil P. C. (1908), Section 151 and Section 145 and Order 21 Rule 43 — Defendant's rice huller attached before judgment and left in charge of third person A — A giving undertaking without personal liability in favour of Court to produce huller when ordered by it — Application by defendant for compensation for use of huller by A — Application held was maintainable under Section 151 — No separate suit would lie — Section 145 did not apply — AIR 1935 All 768 Dissent form.

*(From order of B. B. Das, Munsif Bhadrak, in O. S. No. 19 of 1971 (III); D/- 6-3-1974.

FS/GS/C318/75/GNB

Where the rice huller machine belonging to the defendant was attached before judgment and left it in charge of a third person A who gave an undertaking without any personal liability in favour of the Court to produce the same as and when ordered by the Court and the defendant filed an application in the Court for directing A to pay to the defendant the profits gained by running the huller when it was in his custody, it was held that in the eye of law the attached huller was in the possession of the Court though factually it was in the possession of A and the application by the defendant to determine compensation was maintainable under Section 151 and no separate suit would lie for determining the same and as A had not undertaken a personal liability Section 145 had no application. AIR 1961 SC 803, AIR 1919 PC 55, AIR 1343 PC 189, AIR 1926 Mad 1005 and AIR 1962 Assam 23, AIR 1964 Andh Pra 339 and AIR 1966 Andh Pra 151 Rel. on. AIR 1949 All 305 Dist. AIR 1935 All 768. Dis-sented from. (Paras 1, 3, 5, 8)

Cases Referred: Chronological Paras
 AIR 1966 Andh Pra 151 = (1965) 1 Andh LT 245 7
 AIR 1964 Andh Pra 339 = (1964) 1 Andh WR 374 7
 AIR 1962 Assam 23 7
 AIR 1961 SC 803 = (1962) 1 SCR 75 5
 AIR 1949 All 306 = 1949 All WR (HC) 8 7
 AIR 1943 PC 189 = 1943 All LJ 603 6
 AIR 1935 All 768 = 1935 All LJ 1000 7
 AIR 1926 Mad 1005 = 51 Mad LJ 239 7, 8
 AIR 1919 PC 55 = 46 Ind App 228 6

B. Patnaik and B. B. Patnaik, for Petitioner; R. C. Patnaik, for Opposite Parties.

ORDER:— Opposite party No. 3 filed a suit on a promissory note for recovery of dues against opposite parties 1 and 2. The rice huller machine belonging to opposite parties 1 and 2 was attached before judgment. On 1-4-1971 the Civil Court peon after attachment left the huller in charge of the petitioner who executed a receipt on that day wherein he stated that the rice huller was kept in his custody by the peon and he gave an undertaking that he would produce the huller as and when orders would be issued by the court. In the recitals of the undertaking so given there was no personal liability taken by the petitioner. The undertaking was not in favour of the Presiding Officer or any other officer of the Court. It was an undertaking in favour of the Court. On 1-3-1974 opposite parties 1 and 2 filed an application in Court that the petitioner should be directed to pay Rs. 2100/- towards electric charges and Rs. 5500/- towards profits which he gained by the running of the huller for a period of about 11 months when the huller was in his custody. The petitioner filed objection saying that he did not run the huller and did not make any profits. He also said that the claim was beyond the pecuniary jurisdiction of the court and the Court had no jurisdiction to direct an enquiry regarding compensation

in the suit, and opposite parties 1 and 2 can have remedy only by way of a separate suit. The trial Court by his order dated 6-3-1974 held that he had jurisdiction to make an enquiry. It is against this order that the civil revision has been filed.

2. Mr. B. Patnaik for the petitioner does not press the point that on account of higher pecuniary value of the claim the court has no jurisdiction to make the enquiry. The only contention urged by him is that the court has no jurisdiction to direct an enquiry and the only remedy that opposite parties 1 and 2 have is to make a claim by way of a separate suit.

3. It is the common case of the parties that section 145 C. P. C. has no application to this case. Section 145 runs thus:—

“145. Enforcement of liability of surety.—Where any person has become liable as surety—

(a) for the performance of any decree or any part thereof, or

(b) for the restitution of any property taken in execution of a decree, or

(c) for the payment of any money, or for the fulfilment of any condition imposed on any person, under an order of the court in any suit or in any proceeding consequent thereon, the decree or order may be executed against him, to the extent to which he has rendered himself personally liable, in the manner herein provided for the execution of decrees, and such person shall, for the purposes of appeal, be deemed a party within the meaning of Section 47;

Provided that such notice as the court in each case thinks sufficient has been given to the surety.”

The Section has been consistently construed as having application to cases where the surety has undertaken a personal liability. As has already been stated, the receipt given by the petitioner does not disclose any personal liability on his part. Consequently Section 145 has no application to this case.

4. The next question for consideration is whether the court can direct an enquiry under Section 151 C. P. C. This section saves the inherent power of the court and lays down that nothing in this Code shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court. Law is now well settled that if there is no specific provision of the Code to give a particular remedy then the court in exercise of inherent power under Section 151 C. P. C. can afford proper relief. In granting such a remedy nothing would be done by the court which will run counter to a specific provision of the Code.

5. Order 38, Rule 7 C. P. C. prescribes the mode of making attachment in case of an attachment before judgment. It says that save as otherwise expressly provided, the attachment shall be made in the manner pro-

vided for the attachment of property in execution of a decree.

Order 21, Rule 43 C. P. C. deals with attachment of movable property other than agricultural produce in possession of judgment-debtor. It is to the effect that where the property to be attached is movable property, other than agricultural produce, in the possession of the judgment-debtor, the attachment shall be made by actual seizure and the attaching officer shall keep the property in his own custody or in the custody of one of his subordinates, and shall be responsible for the due custody thereof.

Position of law is settled that attachment by actual seizure involves a change of possession from the judgment-debtor to the court; and the rule deals only with the liability of the attaching officer to the court. Whether amin keeps the movables in his custody or entrusts them to a sapurdar, the possession of the amin or the sapurdar is in law the possession of the court and, so long as the attachment is not raised, the possession of the court continues to subsist. The legal position is not altered if for convenience or out of necessity the sapurdar keeps the movable property with a responsible third party who would be a bailee of the sapurdar in the eye of law (See AIR 1961 SC 803, para 7 (Teeka v. State of U. P.)).

Thus in this case the attached huller was during the relevant period in the possession of the Court though factually it was in the possession of the petitioner.

6. In AIR 1919 PC 55 (Raghubar Singh v. Jai Indra) the nature of the remedy available when the possession was with the court and the undertaking was not in favour of the Presiding officer or any other officer of the Court was indicated. In that case the instrument did not purport to bind the sureties to any individual officer. It was suggested in course of argument that the person keeping the movable in possession was bound to the court. The judicial committee of the Privy Council rejected this contention with the following observation :—

"But the Court is not juridical person. It cannot be sued. It cannot take property, and as it cannot take property it cannot assign it. It remains, therefore, that there is an unquestioned liability and there must be some mode of enforcing it and that the only mode of enforcing it must be by the court making an order in the suit upon an application to which the sureties are parties, that the property charged be sold unless before a day named the sureties find the money."

Such an order could be passed obviously in exercise of the inherent power of the court as the court cannot sue or make an assignment in favour of Opposite Parties 1 and 2 to bring a suit.

This view was reaffirmed in AIR 1949 P. C. 189 (Rohani Ramandhwaj v. Har Prasad Singh). Their Lordships observed thus:—

"Upon examination of the matter it appears to their Lordships that the courts in India were right in holding that the case is not within Section 145 if only because the section applies only to the personal liability of the surety. But the appellant's claim is nevertheless one which cannot be made by a suit but can only be made by application to the trial Court under Section 144 of the Code, and under its inherent powers to enforce the security."

The underlined sentence brings into bold relief two important features— (1) The application could be made only under Sec. 144 or 151 C. P. C., and; (2) This would not be by a separate suit.

7. The Privy Council view has been consistently followed in several decisions of different High Courts (See AIR 1926 Mad 1005, Sankunni v. Vasudevan, AIR 1962 Assam 23, Bachhraj Dugar v. Lalchand Todi, AIR 1964 Andh Pra 339, Subba Rao v. Venkataraju, and AIR 1966 Andh Pra 151, Y. Bapanna v. D. China).

A single Judge decision in A. I. R. 1935 All 768 (Nanhoom v. Gendiva) is contrary to law inasmuch as it did not keep in view the principles laid down by the Privy Council and the Supreme Court. AIR 1949 All 306 (Mathura Das v. Hari Shanker) did not examine the question of granting relief under Section 151 C. P. C. Under the facts of that case Section 145 C. P. C. had application. Their Lordships observed that the liability could be enforced by an application under Section 145 of the Code or by a regular suit, and that if the judgment-debtor chose the former remedy, there is no legal bar to his doing so. As this was not a case under Section 151 C. P. C. it is not necessary in this case to examine whether a separate suit would lie in respect of relief directly covered by Section 145 C. P. C.

8. On the aforesaid discussion, I am clearly of opinion that the petition of opposite parties 1 and 2 to determine compensation is maintainable under Section 151 C. P. C. and no separate suit would lie. The observations in AIR 1926 Mad 1005 to the effect,

"It has always seemed to me anomalous when the court has granted indulgence to the judgment-debtor upon terms, that court should not be able to enforce those terms without recourse to a separate suit" are very apt.

9. The civil revision has no merit and is accordingly dismissed. But in the circumstances there would be no order as to costs.

Revision dismissed.

AIR 1976 ORISSA 11

G. K. MISRA C. J. AND N. K. DAS, J.

Teja Singh, Petitioner v. Additional District Magistrate (Executive), Sundargarh and others, Opposite Parties.

O. J. C. No. 791 of 1973, D/- 14-2-1975.*

(A) Constitution of India, Articles 226 and 227 — Finding of appellate authority becoming concluded and final — Finding based on no evidence — High Court cannot interfere with order of appellate authority under Articles 226 and 227.

Where the finding of appellate authority, that certain portion of the disputed land is in possession of the petitioner which he purchased from the Scheduled Tribes member subsequent to coming into force of the Regulation, has become concluded and final, held that the High Court even if it examined the material on record and came to the conclusion that finding was based on no evidence, still it could not interfere with order of appellate authority in exercise of powers under Articles 226 and 227 as reversal of order of appellate authority in favour of petitioner would result in two inconsistent orders being passed in one and same proceeding.

(Para 3)

(B) Constitution of India, Articles 226 and 227 — Outsider filing appeal — Petitioner's failure to raise objection that persons filing appeal were not parties to suit before appellate authority — Such an objection cannot be entertained in writ petition.

It is well settled that a person who is not a party to suit may prefer an appeal with the leave of the appellate Court as such leave should be granted if he would be prejudicially affected by Judgment. AIR 1971 SC 374 Followed.

(Para 4)

Where the petitioner did not raise objection before the appellate authority that the persons who filed the appeal were not parties to original suit, held in absence of such objection before appellate authority on the score, such an objection could not be entertained in writ petition under Articles 226 and 227.

(Para 4)

Cases Referred: Chronological Paras
AIR 1971 SC 374 = (1971) 3 SCR 247 4

P. V. Ramdas, for Petitioner; Mr. B. K. Mohanty, for Opposite Parties.

G. K. MISRA, C. J.:— At the instance of the Assistant Settlement Officer, Tribal and Rural Welfare Department, a proceeding under Rule 3 of the Orissa Schedule Areas Transfer of Immovable Property (by Scheduled Tribes) Regulation, 1956 (Orissa Regulation No. 2 of 1956) (hereinafter to be referred to as the Regulation) was initiated. The Assis-

*(To quash order of D. C. Gupta, A. D. M. (Executive) Sundargarh, in Revenue Appeal No. 10/69 of 1971, D/- 27-8-1973).

DS/ES/B363/75/RSS

ant Settlement Officer (opposite party No. 3) in his report dated 12-4-1966 found that 0.18 acre of land belonged to Chamara Oram in holding No. 17 Plot No. 935 in village Durgapur in the district of Sundargarh. This land was given to Teja Singh on lease. A notice was issued to the parties interested in the land. In response to the notice Temba Oram, Etua Oram, Buda Oram, Chot Lundia Oram and Goinda Oram appeared. Chamara Oram had two sons—Goinda and Biru. Temba Oram is one of his brothers. Buda Oram and Chot Lundia Oram are his distant cousins. On receipt of notice, Teja Singh (Petitioner) took the plea that he had taken it by lease from one Rur Singh sometime in 1960-61. The Adibasis took the stand that they had let out the land to Rur Singh on rent and had effected no sale. The S. D. O., Panposh, held that 0.10 acre of the suit land had been transferred by Chamara Oram to Rur Singh much before the Regulation came into force. Regarding the balance of 0.08 acre, he held that no transfer had been established and it cannot be brought within the purview of the Regulation and the aggrieved party may agitate the matter in a competent court of law. Temba Oram, Etua Oram, Buda Oram, Chot Lundia Oram and Goinda Oram filed an appeal before the Collector of Sundargarh against the order of the S. D. O. making the State of Orissa, Teja Singh and Rur Singh as parties. The appellate authority held that the disputed lands had been transferred by sale by the scheduled-tribe members in favour of Rur Singh after the Regulation came into force and accordingly such transfers were null and void. He found that 0.14 acre of the disputed land was in possession of Rur Singh and 0.04 acre was in possession of Teja Singh. Rur Singh did not appear at the appellate stage nor has he filed any writ application challenging the finding of the appellate authority. Teja Singh has filed this writ application challenging the legality and propriety of the finding of the appellate authority regarding 0.04 acre.

2. Mr. P. V. Ramdas raised two contentions:—

(i) The Adibasis were not parties to the original proceeding and consequently an appeal at their instance before the Collector of Sundargarh was not maintainable. The Collector exercised his jurisdiction illegally in dealing with the appeal.

(ii) There are no materials on record to show that the Adibasis at all transferred the disputed 0.04 acre which has been found to be in possession of Teja Singh by the appellate authority.

Mr. Mohanty, on the other hand contends that even though the Adibasis were not parties to the original proceeding they appeared therein in response to the notice and gave evidence. Their interest was directly and adversely affected by the disputed lands having been occupied by Teja Singh and Rur Singh and as such an appeal at their instance

was maintainable. He further contended that though five of the scheduled tribe members were the appellants, in the writ application only Temba Oram was made party and the other four appellants had not been impleaded as parties. The appellate order has become final and conclusive in favour of the other four members, namely, Etua Oram, Buda Oram, Chot Lundia Oram and Goinda Oram, and if this court interferes in exercise of the jurisdiction under Articles 226 and 227 of the Constitution, then there will be two inconsistent orders in one and the same proceeding and as such this court would refuse to exercise the jurisdiction.

3. The finding of the appellate authority is that 0.04 acre out of the disputed land is in possession of Teja Singh which he purchased from Rur Singh who purchased the same from the scheduled tribe members subsequent to the coming into force of the Regulation. This finding has become concluded and final in favour of Etua, Buda, Chot Lundia and Goinda. Even if we examine the materials on the record and come to the conclusion that the finding is based on no evidence, still we cannot interfere in exercise of the jurisdiction under Articles 226 and 227 of the Constitution as a reversal of the order of the appellate authority in favour of Teja Singh would result in two inconsistent orders being passed in one and the same proceeding. The writ application is liable to be dismissed on this simple ground. It is, therefore, not necessary to examine the merit of the contention urged by Mr. Ramdas that the factual finding of the appellate authority is based on no evidence.

4. The contention that the appeal filed at the instance of the scheduled tribe members before the Collector, Sundargarh was not maintainable as they were not parties to the original proceeding is not a correct proposition of law. It is not necessary to cite several decisions. The matter is concluded by AIR 1971 SC 374 (Jatan Kanwar v. Golcha Properties). Their Lordships held that it is well settled that a person who is not a party to the suit may prefer an appeal with the leave of the appellate court and such leave should be granted if he would be prejudicially affected by the judgment. There can be no controversy that the scheduled tribe members would have been prejudicially affected by the order of the original authority if they would not have been permitted to file the appeal. It is, however, to be noted that they filed no application to obtain the leave of the court and the order sheet does not indicate that leave of the Court was expressly granted for filing the appeal. There again the difficulty of the petitioner is that he did not raise such an objection before the appellate authority. If an objection would have been raised, the scheduled tribe members could have filed an application for leave subsequent to the filing of the appeal and in the facts and circumstances of this case leave would have been granted

and that would have regularised the matter. In the absence of any objection before the appellate authority on this score such an objection cannot be entertained in the writ application.

5. The result of the aforesaid discussion is that we cannot exercise our jurisdiction under Articles 226 and 227 of the Constitution as the writ application is not properly constituted. The application fails and is dismissed, but in the circumstances parties would bear their own costs throughout.

N. K. DAS, J.:— I agree.

Petition dismissed.

AIR 1976 ORISSA 12

S. ACHARYA, J.

Sarat Chandra Patro, Appellant v. Narasingha Patro and others, Respondents.

Misc. Appeal No. 66 of 1972, D/- 18-4-1975*.

(A) Civil P. C. (1908), Section 49 and Section 148 — Suit for possession of house — Plaintiff decree-holder to recover possession on paying compensation to defendant — Compensation amount deposited in execution of decree — On appeal compensation amount increased — Decree-holder directed to deposit balance within two months — Default by decree-holder — Dismissal of Execution proceeding held was not justified — Time could be extended under Section 148. AIR 1952 Pepsu 88 and AIR 1940 Pat 50 and AIR 1960 SC 388 and AIR 1972 SC 1371 Rel. on. (Paras 1, 2, 3, 4, 6)

Cases	Referred	Chronological	Paras
AIR 1972 SC 1371	=	1972 SCD 361	4
AIR 1960 SC 388			4
AIR 1952 Pepsu 88	=	ILR (1952) Patiala 592	4
AIR 1944 PC 46	=	71 Ind App 65	4
AIR 1940 Pat 50	=	21 Pat LT 849	4

N. V. Ramdas and N. B. K. Murty, for Appellant; R. K. Patra, for Respondents.

JUDGMENT— This is an appeal by the plaintiff-decree holder in Title Suit No. 8 of 1960. In Second Appeal No. 315 of 1963 arising out of the said suit it was found that the suit house was the self-acquired property of late Linga Patra, the husband of plaintiff No. 1, but it had been built on a portion of the joint family property belonging to Linga and defendants 1 and 2. On that finding this court ordered that the decree-holder would recover possession of the suit house along with the suit site on which it was constructed on paying compensation to the defendants for having constructed the said house on a portion of the joint family property. The suit was remanded to the trial court to appoint a

* (From decision of A. K. Patra, Dist. J., Jey-pore, in C. M. A. No. 32 of 1971, D/- 15-4-1972).

commissioner to demarcate the site on which the house had been constructed and to assess the valuation of the said site. The trial court was directed that after the aforesaid demarcation and valuation of the suit site, it would give direction for the payment of compensation by the decree-holder to the defendants for constructing the house on the joint family property, and would pass necessary orders to give effect to the decision arrived at by the High Court in the said second appeal including the question of delivery of possession in favour of the plaintiff. The trial court assessed the valuation of the suit site at Rs. 2,200/- and directed the decree-holder by its decree to pay half of the said amount, i. e. Rs. 1,100/- to defendants 1 and 2 towards compensation and thereafter to recover exclusive possession of the suit house to himself. It also decreed that the decree-holder would remain in joint possession of the rest of the suit land along with defendants 1 and 2. Plaintiff No. 1 deposited Rs. 1100/- in court on the aforesaid account. Defendants 1 and 2 preferred Title Appeal No. 24/66 against the aforesaid decision of the trial court. That appeal was allowed on 11-5-1968, the valuation of the suit site was increased to Rs. 3300/- and it was held that the decree holder was liable to pay half of the same, i. e. Rs. 1650/-, to defendants 1 and 2 towards compensation within two months thereof. The operative portion of the judgment reads as follows:—

“The respondent shall be liable to pay Rs. 1650/- as compensation to the appellants. On payment of such compensation within two months hence the respondent shall be entitled to recover exclusive possession of the double storied house and the site over which the said building stands.”

2. Admittedly, the decree-holder has started the Execution Proceeding No. 35/66 and in that proceeding the decree-holder had deposited Rs. 1100/- on 30-9-1966. After the decision in Title Appeal No. 24/66, the decree-holder could not deposit the balance compensation amount of Rs. 550/- within the period of two months as mentioned in the operative portion of the order of the appellate court. Thereafter the defendants filed M. J. C. No. 6/71 and contended that the above-mentioned execution proceeding was not maintainable as the entire amount of Rs. 1650/- had not been paid within two months as directed by the District Judge in T. A. No. 24/66. The Subordinate Judge in seisin of the execution proceeding dismissed the said M. J. C. holding that the time stipulated in the appellate court's order was meant only to facilitate payment by the decree-holder of the aforesaid compensation amount and not for any other purpose. The subordinate Judge further held that non-payment of the compensation amount or a part thereof within the time prescribed in the appellate court's order did not render the decree ineffective or not executable for all times to come.

3. The defendants filed Miscellaneous Appeal No. 32/72 in the court of the District Judge against the aforesaid decision of the Subordinate Judge in M. J. C. No. 6/71 and the District Judge allowed the said appeal by holding that the executing court could not ignore the prescribed time fixed for the payment of the compensation amount and it could not go behind the terms of the decree and could not make a new decree under the guise of interpreting the court's decree. As the balance compensation amount of Rs. 550/- had not been paid by the decree-holder within the stipulated time, the District Judge dismissed the execution proceeding holding that the decree-holder was not entitled to recover possession of the suit house and the site due to the non-payment of the aforesaid balance compensation amount in time. This appeal has been preferred against the said decision of the learned District Judge.

4. Mr. Ramdas, the learned counsel for the appellant, contends that the above-mentioned decision of the District Judge and the reasoning on which the same is based are entirely illegal and incorrect and are liable to be set aside. Mr. Ramdas submits that admittedly the decree-holder had deposited Rs. 1100/- in the execution case in accordance with the decision and direction dated 27-4-1966 of the trial court, and that the time specified in the decision dated 11-5-1968 of the appellate court in T. A. No. 24/66 could not be adhered to due to the death of the original decree-holder and various other difficulties in the family. Apart from stating so, he urges that merely for the non-payment of the balance compensation amount of Rupees 550/-, the execution case for the delivery of possession of a double storeyed house as decreed in favour of the plaintiff should not and could not have been dismissed. He submits that the time mentioned in the operative portion of the judgment in Title Appeal No. 24/66 is merely to facilitate early payment of the amount to defendants 1 and 2, and that period of time is not the essence of the decree and is not such an integral part of the same as would entail dismissal of the execution case debarring the decree-holder to take possession of the double storeyed house only for the non-payment of Rs. 550/-. Mr. Ramdas further contends that as the order directing payment of the aforesaid compensation amount is silent regarding the effect of the non-compliance of the same, the said direction is not the essence of the matter and hence the court below on a consideration of the facts and circumstances of the case and the dire consequences involved in dismissing the execution case should not have construed the order in the manner done by him. In support of his above contentions Mr. Ramdas has cited the decision in *Nanha v. Baroo*, (AIR 1952 Pepsu 88) wherein, on a similar question it has been held as follows:—

“.....though the Judicial committee gave the appellants six months to deposit the

amount and ordered that they can get the possession of the land only if the deposit is made, the judgment is silent as regards the effect of the appellants' failure to deposit the amount. This makes me think that time fixed for the deposit was not the essence of the matter, and even though the deposit was not made within time the appellants' right to obtain possession was not altogether lost. Different, however, would have been the condition if it had been laid down by the Judicial Committee that if deposit was not made within time the appellants' suit for possession or the land shall stand dismissed or that they would be debarred from taking the possession.

It was urged by the respondents' counsel that when time is once fixed for performance of a certain act in a decree it cannot be extended under Section 148. This is no doubt the general rule, but there are exceptions to it. In this connection I cannot do better than to refer to a Bench decision of the Patna High Court, *Surajmal v. Bhubaneswar Prasad*, AIR 1940 Pat 50. It was held that "though general rule is that where a party is required to do something under a decree the time-limit is prescribed for doing it, the court which passed the decree has no jurisdiction to extend the time limit but it is subject to the qualification that where the decree or order which fixes the time is not intended to be final and the court still retains control over the proceedings the court may extend time under Section 148. It was further held that whether the court still retains control over the proceedings or not must be determined upon the nature of the proceedings and the order passed therein. In the present case, absence of any order on the part of the Judicial Committee that if the appellants do not deposit the amount within time they would lose right to obtain the possession of the land makes me think that its intention was that their direction in so far as it related to the time fixed for the deposit of the amount was not final and it was intended that the court should still retain control over the proceedings."

The above observations aptly apply to the present case. In the operative portion of the order in T. A. No. 24/66 quoted above, fixing the time-limit to pay the aforesaid balance compensation amount, there is no order to the effect that if the said amount is not deposited within the said time the decree holder will lose his right to obtain possession of the double storeyed house and the portion of the land on which it stands. The absence of an order to that effect indicates that the court wanted that the said amount should be paid within that time so that the matter pending in court for a long time can be finally disposed of without unnecessary delay. In the context and perspective of the facts and circumstances of this case the specification of time in the said order does not appear to be the essence of the said order. The Court below has proceeded on the basis that the

executing court cannot accept payment of the said amount after the aforesaid time prescribed in the decree, as the executing court cannot under any circumstance or event ignore the time prescribed in the decree for the payment of the same. It also observes that it is the duty of the executing court to give effect to the terms of the decree and it has no power in any event to go beyond its terms. That no doubt is the general rule, but there are exceptions to the same. In this connection the observations in *Surajmal Marwari's case* (AIR 1940 Pat 50) referred to in the decision in *Nanha's case* (AIR 1952 Pepsu 88) quoted above may be seen. The executing court is not merely to execute the decree as an automaton and/or in a mechanical manner and in certain cases it is the duty of the executing court to properly construe the decree in order to find out the true import and effect of the same, so that it can proceed to execute the decree in its true and correct perspective giving full effect to the same. In *Toponmal Chhotamal's case* (AIR 1960 SC 388) it has been held:

"For the purpose of interpreting a decree when its terms are ambiguous, the court would certainly be entitled to look into the pleadings and the judgment. See *Manakchand v. Manoharlal*, 71 Ind App 65 = (AIR 1944 PC 46)."

In *Bhavan Vaja's case* (AIR 1972 SC 1371) their Lordships of the Supreme Court have observed :—

"19. It is true that an executing court cannot go behind the decree under execution. But that does not mean that it has no duty to find out the true effect of that decree. For construing a decree it can and in appropriate cases, it ought to take into consideration the pleadings as well as the proceeding leading upto the decree. In order to find out the meaning of the words employed in a decree the court, often has to ascertain the circumstances under which those words came to be used. That is the plain duty of the execution court and if that court fails to discharge that duty it has plainly failed to exercise the jurisdiction vested in it. Evidently the execution court in this case thought that its jurisdiction began and ended with merely looking at the decree as it was finally drafted. Despite the fact that the pleadings as well as the earlier judgments rendered by the Board as well as by the appellate court had been placed before it, the execution court does not appear to have considered those documents."

5. In the present case, after a chequered career the plaintiff's suit for a declaration of title and delivery of possession of a double-storeyed house and the site on which it stood was decreed. As per the compensation assessed earlier by the trial court, the decree-holder deposited Rs. 1100/- to be paid to defendants 1 and 2 as compensation for their share. Subsequently, on appeal against the said order, the appellate court directed payment of Rs. 550/- more as compensation

amount on the aforesaid account. This amount of only Rs. 550/- could not be paid by the decree-holder, within the prescribed time granted by the appellate court. As stated above, the appellate court while specifying the time to deposit the said balance amount did not pass any peremptory order regarding the effect of the appellant's failure to deposit the amount within that time. Dismissal of the execution proceeding only for the non-payment of a small amount of Rs. 550/- would be of dire consequences to the decree-holder for thereby he would for all times to come lose his right and title to the double-storeyed building for which the plaintiffs had to fight out this long-drawn litigation for quite a number of years.

6. Considering all the facts and circumstances of the case and on a proper construction of the above-quoted operative portion of the order passed in Title Appeal No. 24/66, I am firmly of the opinion that the time limit specified therein is not the essence of the matter decided by the court nor of the decree passed therein, and it can be extended in order to give due and full effect to the decree passed in this suit. Therefore, the court below, in the facts and circumstances of this case, was not at all justified in dismissing the execution proceeding merely for the non-payment of the aforesaid balance compensation amount within the said period of two months, only on the ground that it could not go behind the written terms of the decree.

7. On the above considerations, the impugned order is set aside and the Miscellaneous appeal is allowed with costs. The executing court after receipt of the lower court records should direct the decree-holder by notice to pay the aforesaid balance compensation amount within a reasonable time, and thereafter proceed to dispose of the execution proceeding in accordance with law. In case the decree-holder does not deposit the said balance amount within the time fixed by the executing court that court will be free to pass any lawful order as it deems fit and proper on that matter.

The L. C. R. be sent back immediately.

Appeal allowed.

AIR 1976 ORISSA 15

G. K. MISRA, C. J. AND N. K. DAS, J.
M/s. Utkal Automobiles (P) Ltd., Appellant v. Biraja Prasad Roy, Respondent.

A. H. O. 26 of 1973, D/- 28-2-1975.*

(A) Contract Act (1872), Ss. 10 and 73 — Contract for supply of trucks on priority basis — No supply of truck by manufacturer

*(From decision of B. K. Ray, J. in F. A. No. 96 of 1966, D/- 19-10-1973).

FS/GS/C307/75/CWM

to defendant-dealer during relevant period — Held no breach of contract on part of defendant — Non-production of stock register — Adverse inference, held, could not be drawn against defendant in the circumstances. F. A. No. 96 of 1966, D/- 19-10-1973 (Orissa), Reversed. (Evidence Act (1872), S. 114).

The plaintiff placed orders for 2 trucks with defendant, and took steps for delivery on special priority basis. The first truck was supplied on priority basis to plaintiff. As the second truck had not been supplied the plaintiff filed the suit for recovery of damages for non-supply of the truck in time. (Para 6)

Held that as no truck was supplied by the manufacturer to the defendant during the relevant period there was no breach of contract on the part of the defendant. The plaintiff was not entitled to the relief claimed. F. A. No. 96 of 1966, D/- 19-10-1973 (Orissa), Reversed. Case law discussed.

(Para 12)

The best document for the supply of truck was available with manufacturer. Plaintiff did not take any step for production of the document by the manufacturer to show that in fact truck was supplied to the defendant in the relevant period. No adverse inference could be drawn against the defendant for non-production of the stock register inasmuch as the same was not called for by the plaintiff. (Paras 10 & 15)

As the plaintiff did not call for the best evidence adverse inference should be drawn against him. (Paras 10 & 16)

Even assuming that adverse inference could be drawn against the defendant for non-production of the stock register though not called for, the adverse inference to be drawn against the plaintiff for not calling for the relevant document from the manufacturer would counterbalance the adverse inference to be drawn against the defendant for non-production of its stock register.

(Para 17)

Cases Referred:	Chronological	Paras
(1969) 73 Cal WN 279		9
AIR 1967 SC 1134 = (1967) 1 SCR 153		9
AIR 1958 Madh Pra 129 = 1958 Jab LJ		9
106		

L. K. Dasgupta and S. K. Dey, for Appellant; S. C. Mohapatra for R. Mohanty, for Respondent.

DAS, J.:— Plaintiff filed the suit for recovery of damages of Rs. 9,300/- from the defendant at the rate of Rs. 300/- per month from 24-12-1961 to 20-7-1964 for non-supply of a truck in time. Plaintiff's case may be stated in brief. He is 'A' Class contractor executing works under the State Government and was in urgent need of 2 trucks for his business. Defendant is the dealer of Tata Mercedes Benz trucks (hereinafter called the TMB trucks). Plaintiff placed orders with defendant for supply of 2 TMB trucks of 1.312/42-165 wheel base model

and payment was to be made on delivery of the truck. Defendant acknowledged receipt of plaintiff's application and registered his name allotting him serial number C-195 and C-196. Plaintiff also deposited Rs. 2,000/- for each truck in the State Bank of India as guarantee. Plaintiff moved the State Government through Chief Engineer for delivery of the trucks to him on priority basis. Government sanctioned delivery on priority basis and the manufacturer Tata Engineering and Locomotive Company (hereinafter described as TELCO) was informed accordingly. TELCO also intimated that plaintiff would be supplied with 2 TMB trucks on special priority. Defendant supplied one truck to plaintiff, but subsequently did not supply the other truck in spite of several correspondence. Thereafter defendant asked plaintiff if he was willing to accept the alternative model. Plaintiff agreed to it and asked if that could be supplied within 30 days from the date of receipt of plaintiff's letter, but defendant remained silent. No truck was supplied to plaintiff even though notice was sent through his Advocate. Plaintiff claimed damages as defendant knowingly and deliberately defaulted in complying his part of the contract.

2. Defendant's case is as follows:— There was no completed contract between the parties for supply of trucks. One truck was supplied on priority basis, but no second vehicle was received by defendant from the manufacturer. Thereafter National emergency was declared and under the Commercial Vehicles (Distribution and Sale) Control Order, 1963 distribution of Vehicles was banned. According to this order plaintiff was not entitled to any preference and as the serial number of plaintiff was changed, no Vehicle was supplied of any model within the period. The bank guarantee of plaintiff expired on 20-7-1964. (The date on which the suit was instituted) and the plaintiff did not renew the guarantee and hence the defendant is not responsible for any breach of contract nor is liable to pay any damages.

3. The trial court held that there was no contract for sale of 2 TMB trucks to plaintiff and dismissed the suit. Plaintiff appealed against this decision. The learned Single Judge held that the defendant is bound by the contract to supply of 2 TMB trucks to the plaintiff. Defendant was in possession of the second truck for supply to the plaintiff and did not supply the same. As against this decision defendant has come up in appeal.

4. The quantum of damages is not disputed.

5. The appellant contends that there was no contract between the parties to sell 2 TMB trucks on priority basis and defendant was not in possession of the second truck which it had to supply inasmuch as no supply has been made by the manufacturer.

6. There is no dispute between the parties that the plaintiff placed orders for 2 TMB trucks with defendant, plaintiff also deposited Bank guarantee for the same, he applied to the Government through the Chief Engineer for delivery on special priority basis, Government informed the manufacturer (TELCO), the manufacturer informed the parties that supply would be made to the plaintiff on priority basis, the first truck was supplied on priority basis to plaintiff on 24-12-1962 and the second truck has not been supplied. It is contended by the defendant that there was no contract for supply of trucks on priority basis, inasmuch as plaintiff moved the Government and Government informed the manufacturer (TELCO) who informed the defendant to supply 2 trucks to plaintiff on priority basis and so there was no direct contract between plaintiff and defendant on this term. This contention has no force. There is no dispute that defendant agreed to supply 2 trucks to the plaintiff on application by the latter and defendant was bound to supply the trucks according to directions of the manufacturer and the manufacturer directed defendant to supply 2 trucks on priority basis and defendant in his turn also intimated plaintiff accordingly. Defendant also supplied the first truck to the plaintiff on priority basis. Subsequently, also defendant has never repudiated this arrangement, on the other hand, letters issued by the defendant clearly establish that defendant had undertaken to supply truck to the plaintiff on priority basis. It is also not disputed that when trucks of the particular make for which plaintiff had placed orders were not available, the defendant asked plaintiff if he was willing to take an alternate model. Defendant also wrote to the manufacturer that it was not in a position to supply the second truck on priority basis to the plaintiff as the truck had not been supplied by the manufacturer. We agree with the finding of the learned Single Judge that there was a contract between the plaintiff and defendant for supply of two TMB trucks on priority basis.

7. The next question that arises for consideration is if defendant had received any truck from TELCO for supply of the second truck and did not supply the same to the plaintiff. The learned Single Judge has held that from Ex-79 it would appear that defendant was already in possession of a truck and accordingly intimated the plaintiff, and defendant did not produce papers of his head office which was within its special knowledge to show that no truck was received during that period and as such adverse inference is to be drawn against defendant.

8. Defence contention is that Ex-79 does not show that defendant was already in possession of the second truck. It on the other hand shows that defendant was expecting the consignment.

THE
All India Reporter
1976

Patna High Court

AIR 1976 PATNA 1

**B. D. SINGH AND BIRENDRA PD.
SINHA, JJ.**

Shri Mahabir Rice and Flour Mills,
Petitioner v. The State of Bihar and an-
other, Respondents.

Civil Writ Jurisdiction Case No. 525
of 1975, D/- 6-5-1975.

(A) Bihar Rice and Paddy Procure-
ment Order 1974, Clause 14 (1) — Peti-
tioner Mill carrying on Rice milling op-
erations, not on its own behalf but only
on behalf of customers — Order for levy
under Clause 14 (1) from the petitioner is
unsustainable. (Para 3)

Cases Referred: Chronological Paras
C. W. J. C. No. 624 of 1975, L/- 25-2-
1975 (Pat) 3
C. W. J. C. No. 615 of 1968, D/- 17-12-
1968 (Pat) 3

G. C. Bharuka and Vijay Pratap
Singh, for Petitioner; Tara Kant Jha,
Standing Counsel 1, with P. N. Jha, for
Respondents.

ORDER:— This application by
Messrs. Shri Mahabir Rice and Flour
Mills — a partnership firm, under Arti-
cles 226 and 227 of the Constitution of
India, is directed against the notice, dated
the 29th of November, 1974 (Annexure 1)
issued by the Subdivisional Officer, Jam-
tara (respondent No. 2), demanding one
thousand quintals of rice as levy from it
for the procurement year 1974-75, under
Clause 14 (1) of the Bihar Rice and Paddy
Procurement Order, 1974 (hereinafter re-
ferred to as the Procurement Order).

2. In order to appreciate the point
involved in this application, it will be
necessary to state, briefly, the facts as
stated by the petitioner in the application.
The petitioner is a firm carrying on manu-
facturing business of rice during the kharif

year 1974-75 only on customers' ac-
count. It was further stated in paragraph
one of the application that the petitioner
had not at any point of time any quantity
of rice or paddy on its own account during
the said Kharif year; since the petitioner's
licence was cancelled by order dated the
18th January, 1975, it had stopped its
milling operations even on customers' ac-
count which it was carrying on. In spite
of the facts stated above, the petitioner
mentioned in paragraph three of its appli-
cation that the firm was served with the
impugned notice. After the receipt of the
impugned notice, the petitioner filed an
application before the Subdivisional Offi-
cer (respondent No. 2) stating, inter alia,
that it was not liable to deliver one thou-
sand quintals of rice as levy since it had
no boiling or drying facilities and had no
such opportunity in the mill and, further
stating therein, that it did not produce
rice on its own account but it produced
rice on customers' account. A copy of
the said application is marked as Annex-
ure 2.

3-A. A counter-affidavit has been
filed on behalf of the respondents, viz., the
State of Bihar through its Secretary in
the Department of Supply and Commerce
(respondent No. 1) and the Subdivisional
Officer, Jamtara (respondent No. 2). The
relevant portion of the counter-affidavit
is to be found in paragraphs 5 and 6
which reads thus:

"(5) That with regard to the state-
ments made in paragraph 4 of the writ
petition, it is stated that it is not a fact
that the petitioner has no drying and
boiling facilities in his mill. The peti-
tioner's mill dehushes paddy of its partner
firm i.e., M/s. Ram Chandra Gopiram and
for all the practical purposes both are
joint.

(6) That with regard to the state-
ment made in paragraph 9, it is stated

that the petitioner's contention is irrelevant as he has a single huller rice mill, having drying and boiling facilities."

3. Learned Counsel appearing on behalf of the petitioner has assailed the impugned notice, chiefly, on the ground that clause 14 (1) of the Procurement Order did not apply to the case of the petitioner who was not carrying on milling operations on its own behalf, but it was carrying on milling operations only on behalf of the customers. Learned Counsel pointed out (referring to the above paragraphs of the counter-affidavit) that it has not been stated on behalf of the respondents that the petitioner was carrying on milling operations on its own behalf. Therefore, according to him, the facts stated in this regard have not been controverted in the counter-affidavit. In order to find support to his contention that clause 14 (1) of the Procurement Order is not applicable in the case of the petitioner, he has relied upon an unreported judgment of this Court in C. W. J. C. No. 624 of 1975, decided on 25-2-1975 (Pat). In our opinion, the contention of learned Counsel for the petitioner is well founded. In the aforesaid case, S. N. P. Singh, C. J. and S. K. Jha, J., while dealing with the provision contained in Clause 14 (1) of the Procurement Order, 1974, considered the judgment in C. W. J. C. No. 615 of 1968 (Pat) and analogous cases, dated 17-12-1968, and observed:

"In view of the decision in that case the petitioner will not be liable to pay levy if it is dehusking paddy only on the customer's account and not on its own or if it is not holding any stock on its own account"

In the instant case also nothing on the record has been brought to show that the petitioner was dehusking paddy on its own account. In that view of the matter, the impugned notice (Annexure 1) has got to be quashed.

4. In the result, the application is allowed and the notice (Annexure 1), dated the 29th November, 1974, is quashed. It is, however, made clear that if the petitioner deal in rice or paddy in any manner on its own account, it would be open to the authorities concerned to take such legal steps against the petitioner as may be permissible in law. There will be no order for costs in this case.

Application allowed.

AIR 1976 PATNA 2

H. L. AGRAWAL, J.

Nagar Khan and others, Appellants v. Gopi Ram Agarwala, Respondent.

A. F. A. D. No. 74 of 1968, D/- 25-4-1975.*

(A) Civil P. C. (1908), Order 7, Rule 3 — Suit regarding immovable property — Particulars to identify property in dispute — Duty of Court.

It is the duty of the Court to pass only such decrees which can be executed under the machinery provided by Order 21 with all precision and without any confusion or embarrassment either to the executing Court or to any other person. However, on this ground a suit cannot be dismissed, nor a plaint rejected, and in such cases the Court may call upon the plaintiffs to furnish more particulars, even to the extent of allowing the amendment of the plaint. (Para 5)

(B) Transfer of Property Act (1882), Sections 53-A and 54 — Contract to transfer under Section 53-A — Consideration need not pass in praesenti.

Under the contract to transfer under Section 53-A it is not necessary that the consideration mentioned for the transfer of the property must pass in praesenti. All that is necessary is that the contract must be a lawful and enforceable contract. (Para 7)

It is open to the parties to settle the terms with respect to the payment of the consideration which can be agreed by parties to be paid either at the time of (i) the agreement itself, (ii) execution of the sale deed, (iii) registration of the sale deed, (iv) exchange of equivalent or by several other modes or at any future time subsequent to the execution and the registration of the document itself. If the title has been intended to pass on the execution of the sale deed, the only remedy in case of non-payment of the consideration available to a vendor is to bring a suit for recovery of the consideration. It is, therefore, not possible to read the expression "contracts to transfer for consideration" occurring in Section 53-A in violation of the provision contained in Section 54. AIR 1956 Pat 308 and AIR 1970 SC 546, Rel. on. (Para 7)

(C) Transfer of Property Act (1882), Section 53-A — Delivery of possession — Need not necessarily be at the instance of vendor.

It is not correct to say that the delivery of possession contemplated under Section 53-A must be at the instance of the vendor in part performance of the

*(From order of Harihar Charan Choudhary, Sub. J., Hazaribagh, D/- 5-1-1968).

contract in furtherance of his intention to complete the contract. (Para 9)

The legislature has used the expression with regard to possession in Section 53-A of the Act as "and the transferee has, in part performance of the contract, taken possession of the property or any part thereof". The act of giving possession has not been left at the mercy and option of the transferor, but of taking possession by the transferee himself, as in a given case, the dishonest intention may set in on the part of the transferor even before the stage for delivery of possession arrives. AIR 1970 SC 546, Rel. on.

(Para 9)

Cases Referred: Chronological Paras

AIR 1970 SC 546 = (1970) 2 SCR 854

8, 9

AIR 1956 Pat 308 = 1956 BLJR 249

7

R. S. Chatterji and Amla Kant Choudhary, for Appellants; J. C. Sinha, Awlokiteswar Mishra and B. K. De. for Respondent.

JUDGMENT:— The plaintiffs appellants in this second appeal had instituted a suit for possession after declaration of their title with respect to a small strip of land measuring 1 1/2 decimals only appertaining to Plot No. 420, Khata No. 130 of village Ramgarh, described in Schedule A of the plaint.

2. The plaintiffs' case is that they purchased the suit land for a consideration of Rs. 4,000/- under two registered sale deeds dated the 18th July, 1960 (Exts. 1 and 1-a) from one Lakhan Sao in pursuance of an agreement dated the 11th November, 1959 and claim to have come in possession over the same. In each of the two sale deeds, although the boundary is the same, the area mentioned is 3/4 decimal. According to the finding recorded by the Courts below, on the basis of the materials on the record, particularly a pleader commissioner's report, the area of the land within the boundaries, as mentioned in Schedule A of the plaint as well as in the sale deeds, is approximately 6 decimals. The land has been shown to be bounded on the north by Gola Road, on the south by the land of the plaintiffs, on the east by the house of the defendant, Gopi Ram Agarwala, and on the west by a lane and thereafter the land of the plaintiffs. In this way, although the northern and the southern boundaries are fixed, the disputed land has yet to be fixed east to west at any place within the boundaries of the area of 6 decimals mentioned above. I have mentioned these facts in some detail as the plaintiffs' suit has been dismissed on the ground of vagueness in the description of the land in suit also.

3. A proceeding under Section 144 of the Code of Criminal Procedure was started between the plaintiffs, on the one

hand, and the defendant, on the other, which, according to the plaintiffs' case, was although decided in their favour, the defendant later on took forcible possession of the suit land and demolished the hut which was standing on a part of the land. The claim of the plaintiffs is being resisted by the defendant on the ground that the owners of the plot in question had entered into a written agreement with him on the 2nd April, 1960 (Ext. E) to sell 4 1/2 decimals of land, out of the aforesaid plot, and in pursuance of the agreement, he purchased three decimals of land under two sale deeds executed by two of the owners, namely, Malo Sao and Pemlal Sao, on 23-4-1960 and 14-6-1960 respectively which were duly registered. Another sale deed, which was executed by Lakhan Sao on 23-4-1960 (Ext. F/3), which was also presented for registration, could not be registered as Lakhan Sao did not turn up to admit execution and subsequently he purported to sell the land to the plaintiffs in the name of plaintiff No. 2 which was wholly illegal and the plaintiffs did not derive any title thereunder. According to the further case of the defendant, the area covered by the two sale deeds (Exts. 1 and 1/a) in favour of the plaintiffs is only 3/4 decimal. In the written statement itself, uncertainty and vagueness in the description of the suit land was pleaded by the defendant.

4. Both the Courts below have dismissed the suit on the finding that the defendant being a transferee from the vendor of the plaintiffs, having already taken possession of the disputed land in part performance of the contract, the plaintiffs claiming through the defendant's transferor, namely, Lakhan Sao were debarred from enforcing any right in respect of the property in pursuance of the provision contained in Section 53-A of the Transfer of Property Act and that the description of the suit land given in the plaint as well as in the sale deeds was quite vague and uncertain. The Court of appeal below has also recorded a clear finding that the agreement for sale deed 11-11-1959 (Ext. 3) set up by the plaintiffs to meet the sale deed of the defendant, being earlier in point of time to their sale deeds, was a forged and fabricated document and that the plaintiffs were never put in possession in pursuance of the same.

5. According to the provision of Order 7, Rule 3 of the Code of Civil Procedure, where the subject-matter of the suit is immovable property, the plaintiff has to describe the same with sufficient particulars to identify it with boundaries or particulars in the record of settlement or survey, so that the decree, if passed, will be capable of execution. Both the courts below have devoted considerable attention on this question and have re-

corded a clear finding, as already pointed out above, that the description of the property was insufficient and it was difficult to fix up the same with definiteness within the four boundaries mentioned above. Mr. R. S. Chatterji, who appeared for the appellants in this Court, when confronted with this situation could not satisfactorily meet the point. He, however, simply contended that if it could be held that the defendant was not entitled to resist the claim of the plaintiffs, it would be a matter between the plaintiffs, on the one hand, and their vendor, on the other, to fix up the area. There is hardly any substance in this contention as it is the duty of the Court to pass only such decree which can be executed under the machinery provided by Order 21 of the Code of Civil Procedure with all precision and without any confusion or embarrassment either to the executing Court or to any other person. However, on this ground a suit cannot be dismissed, nor a plaint rejected, and in such cases the Court may call upon the plaintiffs to furnish more particulars, even to the extent of allowing the amendment of the plaint.

6. The difficulty of the plaintiffs, however, is on the second question, namely, Section 53-A of the Transfer of Property Act. Mr. Chatterji in order to meet this point raised the following contentions: (i) the contract for sale relied upon by the defendant was not enforceable as the consideration was not paid in praesenti and, (ii) possession was not delivered to the defendant by his vendor, but he took forcible possession of the land and therefore the defendant was not entitled to the protection of this provision.

7. Let me consider the contentions in seriatim. The first contention of Mr. Chatterji that under the contract to transfer under Section 53-A of the Transfer of Property Act, the consideration mentioned for the transfer of the property must pass in praesenti as, according to him, it was a special provision; does not appear to have any substance. All that is necessary is that the contract must be a lawful and enforceable contract. In other words, it must be capable of being specifically performed, as has been held by a Bench decision of this Court in *Raju Roy v. Kashinath Roy*, AIR 1956 Pat 308. Section 54 of the Act defines 'sale' as a transfer of ownership in exchange for a price paid or promised or part-paid and part-promised. A 'contract for sale' has also been defined in the said section as follows:

"A contract for the sale of immovable property is a contract that a sale of such property shall take place on terms settled between the parties." According to these definitions, therefore,

it is manifest that it is open to the parties to settle the terms with respect to the payment of the consideration which can be agreed by parties to be paid either at the time of (i) the agreement itself, (ii) execution of the sale deed, (iii) registration of the sale deed, (iv) exchange of equivalent or by several other modes or at any future time subsequent to the execution and the registration of the document itself. If the title has been intended to pass on the execution of the sale deed, the only remedy in case of non-payment of the consideration available to a vendor is to bring a suit for recovery of the consideration. It is, therefore, not possible to read the expression "contracts to transfer for consideration" occurring in Section 53-A of the Act in violation of the provision contained in Section 54 just referred to. There is also enough indication in Section 53-A of the Act itself in the express provision a little later that "the transferee has performed or is willing to perform his part of the contract."

8. Mr. Chatterji failed to cite any authority in support of his proposition. The Supreme Court in the case of *Nathulal v. Phoolchand*, AIR 1970 SC 546 while laying down the conditions necessary for making out the defence of part performance to an action in ejectment by the owner, has indicated the following four conditions; (1) that the transferor has contracted to transfer for consideration any immovable property by writing signed by him or on his behalf from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty; (2) that the transferee has, in part performance of the contract, taken possession of the property or any part thereof, or the transferee, being already in possession continues in possession in part performance of the contract; (3) that the transferee has done some act in furtherance of the contract; and, (4) that the transferee has performed or is willing to perform his part of the contract. All that is required, therefore, with respect to the validity of a contract contemplated under Section 53-A of the Act, to be used as a shield to the action against him by a defendant, is to prove the contract. It is not disputed that the contract in question was for a mentioned consideration of Rs. 2,000/-, and according to the finding, a sum of Rs. 1,000/- had already been received by Lakhan Sao from the defendant. It is also evident that the defendant took possession of the land in question, and when the document was presented for registration, the defendant's vendor, namely, the aforesaid Lakhan Sao did not turn up. It is evident, therefore, that the contract relied upon by the defendant was quite valid and satisfies all the conditions of Section 53-A. The first contention raised by Mr.

Chatterji has, therefore, no substance and is overruled.

9. Coming to the second contention of Mr. Chatterji that the delivery of possession contemplated under Sec. 53-A must be at the instance of the vendor in part performance of the contract in furtherance of his intention to complete the contract, is also of no force. Section 53-A was brought on the statute book in the year 1929 in order to protect the purchaser from any fraudulent intention of the vendor after a contract was completed and to give him relief on the principle that if a man has made bargain with another and allowed that man to act on it, he will have created an equity himself which he cannot resist by setting up want of any infirmity (sic) and to meet situations like that, as one in the present case, that a vendor having already contracted with the defendant to sell the property for Rs. 2,000/- later on turns round when he finds in the plaintiffs a purchaser for double the amount. Advisedly, the legislature has used the expression with regard to possession in Section 53-A of the Act as "and the transferee has, in part performance of the contract, taken possession of the property or any part thereof." The act of giving possession has not been left at the mercy and option of the transferor, but of taking possession by the transferee himself, as in a given case, the dishonest intention may set in on the part of the transferor even before the stage for delivery of possession arrives. The second contention is not supported from the provision of the section itself, rather it is in contrast with the specific provision as already indicated above. Reference may again be made in this context to the case of Nathulal AIR 1970 SC 546 (supra) of the Supreme Court with respect to the second condition mentioned thereunder, namely:

"that the transferee has, in part performance of the contract, taken possession of the property or any part thereof, or the transferee, being already in possession continues in possession in part performance of the contract."

10. The facts found by the Courts below, which cannot be disputed, satisfy all the conditions for application of the doctrine of part performance of the contract as provided in Section 53-A of the Act, which forms part of a substantive law. In other words, there was a contract for sale of the land to the defendant by its admitted owner Lakhan Sao, who also came in possession in part performance of the said agreement, which is for consideration and enforceable in law, and the defendant has also established that he has not (sic) always willing to perform his part of the contract. The Courts below have, therefore, taken a correct view of the case and have rightly dismissed the suit.

11. This appeal, therefore, has got no merit and is, accordingly, dismissed with costs.

Appeal dismissed.

AIR 1976 PATNA 5

MADAN MOHAN PRASAD, J.

Achhelal Mahto and others, Appellants v. Harichand Mahto and others, Respondents.

A. F. A. D. No. 119 of 1973, D/- 15-4-1975.*

(A) Easements Act (1882), Section 13 — Right of way — Proof — Establishment of terminal points — Whether sufficient.

Where the plaintiff in suit for a declaration of a right of way establishes the terminal from which and to which the way runs, he is entitled to have his right of way declared and the right would be enjoyed in the way that the owners of the servient tenement point out as being the track over which the way should be enjoyed and if no track is pointed out, the plaintiff would be entitled to enjoy the right by nearest route. In this view plaintiffs could not fail in respect of their right of way for the reason that they had not stated the right which was followed by the persons exercising the right of user. AIR 1934 Pat 420 and AIR 1919 Cal 976, Rel. on. (Para 12)

(B) Civil P. C. (1908), Section 100, Order 41, Rule 23 — Interference and grounds of remand in second appeal — Suit for establishment of right of way — Non-consideration of pleader commissioner's reports, error of record and improper approach by lower appellate court — Interference in second appeal — Remand.

Where there was non-consideration by the lower appellate court of the evidences of the Commissioners, error of record and improper approach to the case in respect of the law governing cases relating to right of way, the judgment of the lower appellate court cannot be sustained in second appeal in so far as it reverses the decree of the trial court relating to the claim of the plaintiffs of a right of easement and must be set aside to that extent. (Case was remanded to the court below to consider the entire evidence on record and come to a conclusion in respect of plaintiff's claim of easement.)

(Para 13)

Cases Referred: Chronological Paras
AIR 1934 Pat 420 = 148 Ind Cas 431 12
AIR 1919 Cal 976 = 46 Ind Cas 374 12

*(From Order of Raniit Lal Bhagat, 1st Addl. Sub. J., Darbhanga, D/- 27-1-1973).

IS/JS/D522/75/VBB

S. P. Srivastava, for Appellants: Satya Nand Kumar and Ramanand Kumar, for Respondents.

JUDGMENT:— This second appeal by the plaintiffs arises out of a suit for declaration of their title to and confirmation of possession or in the alternative for recovery of possession in respect of 1 khata 2 1/2 dhurs of land appertaining to plot No. 1193 of khata No. 49 in village Rampur, Police Station Sarlakhi, District Darbhanga, or for a declaration that the plaintiffs had acquired a right of way over the aforesaid land.

2. Briefly stated the plaintiffs' case is as follows:—

It is said that the parties are descendants from the same common ancestor. In the year 1919, the plaintiffs purchased lands of Plot No. 1189 from one Mossamat Somani. This plot is situate immediately north of Plot No. 1193 of village Rampur in the district of Darbhanga. To the south of Plot No. 1193, there is a District Board road running east to west, over Plot No. 1226. Plot No. 1193 belongs to the defendants, Mossamat Somani, it is said, had exchanged 1 katha 2 1/2 dhurs of land of Plot Nos. 1229, 1230 and 1231 with the defendants for an equal area thereof out of Plot No. 1193. This took place in the year 1919, as a result of which the plaintiffs, when, they purchased the land of Plot No. 1189 from Mossamat Somani, became entitled to and came into possession of 1 katha 2 1/2 dhurs of land of Plot No. 1193. The plaintiffs state that they used these lands partly as passage from their house up to the public road over Plot No. 1226 and partly as their Bari and a place to keep their cattle and for them Nads and Khutias. They, therefore, prayed for a declaration of their title to these lands and for possession. They also asked for permanent injunction against the defendants restraining them from interfering with their rights. By an amendment of the plaint, the plaintiffs further made an alternative claim to the effect that if it be found that the plaintiffs had no title or possession as a result thereof over the lands in question, the plaintiffs, having exercised a right of way over the lands since the year 1919, had acquired a right of easement by open and uninterrupted user for more than twenty years, and a declaration to that effect was, therefore, prayed for.

3. The defendants characterise the story of exchange as a concoction. They deny the alleged title and possession of the plaintiffs over any portion of Plot No. 1193. The plaintiffs' case of user of right of way is also denied. It is said that there is an alternative passage towards the west of the plaintiffs' house which runs north to south and meets the public road on

Plot No. 1226 and the plaintiffs are said to have been using this passage in order to come to the public road. It is said that the plaintiffs have closed that passage and want to create a new route through Plot No. 1193.

4. Both the courts below have found against the plaintiffs with regard to the story of exchange set up by them as also on the question of possession of the lands which were said to be the subject-matter of exchange. The trial court, however, found that although the plaintiffs were not in possession of the lands as a result of the exchange, they had proved their alternative case of having exercised a right of way for the statutory period and in that view of the matter they were entitled to a decree in respect of their claim for easement. It decreed the suit in that respect and directed the removal of certain logs of wood which were alleged to have been kept by the defendants at the plot in question to block the passage. In appeal, however, the court below reversed the decree passed by the trial court. Hence this second appeal.

5. It appears from the judgment of the lower appellate court that it formulated two points for decision; first relating to the question of title or possession over Plot No. 1193 by virtue of the alleged exchange and second relating to the question of rights of passage. As stated earlier, on the first point the Additional Subordinate Judge who heard the appeal agreed with the trial court. With regard to the second one, the reason which led him to come to the conclusion contrary to that of the trial court is as follows:—

"The story of exchange has been found to be false. Consequently the story that any portion of Plot No. 1193 has been used as rasta, ipso facto becomes false

.....". He, however, went on to examine whether the plaintiffs had ever used any portion of the plot as rasta. While doing so, he says "the facts necessary to make out a case of easement of necessity remained wanting" and "in the plaint neither any description was given nor any sketch map was appended to show the route of the alleged passage from Plot No. 1189 to Plot No. 1226 through Plot No. 1193. In a case of claim of easement of passage, it cannot be conceived that without giving any definite direction of the passage, the plaintiffs can claim a relief. The plaintiffs cannot be granted a relief of passage so as to wander all over Plot No. 1193. As a matter of fact, this is what has happened in this suit". This is one circumstance which weighed with the learned Additional Subordinate Judge. The second is that there was an alternative passage available to the plaintiffs and

the third, that in view of the admission of the plaintiffs, the story of any portion of Plot No. 1193 being used as a passage must be false because there are obstructions in between the house of the plaintiffs on Plot No. 1189 and the public road inasmuch as the bari of one Kashi Mahto appears to exist at the extremity of Plot No. 1193, which would not allow a bullock cart to pass through at the relevant place.

6. Learned Counsel for the appellants, in view of the concurrent findings of facts of the courts below with regard to the question of title and possession over the lands in question, as a result of exchange, has not challenged these findings. He has, however, urged that the lower appellate court was not justified in reversing the decree of the trial court in respect of the claim of the plaintiffs of a right of easement. He has contended firstly that the court below has not at all considered the evidence of P. W. 4, the pleader-commissioner and his report (Ext. 3) and the evidence of P. W. 12, another pleader-commissioner and his report (Ext. 3/a), which prove the existence of passage on the land in question. He has next contended that while considering the point, the court below has not considered the evidence of the plaintiffs' witnesses for the purpose of finding out whether they proved the point relating to the right of way. Thirdly, it is urged, the court below has committed an error of record in reading the report (Ext. 3/a) of the pleader-commissioner (P. W. 12). Fourthly, it has not considered the question as to whether the obstruction put up in the shape of Tati in the bari of Kashi was a recent obstruction or not. Fifthly, the court below has not considered whether the alternative route was available to the plaintiffs ever since they constructed their house in the year 1919. In respect of the last two points, it is also said, that the court below has not considered the reasonings given by the trial court for coming to the conclusion contrary to that of the appellate court.

It has been lastly contended that the court below was wrong in drawing adverse inference against the plaintiffs for their failure to state the dimension or the exact route of the alleged passage. There appears to be substance in most of the contentions.

7. It is obvious from the judgment that the court below has not considered the evidence of the pleader-commissioner (P. W. 4) or his report Exhibit 3. It may be mentioned that on a petition filed by the plaintiffs, he had been appointed to find out the features of the land in order that the application of the plaintiffs for an ad interim order of injunction could be properly disposed of.

The report of the said commissioner was considered and the ad interim order of injunction was made absolute in preserve of both the parties. It appears that he was subsequently examined as P. W. 4. Learned Counsel for the respondents has pointed out that his report was made at a stage when proceeding was *ex parte*, and for that reason it was of no value. The question, however, is different viz., whether the court below at all considered the evidence aforesaid. The question as to whether it should have placed reliance thereon is a matter on which I do not wish to express any opinion. That it was for the learned Judge to consider all the relevant evidence, cannot be disputed. It is said on behalf of the appellants that the evidence of the said Commissioner was important inasmuch as at that point of time when he had inspected the land, he had not found any obstruction. Be that as it may, there is no dispute that the evidence of the aforesaid pleader-commissioner is relevant to the question of the right of passage and for that reason in my view, it ought to have been considered.

8. With regard to the evidence of the second pleader-commissioner (P. W. 12) and his report (Ext. 3/a) learned counsel for the appellants has made a grievance that although the said Commissioner had found a passage to be existing on the land, his evidence to that effect has not been considered at all. Some parts of his report have been considered for the purpose of coming to the conclusion that there could not be existence of any passage. The court below has referred to the case map and the report (Ext. 3/a) and found out therefrom the physical feature of the land to show that the pleader-commissioner had found the existence of a bari of Kashi Mahto which had a Tati obstructing the passage and it made it impossible for a bullock cart to pass. On this basis the court below said that there could not be any 'rasta'. Learned Counsel has pointed out that assuming that a bullock-cart could not pass, upon the report of the pleader-commissioner, there was a rasta in existence through which at least pedestrians could pass and this aspect of the matter has not been considered by the court below. Reading the discussion on the point and the judgment of the court below I do find that the court below has not applied its mind to the question as to whether the pleader-commissioner's evidence and the report support the case of the plaintiff and whether it could be relied upon. Again it was the duty of the Court below to do it.

9. There is a slight error which is said to be an error of record committed by the lower appellate court in the reading of the Commissioner's report (Ext. 3/a). The court below in paragraph 10 of

its judgment said that "on the western end of Plot No. 1193 there is a dalan facing east. It occupied an area measuring about 1 katha 8 1/2 dhurs". Actually in the report it is said to occupy only 8 1/2 dhurs. This is an obvious error of record. The point has some importance because the lower appellate court has given the reason that the total area of Plot No. 1193 is only 1 katha 17 1/2 dhurs and it appears that the well, dalan, the Sahan, the khop and the khunta occupy so much of the area aforesaid that there could hardly be left 1 katha 2 1/2 dhurs, as claimed by the plaintiffs, to be used as passage. The court below has also relied on the statement of P. W. 15 in respect of certain areas being occupied in the manner aforesaid. The crux of the question was whether the plaintiffs had exercised a right of way on the land in question. Surely they could not have exercised such a right through the house or a dalan of a particular person. Whether or not they exercised such a right of passage through the open land was a matter for consideration of the court of appeal below.

10. There is substance in the contention that the oral evidence of the plaintiffs has not been considered in relation to the point of right of passage. As I have quoted earlier, the lower appellate court seemed to think that since the story of exchange was found false, the claim of the right of user *ipso facto* failed. Perhaps in that view of the matter, it did not consider the evidence from this point of view while considering the second point at issue, namely, the question of right of passage.

11. It is also true that the court below did not consider the reasonings which led the trial court to come to the conclusion that there was no alternative rasta available to the plaintiffs since the year 1919 up to the year 1963 when they purchased some portions of Plot No. 1187 which is contiguous west of Plot No. 1189 where the plaintiffs' house had been constructed and to the west of Plot No. 1187 lies the alternative route, which comes to the south and joins the public road on Plot No. 1226. The court below has also not considered the reason given by the trial court, namely, that the Tati structure put up by Kashi was, upon the evidence, a recent construction and, therefore, of no avail to show that the plaintiffs had not been exercising the right of passage from 1919.

12. Learned Counsel for the appellants has placed reliance on two decisions in the cases of Ramhary Pal v. Nidhi Mahanty, 148 Ind Cas 431 = (AIR 1934 Pat 420) and Lakhi Kanta Roy v. Raj Chandre Saha, 46 Ind Cas 374 = (AIR 1919 Cal 976). The first case is of this very Court in which Fazl Ali, J. (as he

then was) relied on a passage from Katjar's Law of Easement borrowed from the well-known treatise on the same subject by Goddard to the following effect:

"When the two termini are known, the right to the way does not fall merely for want of a defined track between them, and if the owner of the servient tenement does not point out the line of such way, the dominant owner must take the nearest way he can. If the owner of the servient tenement wishes to confine him to a particular track, he must set out a reasonable way, and then the person is not entitled to go out of the way merely because the way is rough, and there are ruts in it and so forth."

In the other case, a Bench of the Calcutta High Court also held that if the plaintiff in a suit for a declaration of a right of way establishes the terminal from which and to which the way runs, he is entitled to have his right of way declared and the right would be enjoyed in the way that the owners of the servient tenement point out as being the track over which the way should be enjoyed and if no track is pointed out, the plaintiff would be entitled to enjoy the right by nearest route. In view of the law laid down in these two cases, the lower appellate court was not correct in saying that the plaintiffs could not succeed in respect of their right of easement for the reason that they had not stated the right which was followed by the persons exercising the right of user.

13. In view of the aforesaid non-consideration of the evidence, error of record and the improper approach to the case in respect of the law governing such cases, the judgment of the lower appellate court cannot be sustained in so far as it reverses the decree of the trial court relating to the claim of the plaintiffs of a right of easement. It is, accordingly, set aside to that extent. The case is remanded to the court below to consider the entire evidence on record and come to a conclusion thereafter in respect of the plaintiffs' claim of easement.

14. In the result, the appeal is allowed in part as indicated above. In the circumstances of the case, there will be no order as to costs.

Appeal allowed in part.

AIR 1976 PATNA 8

MADAN MOHAN PRASAD AND
S. K. CHAUDHURI, JJ.

Dulhin Mahesari Devi, Appellant v.
Dulhin Jahari Devi and others, Respondents.

A. F. O. D. No. 139 of 1973, D/- 26-2-1975.

HS/IS/C980/75/KNA

(A) Court Fees Act 1870, Sections 10 (ii), 12 (ii) — Court-fee payable on memorandum of appeal, not paid — Cannot be directed to be paid, after dismissal of appeal for non-payment.

On dismissal of the appeal the Court becomes functus officio and it is not open to the Court to pass any order, whether it be in respect of the rejection of the plaint or in respect of the recovery of the deficit court-fee. AIR 1919 Pat 9 and AIR 1957 Pat 533, Foll. (Paras 1 and 3)

Cases Referred: Chronological Paras
AIR 1957 Pat 533 = 1957 BLJR 356 4
AIR 1919 Pat 9 = 4 Pat LJ 472 (FB) 4

ORDER:— The question for consideration is whether the plaintiff-appellant, after the dismissal of her appeal for non-payment of the deficit court-fee in respect of the memorandum of appeal, can be directed to pay the deficit court-fee in respect of the plaint filed by her.

2. It appears that the plaintiff instituted, what she called a suit for partition, pure and simple, and paid court-fee on this basis in the trial Court. The suit was dismissed. Thereafter she appealed to this Court. The stamp reporter reported that the suit was really a title suit in the garb of a partition suit and ad valorem court-fee was, therefore, payable in the trial Court as also in this Court. On that basis this Court passed an order on the 26th September, 1974, by which it granted three months' time to the appellant to pay the deficit court-fee on the memorandum of appeal, failing which the memorandum of appeal was to stand rejected without further reference to a Bench. The same time was also allowed to pay the deficit court-fee in respect of the plaint, failing which the question of rejection of the plaint and recovery of the deficit court-fee thereon was to be considered. It appears that the deficit court-fee in respect of the memorandum of appeal was not paid within the time allowed and, therefore, the memorandum of appeal stood rejected. The question of rejection of the plaint and recovery of the deficit court-fee has been referred to us for orders.

3. We are of the opinion that in view of the fact that the appeal itself stood dismissed, this Court has become functus officio and it is not open to us to pass any order, whether it be in respect of the rejection of the plaint or in respect of the recovery of the deficit court-fee. We have considered the effect of Sections 10 (ii) and 12 (ii) of the Court Fees Act, 1870 (hereinafter called the 'Act') to which our attention was drawn. Section 12 (ii) of the Act provides that whether a suit comes before a Court of appeal, reference or revision, if such Court considers that the said question has been wrongly decided, to the detriment of the revenue, it

shall require the party by whom such fee has been paid to pay so much additional fee as would have been payable had the question been rightly decided. It further provides that the provisions of Section 10, paragraph (ii), shall apply in such a case. Section 10, paragraph (ii), provides that in such case the suit shall be stayed until the additional fee is paid, and if the additional fee is not paid within such time as the Court shall fix, the suit shall be dismissed. A reading of these two provisions makes it clear beyond doubt that it relates to a period during which the appeal, reference or revision, in course of which the Court takes cognizance of the deficiency in court-fee, is pending. There is no question of staying a suit or an appeal after it has been dismissed. There is no further question of dismissing an appeal which has already been dismissed. Paragraph (ii) of Section 12 does not, therefore, answer the question, which has been posed before us.

4. No provision has been cited in support of the view that this Court has any jurisdiction to order the recovery of the court-fee in respect of the plaint found to be due in spite of the fact that the appeal, during the pendency of which we could pass any order, has been dismissed. We have come across two decisions of this Court which conclusively lay down to the contrary. Reference may be made to a decision of the Full Bench in Radhika Raman Prasad Singh v. Mt. Janki Kuer, AIR 1919 Pat 9 and a Bench decision in Smt. Parvati Devi v. Dhodhi Lal Mahto, AIR 1957 Pat 533, which are on all fours with the facts of the present case.

5. In the result, this Court can pass no further orders in either respect. Order accordingly.

AIR 1976 PATNA 9

K. B. N. SINGH AND UDAY SINHA, JJ.

Janki Singh, Petitioner v. The Collector of Central Excise and others, Respondents.

Civil Writ Jurisdiction Case No. 535 of 1971. D/- 7-2-1975.

(A) Defence of India Rules (1962), Rule 126-L (13) — Power to summon witnesses — Rule does not require authority to summon witnesses in support of defence when no prayer is made by defendant. (Para 7)

(B) Defence of India Rules (1962), Rule 126-HH (8), Proviso — Interpretation — Proviso is not limited to primary gold belonging to certified goldsmith.

The contention that the proviso is limited to the primary gold belonging to

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the certified goldsmith, that is to say, his own gold is not sound. The proviso speaks of 'primary gold in excess of one hundred grammes', in his 'possession', 'custody', or 'control' which is wide enough to include all kinds of primary gold in possession, custody or control of a certified goldsmith, including that belonging to the certified goldsmith, of purity exceeding fourteen carats, which he may receive and out of which he may prepare new ornaments. (Para 9)

Keshri Kishore Sharan, for Petitioner; Ashwini Kumar Sinha, for Respondents.

K. B. N. SINGH, J.:— In this writ application, the petitioner has prayed for quashing orders of confiscation of gold and gold ornaments and imposition of penalty of the Collector of Central Excise, Patna dated the 19th June, 1965 (Annexure '1'), as also the orders of the Gold Control Administrator, dated the 26th September, 1969 (Annexure '3'), and the orders of the Government of India dated the 25th January, 1971 (Annexure '4'), refusing to interfere with the orders of the Collector.

2. The petitioner has stated in the writ application that he is a poor Karigar (certified goldsmith) and has been doing the work of repairing and making gold ornaments from old ornaments supplied by the customers. At the place where the petitioner worked, other Karigars (certified goldsmiths), namely, Ramchandra Prasad, Baleshwar Prasad and Sarjoo Lal, were also doing similar work of their own customers, as the petitioner. None of these workers were subordinate to one another and they earned their charges from their respective customers for the work done by each of them. On the 11th April, 1964, some officers of the Central Excise visited the premises where the petitioner and the other three Karigars used to work and seized 474.207 grammes of melted gold and ornaments. They also seized a piece of primary gold bearing foreign marks, weighing 116.650 grammes from the possession of Ramchandra Prasad. The Officers also forced the petitioner to sign some statements, which were written according to their dictation. Thereafter, show cause notices were served on the petitioner as well as the other three Karigars, alleging contravention of Rules 126-C, 126-G (3) and 126-HH of the Defence of India Rules, 1962 (hereinafter referred to as the Rules). Notices were also served on the petitioner and the other three Karigars for the alleged contravention of Section 11 of the Customs Act and Rules 126-E, 126-H and 126-I of the Rules. The first set of notices related to the seizure of 474.207 grammes of gold and ornaments and a proceeding was initiated before the Collector of Central Excise, Patna, in this

regard. The second set of notices related to the seizure of primary gold piece, bearing foreign marks, and a proceeding in this regard was started before the Assistant Collector of Central Excise, Patna. It is the petitioner's case that he and the other two Karigars filed their show cause before the Collector of Central Excise, stating that the petitioner held goldsmith's certificate dated the 21st January, 1964, to make ornaments from old ornaments supplied by the customers. The other three Karigars also had similar certificates and the seized gold and the gold ornaments, weighing 474.207 grammes were the ornaments made or in the process of being made from the old ornaments supplied by the various customers, whose names and addresses were given for verification. The petitioner also prayed that the said customers be summoned for examination before the Collector. The petitioner's case further is that two of the Karigars, namely, Sarjoo Lal and Baleshwar Prasad, corroborated the case of the petitioner before the Collector. Ramchandra Prasad, however, neither filed show cause nor appeared before the Collector. A grievance is made that without summoning the customers or Ramchandra Prasad, the Collector, by an order dated the 19th June, 1965, directed for confiscation of the gold and gold ornaments seized, under Rule 126-M and also imposed a penalty of Rs. 2,000/- under Rule 126-L (16) of the Rules (Annexure '1'). No order adverse to the remaining three Karigars was passed in the proceeding before the Collector.

3. As regards the proceeding before the Assistant Collector of Central Excise, Patna, regarding the seizure of primary gold bearing foreign marks, in his show cause the petitioner has stated that the said primary gold was not recovered from the possession of the petitioner, but it was recovered from the possession of Ramchandra Prasad, who was accountable for that. In that proceeding, the Assistant Collector of Central Excise ordered confiscation of the primary gold under Rule 126-M of the Rules.

4. The petitioner filed an appeal against the order of the Collector of Central Excise before the Gold Control Administrator, New Delhi, and also filed affidavits of ten customers (filed as Annexures 2 (a) to 2 (i) to the writ application), in support of his assertion about the gold ornaments being handed over to the petitioner by those witnesses for making new ornaments as per their orders. The petitioner also filed an affidavit sworn by him. The petitioner's appeal, however, was dismissed by the Gold Control Administrator (Annexure '3'). A revision application filed by him before the Government of India was also rejected (Annexure '4'). Thereafter this

writ application was filed for quashing these orders.

5. On behalf of the respondents, a counter-affidavit has been filed, in which it was asserted that the petitioner was maintaining a regular workshop where petty Karigars were manufacturing gold ornaments out of illegally acquired gold and two of the Karigars, Sarjoo Lal and Baleshwar Prasad, admitted this fact. In the counter-affidavit it was also asserted that the foreign gold was recovered from the possession of the petitioner and not Ramchandra Prasad. As a matter of fact, the petitioner, in his statement before the seizing authority admitted that all the gold seized was recovered from his premises and possession. In his show cause before the Assistant Collector of Central Excise also the petitioner admitted recovery of foreign gold from his possession and the statement of the petitioner made at the time of the seizure was voluntary one, made without any threat or coercion. It was also asserted in the counter-affidavit that no account was produced by the petitioner at the time of the seizure to show the lawful possession of the gold and gold ornaments and the production of the list of the so-called customers at the late stage, without any entry in the prescribed account book in this regard was not relevant.

6. Mr. Keshari Kishore Saran, learned Counsel appearing on behalf of the petitioner, has submitted that the orders of the Central Excise Authorities are vitiated as there has been violation of the principles of natural justice in denying adequate opportunity to the petitioner to defend himself by the Collector of Central Excise. The following factors have been emphasised in support of this contention:

(a) Failure to secure presence of Ramchandra Prasad from whose possession foreign gold was recovered.

(b) The customers whose names and addresses were filed before the Collector, along with the show cause, were not summoned and examined by the Collector.

(c) The statement of the petitioner recorded at the time of the seizure has been used against him, without supplying a copy of the same to the petitioner. There does not appear to be any substance in these contentions of the learned Counsel. From the order of the Collector of Central Excise, it appears that the petitioner, after he filed show cause, was given a personal hearing. The other two Karigars, Sarjoo Lal and Baleshwar Prasad, while supporting partially the contention of the petitioner, as mentioned in the counter-affidavit, asserted that they were working for the petitioner for wages and they were neither keeping gold nor gold ornaments with them. From the copy of the show

cause filed by the petitioner, produced before us on behalf of the petitioner, it does not appear that any prayer was made to examine the ten customers nor anything has been produced before us to show that any prayer was made at any stage before the Collector to summon any of the customers, which was refused by the Collector.

7. The petitioner's contention that the ornaments in question belonged to the customers, was rejected by the Collector, in view of the statement of the petitioner made at the time of the seizure that the gold and ornaments in question were purchased from the Patna Market. The statement used is a statement recorded in his own handwriting and under his own signature, which he has not alleged in the show cause to have been obtained under any coercion. If the petitioner wanted a copy of that statement, he should have demanded the same from the authorities. Nothing has been produced before us to show that he ever wanted a copy of the said statement, which was refused by the authorities. There was no obligation on the part of the Collector to summon the customers even without a prayer to that effect on the part of the petitioner. Sub-rule (13) of Rule 126-L of the Rules empowers the authorities to summon witnesses at the inquiry, but it does not make it obligatory to summon all conceivable persons in support of the defence, even without a prayer to that effect. It appears from paragraph 12 of the counter-affidavit that efforts had been made to secure the attendance of Ramchandra Prasad by issuing notice by registered post, but it failed, and even the petitioner could not give the home address of Ramchandra Prasad and only stated that he lived in the house of Sheolalji of Mohalla Machharhatta, who also, on being contacted, could not give the home address of Ramchandra Prasad. It is, therefore, manifest that efforts were made by the Department to procure the attendance of Ramchandra Prasad and, apparently, as he had no interest in the matter, he did not appear. The primary gold, with foreign marking, has been ordered to be confiscated by the Assistant Collector and there has been no appeal or revision against that order, as admitted by learned Counsel for the petitioner, and that order has become final. The absence of Ramchandra Prasad, in my considered opinion, has not in any way prejudiced the petitioner. The affidavits of the ten customers were filed before the Gold Control Administrator, before whom the petitioner was personally present and represented by a Counsel at the time of hearing, and, after hearing the lawyer and examining the records, the Administrator rejected the appeal of the petitioner. His defence has been fully considered by the Government

of India also and rejected. No argument seems to have been advanced before the appellate or the revisional authority about the petitioner having been denied any adequate opportunity to defend himself. It is, therefore, manifest that there has been no violation of the principles of natural justice, as urged by the learned Counsel for the petitioner. It may be pointed out that every dealer is required to maintain accounts, as provided under Rule 126-G in the prescribed form of gold bought or sold. This rule is applicable to a certified goldsmith also, which the petitioner claims to be, by virtue of sub-rule (7) of Rule 126-HH. A reference to the prescribed Forms Nos. 7 and 8 shows that the detailed accounts of gold received have to be maintained in regular course of business. None was produced before the authorities in support of the assertion that the gold or ornaments in question belonged to the customers. Those accounts were not even produced before us. The expression 'gold' according to the definition contained in Rule 126-A (d) of the Rules, includes ornaments also. A party having failed to comply with the requirements of the rules, in not maintaining accounts of the gold received, can hardly be allowed to complain that the principles of natural justice have been violated by failure of the authority to summon customers to prove that the gold in question belonged to the customers.

8. Mr. Sharan has further submitted that the Collector of Central Excise, the Gold Control Administrator, as well as the Central Government, have acted prejudicially to the petitioner on a mistaken notion that the petitioner was dealing in foreign gold. Due to this mistaken notion of theirs, they were importing matters beyond the scope of the proceeding before them. Learned Counsel submitted that the foreign gold in question was really recovered from the possession of Ramchandra Prasad and not the petitioner. There is no substance in this submission of the learned Counsel as well. A copy of the order of the Assistant Collector of Central Excise dated the 1st October, 1964, passed in the proceeding started against the petitioner regarding the seizure of foreign gold bar has been filed before us on behalf of the Department and there is no dispute before us with regard to that order. From the said order it appears that in reply to the show cause notice, the petitioner contended that the foreign gold bar in question was given to the petitioner through Ramchandra Prasad, Karigar, in the evening of the 10th April, 1964, for manufacture of ornaments by some customer, whose name and address is not known to him. At the time of actual hearing, the petitioner was personally heard by the Assistant Collec-

tor and the stand taken at the time of hearing was that the foreign gold bar in question was handed over to the petitioner by some unknown person in the evening of the 10th April, 1964, whose name and address was not known to him, and the petitioner expressed his inability to trace out that person. The Assistant Collector rejected the defence story as concocted and also relied upon his earlier statement recorded on the 11th April, 1964, and held the petitioner guilty of contravention of the provisions of Rule 126-H of the Rules, and ordered confiscation of the foreign gold bar. There has been no appeal against this order of the Assistant Collector and the order has become final, as already mentioned. In such circumstances, there is no question of the Collector of Excise or Administrator or the Central Government acting under any mistaken notion about the petitioner dealing in foreign gold, as urged.

9. Mr. Sharan has lastly contended that there can be no question of any contravention of Rule 126-C, as it applies to a 'dealer', whereas the petitioner is not a 'dealer', but a 'certified goldsmith', and is entitled to receive from customers gold ornaments for manufacturing ornaments of above 14 carats purity. Mr. Sharan relied upon the definition of the term 'dealer' as contained in Rule 126-A (c) of the Rules, the relevant portion of which may be quoted:—

"(c) 'dealer' means any person who carries on, directly or otherwise, the business of—

(i) making, manufacturing, buying, selling, supplying, distributing, melting, processing or converting ornaments,

(ii) buying, selling, supplying, distributing, melting, processing or converting gold for the purpose of making or manufacturing ornaments, whether for cash or for deferred payment, or for commission, remuneration or other valuable consideration and includes—

xx xx xx xx"

He next referred to the provisions of Rule 126-C of the Rules, which imposes a restriction on a dealer from making, etc., of ornaments of gold having purity exceeding 14 carats. The relevant portion of this rule may usefully be quoted:—

"126-C — Restriction on the making, etc. of ornaments —

(1) Save as provided in Chapter IV-A of this Part, as from the commencement of this part—

(a) no dealer, whether licensed under this Part or not, shall—

(i) make, manufacture or prepare, or,

(ii) sell or otherwise transfer, agree to sell or otherwise transfer, or expose or offer for sale or transfer, and,

(b) no person shall place any order with any dealer, whether licensed under

his Part or not, for the making, manufacture or preparation of, any ornament having gold of a purity exceeding fourteen carats:

xx xx xx xx"
Rule 126-E of Chapter III of the Rules deals with licensing of dealers and refiners. In the instant case we are not concerned with the case of a dealer or a refiner. It is not disputed before us that the petitioner is a certified goldsmith. As a matter of fact, the petitioner has produced a valid licence for the relevant period, renewed up to the year 1966. A certified goldsmith has been defined in Rule 126-A (bb), which runs as follows:—

"(bb) 'Certified Goldsmith' means a dealer who holds a valid certificate granted under Rule 126-HH, recognising him as a goldsmith;"

Chapter IV-A of the Rules consists of the solitary rule, Rule 126-HH, which deals with 'certified goldsmiths', relevant portion of which runs thus:—

"(1) A dealer, who is not required by sub-rule (3) or sub-rule (4) of Rule 126-E to make any application for the issue of a licence under that rule and has not obtained any licence in pursuance of an application made by him under sub-rule (E) of that rule may, if he was carrying on business as a dealer for more than a year immediately before the commencement of this Part—

(a) accept from any person, not being a dealer or refiner, any ornament or ornaments having gold or purity exceeding fourteen carats for the purpose of making, manufacturing or preparing; and,

(b) make, manufacture, or prepare, new ornament or ornaments from that ornament or those ornaments so however that the purity and the total quantity of gold contained in such new ornament or ornaments do not exceed the purity and the total quantity of gold contained in the ornament accepted.

(2) No such dealer shall accept any such ornament or ornaments for the purpose of making, manufacturing or preparing new ornament or ornaments as aforesaid after the 31st March, 1964, unless he has before that date made application to the Administrator in the prescribed form on payment of a fee of one rupee for the issue of a certificate recognising him as a goldsmith, provided that he shall not carry on business as such dealer after he is informed by the Administrator by notice in writing that his application for the issue of a certificate has been rejected.

xx xx xx xx"
Sub-rule (7) of this Rule requires a certified goldsmith to maintain accounts, as required under Rule 126-G as if he was a licenced dealer. Then comes sub-rule

(8), on which reliance is placed by Mr. Sharan, and which reads as follows:—

"(8) Notwithstanding anything contained in Rule 126-C a certified goldsmith may make or manufacture primary gold of a purity exceeding fourteen carats by melting or processing or converting any ornament:

Provided that a certified goldsmith shall not have at any time in his possession, custody or control any quantity of such primary gold in excess of one hundred grammes."

Mr. Sharan has relied on the first part of sub-rule (8), and contended that Rule 126-C has no application to a 'certified goldsmith' and there is no restriction on a certified goldsmith in making ornaments having gold purity exceeding 14 carats. But this sub-rule, making a concession in favour of a certified goldsmith for making and manufacturing primary gold is not unqualified. It is restricted by a proviso to sub-rule (8), which forbids a certified goldsmith from possessing at any time primary gold of purity above fourteen carats in excess of one hundred grammes. 336.428 grammes of primary gold and 137.779 grammes of ornaments of purity above fourteen carats were recovered from the premises and possession of the petitioner. This is obviously in excess of the quantity permissible under the proviso to sub-rule (8) of Rule 126-HH. Faced with this difficulty, Mr. Sharan argued that the proviso to sub-rule (8) was limited to the 'primary gold' belonging to the 'certified goldsmith', that is to say, his own gold.

The wording of the proviso does not admit of any such construction. It speaks of 'primary gold in excess of one hundred grammes', in his 'possession', 'custody', or 'control', which is wide enough to include all kinds of primary gold in possession, custody or control of a certified goldsmith, including that belonging to the certified goldsmith, of purity exceeding fourteen carats, which he may receive and out of which he may prepare new ornaments. The contention of Mr. Sharan is also directly in conflict with the provisions contained in Rule 126-I of Chapter V of the Rules, where a restriction is put on every person other than a 'dealer' to keep more than 50 grammes of primary gold, without furnishing a declaration to the Administrator. On the facts found in the instant case, the petitioner was in possession of primary gold in excess of the permissible limit even for a 'certified goldsmith', and therefore, is guilty of contravention of Rule 126-HH of the Rules, as found by the authorities. Besides that, on the findings, primary gold with foreign markings weighing 116.650 grammes has also been recovered from his possession.

10. In the result, there is no merit in this application and it is dismissed, but without costs.

UDAY SINHA, J.— I agree.
Application dismissed.

AIR 1976 PATNA 14

S. ANWAR AHMAD, J.

Amarnath Singh and others, Petitioners v. Phulwa Devi and another, Opposite Parties.

Civil Revn. No. 1248 of 1974, D/- 3-2-1975.*

(A) Hindu Law — Suit for partition — Right to maintenance of a female defendant admitted — Court has jurisdiction to order interim maintenance pending suit. AIR 1972 Pat 376 and AIR 1974 Pat 280, ~~here~~ not good law in view of AIR 1948 Pat 195.

The law on the point as to whether during the pendency of a suit for partition an order for ad interim maintenance can be passed is settled. If the right to maintenance is admitted, the Court can pass an ad interim order of maintenance during the pendency of a suit. AIR 1974 Pat 280 and AIR 1972 Pat 376 held not good law in view of AIR 1948 Pat 196; AIR 1961 SC 218 and AIR 1924 Pat 69, D.L.J.; AIR 1941 Mad 55 and AIR 1968 Cal 567 and AIR 1948 Pat 195, Rel. on.

(Para 6)

Cases Referred: Chronological Paras

AIR 1974 Pat 280 = 1974 BLJR 201	4
AIR 1972 Pat 376	4
AIR 1968 Cal 567	6
AIR 1961 SC 218 = (1961) 1 SCR 884	4
AIR 1948 Pat 195	6
AIR 1941 Mad 55 = (1940) 2 Mad LJ 573	6
AIR 1924 Pat 69 = 5 Pat LT 560	4

Bndeshwari Pd. Sinha, No. 1, for Petitioners; A. K. Saran, K. B. Verma and S. Hoda, for Opposite Parties.

ORDER:— The point for determination in this case is that if the claim for maintenance is admitted, can the Court pass an order for interim maintenance during the pendency of a partition suit?

2. In the suit for partition brought by opposite party Nos. 1 and 2, claiming one-third share, they filed an application under Section 151 and Order 40, Rule 1, Code of Civil Procedure, for appointment of a Receiver or, in the alternative, to allow them some maintenance. In the written statement filed on behalf of the petitioners (defendants) the right to claim partition was denied, inter alia, on the ground that Ramsewak Singh, husband of

*(Against order of Narayan Pd. Singh, Sub. J., Aurangabad, D/- 2-7-1974).

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Opposite Party No. 1, had died in the year 1935, and not in 1958, and that opposite party No. 1, Phulwa Devi had no right in the joint family properties, but she was entitled to maintenance. So far as opposite party No. 2 was concerned, it was stated that she was a married lady and had passed out of the family by reason of her marriage. In their rejoinder to the petition for appointment of Receiver, the petitioners denied the allegation made on behalf of the opposite party with regard to sale or mortgage of the property in suit as false and stated that no sufficient cause had been made out for appointment of a Receiver. They, however, did not state therein that opposite party No. 1 was not entitled to maintenance.

3. The Court below has refused to appoint a Receiver but has directed that out of the 22 bighas of land in dispute, survey plot No. 1624, having an area of 1.53 acres, be given for the maintenance of opposite party No. 1 till the disposal of the suit as, in its opinion, considering the large area involved, giving of 1.53 acres did not seem to be unjustified. The present application is directed against this order of the Court below.

4. The submission of learned Counsel for the petitioners is that there was no jurisdiction in the Court to pass an order for ad interim maintenance during the pendency of the partition suit. In support of his submission Counsel relied on the decision in Ramji Gir v. Elaichi Devi, (AIR 1974 Pat 280) wherein it was laid down that an order for grant of maintenance could not be passed under the inherent powers. Reliance was also placed on the decision in Rambujhawan Pathak v. Gauri Kant Pathak, AIR 1972 Pat 376. Both these decisions are of a single Judge of this Court. Counsel also relied on the decision of the Supreme Court in Padam Sen v. The State of Uttar Pradesh, (AIR 1961 SC 218). In that case it was held that the Court had no inherent powers to appoint a Commissioner to seize the account books of the plaintiffs. The facts of this case have no bearing on the facts of the present case. In the case of Maharaj Kumar Gopal Saran Narayan Singh v. Site Debi, 5 Pat. LT 560 = (AIR 1924 Pat 69) cited by learned counsel for the petitioners, it was held that if the claim based on a contract for payment of money is disputed, the Court has no jurisdiction under Section 151, Code of Civil Procedure, to order that the plaintiff be awarded a portion of the amount before her right is established in the suit brought for that purpose. In the instant case, however, the right to claim maintenance was admitted on behalf of the petitioners.

5. Learned Counsel for the opposite party, Mr. K. B. Verma, brought to

my notice an order dated the 6th of March, 1965, passed in First Appeal No. 65 of 1964. That appeal arose out of a suit for partition which had been dismissed, but it was held by the Bench (consisting of Mahapatra and A. B. N. Sinha, JJ.) that appellant No. 1 would be entitled to maintenance as her husband had died prior to 1937. In the instant case, on the written statement and the show cause filed by the petitioners, the husband of opposite party No. 1 died in 1935. Perhaps, it was on account of this fact that there was no denial to the grant of maintenance in favour of opposite party No. 1 either in the written statement or in the rejoinder filed to the petition under Order 40, Rule 1, Code of Civil Procedure. According to counsel for the opposite party, the law on the point is clearly laid down in Article 543 of the Principles of Hindu Law by Mulla (13th Edition). "It is to the effect that the manager of a joint Mitakshara family is under a legal obligation to maintain all male members of the family, their wives and their children and that on the death of any one of the male members he is bound to maintain his widow and his children. Similar provision is to be found in Article 560-A (ibid) which is to the effect that a widow who has left the residence of her deceased husband, not for unchaste purposes, is entitled not only to maintenance but also to arrears of maintenance from the date of her leaving her husband's residence.

6. In my opinion, the law on the point as to whether during the pendency of a suit an order for ad interim maintenance can be passed is settled. If the right to maintenance is admitted, the Court can pass an ad interim order of maintenance during the pendency of a suit. It was held in *Sri Rajah Yenumala Latchanna Dora v. Sri Rajah Yenumala Mallu Dora Varu*, AIR 1941 Mad 55 that there was no inherent power in the Court to grant maintenance if the matter was asserted by the plaintiff and denied by the defendant and that an order for ad interim maintenance could only be passed where the allegation was admitted and that the wife was also entitled to separate maintenance. In the case of *Tarini Gupta Chowdhury v. Sm. Gouri Gupta Chowdhury*, AIR 1968 Cal 567 a Bench of the Calcutta High Court while considering Section 18 of the Hindu Adoptions and Maintenance Act, 1956, went so far as to hold that even if the matter was not covered by Section 151, Code of Civil Procedure, an order for ad interim maintenance in a suit should be decided with reference to the general provisions of the Hindu Law and the provisions contained in the Hindu Adoptions and Maintenance Act. It was also held that a claim for maintenance in a pending suit would not be taken away by denial, i.e., if a claim

for maintenance was denied that would not take away the jurisdiction of the Court to make interim orders in a suit for maintenance. The jurisdiction of the Court did not depend on the denial of a case by the defendant. It was one thing to say that the Court declined to make an order in a case where facts were disputed and quite another thing to say that the Court had no jurisdiction to make an order because the claim was contested. In the instant case, as already indicated, the right to maintenance has not been denied, rather it has been admitted. In the case of *Bhubaneshwar Prasad Narain Sinha v. Ra'eshwar Prasad Narain Sinha*, AIR 1948 Pat 195 a Bench of this Court while deciding an appeal filed against the order of the Court below appointing a Receiver observed — "of course, it will be open", to the parties to apply to the Court below for such orders "as it thinks fit and proper for payment to the respective" families of such amounts by way of maintenance and other "expenses as the Court below may direct". By giving this direction, their Lordships accepted the principle that in a suit for partition the court has got a right, on proper application being made, to grant ad interim maintenance. In this view of the law laid down by a Division Bench of this Court, the two single Judge decisions cited on behalf of the petitioners are of no avail to them.

7. On the facts to this case, therefore, I am not in a position to agree with learned Counsel for the petitioners that the order passed by the learned Subordinate Judge for maintenance is without jurisdiction or tainted with illegality or material irregularity. The Court below was perfectly justified on the facts of the present case to protect the interest of opposite party No. 1 and to see that she is maintained during the pendency of the partition suit.

8. The result, therefore, is that the application fails and is dismissed. There will be no order for costs of this Court.

Application dismissed.

AIR 1976 PATNA 15

S. N. P. SINGH, C. J. AND S. K. JHA, J.
Chandra Dhan Singh, Appellant v.
The State of Bihar and others, Respondents.

Appeal From Original Order No. 252 of 1970, D/- 28-1-1975.*

(A) Constitution of India, Article 299
(1) — Contracts — Agreements for over

*(Against order of Ajit Nath Sarkar, Spl. Sub. J., Ranchi, D/- 23-7-1970).

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Rs. 50,000/- executed not by Superintending Engineer (competent authority on behalf of State Government) — If and when valid.

In view of the Article there is no scope for any implied contract with Government. If a contract with Government is not in compliance with the Article it will be no contract and cannot be enforced either by the Government or by the other party to it. As such even if all negotiations upto the stage of incorporating the terms in the agreement had been done between a party and the Superintending Engineer (the authority empowered to execute agreements on behalf of the State Government) in the absence of the formal deed having been executed by him, the agreement is non est. AIR 1967 SC 203, Followed. (Para 5)

(B) Arbitration Act (1940), Section 2 (c) — "Court" — Negotiations done and agreement entered into in Ranchi — Application under Act if maintainable in City Civil Court, Ranchi.

The section does not mean that a court has jurisdiction to receive an award only if the whole cause of action arose within its jurisdiction. Thus when the entire negotiations for an agreement were completed and the agreement also was entered into at Ranchi, any action in respect of breach of that agreement will lie before the Civil Court there and as such an application under Section 20 of the Act will be maintainable before that Court. AIR 1943 Bom 32, Followed; AIR 1954 Pat 147, Relied on. (Para 6)

Cases Referred: Chronological Paras
 AIR 1967 SC 203 = (1966) 3 SCR 919 5
 AIR 1954 Pat 147 = 153 BLJR 444 6
 AIR 1943 Bom 32 = 44 Bom LR 859 6

S. B. N. Singh and Rana Pratap Singh No. 2, for Appellant; Tara Kant Jha, Standing Counsel No. 2, Akhileshwar Prasad Singh, Junior Counsel for Standing Counsel No. 1, for Respondents.

S. K. JHA, J.:— This is an appeal by the plaintiff under Section 39 (1) (iv) of the Indian Arbitration Act (hereinafter referred to as "the Act"). The plaintiff had filed a petition in the court of the Special Subordinate Judge, Ranchi, under Section 20 of the Act praying that the four agreements entered into between the plaintiff and the defendants be directed to be filed in Court. By the impugned order dated the 23rd of July, 1970, the learned Subordinate Judge has dismissed the plaintiff-appellant's application under Section 20, being aggrieved by which the plaintiff has preferred this appeal.

2. The short facts relevant for the disposal of the appeal are these. The appellant in his petition under Section 20 of the Act filed in the court below stated that he carried on the business of contract and an agreement dated the 4th of

September, 1964, was executed by the appellant on one side and the then Superintending Engineer, Chota Nagpur Waterways Circle, Ranchi (respondent No. 2), on the other. The number of this agreement was F2-49 of 1964-65. This was in relation to earth work to be done by the appellant in Seraikela Branch canal from Chainage 994 to 1209 in Rore Irrigation Scheme in the District of Singhbhum. The tender of the appellant was accepted at Ranchi and the agreement was entered into in pursuance thereof and the value of the work to be done was about Rs. 3,17,592/-.

There were three other agreements, all dated the 5th of March, 1965, bearing Contract Nos. F2-57, F2-58 and F2-59 of 1964-65 for construction of some structures in the said canal. The appellant's further case was that there was a dispute regarding structure work and the appellant had stacked huge quantities of ballast, boulders and chips near the work site and had paid advances to the labourers totalling Rs. 20,000/-. The work regarding structures could not be executed due to the fault and laches of the State of Bihar and/or its employees regarding the dispute for payment of the dues for the work done under the first agreement. In respect of the work done under the first agreement, it was asserted that the work as scheduled was changed from place to place due to the change in the alignment of the work.

The first 'on account bill' was submitted for Rs. 35,878/- which was paid to the appellant. But this did not include certain work done for hard rock and Mica Schist. The second 'on account bill' was for more than Rs. 1,50,000/-, which was duly noted in the Measurement Book prepared by the then Sectional Officer and the Sub-Divisional Officer also signed the same but later on the officers of the Department resiled from the position and cancelled the original entries made in the Measurement Book. When the appellant came to know all these, he protested and moved the higher authorities in the matter. Numerous pieces of correspondence followed thereafter, according to the appellant, by him with the authorities in the various hierarchies of respondent No. 1. It seems, however, without going into all the other details of the matter, that according to the appellant the disputes in relation to the matters covered by the four agreements, aforesaid, were still outstanding and since all the agreements are incorporated in one of the clauses the usual arbitration clause, it was prayed in the application filed under Section 20 of the Act that the four agreements be directed to be filed in Court.

3. The respondents contested the application of the appellant under Section 20 and raised two objections, firstly, that

there had been no agreement between the parties inasmuch as the agreements in question were not executed by the Superintending Engineer, who alone was empowered under law to execute the agreements on behalf of the State Government in consonance with the provisions of Article 299 (1) of the Constitution of India, and, secondly, that the court below had no jurisdiction in the matter as it was not a court competent to deal with the subject-matter of reference under Section 2 (c) of the Act.

4. So far as the first objection of the respondents is concerned, the learned Subordinate Judge held that out of the four agreements, which had been prayed to be directed to be filed, only three involved more than Rupees 50,000/- with regard to which the Superintending Engineer was the competent authority to execute the deeds by appending his signature on behalf of the State. With regard to the remaining fourth agreement, however, it was held that admittedly it was an agreement for a sum involving less than Rs. 50,000/- and had been duly signed by the Executive Engineer (respondent No. 3), who was competent to sign it, and this was in consonance with the provisions of Article 299 (1) of the Constitution.

With regard to the second objection raised by the respondents, however, the court below held agreeing with the objection that it had no territorial jurisdiction over the matter involved in any of the four agreements in question and that, therefore, in spite of the fact that one of the agreements involving less than Rs. 50,000/- was in conformity with the provisions of Article 299 (1) of the Constitution yet none of the agreements could be directed to be filed.

5. Mr. S. B. N. Singh, learned counsel for the appellant, submitted rather half-heartedly that the provisions of Article 299 (1) of the Constitution should not be held to be of such a mandatory effect as to disentitle the appellant of the benefits of the arbitration clause in the agreements which had been entered into on the representation of the Superintending Engineer, who was undoubtedly the competent authority. It should, in the circumstances, it was submitted, be taken as a mere lack of formality that the Superintending Engineer in spite of his oral agreement had not appended his signature to the three agreement deeds in question.

With regard to the fourth agreement, learned counsel submitted that it had been duly executed by the Executive Engineer, the validity of which has correctly not been rejected by the learned Subordinate Judge. Regarding this aspect of the matter, suffice it to say that so far as the fourth agreement involving a sum less

than Rs. 50,000/- is concerned, learned Standing Counsel No. 1 appearing for the State could not combat the position that it was free from any blemish regarding compliance with the provisions of Article 299 (1) of the Constitution and indeed the finding of the learned Subordinate Judge to that effect could not be assailed by any party. But with regard to the validity of the other agreements involving a sum of Rs. 50,000/- or more, the submission of learned Counsel for the appellant has been stated merely to be rejected.

It is settled law now that in view of Article 299 (1) of the Constitution there is no scope for any implied agreement or contract between the Government and any other person as has been held by the Supreme Court in the case of K. P. Chowdhry v. State of Madhya Pradesh, (AIR 1967 SC 203). If the contract between the Government and another person is not in compliance with Article 299 (1) of the Constitution, it would be no contract at all and could not be enforced either by the Government or by the other person as a contract. Assuming, therefore, that all the negotiations up to the stage of incorporating the terms in the agreement had been done between the appellant and the Superintending Engineer, who was the competent authority, in the absence of the formal deed having been executed by such a competent authority, the agreement must be held to be non est in law. That being so, there is no contract in so far as the three agreements involving a sum of Rs. 50,000/- or more are concerned and there being no contract there is no clause of arbitration to be enforced.

6. This then brings us to the next question as to whether the court below is right in holding that it had no territorial jurisdiction in respect of the matter in question. The learned Subordinate Judge has referred to the definition of the term "Court" in Section 2 (c) of the Act and has come to a conclusion that the definition of 'Court' in the aforesaid statutory provision read with Section 31 of the Act precluded the jurisdiction of the court below in regard to the subject-matter of reference. In my view, the learned Subordinate Judge has committed an error of law in so holding on this point. Section 2 (c) of the Act runs as follows:—

"2. In this Act, unless there is any thing repugnant in the subject or context—

(c). 'Court' means a Civil Court having jurisdiction to decide the questions forming the subject-matter of the reference if the same had been the subject-matter of a suit, but does not, except for the purpose of arbitration proceedings

under Section 21, include a Small Cause Court."

The definition of 'Court' in Section 2 (c) makes it clear that all proceedings under the Act may be taken to the Court which shall have jurisdiction to decide the questions which form the subject-matter of the reference. So far as the three agreements, which did not comply with the provisions of Article 299 (1) of the Constitution, are concerned, this question does not actually arise since there is no agreement at all. But in so far as the fourth agreement is concerned, which has been held to have been duly executed by the competent authority, namely, the Executive Engineer (respondent No. 3), on behalf of the State Government (respondent No. 1), the agreement has been entered into at Ranchi, the parties have appended their signatures to the agreement at Ranchi and the entire course of negotiations culminating in the final execution of the deed took place at Ranchi. Any breach in respect of such an agreement could afford a cause of action even at a place where the agreement had been executed between the parties.

As observed by Kania, J., in the case of *Cursetji Jamsedji v. R. D. Shiralee*, (AIR 1943 Bom 32), Section 2 (c) of the Act does not mean that a court has jurisdiction to receive an award only if the whole cause of action arose within the jurisdiction of the Court. I respectfully agree with the learned Judge when he says in the aforesaid case that under Section 2 (c) any Court which would have jurisdiction to decide the question arising from the subject-matter of the reference would be the proper Court in which the award may be filed and to give the Court jurisdiction it is not necessary that the whole cause of action should arise there. The Court has jurisdiction to determine the subject-matter of the disputes between the parties also when the parties reside within its jurisdiction or a part of the cause of action arises there.

As was also held in the case of *K. M. S. Mine & Mill-Owners v. Rohtas Industries Ltd.*, (AIR 1954 Pat 147), suit for damages for breach of contract may be filed where contract was made or where it should have been performed but for the breach. In the instant case, as I have already noticed above, the entire negotiations and agreement were entered into at Ranchi and any action in respect of breach of such an agreement would certainly lie before a competent Civil Court at Ranchi. There is thus no impediment in the court below having territorial jurisdiction in respect of the fourth agreement involving a sum less than Rs. 50,000/-.

7. The four agreements which have been prayed to be called for by the

appellant were admittedly distinct agreements, each independent of any other. It cannot in any way be said that any one agreement is even remotely connected with any other of the four agreements in question. It will inevitably follow that the decision of the learned Subordinate Judge in respect of the agreement involving a sum less than Rs. 50,000/- is erroneous and to that extent only the appeal shall have to be allowed. I must make it clear that either from the materials on the record or as instructed by learned counsel for both the parties, it has not been possible for us to ascertain as to which particular agreement is in respect of a sum less than Rs. 50,000/-.

8. While allowing this appeal in part, I would, therefore, direct that the learned Subordinate Judge should apply his mind afresh to the four agreements in question only for the purpose of satisfying himself with the assistance of the parties as to which one of the four agreements in question involves a sum less than Rs. 50,000/- and so far as that agreement is concerned, the court below shall issue a direction for such an agreement to be filed in Court in pursuance of the provisions of Section 20 of the Act.

9. The appeal is thus allowed in part but in the circumstances there will be no order as to costs.

S. N. P. SINGH, C. J.:— I agree.
Appeal allowed.

AIR 1976 PATNA 18

S. N. P. SINGH, C. J. AND S. K. JHA, J.
Deopato Kuer and others, Appellants
v. Kamal Prasad Singh, Respondent.

A. F. A. D. No. 341 of 1970. D/- 30-1-1975.*

(A) Evidence Act (1872), Section 91 — Document, where existing, alone to be evidence — If and when existence of unregistered sale deed bars proof of oral sale.

The section only bars the proof of terms of a document otherwise than by the production of that document itself. But the section does not exclude other proof of the transaction itself. As such when witnesses supporting a claim of oral sale of property depose about execution of a document also at the time of the oral sale but that document has not been registered the bar under the section is not attracted for proving that oral sale.

(Para 6)

*(Against order of Murli Mohan Shukla, 1st Addl. Sub. J., Chapra, D/- 7-4-1970).

GS/IS/C597/75/JRM

(B) T. P. Act (1882), Section 83, 60 — Deposit of mortgage money by mortgagor — If and when redemption suit not maintainable for absence of notice of tender to mortgagee.

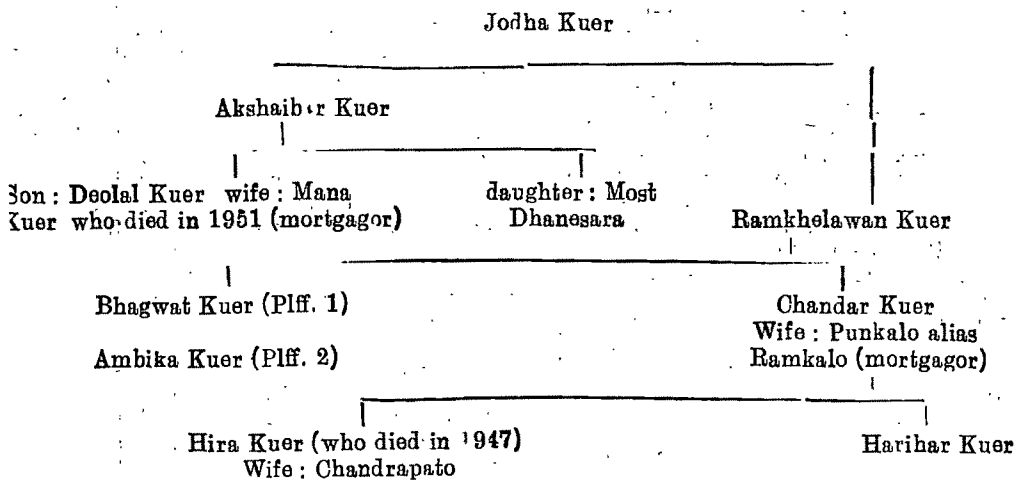
A tender of mortgage money under the section will not be valid until notice has been duly served on the mortgagee but tender or deposit under the section is not a precondition to a redemption suit. That suit therefore cannot be dismissed on the ground of absence of a previous deposit or of non-service of notice of tender. (Para 8)

K. D. Chatterji, A. N. Sahay and Alakh Sundar Prasad, for Appellants; J. C. Sinha and Umesh Prasad Singh, for Respondent.

S. K. JHA, J.:— This is a plaintiffs' appeal against a judgment of reversal in a suit for redemption filed by them. Their suit for redemption was in respect of a zarpeshgi deed dated 27-1-1941 alleged to (Contd. on Col. 2)

have been executed by one Most. Mana Kuer, widow of Deolal Kuer, and one Most. Punkalo Kuer, widow of Chandar Kuer, in favour of one Sheoshankar Sah. That zarpeshgi deed was in respect of an area of 5 kathas 8 dhurs of land comprising plot No. 525 (area 1 katha 2 dhurs) and plot No. 526 (area 4 khatas 6 dhurs) of khata No. 24 of village Basantpur, for a consideration of Rs. 60/- only. Further prayer was for a decree for mesne profits from the date of tender. The trial court had decreed the suit for redemption whereas the lower appellate court has dismissed the suit on a finding that the equity of redemption was no longer subsisting. Against this judgment and decree the plaintiffs have come up in second appeal.

2. In order to appreciate the facts involved for determination of the issue in question in this case it would be worthwhile to give a genealogy as under—



It would be seen from the aforesaid genealogy that Deolal was a first cousin of Chandar. Deolal died leaving behind a widow Most. Mana Kuer alias Munia, and a sister Most. Dhanesara. Mana Kuer is said to have died sometime in 1951. On the other hand Chandar died leaving behind a widow Most. Punkalo alias Most. Ramkalo and two sons Hira and Harihar. Hira is said to have died sometime in the year 1947 leaving behind a widow Most. Chandrapato. The original plaintiffs in the suit were Bhagwat Kuer, plaintiff No. 1, the own brother of Chandar, and Ambika Kuer, plaintiff No. 2, being the son of plaintiff No. 1. This genealogy is not in dispute. According to the plaintiffs' case, the zarpeshgi deed in question was executed on the 27th of January, 1941, by Most. Mana alias Munia and Most. Punkalo alias Ramkalo. In 1942 the aforesaid mortgage was assigned to the sole defendant respondent. The plaintiffs claim to be the purchasers of the equity of redemp-

tion in the following manner. On 6-12-1952 a registered sale deed (Ext. 1) was executed by Most. Dhanesara regarding 2 kathas 13 dhurs of plot No. 526 only appertaining to the half share of Deolal. This sale deed is said to have been executed in favour of plaintiff No. 2. By another registered sale deed dated 3-4-1961 (Ext. 1/a) plaintiff No. 1 Bhagwat claims to have purchased the remaining half share of Chandar's branch from Harihar and Most. Chandrapato, widow of Hira. This sale deed is in respect of 3 kathas 9 dhurs out of plot Nos. 525 and 526.

It is further claimed that on 23-3-1961 a tender was duly made by the plaintiffs to the defendant, which was refused, and thereafter a deposit under Section 83 of the Transfer of Property Act, 1882 (hereinafter to be referred to as the Act) was made and notice served on the defendant respondent which he refused to accept. Hence, the suit for redemption

along with the claim for a decree for mesne profits.

3. According to the defendant respondent's case, it was not correct to say that the zarpeshgi deed dated 27-1-1941 was executed by Most. Mana and Most. Punkalo; actually it is said to have been executed by Most. Mana and Chandar. The other particulars regarding the area and the description of the land were accepted as correct. Although, it was admitted by private arrangement Deolal and Chandar had joint interest in the land in question, it was disputed that they were in possession of the equal share. According to the defence case, Chandar's interest was to the extent of 2 kathas 14 dhurs only. This area of 2 kathas 14 dhurs comprised the whole of Plot No. 525 (area 1 katha 2 dhurs) and only 1 katha 12 dhurs out of Plot No. 526. The remaining area out of the total area in dispute fell in the share of Deolal.

In 1952 the mortgage was assigned to the defendant who, in his turn, is said to have acquired the equity of redemption in the following manner. On 4-6-1947 the defendant mortgagee took a sale deed (Ext. A) from Harihar, which also purported to be a confirmation of a previous oral sale by Hira in favour of the defendant. This registered sale deed was executed for a consideration of Rs. 85/- out of which Rs. 30/- being the half share of the mortgage money was adjusted against the half share of consideration of the mortgage, Rs. 10/- was given for the shradh of Hira and Rs. 45/- was adjusted against a loan on a stamped paper dated 14-5-1942 advanced by one Sheojit, uncle of the defendant.

Sometime in the year 1949 the interest of Deolal is said to have been purchased orally by the defendant from the widow of Deolal, Most. Mana Kuer who was, as already stated, one of the mortgagors, for Rs. 75/- out of which Rs. 30/- was said to have been adjusted against the half share in the mortgage due and Rs. 45/- was paid in cash to Most. Mana Kuer. Thereafter the defendant claims to have been put in possession qua a kashtkar and he no longer continued in possession as mortgagee. On 1-8-1950 a stamped receipt (marked as Ext. C by the lower appellate court) was said to have been executed by Most. Mana Kuer to prevent any future litigation reciting the acknowledgment regarding the transaction of oral sale which had taken place in 1949.

4. The trial court accepted the plaintiffs' case and held that they had purchased the equity of redemption. The lower appellate court, on the contrary, while dismissing the suit, found as follows:—

(i) That the plaintiffs' assertion that the zarpeshgi deed was executed by Most. Mana and Most. Punkalo was not correct; as a matter of fact, it was executed by Most. Mana and Chandar, as was the defence case.

(ii) Furthermore, that the documents of 1952 and 1961 (Exts. 1 and 1/a respectively) through which the plaintiffs claim to have acquired the equity of redemption did not confer any title on the plaintiffs (appellants). On the contrary, the entire equity of redemption had been purchased by the defendant (respondent) through Ext. A, dated 4-6-1947 which was a sale deed from Harihar and the oral sale of 1949 by which Deolal's share was acquired by the defendant from his widow Most. Mana.

As such, it was found that the entire equity of redemption had been duly and legally acquired by the defendant in 1949 and since after that date the defendant had been coming in possession, paying rent and obtaining rent receipts, having got himself mutated as kashtkar in respect of the entire land in question.

5. Mr. K. D. Chatterji, learned Counsel appearing for the appellants, urged firstly that on the findings of the lower appellate court the plaintiffs appellants were entitled to redeem the mortgage. It was submitted that the plaintiffs had acquired, by Ext. 1 dated 6-12-1952, an area of 2 kathas 13 dhurs out of plot No. 526 from Most. Dhanesara and by virtue of Ext. 1/a dated 3-4-1961 an area of 3 kathas 9 dhurs of plots Nos. 523 and 526 from Harihar and Chandrapato whereas the defendant claims to have got an area of only 2 kathas 4 dhurs under Ext. A dated 4-6-1947. Evidently, therefore, Ext. A not being in respect of half interest of Chandar's branch, the portion which was not covered by Ext. A must be deemed to have still remained with Harihar and Hira which had been acquired by the plaintiffs under Ext. 1/a from Harihar and Chandrapato. On such a premise, it was argued, under Section 91 of the Act all persons having any interest in the property subject to mortgage were entitled to the right of redemption; as, any interest, howsoever small, in the property gives a right of redemption. Even if, therefore, it be held that a fraction of mortgagors' right in respect of Chandar's interest in the property came to be acquired by the plaintiffs by Ext. 1/a, the plaintiffs were perfectly entitled in law to sue for redemption. This argument is based upon a misconception of facts.

It was pointed out by Mr. J. C. Sinha, learned Counsel for the respondent, that the area covered under Ext. A dated 4-6-1947 was not only 2 kathas 4 dhurs, as was suggested by Mr. Chatterji, but 2 kathas 14 dhurs, the break-up of which

was 1 katha 2 dhurs of plot No. 525 and 1 katha 12 dhurs out of plot No. 526. This area of 2 kathas 14 dhurs was just the half of the total area in dispute, namely, 5 kathas 8 dhurs. It is, therefore, wrong to suggest, as was suggested by Mr. Chatterji, that a fraction of the right in the equity of redemption in respect of the interest of Chandar was still left over in spite of execution of Ext. A dated 4-6-1947 by Harihar. Indeed, Mr. Chatterji could not then contradict the fact that actually the area transferred under Ext. A was 2 kathas 14 dhurs. The first submission of Mr. Chatterji, therefore, fails on this ground alone.

Apart from this, I may also point out here the inherent absurdity in the plaintiffs appellants' case. The plaintiffs claim to have acquired under each of Exts. 1 and 1/a half share in the lands in dispute. The total area in dispute, as already stated, is 5 kathas 8 dhurs. It does not, therefore, stand to reason as to how and on what basis under Ext. 1 plaintiff No. 2 got 2 kathas 13 dhurs of plot No. 526 and under Ext. 1/a plaintiff No. 1 got 3 kathas 9 dhurs comprising the entire plot No. 525 and the remaining area of plot No. 526. The total area under these two exhibits comes to 6 kathas 2 dhurs. This is nobody's case.

6. It was next urged that the equity of redemption even regarding the interest of Deolal could not have been extinguished as was held by the lower appellate court, because the alleged oral sale by Most. Mana cannot be proved in view of Section 91 of the Evidence Act. Learned Counsel submitted by referring to certain portions of the lower appellate court judgment that some of the witnesses examined on behalf of the defendant had stated, while supporting the case of this oral sale of 1949, that a deed was also scribed on the occasion. Mr. Chatterji submitted that, since the witnesses had admitted that a formal deed witnessing the sale had been scribed and executed on the occasion of the alleged oral sale, the sale could be proved only by the production of the document of sale duly registered and the entire evidence on the question of oral sale must be held to be inadmissible in view of Section 91 of the Evidence Act. This argument is not at all well founded.

It is well settled that Section 91 bars the proof of the terms of a document otherwise than by the production of the document itself. It does not, however, exclude other proof of the transaction itself. The terms of a contract grant or any other disposition of property reduced to the form of a document are something distinct from the proof of the transaction itself. If, for example, a document of sale is on the record evidencing certain terms of the contract of such sale. Section 91

precludes any other evidence, apart from the terms of the document itself, from being taken in, in order to prove such terms. Section 91, however, does not preclude in the case even of an unregistered deed of sale, which has not been brought on the record of a case, a proof of the fact that a transaction by way of oral sale had taken place.

Merely because the defence witnesses had said in their evidence that at the time of the oral sale a sada document was also executed, which has never seen the light of the day, it cannot attract the bar of Section 91 of the Evidence Act to prove the nature of the transaction, namely, that an oral sale was made in favour of the defendant by Mana Kuer. This is on the assumption that whatever the defence witnesses have said must be taken on its face value in entirety as gospel truth. None of the courts below has actually recorded a finding on the basis of such evidence that there ever was a written document in proof of the oral sale of 1949 executed simultaneously with it. It may just be that the defendants' witnesses may, in their zeal to support the defence case, have made certain embellishments and exaggerations by trying to further strengthen the case of the defendant. In the absence of any finding on the basis of such evidence, this argument is not available to learned Counsel for the appellants.

Apart from that, the recitals in Ext. C clearly support the case of the defendant that an oral sale had been made by Most. Mana Kuer which fact was acknowledged in the deed purported to be a receipt (Ext. C). At the initial stage Mr. Chatterji contended that the lower appellate court had committed an error of law in taking an unstamped paper (Ext. C) in evidence even for a collateral purpose. This argument, however, was based upon a bone fide misapprehension of the true state of facts, which was bound to arise on account of an inadvertent statement of fact in the judgment of the lower appellate court. In paragraph 33 of the lower appellate court judgment, Ext. C has been described by the learned Subordinate Judge as being an unstamped sale deed dated 1-8-1950. This was, however, clearly an accidental slip, it can be gathered from the original deed on record itself, which was shown to Mr. Chatterji, that what was intended to be said by the lower appellate court was that, although stamped, it was an unregistered document. Even the trial court has stated at the end of paragraph 3—

"That to prevent future trouble regarding oral sale Mana Kuer also executed a deed in the form of receipt dated 1-8-1950 on stamp paper." Having been confronted with this posi-

tion, learned Counsel for the appellants withdrew the submission in this respect.

7. It was next contended by Mr. Chatterji that there is a stipulation in Ext. A, which is the sale deed executed by Harihar in favour of the defendant, that previous to that sale deed an oral sale had also been made by Hira in respect of his share. It was suggested that, since no case of oral sale had been pleaded in the written statement and none of the courts of fact had accepted that case, it ought to have been held that the entire interest of Chandar had not passed on to the respondent. It is quite true that the case of oral sale by Hira has not been pleaded. It is also well settled that no amount of evidence can be gone into in support of a fact not pleaded and it is also true that none of the two courts below has accepted any story of oral sale by Hira in favour of the respondent. Nonetheless the final court of fact has non-suited the plaintiffs not on the ground that any interest in the equity of redemption had passed on to the respondent by virtue of any oral sale said to have been made by Hira but on the strength of the transfer made by Harihar himself. It has been found as a fact by the lower appellate court that Harihar in executing the sale deed had acted for, and on behalf of, the joint family of Harihar and Hira.

In paragraph 28 of the judgment of the lower appellate court, the evidence of the plaintiffs' witnesses who had tried to prove that there was a separation in status between Hira and Harihar has not been accepted. On the contrary, from the discussion of evidence and the findings on the basis of such evidence, the conclusion arrived at seems to be that Harihar, in executing Ext. A had acted on behalf of the joint family of himself and Hira. I may mention here that it is unfortunate that the finding in this respect does not seem to be very clearly and systematically recorded as the entire evidence on all the points has been sought to be discussed by the lower appellate court as if all the issues were in a common hotchpot.

Be that as it may, it is quite clear that no relief has been granted to the respondent nor have the plaintiffs been non-suited on any alleged supposition of transference of Hira's interest to the respondent or any oral sale. That, therefore, disposes of this part of the submission of Mr. Chatterji. No other point was raised on behalf of the appellants.

8. Mr. J. C. Sinha, learned Counsel for the respondent urged that, even assuming that something could be said in favour of the appellants, the story of a valid tender having not been accepted as correct and it having been held by the lower appellate court on an appraisal of evidence that the service of notice of tender under Section 83 of the Act had

not been proved, the appellants must be non-suited on that ground also. I am afraid this argument is not at all tenable.

The law is well settled that deposit under Section 83 of the Act is not valid until notice has been duly served on the mortgagee, for it is the service of notice that operates as a valid tender, although so long as the notice is not served, the mortgagee's right of suit under Section 67 of the Act is not wiped out if he is not otherwise aware of the deposit. In a suit for redemption it is not necessary to prove even a previous tender. Either a tender or a deposit under Section 33 of the Act is not a condition precedent to a suit for redemption of the mortgaged property and the court cannot dismiss the suit on the ground that a previous deposit had not even been proved. If at all this question can have any bearing in appropriate cases, it will have a bearing on the question of mesne profits only. There is, therefore, no substance in the contention of Mr. Sinha that on account of non-service of the notice of deposit under Section 83 of the Act the suit ought to have been dismissed. That, however, is a question merely of academic importance in this case in view of what I have already held above.

9. For the foregoing reasons, I am constrained to hold that there is no merit in this appeal and it accordingly fails. The appeal is dismissed with costs.

S. N. P. SINGH, C. J.:— I agree.
Appeal dismissed.

AIR 1976 PATNA 22

SHAMBHU PD. SINGH AND LALIT
MOHAN SHARMA, JJ.

Abanindra Nath Das, Petitioner v.
The State of Bihar and others, Respondents.

Civil Writ Jurdn. Case No. 1133 of
1973, D/- 16-1-1975.

(A) Bihar Buildings (Lease, Rent and Eviction) Control Act (3 of 1947), Section 11 (2) (a) — Vacation of premises by servant of Government — Building leased to Central Government for office purposes — Department vacating building — Allotment made to another department is illegal.

The language of clause (a) shows that a servant of the Government should be in possession of a building as tenant. When the building has been let out to Central Government the servant of the Government is not in possession as tenant but is in occupation on behalf of the Government. When the Central Government department occupying the building vacates it, no question of allotment arises.

HS/JS/D22/75/JRM

The Government being the tenant can ask any of its servants to occupy it. Therefore an allotment order passed under the section in favour of another department is illegal. (Para 5)

Cases Referred: Chronological Paras
AIR 1924 Rang 278 = 3 Bur LJ 36 4

B. C. Ghose and P. K. Sinha, for Petitioner; K. P. Verma (Govt. Advocate) G. P. Jaiswal (Jr. to Govt. Advocate) Shambhu Saran, (Standing Counsel for Income-tax Department), for Respondents.

ORDER:— By this application under Articles 226 and 227 of the Constitution of India, the petitioner prays for quashing an order of the District Magistrate of Saran (Respondent No. 2) dated the 22nd May, 1973 (Annexure '6'), passed under the Bihar Buildings (Lease, Rent and Eviction) Control Act, 1947 (hereinafter referred to as the Act). The facts leading to the passing of that order and the filing of this application before this Court may briefly be stated. On the 1st April, 1941, the petitioner leased his house situate in the town of Chapra to the Union of India for use of the Commissioner of Income-tax, for office purposes. The lease was for three years only and it was again renewed from time to time till the year 1972. The Office of the Income-tax Department was located in the building.

On the 17th December, 1972, the office was shifted to another place and this fact was communicated to the petitioner on the 18th December, 1972. The Income-tax Department also started vacating the premises from that date and vacated the same completely on the 5th February, 1973. The Department stopped payment of rent from August, 1972, and there was some communication between the petitioner and the Department with regard to that and it appears, ultimately, the Department has paid the rent for the period from August, 1972, till the 5th February, 1973. On the 13th February, 1973, Respondent No. 2 allotted the house to the Executive Engineer, Buildings Division, Public Works Department (Vide Annexure '3'). On the 26th February, 1973, some persons on behalf of the Executive Engineer (Respondent No. 3) forcibly opened the lock of the house and occupied it. On the 6th of March, 1973, the petitioner filed an application before Respondent No. 2, challenging the order of allotment (vide Annexure '5'). The impugned order (Annexure '6') has been passed on this application.

2. The case of the petitioner is that under Section 11 (2) (a) of the Act, which reads as follows, Respondent No. 2 could not have allotted the house to Respondent No. 3:—

"(2) (a) Where a servant of the Government in possession of any building as a tenant intends to vacate such building, he

shall give fifteen days' previous notice in writing of his intention to do so to the landlord and to the District Magistrate who shall under intimation to the landlord within a week of the receipt of the notice, either allot building to any other servant of the Government whom the District Magistrate thinks suitable subject to the payment of rent, and the observance of the conditions of the tenancy by such servant of the Government, or direct that the landlord shall be put in possession of the building:

Provided that when no such order is passed by the District Magistrate, the landlord shall be deemed to have been put in possession of the building."

According to the petitioner, sub-section (2) (a) of Section 11 of the Act could have applied only if the building would have been let out to a servant of the Government in his personal capacity and as in this case the building was let out to the Central Government, that sub-section had no application.

3. No counter-affidavit has been filed on behalf of the Respondents Nos. 1 to 3. A counter-affidavit has been filed on behalf of Respondent No. 4, the Commissioner of Income-tax, admitting the facts alleged by the petitioner that the house was let out to the Union of India for office purposes, but, at the same time asserting that all the arrears of rent have been paid.

4. Learned Government Advocate, appearing on behalf of Respondents Nos. 1 to 3, has submitted that sub-section (2) (a) of Section 11 of the Act would apply even to a case where a building is let out to the Government. He has relied upon a decision of the Rangoon High Court in the case of *Azee Meah v. Jeewa*, AIR 1924 Rang 278, but that decision has got no application to the present case.

5. In our opinion, the contention of the learned Counsel for the petitioner is correct. From the language of sub-section (2) (a) of Section 11 of the Act, it is manifest that a servant of the Government should be in possession of the building as a tenant. If the tenant is the Government, then the servant of the Government is not in possession of the building as a tenant. He is in occupation of the building on behalf of the Govt. Really, if a building is let out to the Government itself, then the question of allotment to another Government servant after it is vacated by one Government servant does not arise at all.

In that case the Government, being the tenant, could ask any of its servants to occupy it without any formal order of allotment being passed under the said sub-section of Section 11 of the Act. Respondent No. 2 in his order (Annexure '6') has taken the view that there is no differ-

ence between a servant of the Government' and the 'Government', and, therefore, sub-section (2) (a) of Section 11 of the Act has got application to the facts of the case. He is obviously wrong. Accordingly, his order dated the 22nd May, 1973, has got to be quashed and the order of allotment as contained in Annexure '3' has to be held illegal. The application is accordingly allowed and the order dated the 22nd May, 1973, of Respondent No. 2 (Annexure '6') is quashed. The petitioner shall be entitled to costs from the State Government. Respondent No. 1. Hearing fee is assessed at Rs. 100/- (Rupees one hundred only). Respondent No. 2 should now see that Respondent No. 3 vacates the house within a month from today and the petitioner is paid rent for the period Respondent No. 3 has been in occupation of the building.

Petition allowed.

AIR 1976 PATNA 24

K. B. N. SINGH AND

LALIT MOHAN SHARMA, JJ.

The State of Bihar, Appellant v. Sishir Kumar Mukherji, Respondent.

A. F. O. D. No. 265 of 1966. D/- 20-11-1974.*

(A) Fatal Accidents Act (1855), Section 1-A — Negligence — Capsizing of boat in river due to flood water — Failure to provide life saving device.

Where the employer had kept a boat for carrying his employees from one bank of the river to the other and the river was famous for furious and turbid current and the boat capsized because of swift onrush of flood water and the employee died of drowning, held that the failure to provide life saving device in the boat amounted to negligence. The fact that the statutory rules did not specifically mention about the provision of life saving device was immaterial. Even if excess of flood water was due to heavy rain, it would not constitute an act of vis major. 1917 AC 556, Relied on. (Para 13)

(B) Fatal Accidents Act (1855), Section 1-A — Suit for compensation — Suit by father of deceased — Claim made on behalf of widow and daughter of deceased also — Failure to implead them or the fact that they had disclaimed compensation is not fatal to maintainability of suit. AIR 1947 Cal 195, Followed. (Para 15)

(C) Fatal Accidents Act (1855), Section 1-A — Costs — Costs can be awarded on amount of compensation decreed

*(From order of S. K. Jha. Sub. J., Patna, D/- 7-5-1965).

GS/IS/C606/75/JHS

and not on net amount which deceased might have earned — (Civil P. C. (1908), S. 35).

(Para 19)

Cases Referred: Chronological Paras

AIR 1966 Pat 130 = 1965 BLJR 564	19
AIR 1962 SC 1 = (1962) 1 SCR 929	16
(1950) 1 All ER 819 = 1950 WN 193	13
AIR 1947 Cal 195 = 51 Cal WN 419	15
1942 AC 601 = (1942) 1 All ER 657	16
1917 AC 556 = 86 LJ PC 185	13
(1864) 2 Macph (Ct. of Sess.) (HL) 22 =	
36 Sc Jur 400 (Scot)	13
(1850) 13 Dunl 312 (Scot)	13

Birendra Prasad Sinha. (Govt. Pleader) and Prabhunath Roy (Jr. Counsel to G. P.), for Appellant; S. K. Sarkar, for Respondent.

K. B. N. SINGH, J.:— This appeal by the State of Bihar arises out of a suit for compensation, in which a decree for Rs. 14,040/- has been awarded as compensation to the plaintiff-respondent and his w.f.e.,

2. The plaintiff-respondent filed a suit claiming compensation and damages to the tune of Rs. 2,19,301/-, on account of fatal accident met by his son, Raghu Nath Mukharji, due to wrongful act and utter negligence on behalf of the appellant, under whom he was employed as an Assistant Engineer. The suit was filed by the plaintiff for his own benefit as also for the benefit of Sulekna Mukherji, widow of the deceased, and the minor daughter of the deceased, as also his own wife, the mother of the deceased, under Fatal Accidents Act, 1855 (hereinafter referred to as the Act).

3. The deceased, Raghunath Mukharji, was appointed as an Assistant Engineer in the Irrigation Department of the State of Bihar and, at the relevant time, was posted in the Kosi Project and was working as Subdivisional Officer, In-charge of Vardah Quarry sub-division, under the Barrage Division of Birpur. It is the common case of the parties that the deceased, while returning from Birpur, where he had gone on the 25th June, 1960 to his headquarters at Vardah on the 26th June, 1960, died of drowning, as the boat of the Kosi Project Department, in which he was travelling capsized in the Kosi river. His dead body was recovered on the 28th June, 1960. The plaintiff's case is that the death of his son was due to the negligent act of officers of the defendant-appellant in the Kosi Project Department in not providing the boat with any life saving device and that the boat was also old and worn out. As the death of the plaintiff's son took place while he was in course of his employment and duty, the plaintiff was entitled to compensation from the State of Bihar. The plaintiff has averred that the deceased at the time of his death was drawing a total emolu-

ment of Rs. 481/- per month and was expected to be promoted as Executive Engineer by July, 1962, and as Superintending Engineer by July, 1972. On that basis, fifty per cent. of his total earning up to the period of his superannuation, has been claimed as compensation, as mentioned in Schedule A to the plaint, besides gratuity.

4. The suit has been contested by the State of Bihar. The case of the State, in short, is that the boat was in a sound condition and was not worn out or rickety, and that the death was not caused on account of any negligent act or the part of the employees of the Defendant, but it was a case of pure accident in which the deceased Raghunath Mukharji and two others, namely, Pahari Lal, Mechanic, and Gauri Shankar Gupta, Overseer, were drowned. The duty of the deceased consisted of supervision work of collection and transportation of sand from a place named Gangajali to the headquarters at Vardah, both the places being on the western bank of Kosi, and his official duty did not require him to cross river Kosi on the east of which is Birpur. He had not received any order for going to Birpur from his superior authorities and he had gone to Birpur on the 25th June, 1960, of his own accord. Therefore, the death did not take place in course of his official duty or employment. It is also pleaded that there was an alternative land route via Nirmali and Bathnaha for going to Birpur from Vardah, which did not involve crossing of the Kosi river. The amount of compensation claimed was also said to be imaginary and without any basis. The suit was also said to be not maintainable for non-compliance of the provision of Section 80 of the Code of Civil Procedure (hereinafter referred to as the Code).

5. After the written statement was filed, the plaint was amended stating therein that notice under Section 80 of the Code had duly been served on the defendant.

6. The trial Court decreed the suit in part, as mentioned above, and held as follows:—

(a) The notice under Section 80 of the Code was duly served on the defendant.

(b) The suit was not barred by limitation.

(c) The plaintiff filed the suit in the representative capacity as provided under the Act for the benefit of the widow, child and parents of the deceased, and the suit as framed was maintainable.

(d) The death of the deceased was caused due to the negligent act on the part of the employees of the defendant, while the deceased was acting in course

of his duty and employment under the defendant.

(e) The defendant having granted ex gratia help to the deceased's widow and minor daughter, as is the evidence of Sulekha Mukharji (D. W. I-examined on commission), no amount could be decreed or apportioned for the widow and the minor daughter of the deceased.

(f) The loss suffered by the plaintiff and his wife was held to be Rs. 75/- per month for each of them and on that basis, the compensation has been calculated at Rs. 14,040/- for both of them, each getting half and half.

7. Against the above decree, the defendant-appellant has filed the present appeal. The plaintiff-respondent has also filed a cross-objection, claiming higher compensation.

8. The learned Government Pleader has urged that on the basis of the notice dated the 5th June, 1961, under Section 80 of the Code, the learned trial Court has added the notice period of two months and held that the suit was filed in time, without any finding that the notice dated the 5th June, 1961, had duly been served. He has also submitted that on the basis of an earlier notice dated the 14th December, 1960, under Section 80 of the Code having been served, the plaintiff was not entitled to any extension of the time for the period of two months. There is no substance in this submission of the learned counsel. The death took place on the 26th June, 1960, and the suit has been filed on the 21st August, 1961. The limitation for filing a suit under the Act was one year from the date of the death of the person killed under Article 21 of the Old Limitation Act, which applied to this case. This suit was filed beyond one year but within two months of the expiry of the period of limitation. The trial Court has found that the plaintiff was entitled to exclusion of two months period of notice under Section 80 of the Code of Civil Procedure, as provided by S. 15 (2) of the Limitation Act. The plaintiff has produced the office copy of the notice dated the 5th June, 1961, which has been marked as Exhibit 1. This notice was sent under registered post to the Secretary, Kosi Project Department, now River Valley Department, the same day, as it appears from the postal receipt Exhibit 3. In the written statement, all that the defendant has averred in paragraph 3 is that the suit is liable to be dismissed for non-compliance of the provisions of Section 80 of the Code. As already mentioned the plaint was thereafter amended asserting that the notice under Section 80 of the Code was served on the defendant. The plaintiff (P. W. 1), who proved the office copy of the notice dated the 5th June,

1961, as Exhibit 1, has stated that he sent the notice under Section 80 of the Code through Shree Anant Kumar Bose, Advocate, and that Exhibit 1 was its office copy and the corrections in the said notice were in the pen of Shree Rameshwar Prasad, Advocate. The cross-examination of the plaintiff on the point is in para. 18 (which should have been paragraph 14 instead of 18, as it follows paragraph 13 and all paragraphs after 13 have been wrongly numbered). In this paragraph, there is no suggestion to the witness that the notice was not served. There is not a word in the evidence of any of the defence witnesses about the non-service of the notice under Section 80 of the Code. On the other hand, there was a suggestion to P. W. 1 that his daughter-in-law (widow of the deceased) did not authorise him to give any notice under Section 80 and she was opposed to the service of notice under Section 80 of the Code by the plaintiff and that she had written to the plaintiff that he made a mistake by giving a notice under Section 80 of the Code. From this suggestion the service of notice is in a way accepted. Not only that, a letter written by the daughter-in-law of the plaintiff to the State Government to the above effect has been produced and marked as Exhibit D (4). This letter is in reply to a letter dated the 21st December, 1960, written by the P. A. to the Chief Engineer, River Valley Projects Department (Kosi Wing), Government of Bihar, Patna, in which the widow of the deceased was informed about the notice by Shree S. K. Roy, Choudhary, Advocate, on her behalf as also on behalf of her daughter. This obviously refers to an earlier notice dated the 14th December, 1960, sent by registered post under postal receipt Exhibit 3 (Ka), which receipt was exhibited on the 16th November, 1964, even before the application for amendment of the plaintiff dated the 12th August, 1964, was allowed on that date. The notice dated the 5th June, 1961, having been sent by registered post, as is evident from Exhibit 3, well within time, must be presumed to have been delivered in the ordinary course. This must be so, in absence of any denial on the part of the defendant's witnesses about the non-service of notice. It is true that no office copy of the earlier notice dated the 14th December, 1960, has been brought on the record, but from the suggestion in cross-examination of P. W. 1 and Exhibit D/4, it appears that the notice was also served. Once it is held that the notice under Section 80 of the Code has been duly served in time, the plaintiff is entitled to exclusion of the notice period of two months in computing the period of limitation under sub-section (2) of Section 15

of the Limitation Act. It is, therefore, manifest that the trial Court was not in error in holding that the notice was duly served and the suit was filed within time.

9-10. The learned Government pleader has next contended that it was no part of the duty of the deceased to go to Birpur, which is on the eastern side of Kosi river, and the accident did not occur in course of the duty and employment under the defendant, and so the defendant was not liable to pay any compensation.

[After considering the evidence, the Judgment proceeded.]

11. On an analysis of the evidence, it is manifest that the deceased being admittedly in charge of Vardah Sub-division and having supervision and control over that sub-division, having gone to Birpur on the 25th June, 1960, and having actually collected some cash for payment to the labourers and for purchase of spare parts and repairs of some machineries working at Vardah, as admitted in the written statement cannot but be said to have gone to Birpur, in discharge of his duties and in course of employment. Simply, because his subordinate, the cashier, had also accompanied him or for the reason that the Cashier had stated that as he was going it was not necessary for the deceased to go, will not be sufficient to hold that he had not gone to Birpur in discharge of his duties and in course of his employment. From the suggestions made to the Superintending Engineer, D. W. 5, it appears that perhaps the authority slip for drawing the cash was not renewed. Relevant document regarding withdrawal of cash has also not been produced by the State to show that his going in this connection was wholly uncalled for. The distribution of cash ultimately was the responsibility of the deceased. Besides that, no duty chart has been produced and even the Superintending Engineer could not say whether the deceased had gone to Birpur on official duty or not. Some of the duties of the deceased, as stated in the plaint, have not been controverted in the written statement. From the evidence of D. W. 3, it appears that the barrage was being constructed a mile away from the main current of Kosi river towards the east. The journey of the Sub-divisional Officer of Vardah Sub-division to the Divisional Headquarters at Birpur for drawing cash for payment to labourers and purchase of spare parts obviously must be in discharge of his official duty. It lay within his discretion, whether he should go himself for that purpose or leave it to his subordinates. Even if he had erred in exercise of his discretion, nonetheless it will be in discharge of his duties.

12. The learned Government Pleader has next contended that the finding of the trial Court about negligence on the part of the defendant is based merely on absence of life saving device in the ill-fated boat. He has submitted that it was not practice to provide life saving device in such country boat. The test of negligence in such cases is a test of a prudent man. The evidence indicated that the boat was in good condition and the accident took place because of a very swift current and increase in volume of water in river Kosi. Therefore, merely on account of absence of life saving device on the boat, it cannot be held that the death took place on account of the negligence on the part of the defendant's employees.

13. It is true that no rule or circular has been pointed out to us on behalf of the respondent that these country boats should be provided with life saving device. Under Section 22 of the Fingal Ferries Act, the Commissioner has been given power to make rules for maintenance and safety of passengers and properties on private ferries situated in his Division. The Rules framed under this section make it obligatory for the private ferries to be registered. The application for the purpose has to state particulars as required in the rules in this regard. The plaintiff has averred in paragraph 5 of the plaint that this ferry was not registered under the said Act which has not been denied by the defendant. There is no specific mention in those rules about the provision of life saving device. The liability of the master is not limited to failure to perform statutory obligations so as to make him liable for negligence. The master owes a duty to his servants to see that reasonable care is taken for the latter's safety. He may delegate his own functions to his officers, but he cannot delegate or avoid his own responsibility for their proper performance, as observed by Lord Reid in *Winter v. Cardiff R. D. C.* ((1950) 1 All ER 819, 825). The standard of care which a master is required to take about the safety of his employee would, no doubt, be what would be observed by a prudent and reasonable man and this again will depend upon the facts of each case and the attending circumstances. Analysing the facts in the instant case, it is admitted position in the case that the Kosi Project Department had provided the boat in question for plying across Kosi river for use of its employees during the construction of barrage. It appears from the evidence of D. W. 1 that the Department had a number of boats and none of which was provided with any life saving device. The witness also admitted that river Kosi is turbulent during the time of flood. From the evidence of D. W. 2 it appears that the boat capsized

due to swift current in the river. D. W. 3, who was also an occupant of the boat, stated that the boat capsized because of the on-rush of flood water. The river Kosi is well known for its furious and turbid current, especially in the rainy season, as observed by the trial Court. It is thus obvious that the danger involved in crossing river Kosi is of greater magnitude than involved in crossing comparatively tame rivers. In my considered opinion, a prudent or reasonable man, while providing a boat for carrying its employees in such a river during rainy season and flood, would be required to provide life saving device, in view of the hazardous nature of journey involving greater amount of risk than an ordinary river crossing. Mere provision of a boat having no leakage, painted and in proper working condition is not enough to ensure safe journey in such a perilous river, but provision for some life saving device becomes necessary in view of the magnitude of the risk to minimise it. The provision for transport means provision for a safe transport, which, in terms, implies provision for safety in case of hazards in such a river. The imminence of risk and perilous nature of journey by boat at that point in river Kosi, especially during rainy season, as in the instant case, made it obligatory on the part of the defendant to provide life saving device on the boat in question and its failure showed lack of reasonable care and precaution, which a master was expected to take in a situation like this and it amounted to an act of negligence on the part of the defendant on the facts and in the circumstances of the case. Negligence after all in any given circumstance is failure to exercise that care which circumstances demand. Even if excess of flood water was due to heavy rains, it will not constitute an act of vis major, as contended. This gains support from a decision of the House of Lords in the case of *Corporation of Greenock v. Caledonian Railway*, 1917 AC 556, where rain fall of extraordinary violence was not considered by the House of Lords to constitute an act of God. In that case, the definition of 'Vis Major' as given by Lord Westbury, in *Tennent v. Earl of Glasgow*, (1864) 2 Macph (Ct. of Sess.) (HL) 22 was quoted with approval, which runs as follows:—

".....Circumstances which no human foresight can provide against, and of which human prudence is not bound to recognise the possibility, and which when they do occur, therefore, are calamities which do not involve the obligation of paying for the consequences that may result from them."

Lord Finlay, L. C., also quoted the same idea conveyed by Lord Cockburn, in a

picturesque phrase in *Samuel v. Edinburgh and Glasgow Railway Company*. (1850) 13 Durl 312:—

"I think he is bound to provide against the ordinary operation of nature, but not against her miracles."

Thus, there is no substance in this submission of the learned Counsel as well.

14. The learned Government Pleader also contended that if the boat had no life saving device, the deceased should not have gone by the ill fated boat, but could have taken the alternative route. It has come in evidence that on the west bank of Kosi is Vardah and on the east of it is Birpur at a short distance. D. W. 4 has spoken about the alternative route from Vardah to Birpur via Nirmali up to Bathnaha by rail and thereafter up to Birpur by road. The route obviously seems to be a long and circuitous one and time consuming, although the distance has not been given by the witness. A transport having been provided by the Department and the two places being across the river, the existence of an alternative route could be no answer to the plaintiff's claim for compensation and damages against the defendant. The deceased having utilised the boat, without any life saving device, will also be no answer to the claim for damages, where a transport is provided by the employer for the journey in question. No evidence has been led in the case that the deceased was entitled to his expenses via a circuitous route in case of his refusal to go by the conveyance provided by the employer. This submission of the learned counsel also, therefore, fails.

15. The learned Government Pleader has also challenged the maintainability of the suit on the ground that the claim being under Section 1-A of the Act, in which the wife of the deceased is disclaiming, the plaintiff alone could not maintain the suit. He has urged that in the copy of the plaint attached to the notice the name of the plaintiff alone appears and the names of others have been scored through. There is no substance in this submission also of the learned counsel. The first part of Section 1-A of the Act provides for suit for compensation to the family of a person for the loss occasioned to it by his death, by actionable wrong. The second part lays down that such action or suit can be brought in the name of an executor, administrator or representative of the person deceased. The representative of the deceased in this part of the action includes parent of the deceased. The relevant portion may usefully be reproduced in this connection:—

"Every such action or suit shall be for the benefit of the wife, husband, parent, and, child, if any, of the person whose

death shall have been so caused, and shall be brought by and in the name of the executor, administrator or representative of the person deceased."

Section 2 only lays down that not more than one action shall be brought for such claim, and claims in respect of loss to the estate of the deceased may be added in the suit that may be filed under S. 1-A of the Act. As already mentioned, the claim being on behalf of the widow and daughter of the deceased also, it cannot fail merely on account of the disclaimer on the part of the widow or her daughter. Merely because the widow and the daughter have not been impleaded in the suit, their omission will not be fatal to the maintainability of suit, as urged by the learned counsel, as any one of the persons mentioned in Section 1-A, namely, wife, child or parent, could maintain a suit for benefit of all, as held in the case of *Jeet Kumari Poddar v. Chitagong Eng. and Elec. Supply Co. Ltd.*, (AIR 1947 Cal 195).

16. The learned Government Pleader has lastly contended that the plaintiff is not entitled to any compensation. He was not so far receiving anything from his son. He has not said a word as to what were his expectations and there is no evidence also in this regard. He has relied on paragraph 9 of the plaint in this regard, which refers to a large amount being required for education, bringing up and marriage of the minor daughter of the deceased, who was then only 9 months old, besides the maintenance of the mother and widow of the deceased which the deceased was legally and morally bound to meet. The submission based on paragraph 9 of the plaint overlooks the averments made in paragraph 8 of the plaint, in which it is stated that the plaintiff, along with his wife, Pannarani Devi, his daughter-in-law Sulekha Mukharji, and his minor grand-daughter, Dolla, are the persons who answer the term "representative" of the deceased under Section 1 of the Act and it was for their benefit that the present petition was filed claiming compensation, and the suit was filed for the benefit of all and the amount of compensation can be easily adjusted amongst themselves, to which they are legally entitled. Thus the claim is made on behalf of the plaintiff and his wife as well, in conjunction with the widow and the minor daughter of the deceased, for whom a lump sum compensation was claimed, which was to be distributed amongst themselves. It is true that the plaintiff, in his evidence, has not stated a word that he received any amount from the deceased prior to his death, nor it is mentioned as to what assistance and help he expected from his son. The plaintiff himself was in service from 1928 in the

Public Works Department and he retired as an Accountant in 1959. At the time of his retirement, he was drawing a salary of Rs. 120/- per month, besides dearness allowance, etc., and was then living in Government quarters. It is common knowledge that the rent payable for such quarters would be a nominal amount and he might not have been in need of any assistance from his son, so long he was in service. After retirement, he would have got his gratuity etc. and might not have been in need of getting any amount from his son for the few months that he lived after the plaintiff's retirement. The plaintiff has stated that till 1964 his pension has not been fixed. The pension amount which he would draw would be a small fraction of the salary drawn by him and would be a paltry sum, with which it would be difficult for the plaintiff to maintain himself and his wife in these hard days. There is no evidence that he had any other source of assistance. His son would naturally have come to his assistance and he must have been expecting a substantial help from his son for his maintenance and that of his wife. The deceased under the Hindu Law also was under an obligation to maintain his aged parents. Provision has been made by the Government for the pension to the deceased's widow and for the maintenance and education of the minor daughter but that would not defeat the claim of the plaintiff and his wife on account of one lump sum compensation having been claimed in respect of all and the claim for compensation of each of the dependants within the meaning of Section 1-A of the Act, namely, wife, husband, parent and child, of the deceased has to be considered separately. The position in this regard is beyond dispute in view of the decision of the Supreme Court in the case of Gobald Motor Service v. R. M. K. Veluswami, AIR 1962 SC 1, where a decision of the House of Lords while considering similar provisions of the English Fatal Accidents Act in the case of Davies v. Powell Duffryn Associated Collieries Ltd., 1942 AC 601 has been referred to with approval. Their Lordships of the Supreme Court have also quoted the following observations of Lord Russell of Killowen:—

"The general rule which has always prevailed in regard to the assessment of damages under the Fatal Accidents Act is well settled, namely, that any benefit accruing to a dependant by reason of the relevant death must be taken into account. Under those Acts the balance of loss and gain to a dependant by the death must be ascertained, the position of each dependant being considered separately." Their Lordships of the Supreme Court further observed:—

"The same principle was restated with force and clarity by Viscount Simon in Nance v. British Columbia Electric Railways Co. Ltd., 1951 AC 601. There, the learned Lord was considering the analogous provisions of the British Columbia Legislation, and he put the principle thus at page 614:

"The claim for damages in the present case falls under two separate heads. First, if the deceased had not been killed, but had eked out the full span of life to which in the absence of accident he could reasonably have looked forward; what sums during that period would he probably have applied out of his income to the maintenance of his wife and family?"

Viscount Simon then proceeded to lay down the mode of estimating the damages under the first head. According to him, at first the deceased man's expectation of life has to be estimated having regard to his age, bodily health and the possibility of premature determination of his life by later accidents; secondly, the amount required for the future provision of his wife shall be estimated having regard to the amounts he used to spend on her during his life-time and other circumstances; thirdly, the estimated annual sum is multiplied by the number of years of the man's estimated span of life, and the said amount must be discounted so as to arrive at the equivalent in the form of a lump sum payable on his death; fourthly, further deductions must be made for the benefit accruing to the widow from the acceleration of her interest in his estate; and, fifthly, further amounts have to be deducted for the possibility of the wife dying earlier if the husband had lived the full span of life; and it should also be taken into account that there is the possibility of the widow re-marrying much to the improvement of her financial position. It would be seen from the said mode of estimation that many imponderables enter into the calculation. Therefore, the actual extent of the pecuniary loss to the respondents may depend upon data which cannot be ascertained accurately, but must necessarily be an estimate, or even partly a conjecture. Shortly stated, the general principle is that the pecuniary loss can be ascertained only by balancing on the one hand the loss to the claimants of the future pecuniary benefit and on the other any pecuniary advantage which from whatever source comes to them by reason of the death, that is, the balance of loss and gain to a dependant by the death must be ascertained.

Applying the aforesaid principle, the trial Court has estimated the amount which

the deceased would have saved out of his earnings had he not met with the accident and lived till the date of his retirement, which is much below the normal expectancy of his life, and has observed that his net earning would have been about one lac of rupees. No compensation has been claimed on behalf of the widow and the minor daughter of the deceased, as they have got ex-gratia grant from the Government. The Court below has calculated the expectancy of life of the plaintiff and his wife up to 75 years, that is for a period of 13 years from the time of plaintiff's evidence in 1964, when he was aged 62 years. Applying the aforesaid principle and taking everything into account, the trial Court has determined the loss sustained by the plaintiff and his wife at Rs. 75/- per month, each, to be just and proper. Assessing the expectancy of life of the plaintiff and his wife to be 13 years, up to the maximum estimated age, the trial Court has come to the conclusion that the total amount would come to Rs. 23,400/-. On that basis, out of this amount, it has deducted forty per cent in consideration of risk of life, benefit of lump and immediate payment, etc., and determined the net amount payable to the plaintiff and his wife as compensation at Rs. 14,040/- to be shared half and half by each of them. The learned Government pleader has fairly not challenged the apportionment and general expectancy of life. There is no evidence of any other benefit having accrued to the plaintiff or his wife on account of the death of his son. In my considered opinion, the plaintiff, after his retirement, for himself and his wife would be naturally expecting not less than the amount assessed by the Court below for their maintenance. Failure on the part of the plaintiff to mention as to what amount he was expecting from his son, will not be fatal to the claim, as it is open to the Court to make a fair estimate as to the assistance or help that the plaintiff would be expecting from his son on the relevant materials on the record.

17. Coming to the cross-objection filed on behalf of the respondent, Mr. Sarkar has argued that the trial Court having estimated the expectancy of the life of the plaintiff and his wife at 75 years, should have calculated the compensation for the plaintiff and his wife for a period of 16 years, i.e., from the date of the institution of the suit, when the plaintiff was aged 59 years, if not from the date of the death, and not from the date of his deposition in 1964, when he was aged 62 years. I think, there is substance in this submission of the learned counsel. The plaintiff was entitled to

compensation, if not from the date of the death of the deceased, at least from the date of the institution of the suit. Mr. Sarkar, however, has not been able to satisfy us that the sum of Rs. 75/- per month awarded by the Court below was low and required enhancement. As a matter of fact, the trial Court has made a correct and fair estimate in this regard, which does not call for any interference.

18. Mr. Sarkar has then contended that the deduction of forty per cent from the total estimated amount of compensation of Rs. 23,400/-, has been deducted twice, without any basis. There is no substance in this submission of the learned counsel. The earlier deduction of 25% out of the net income of the deceased as mentioned in the schedule to the plaint was allowed on account of risk of life, likelihood of premature death, hazardous nature of the service of the deceased, etc., which were not taken into account by the plaintiff. The deduction of 40%, however, besides being in consideration of risk of life, was on account of benefit of lump and immediate payment etc., and is not a case of double deduction, as urged by the learned counsel. The result of my finding will be that the total amount of compensation payable to the plaintiff and his wife at the rate of Rs. 1,800/- per year for both of them for 16 years would be Rs. 28,800/-, and allowing 40 per cent deduction out of this amount, the net amount will come to Rs. 17,280/-, payable half and half to the plaintiff and his wife. I think that the Government should pay the amount, if not already paid, within two months from this date, failing which, it would be liable to pay interest at the rate of six per cent per annum on the aforesaid amount till the date of payment.

19. Mr. Sarkar has next contended that the plaintiff has been charged court-fee on the entire amount of claim amounting to Rs. 2,19,301/-, and thus costs should have been assessed over Rupees 1,00,000/-, which has been held to be the net savings of the deceased by the trial Court and not on the amount actually decreed in favour of the plaintiff. He has urged that the plaintiff in the suit could not but claim compensation on behalf of all and reliance is placed on a Bench decision of this Court in the case of Union of India v. Satyabati, 1965 BLJR 564 = (AIR 1966 Pat 130), to say that it was necessary in the pauper suit brought by the plaintiff to claim compensation on behalf of all the claimants mentioned in Section 1-A of the Act. That may be so, but there is no finding by the Court below decreeing compensation to the tune of Rs. 1,00,000/-, in favour of the representatives of the deceased. What the

Court has estimated is the net earnings of the deceased to be Rs. 1,00,000/-. There is no decree for that sum as compensation available to the representatives of the deceased and it could not be so in view of the special feature of this case that the widow has disclaimed all right to compensation on her behalf as well as on behalf of her minor daughter in view of the ex-gratia help and pension granted by the Government for the two dependants. The actual loss adjudged, therefore, in the suit is at the rate of Rs. 75/- per month to the plaintiff and his wife each, for a period of 16 years, and it is to that extent that the suit has succeeded and the plaintiff is entitled to a decree for costs on the amount actually calculated on this basis. There is another lacuna in the cross-objection, which would disentitle the respondent to any relief on this account and that is that no valuation has been put on the cross-objection and no ground has been taken in this regard therein.

20. In the result, the appeal is dismissed with costs and the cross-objection is allowed in part in proportionate costs, as indicated above.

LALIT MOHAN SHARMA, J.:— I agree.

Order accordingly.

AIR 1976 PATNA 31

B. D. SINGH AND S. ALI AHMAD, JJ.
Vidya Nand Sinha and others, Petitioners v. The State of Bihar and others, Respondents.

Civil Writ Jur. Case No. 1683 of 1973, D/- 3-10-1974.

(A) Constitution of India, Articles 226, 227 — Other remedy open — No bar for entertaining application.

The existence of an alternative remedy is no bar for entertaining an application under Articles 226-227 of the Constitution. The power to grant relief under Article 226 is discretionary and its exercise would depend in each case on its own facts and circumstances. AIR 1964 SC 1006, Expl.; AIR 1969 SC 556, Foll.

(Para 6)

If a writ petition was entertained and at the time of admission, the rule was issued against the respondents after hearing the respondents, the respondents could not be heard again on that point at the time of hearing and therefore on that score the application of the petitioners could not be rejected, even if they had an alternative remedy. AIR 1971 SC 33, Foll.

(Para 7)

IS/JS/D535/75/DRG

(B) Constitution of India, Art. 226 — Writ to enforce right arising from administrative order — Can be issued.

To say that an administrative order could never confer any right would be too wide a proposition. There are administrative orders which confer rights and impose duties. AIR 1973 SC 303, Rel. on. (Para 7)

(C) Constitution of India, Article 226 — Other remedy open — Prayer not for merely declaratory decree — Writ proceedings are appropriate.

Where the writ petitioners who were employees of the Bihar Electricity Board were deputed to the Government by the Board and the Board had subsequently enhanced the scales of pay, the deputed employees were entitled to the higher scale and their prayer for the enforcement of the higher scale in their case cannot be said to be for a mere declaration. (Para 8)

Cases Referred: Chronological Paras
AIR 1974 Delhi 119 = ILR (1973) 2 Delhi 158 8
AIR 1973 SC 303 = 1973 Lab IC 191 7
AIR 1971 SC 33 = (1971) 1 SCR 683 7
AIR 1969 SC 556 = (1969) 1 SCR 518 7
AIR 1966 Cal 601 8
AIR 1964 SC 1006 = (1964) 6 SCR 261 6
AIR 1956 All 43 = (1956) 1 Lab LJ 242 8

Sarojendu Mukherjee and Swapan Kumar Mishra, for Petitioners; K. P. Verma and Ganesh Prasad Jaiswal (for No. 1) and Parmeshwar Prasad Sinha and Motilal Roy (for Nos. 3 and 4), for Respondents.

ORDER:— The four petitioners obtained rule of this Court on the basis of their application under Articles 226 and 227 of the Constitution of India. In the application, they have prayed for issuance of writ on respondents 1 to 4 to show cause why an appropriate writ, order or direction should not be issued directing the respondents to allow the petitioners with effect from 1st January, 1971, the scale of pay of Rs. 425 to Rs. 710/- which was the sanctioned scale of the Bihar State Electricity Board, respondent No. 3.

2. In order to appreciate the points involved in this application, it would be necessary to state briefly the facts. All the four petitioners were overseers serving under respondent No. 3. At present, they are serving with respondent No. 1 as deputed by respondent No. 3. The scales of pay prescribed by respondents 1 and 3 were identical upto 31-12-1970. Respondent No. 3 revised the scale of the overseers among others by Notification dated 29th March, 1973, contained under Annexure 1 from Rs. 200 to Rs. 660/-. Further, enhancement of the scale was made by Notification dated 18th April, 1973 — Vide Annexure 2, according to which the scale of pay of the overseers was fixed at Rs. 425/- to 710/-. There

is a further Note in the said Notification which reads as:

"The minimum starting pay of those overseers who are in employment on the date of issue of the order will be fixed at Rs. 455/-,"

while the sanctioned scale of pay for the overseers in the department of respondent No. 1 is only Rs. 335/- to 535/-. According to the petitioners, since they are on deputation, as deputed by respondent No. 3, they are on foreign service with respondent No. 1 according to Rule 17 of the Bihar Service Code, 1952 (hereinafter to be referred to as the Code). Therefore, according to them, they are entitled to the scale as fixed by respondent No. 3 from 1st January, 1971.

3. Vidya Nand Sinha, petitioner No. 1, was appointed by respondent No. 3 as a temporary overseer on 18th January, 1962 and was confirmed as a permanent overseer with effect from 1st August, 1967. He was deputed by respondent No. 3 to work in the department of respondent No. 1 from 23rd July, 1966; whereas Thakur Chittaranjan Prasad Singh, petitioner No. 2, was appointed as a temporary overseer by respondent No. 3 on 19th January, 1962 and was confirmed by respondent No. 3 with effect from 1st August, 1967. He was deputed by respondent No. 3 to work in the department of respondent No. 1 on 18th January, 1968. Ramashray Prasad Singh, petitioner no. 3 was also appointed as a temporary overseer by respondent no. 3 on 2nd March, 1964 and he was deputed in the department of respondent No. 1 on 21st August, 1967, where he is still holding a temporary post. Lastly Kamla Prasad Sinha, petitioner no. 4, was appointed on 9th May, 1964 by respondent No. 3 as a temporary overseer and he was sent on deputation to the department of respondent No. 1 with effect from 21st August, 1967, where he is also, like petitioner No. 3, holding still a temporary post.

4. Learned counsel for the petitioners submitted that in deputation, the petitioners had no option. In this connection, he drew our attention to the proviso to Rule 267 (a) of the Code which reads as:

"267 (a) — No Government servant may be transferred to foreign service without his consent.

Provided that this sub-rule shall not apply to the transfer of a Government servant to the service of a body incorporated or not which is wholly or substantially owned or controlled by the State Government, or by the Central Government, when the body operates, or would operate in Bihar even though its headquarters may be outside."

Serial No. 4 of the Resolution dated 12th December, 1963, contained under Annex-

ure 8 to the supplementary affidavit filed by the petitioners reads as follows:—

"In continuation of Board's Standing Order No. A/A1-1004/53-EB-2 of 1958-59 the Bihar State Electricity Board has decided (in its Resolution No. 239 of 1960-61) that the Bihar Service Code, the Bihar T. A. Rules, the Bihar Government Servants, Discipline and Appeal Rules and the Bihar Government Servant's Medical Attendants Rules, shall apply mutatis mutandis to all categories of officers and staff of the Board, other than those whose cases are governed by the Industrial Laws and the Standing Orders framed thereunder.

These aforesaid rules shall be deemed to be the regulations framed under Section 79 (c) of the Electricity (Supply) Act, 1948."

On the basis of the said resolution, learned counsel for the petitioners rightly asserted that the provisions contained under the Code would apply in their cases as well.

5. Learned counsel for the petitioners drew our attention to the statement made in paragraph 12 of the writ petition wherein it is stated that overseers actually working under respondent No. 3, some of whom are even juniors to the petitioners, are drawing higher scale of pay from 1st January, 1971, than the petitioners. It is stated by the petitioners in paragraph 11 of the petition that they submitted their representation to respondent No. 1 making grievance regarding the lower scale of pay which the petitioners were getting from respondent No. 1 and they also sent copy of the representation to respondent No. 3. As a sample of their representations, the petitioners have annexed a copy of the representation dated 14th July, 1973, submitted by petitioner No. 2 to respondent No. 1 and a copy to respondent No. 3. The same is marked as Annexure 5 to their writ application. On 19-10-1973, petitioner No. 2 sent another representation to respondent No. 2 and a copy thereof was submitted to respondent Nos. 1 and 3 — Vide Annexure 6 to the writ petition. Learned counsel also pointed out that respondent No. 3 was a statutory body created on 1st April, 1958, under Section 3 of the Electricity (Supply) Act, 1948 (hereinafter to be referred to as the Act). Therefore, all the petitioners were discharging public duties and they have acquired fundamental right to get their salary according to the scale fixed by respondent No. 3 and the Bihar Service Code as pointed out earlier.

6. Notices having been served on the respondents of the application of the petitioners, they showed cause on behalf of respondents 1 and 2 in one counter-affidavit, whereas on behalf of respondent

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Punjab and Haryana High Court

AIR 1976 PUNJAB AND HARYANA 1

**BAL RAJ TULI AND
PRITAM SINGH PATTAR, JJ.**

M/s. Hanuman Dall & General Mills,
Hissar, Petitioner v. The State of Haryana
and others, Respondents.

Civil Writ Nos. 3274, 2583, 3268 etc. of
1974 and Civil Misc. No. 9010 of 1974 D/-
8-11-1974.

(A) Constitution of India, Arts. 213 and
254 — Punjab Agricultural Produce Markets
Act (23 of 1961), S. 23 (as amended in 1973
and 1974) — Validity — Original Act received
assent of President — Amendment is not
invalid merely because the Amending Acts
were not reserved for the Assent of President.
ILR (1973) 1 Punj 496, Overruled.

An amending Act does not require the
assent of the President merely because the
parent Act has received such assent. The Presi-
dent does not become a limb of the State
Legislature merely because he gives his assent
to certain Bills reserved for his consideration.
It is not every amendment that should be
submitted for the assent of the President
irrespective of whether the amendment involves
anything which calls for the assent of the
President or not merely because the main Act
was reserved for his assent. The amend-
ment of only that provision of an Act, con-
taining provisions in respect of one of the
matters enumerated in the Concurrent List will
require the assent of the President for its
enforcement, which relates to any such matter
but if it relates to the amendment of any other
provision with respect to a matter not enu-
merated in the Concurrent List, it will not re-
quire the assent of the President for its en-
forcement. (Case law discussed). ILR (1973)
1 Punj 496, Overruled. (Paras 11, 16)

Both the Articles 213 and 254 use the
words "provision contained in an Act" and
not the entire Act. Article 254 (2) also uses
the words "matters enumerated in the con-

current List". Reading these two provisions,
it becomes abundantly clear that if an Act,
when enacted, contains any provision with
respect to one of the matters enumerated in
the Concurrent List, which is repugnant to
the provisions of an earlier law made by
Parliament or an existing law with respect
to that matter, then the law so made by the
Legislature of the State has to be reserved
for the consideration of the President in order
to enforce it. Thereafter, if any provision
of that Act which does not relate to any of
the matters enumerated in the Concurrent
List, is sought to be amended, it will not re-
quire the assent of the President.

(Para 16)

(B) Punjab Agricultural Produce Markets
Act (23 of 1961), S. 23 (as amended in 1973
and 1974) — Enhancement of market fee —
Validity — Fee imposed is compensatory —
Article 304 (b) not attracted — Article 14 also
not violated — (Constitution of India, Arti-
cles 304 (b) and 14).

In view of the services rendered and faci-
lities provided for carrying on the trade, the
fee levied by the market committees under
Section 23 of the Act is compensatory and its
imposition does not hamper trade and com-
merce and, therefore, Article 304 (b) is not
attracted. There is also no violation of Arti-
cle 14 of the Constitution because no material
has been placed on the record to show the
rate of such fees in other States. AIR 1962
SC 1406, Followed. (Para 17)

(C) Punjab Agricultural Produce Markets
Act (23 of 1961), S. 23 (as amended in 1973
and 1974 in Punj. & Har.) and Ss. 27 and 28
— Fee levied under S. 23 — Whether a tax
or fee — Enhancement of fee — Validity —
(Constitution of India, Arts. 19 (1) and 265).

The fees are of various kinds and it is
not possible to formulate a definition that
would be applicable to all cases. The matter
shall have to be decided in each case taking
into consideration the objects of the Act and
the kind of service to be rendered. The

collections from the fees must not be merged in the general revenue but should be kept apart and appropriated for rendering the services. The amount of the fees charged must have a reasonable correlation with the cost of the services rendered or to be rendered to the payers of the fees. However, it is impossible to have an exact correlation and so the correlation expected is one of general character and not of arithmetical exactitude; and the amounts of fees so collected are not to be spent exclusively for rendering services to the payers of the fees but can also be utilised for carrying out the purposes or objects of the Act under which they are levied. They cannot, however, be utilised for purposes which have no connection with the main purposes of the Act for which fee is levied. (Case law discussed).

(Para 31)

The levy permitted under Section 23 is primarily a fee and not a tax. It can also be called a compensatory fee. The amount of the fee collected by the market committees goes to the market committee fund constituted under Section 27 of the Act and that fund has to be utilised for the purposes mentioned in that section and Section 28. The fees collected under the Act cannot be spent for carrying out the governmental functions of the State but for rendering services to the payers of the fees in accordance with the provisions of the Act.

(Paras 29, 31)

Since Section 23 of the Act, as applicable to the State of Haryana, only prescribes the maximum limit within which the market committees, according to their needs, can prescribe the fee to be realised from the licensed dealers, it is not possible to strike down the amendments of that section made by the various Acts enhancing the amount of maximum fee. Looking to the various projects to be undertaken for the improvement of the market committees and the funds required for the repayment of loans already taken for the construction of godowns, the levy of fee at the rate of rupees two per one hundred rupees is considered to be justified and in order.

(Paras 18 and 39)

The enhancement of market fee made by the State of Punjab is, however, different. They have to charge the fee prescribed in Section 23 of the Act by the Legislature. There is no scope for flexibility. The amount of the fee has been fixed by the Legislature and it has not been left to each market committee to levy fee according to its needs within the prescribed limit. The enhancement in the amount of fee from one rupee and fifty paise to two rupees and twenty-five paise per one hundred rupees was not genuine and it was made with a view to enable the market committees and the Agricultural Marketing Board to reimburse themselves for the amounts which they were directed to contribute to Guru Gobind Singh Medical College at Faridkot. The market committees were having enough income and could meet their legitimate re-

quirements from the amounts of fees which were being realised prior to the enhancement. The new projects to be undertaken by the market committees or the Agricultural Marketing Board have not been stated and, therefore, the enhancement in the fee from one rupee fifty paise to two rupees and twenty-five paise cannot be justified. This enhancement is nothing but a colourable exercise of power to levy fee with a view to raise funds for extraneous purposes not intended by the Act and the Punjab Agricultural Produce Markets (Amendment) Ordinance (No. 4 of 1974) and (Amendment) Act (13 of 1974) have to be struck down. The enhancement of fee from one rupee to one rupee and fifty paise by Punjab Act 17 of 1973 is considered to be justified for carrying out the various purposes mentioned in Sections 26 and 28 of the Act and is upheld.

(Paras 18 and 43)

It is not open to the State Government to designate a certain institution or project as of public importance and direct the market committees and the Marketing Board to make compulsory contributions thereto. The State Government shall be well advised to compensate the Agricultural Marketing Board and the market committees for the misutilisation of their funds for this unauthorised purpose.

(Para 41)

(D) Punjab Agricultural Produce Markets Act (23 of 1961), Ss. 28 (xiii) and 23 — Levy of market fee under S. 23 — Amounts spent by market committees on donations given to educational institutions not imparting education in marketing or agriculture are not within S. 28 and wholly unauthorised.

(Para 36)

(E) Punjab Agricultural Produce Markets Act (23 of 1961), Ss. 28 (xiii) and 23 — Levy of market fee under S. 23 — Amount spent by marketing committee on water supply scheme of a village is not covered by S. 28 — Such scheme has no connection with the marketing of agriculture produce for which the markets have been established. (Para 36)

(F) Interpretation of Statutes — Statement of object and reasons — Use of.

The statement of object and reasons for the enactment cannot be a direct aid to the construction but it can be used for a limited purpose for finding out the purpose of the enactment by furnishing valuable historical material.

(Para 41)

Cases Referred: Chronological Paras
AIR 1973 SC 724 = 1973 Tax LR 581 31,

ILR (1973) 1 Punj & Har 496 5, 11

AIR 1972 Raj 168 = 1972 Raj LW 191 14

AIR 1971 SC 1182 = 1971 SCD 489 21

ILR (1969) 1 Punj & Har 756 28

AIR 1968 SC 1408 = (1968) 3 SCR 534 28

AIR 1967 SC 59 = (1962) 3 SCR 250 5

AIR 1965 SC 1107 = (1965) 2 SCR 477 24,

AIR 1965 Punj 33 = (1964) 66 Pun LR 836 29

AIR 1964 Andh Pra 266 = 15 STC 676 11

AIR 1964 Ker 92 = 1963 Ker LJ 876	11,
	12
AIR 1963 SC 966 = 1963 Supp (2) SCR 302	23
AIR 1962 SC 97 = (1962) 2 SCR 659	27,
	28
AIR 1962 SC 1406 = (1963) 1 SCR 491	17,
	29
AIR 1962 Mys 218	5, 9
AIR 1961 SC 459 = (1961) 2 SCR 537	22,
	35
AIR 1959 Pat 488 = 1959 BLJR 362	5, 8
AIR 1957 Orissa 96 = ILR (1957) Cut 1	5,
	7
AIR 1956 Raj 107 = 1956 Raj LW 417	13
AIR 1954 SC 282 = 1954 SCR 1005	19,
	28
AIR 1954 SC 388 = 1954 SCR 1055	20
AIR 1954 SC 400 = 1954 SCR 1046	20
AIR 1953 Pat 14 = 1953 BLJR 151 (FB)	5, 6

Bhal Singh Malik, P. S. Jain and F. L. Batta, for Petitioner; C. D. Dewan, Addl Advocate-General (Haryana), (for Nos. 1 & 2) and S. K. Lamba (for No. 3), for Respondents.

BAL RAJ TULI, J.:— This judgment will dispose of 211 civil writ petitions (Nos. 3583, 3268, 3270 to 3274, 3712 to 3720, 3722 to 3729, 3753 to 3757, 3768, 3790, 3913 to 3954, 4205, 4206, 4291 to 4293, 4303, 4323, 4366, 4373 to 4376, 4381, 4385 to 4387, 4395, 4396, 4402, 4403, 4405, 4409 to 4412, 4428, 4436, 4438, 4440, 4441, 4467, 4468, 4489, 4544, 4548, 4549, 4570, 4572, 4580, 4584, 4607, 4610, 4617, 4625, 4688, 4692, 4699, 4709, 4717 to 4727, 4730, 4741, 4743, 4775, 4780 to 4782, 4792, 4800, 4818, 4844, 4865, 4866, 4869, 4870, 4874 to 4885, 4892 to 4906, 4910, 4911, 4919, 4923, 4924, 4935, 4947, 4962 to 4964, 4967 to 4972, 4985, 4990, 5002 to 5004, 5007, 5008, 5028, 5029, 5035, 5052, 5053, 5059, 5081, 5084, 5100, 5105, 5109, 5113, 5117 and 5122 of 1974) as common questions of law are involved. 127 writ petitions relate to the market committees in the State of Haryana and 84 to the market committees in the State of Punjab.

2. The Punjab Agricultural Produce Markets Act (Punjab Act 23 of 1961) (hereinafter referred to as the Act), received the assent of the President of India on Mar 18, 1961, and was published in the Punjab Government Gazette (Extraordinary), Legislative Supplement dated May 26, 1961, and came into force at once. Section 23 of this Act read as under:—

"Section 23. A committee may, subject to such rules as may be made by the State Government in this behalf, levy on ad valorem basis fees on the agricultural produce bought or sold by licensees in the notified market area at a rate not exceeding fifty naye paise for every one hundred rupees;

Provided that—

- (a) no fee shall be leviable in respect of any transaction in which delivery of the agricultural produce bought or sold is not actually made; and

- (b) a fee shall be leviable only on the parties to a transaction in which delivery is actually made."

In accordance with the provisions of this section, the market committees levied a fee of forty naye paise per one hundred rupees and no dealer felt aggrieved.

3. The Haryana Government substituted the words "one rupee" in place of "fifty naye paise" by the Punjab Agricultural Produce Markets (Haryana Amendment) Act (28 of 1969), which came into force on September 3, 1969, and thereafter the market committees in the State began to charge fee at the rate of one rupee per one hundred rupees in accordance with that amendment. The objects and reasons for making the increase in the rate of fee were stated as under:—

"Fifty paise ad valorem fee is provided on every 100 rupees as value of the agricultural produce bought or sold in the notified markets under Section 23 of the Punjab Agricultural Produce Markets Act, 1961. Market fee is an important source of income of the market committees. In order to make an increasing use of the market committee's funds for development purposes in accordance with the provisions of the Punjab Agricultural Produce Markets Act, 1961, it is necessary that the resources of the market committees should be increased. It was considered absolutely necessary to increase the minimum market fee to rupee one on the Rabi produce arriving in the mandis. In order to achieve this object, the minimum market fee was increased on the promulgation of an Ordinance, 'The Punjab Agricultural Produce Markets (Haryana Amendment)' which is now being replaced by amending the Punjab Agricultural Produce Markets Act, 1961."

Thereafter, by the Punjab Agricultural Produce Markets (Haryana Amendment) Act (21 of 1973), the words "except in the case of agricultural produce brought for processing", were added after the words "provided that." This amendment is not material for the decision of the points of law involved in these cases. The words "one rupee and fifty paise" were substituted for the words "one rupee" in Section 23 of the Act by the Punjab Agricultural Produce Markets (Haryana Amendment) Act (10 of 1974), which came into force on January 30, 1974. The objects and reasons for the increase were stated as under:—

"At present an ad valorem fee of one rupee is provided on every one hundred rupees as value of the agricultural produce bought and sold in the notified market committees under Section 23 of the Punjab Agricultural Produce Markets Act, 1961. The market committees are required to play a vital role in the development of roads for transportation, setting up godowns for storage of agricultural produce, and providing other facilities to the growers in the notified market areas. It has, therefore, been decided to augment the re-

sources of the market committees by increasing the said market fee from one rupee to rupee one and fifty paise."

In fact, no fee was increased by the market committees in pursuance of this amending Act because the increase in the rate of fee was not considered sufficient by the Agricultural Marketing Board to carry out the development projects which had been planned. A suggestion was, therefore, made to increase the rate to two rupees per one hundred rupees. This increase was effected in Section 23 of the Act by the Punjab Agricultural Produce (Haryana Amendment) Ordinance 2 of 1974, which came into force on April 13, 1974. Thereafter, this Ordinance was replaced by the Punjab Agricultural Produce Markets (Haryana Second Amendment) Act (No. 17 of 1974), which came into force on July 23, 1974. The objects and reasons for the increase were stated as under:—

"At present under Section 23 of the Punjab Agricultural Produce Markets Act, 1961, an ad valorem fee of rupee one and fifty paise on agricultural produce worth rupees one hundred bought and sold in the notified market committee, is provided. The market committees are required to play vital role in the development of roads for transportation, setting up godowns for storage of agricultural produce and to provide other facilities to the growers in the notified market areas. It has, therefore, been decided to augment the resources of the market committees by increasing the said market fee from rupee one and fifty paise to rupees two." The result is that the maximum rate of fee has been prescribed as two rupees per one hundred rupees in Section 23 of the Act. The Marketing Board has directed every market committee to charge fee at that rate. The increase in the rate of fee from one rupee to one rupee and fifty paise and then to two rupees has been challenged in the writ petitions which pertain to the State of Haryana.

4. Similar amendments were made by the State of Punjab in Section 23 of the Act with the difference that instead of two rupees as in the State of Haryana, two rupees and twenty-five paise per one hundred rupees is now the fee to be charged in the State of Punjab. The increase from fifty naya paise to one rupee was effected by the Punjab Agricultural Produce Markets (Amendment) Act (No. 25 of 1969), which amended Section 23 of the Act so as to substitute the words "at the rate of one rupee" in place of the words "at the rate not exceeding fifty naya paise", with effect from May 22, 1969. The fee was further increased from one rupee to one rupee and fifty paise, with effect from April 20, 1973, by the Punjab Agricultural Produce Markets (Amendment) Act (17 of 1973), and from one rupee and fifty paise to two rupees and twenty-five paise, with effect from 30-4-1974, by the Punjab Agricultural Produce Markets (Amendment) Ordinance (No. 4 of 1974). That Ordinance has been replaced by the

Punjab Agricultural Produce Markets (Amendment) Act (13 of 1974) which came into force on August 20, 1974. The Objects and Reasons for enacting the Punjab Agricultural Produce Markets (Amendment) Act (No. 17 of 1973) were stated as under:—

"In order to facilitate the producers to bring their produce to the nearest markets for better marketing, it is necessary to provide better facilities in the villages. To meet the additional expenditure required for providing those facilities and their maintenance, it is considered expedient to enhance the rate of market fee leviable by the State Government from one rupee to one rupee and fifty paise per every hundred rupees of agricultural produce."

The objects and reasons for enacting the Punjab Agricultural Produce Markets (Amendment) Act (No. 13 of 1974) were expressed as under:—

".....to provide link roads, culverts and bridges in the rural areas, to effectively link them to the various markets in the State to enable the producer to get competitive prices, and other various objectives as defined under Section 28 of the Act, ..."

These increases in rate of fee by various amending Acts have been challenged in the writ petitions pertaining to the market committees in the State of Punjab.

5. The first ground of attack by the petitioners is that the Act was reserved for the assent of the President when it was enacted in 1961 and every amendment in any provision of that Act can be effected only after obtaining the assent of the President under Articles 213 and 254 (2) of the Constitution. Since it is admitted by the respondents that the amending Acts were not reserved for the assent of the President, they are invalid and unenforceable. Reliance in support of this submission is placed on a Single Bench judgment of this Court in Karnail Singh Doad v. The State of Punjab, ILR (1973) 1 Punj and Har 496. That case pertained to the amendment in Section 3 of the Act by the Punjab Agricultural Produce Markets (Amendment) Ordinance No. 7 of 1970, which was published in the Punjab Government Gazette (Extraordinary) dated September 11, 1970 and came into operation on that date. By that amendment, the constitution of the Marketing Board was changed. Prior thereto, by an order dated April 2, 1970, the Board then existing was abolished and the abolition of that Board was challenged by the petitioners of that writ petition. After the promulgation of the Ordinance, the State Government reconstituted the Marketing Board in accordance with the amended provisions of Section 3 of the Act. One of the contentions raised before the learned Single Judge was that the Ordinance was inoperative because no instructions were received from the President under Art. 213 of the Constitution before its promulgation. It was submitted that the assent of the President was necessary because the original Act,

some of the provisions of which had been amended, had been promulgated after obtaining the assent of the President. The learned Judge gave effect to this contention and held that the Ordinance, which was later on replaced by an Act, was unconstitutional and hence invalid and that the new Board, constituted after the promulgation of the Ordinance, had never come into existence in the eye of law and the Board, which had been abolished, was held to have continued to be in existence with the first petitioner Karnail Singh Doad as its Chairman. While discussing this constitutional aspect, the learned Judge relied on *Mangtula v. Radha Shyam*, AIR 1953 Pat 14 (FB); *Sankarsana Ramanuja Das v. State of Orissa*, AIR 1957 Orissa 96, which was upheld by the Supreme Court in *Sankarshan Ramanuja Das Goswami v. State of Orissa*, AIR 1967 SC 59; *Rameshwar Kumar v. R. P. Mishra*, AIR 1959 Pat 488 and *P. Achiab Chetty v. State of Mysore*, AIR 1962 Mys 218. These cases are clearly distinguishable.

6. *Mangtula's* case AIR 1953 Pat 14 (FB) (supra) was the case of an amending Act which extended the duration of the Principal Act beyond March 14, 1952, and up to March 14, 1954. The original Act, the duration of which was extended, had received the assent of the President because some of its provisions were repugnant to the provisions of the Transfer of Property Act, 1882 — an existing law — with respect to the transfer of property other than agricultural land enumerated in Seventh Schedule, List III, Item 6, within the meaning of Article 254 (1) of the Constitution of India. The extension of its duration without doubt required the assent of the President because the entire Act was being extended for a further period and not that any amendment in one of its provisions, not relatable to any matter enumerated in the Concurrent List, was being made.

7. The case of *Sankarsana Ramanuja Das*, AIR 1957 Orissa 96 (supra), before the Orissa High Court and the Supreme Court, related to the Orissa Estates Abolition (Amendment) Act (No. 17 of 1954), which substituted the expression "inam estate" in Section 2 (g) of the Orissa Estates Abolition Act, 1951, by the expression "any inam". That Act related to the acquisition of property for public purposes and required the assent of the President under Article 31-A of the Constitution. One of the contentions raised in that case was that the benefit of Article 31-A might have been available to the original Act, as it was a law for the compulsory acquisition of property for public purposes, but not to the amending Act which was not such a law but only amended a previous law by enlarging the definition of estate. Repelling this argument, their Lordships observed in para. 12 of the report:—

"It assumes that the benefit of Art. 31-A is only available to those laws which by themselves provide for compulsory acquisition of

property for public purposes and not to laws amending such laws, the assent of the President notwithstanding. This means that the whole of the law, original and amending, must be passed again and be reserved for the consideration of the President, and must be freshly assented to by him. This is against the legislative practice in this country. It is to be presumed that the President gave his assent to the amending Act in its relation to the Act it sought to amend, and this is more so, when by the amending law the provisions of the earlier law relating to compulsory acquisition of property for public purposes were sought to be extended to new kinds of properties. In assenting to such law, the President assented to new categories of properties being brought within the operation of the existing law, and he, in effect, assented to a law for the compulsory acquisition for public purposes of these new categories of property. The assent of the President to the amending Act thus brought in the protection of Article 31-A as a necessary consequence. The amending Act must be considered in relation to the old law which it sought to extend and the President assented to such an extension or, in other words, to a law for the compulsory acquisition of property for public purposes."

It is thus clear that the Orissa Estates Abolition (Amendment) Act, 1954, extended the provisions of the original Act which related to compulsory acquisition of property for public purposes to new kinds of properties and, therefore, it was clearly relatable to Entry 42 in the Concurrent List and required the assent of the President before its enforcement.

8. The case of *Rameshwar Kumar* AIR 1959 Pat 488 (supra), before the Patna High Court, related to Land Acquisition (Bihar Amendment) Act, 1956, Section 4 of which amended the provisions of Section 35 of the Land Acquisition Act, 1894, by adding a proviso thereto. It is thus clear that the Bihar Amendment Act directly amended the Land Acquisition Act, 1894, which was an existing law and, therefore, required the assent of the President.

9. *P. Achiab Chetty's* case AIR 1962 Mys 218 (supra), before the Mysore High Court, challenged the constitutional validity of the City of Bangalore Improvement (Amendment) Act (13 of 1960) which introduced Section 27-A in the parent Act — City of Bangalore Improvement Act (5 of 1945) — validating retrospectively acquisition of land under Mysore Land Acquisition Act for purposes of city improvement in contravention of Sections 14, 15, 16, 17, 18 or 27 of the parent Act. It was held that the provisions of the amending Act were in respect of existing law within the meaning of Article 254 (2) of the Constitution and, the Amendment Act having not been reserved for the assent of the President in accordance with the proviso to Article 213 (1), was invalid. That Act

again related directly to acquisition of property — the matter enumerated in the Concurrent List.

10. The ratio of these decisions, therefore, could not be applied to the case before the learned Judge which did not relate to any matter enumerated in the Concurrent List.

11. On behalf of the respondents, reliance was placed on *Sri Durga Rice & Baba Oil Mills Co. v. State of Andhra Pradesh*, AIR 1964 Andh Pra 266 and *Koteswar Vittal Kamath v. K. Rangappa Baliga and Co.*, AIR 1964 Ker 92. Some of the observations made by the learned Judges of the Andhra Pradesh High Court in *Sri Durga Rice and Baba Oil Mills Co.'s case* (supra), are more relevant and pertinent to the kind of amendment with which the learned Judge dealt in *Karnail Singh Doad's case* ILR (1973) 1 Punj & Har 496 and we are dealing in these cases. It was held by the learned Judges that an amending Act did not require the assent of the President merely because the parent Act had received such assent. The President does not become a limb of the State Legislature merely because he gives his assent to certain Bills reserved for his consideration and that it is not every amendment that should be submitted for the assent of the President irrespective of whether the amendment involves anything which calls for the assent of the President or not merely because the main Act was reserved for his assent. It was further observed that—

“Often, the parent Act by a State Legislature may contain some provisions which deal with a matter coming either (sic) under List III and it is only to save a law made by such a Legislature from challenge on the plea of repugnancy between it and an existing law or a Parliamentary law that the device of obtaining the President's assent is resorted to.”

In that case, the Andhra Pradesh General Sales Tax Act had been reserved for the assent of the President because there were certain provisions in it which dealt with subjects coming under the Concurrent List. The impugned Act amended items 5 and 6 of Schedule III (paddy rice) to the Andhra Pradesh General Sales Tax Act, 1957, which enumerated the goods in respect of which a single point purchase tax only was leviable under Section 5 (3) (b) of that Act, by enhancing the sales tax payable thereon from 3 naye paise to four naye paise in the rupee. The validity of the impugned Act was challenged on three grounds, namely—

- (i) that it operates as a restriction on the freedom of trade contemplated by part XIII of the Constitution, especially, Article 304 (b) and, consequently, it falls within the protection of the proviso and that since the requirement as to the assent of the President was not satisfied, the legislation is void;

- (ii) that the parent Act having been assented to by the President, the amending Act could not become law unless and until the President had accorded his assent to it; and
- (iii) that the impugned Act was a colourable piece of legislation as in pith and substance this enactment has modified the Central Sales Tax Act, 1956.”

All the pleas were decided against the petitioners and the petitions were dismissed.

12. In *Koteswar Vittal Kamath's case* AIR 1964 Ker 92 (supra), the validity of Section 3 of the Travancore-Cochin Public Safety Measures Act (5 of 1950), was challenged on the ground that the previous sanction of the President had not been obtained under the proviso to clause (b) of Article 304 of the Constitution. With regard to that contention it was observed by the learned Judges:—

“The condition precedent of President's previous sanction is attached only to legislation which imposes restriction on freedom of trade, commerce or intercourse. Repealing is not imposing restrictions and so the proviso to Article 304 does not affect the validity of the repeal under Section 73 of the Act if the repeal is otherwise valid.”

Those observations are also helpful in upholding the constitutional validity of the amendments made in Section 23 of the Act from time to time enhancing the rate of fee.

13. In *Jugraj v. Rajasthan State*, AIR 1956 Raj 107, the constitutional validity of the Rajasthan Panchayat (Amendment) Ordinance (15 of 1955) was challenged on the ground that the President's assent had not been obtained which was necessary, as it amended certain provisions of the Rajasthan Panchayat Act (21 of 1953). It was observed by the learned Judges—

“But the provisions which have been amended by the Ordinance have nothing to do with any existing legislation of the Central Legislature covered by the Concurrent List. It was, therefore, not necessary to obtain the assent of the President to this modification.”

14. In another case, *K. N. Joshi v. State of Rajasthan*, AIR 1972 Raj 168, the constitutional validity of the Rajasthan Urban Improvement (Amendment) Ordinance (1972) was challenged on the ground that the assent of the President had not been obtained and, therefore, it could not be enforced under Article 254 (2) of the Constitution. Repelling this attack, it was observed:—

“The Governor has power under Art. 213 of the Constitution to promulgate Ordinance in respect of the subject covered by List II of the Seventh Schedule even if the Parent law which contains provisions about acquisition of land was enacted after getting President's assent. The impugned Ordinance deals only with the constitution of the Improvement Trust and, therefore, it was not necessary to get the assent of the President on such Ordinance.”

15. After giving my careful consideration to the points canvassed and in the light of the decisions referred to above, I am of the opinion, and I say so with great respect, that the learned Judge erred in holding that the amendment of any provision of the Act requires the assent of the President even if that particular provision, which is amended, does not relate to any matter enumerated in the Concurrent List.

16. Articles 213 (1) and 254 of the Constitution are in these terms:—

"Article 213 (1). If at any time, except when the Legislative Assembly of a State is in session, or where there is a Legislative Council in a State, except when both Houses of the Legislature are in session, the Governor is satisfied that circumstances exist which render it necessary for him to take immediate action, he may promulgate such Ordinances as the circumstances appear to him to require:

Provided that the Governor shall not, without instructions from the President, promulgate any such Ordinance if—

- (a) a Bill containing the same provisions would under this Constitution have required the previous sanction of the President for the introduction thereof into the Legislature; or
- (b) he would have deemed it necessary to reserve a bill containing the same provisions for the consideration of the President; or
- (c) an Act of the Legislature of the State containing the same provisions would under this Constitution have been invalid unless, having been reserved for the consideration of the President, it had received the assent of the President.

Article 254 (1). If any provision of a law made by the Legislature of a State is repugnant to any provision of a law made by Parliament which Parliament is competent to enact, or to any provision of any existing law with respect to one of the matters enumerated in the Concurrent List, then, subject to the provisions of clause (2), the law made by Parliament, whether passed before or after the law made by the Legislature of such State, or, as the case may be, the existing law, shall prevail and the law made by the Legislature of State shall, to the extent of the repugnancy, be void.

(2) Where a law made by the Legislature of a State with respect to one of the matters enumerated in the Concurrent List contains any provision repugnant to the provisions of an earlier law made by Parliament or an existing law with respect to that matter, then, the law so made by the Legislature of such State shall, if it has been reserved for the consideration of the President and has received his assent, prevail in that State:

"Provided that nothing in this clause shall prevent Parliament from enacting at any time

any law with respect to the same matter including a law adding to, amending, varying or repealing the law so made by the Legislature of the State."

Both these Articles use the words "provision contained in an Act" and not the entire Act. Article 254 (2) also uses the words "matters enumerated in the Concurrent List." Reading these two provisions, it becomes abundantly clear that if an Act, when enacted, contains any provision with respect to one of the matters enumerated in the Concurrent List, which is repugnant to the provisions of an earlier law made by Parliament or an existing law with respect to that matter, then the law so made by the Legislature of the State has to be reserved for the consideration of the President in order to enforce it. Thereafter, if any provision of that Act, which does not relate to any of the matters enumerated in the Concurrent List, is sought to be amended, it will not require the assent of the President. Only the amendment of that provision of the Act will require the assent of the President which is with respect to one of the matters enumerated in the Concurrent List. Section 3 of the Act, as originally enacted in 1961, did not relate to any of the matters enumerated in the Concurrent List and, therefore, its amendment, in my opinion, did not require the assent of the President. The learned Judge was of the view that since the power to acquire property under the Act was to be exercised by the Marketing Board, the provision with regard to its constitution related to the acquisition of property and was, therefore, relatable to Entry 42 in the Concurrent List. With great respect, I do not find myself in agreement with the learned Judge. To reiterate, I hold that the amendment of only that provision of an Act, containing provisions in respect of one of the matters enumerated in the Concurrent List, will require the assent of the President for its enforcement, which relates to any such matter but if it relates to the amendment of any other provision with respect to a matter not enumerated in the Concurrent List, it will not require the assent of the President for its enforcement. Since the correctness of the decision of the learned Judge has been doubted on this point, I hold that that case has not been correctly decided and overrule the same.

17. Shri P. S. Jain, appearing for some of the petitioners in these cases, submitted that the assent of the President was necessary under Article 304 (b) of the Constitution as the increase in the rate of fee affects the free flow of trade and commerce in agricultural produce, which is bought and sold in the market by licensees in the notified market area as a result of which the licensees will be at a disadvantage while competing with the traders of the other States. This plea, has not been specifically taken in the petitions and no material has been placed on the record to show as to what is the rate of the market

fee being charged by the market committees in other States, with the dealers of which the petitioners intend to trade or compete. Moreover, it has been held by their Lordships of the Supreme Court in *Automobile Transport (Rajasthan) Ltd. v. State of Rajasthan*, AIR 1962 SC 1406, that compensatory taxes for the use of trade facilities are not hit by the freedom declared by Article 301 of the Constitution. Their Lordships further observed :—

"It seems to us that a working test for deciding whether a tax is compensatory or not is to enquire whether the trades people are having the use of certain facilities for the better conduct of their business and paying not patently much more than what is required for providing the facilities. It would be impossible to judge the compensatory nature of a tax by a meticulous test, and in the nature of things that cannot be done.

... ..

If a statute fixes a charge for a convenience or service provided by the State or an agency of the State, and imposes it upon those who choose to avail themselves of the service or convenience, the freedom of trade and commerce may well be considered unimpaired. In such a case the imposition assumes the character of remuneration or consideration charged in respect of an advantage sought and received."

On the parity of reasoning, in view of the services rendered and facilities provided for carrying on the trade, it will be reasonable to hold that the fee levied by the market committees under Section 23 of the Act is compensatory and its imposition does not hamper trade and commerce and, therefore, Article 304 (b) is not attracted. There is also no violation of Article 14 of the Constitution, because no material has been placed on the record to show the rate of such fees in other States. For all the reasons given above, the challenge to the constitutional validity of the amending Acts is repelled.

18. The most important point argued in these petitions is that the Marketing Board in both the States has directed the market committees to levy the maximum fee of two rupees per one hundred rupees in the Haryana State and two rupees and twenty-five paise for one hundred rupees in the State of Punjab which is too excessive and exorbitant and, therefore, infringes their Fundamental Rights guaranteed under Article 19 (1) (f) and (g) of the Constitution. It is further submitted that in order to justify the imposition of fee the element of *quid pro quo*, that is, the services rendered to the payers of the fee by the market committees, has to be related to the amount of fee collected from them. In other words, if the cost of the services rendered to the payers of the fee is insignificant or the services rendered are worth much less than the amount charged from them, the

fee will amount to tax and colourable exercise of power to impose tax in the garb of fee by the Legislature, the Marketing Board and the market committees. It may be stated here that Section 23 of the Act in the State of Haryana only prescribes the maximum fee that can be levied and not that it must be levied. In the State of Punjab, however, fee to be charged has been fixed by the Legislature and the market committees have no option to charge less. They, of course, cannot charge more unless further amendment is made. Originally, when fifty naye paise for every one hundred rupees was prescribed as the maximum fee, the market committees were directed by the Marketing Board to charge only forty naye paise per one hundred rupees. Similarly, the Marketing Board of Haryana State can direct the market committees to charge less than the maximum amount provided in that section. The section, as amended by the Haryana State, therefore, cannot be struck down as prescribing an excessive amount of fee because it is only an enabling provision and does not provide for any compulsion. The position in the State of Punjab is, however, different as pointed out above. The Marketing Board in both the States has issued directions to the market committees to levy the maximum rate allowed by the Legislature. We have, therefore, to determine whether the imposition of fee at the enhanced rate can be justified as fee and if not, whether it is wholly unauthorised or can be saved to any extent on the basis of correlative relationship of the services rendered to the payers of the fee under the Act. Another question that arises in this connection is the nature of the services to be rendered by the market committees in exchange of the fee charged, that is, whether they have to be rendered to the payers of the fees exclusively and in entirety or the amount realised can also be spent for carrying out the objects mentioned in Sections 26 and 28 of the Act.

19. The learned counsel for the petitioners have greatly relied on the definition of "fee" stated by their Lordships of the Supreme Court in the Commr. Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt, AIR 1954 SC 282, in the following words (para 44) :—

"..... a 'fee' is generally defined to be a charge for a special service rendered to individuals by some governmental agency. The amount of fee levied is supposed to be based on the expenses incurred by the Government in rendering the service, though in many cases the costs are arbitrarily assessed.

Ordinarily, the fees are uniform and no account is taken of the varying abilities of different recipients to pay, vide Lutz on 'Public Finance' p. 215. These are undoubtedly some of the general characteristics, but as there may be various kinds of fees, it is not possible to formulate a definition that would be applicable to all cases."

20. The difference between a tax and a fee was brought out again in *Ratilal Panachand Gandhi v. State of Bombay*, AIR 1954 SC 388 wherein the following observations occur (para 22)—

"Fees, on the other hand, are payments primarily in the public interest, but for some special service rendered or some special work done for the benefit of those from whom the payments are demanded. Thus in fees there is always an element of 'quid pro quo' which is absent in a tax. It may not be possible to prove in every case that the fees that are collected by the Government approximate to the expenses that are incurred by it in rendering any particular kind of services or in performing any particular work for the benefit of certain individuals. But in order that the collections made by the Government can rank as fees, there must be correlation between the levy imposed and the expenses incurred by the State for the purpose of rendering such services. This can be proved by showing that on the face of the legislative provision itself, the collections are not merged in the general revenue but are set apart and appropriated for rendering these services.

Thus two elements are essential in order that a payment may be regarded as a fee. In the first place, it must be levied in consideration of certain services which the individuals accepted either willingly or unwillingly and in the second place, the amount collected must be ear-marked to meet the expenses of rendering these services and must not go to the general revenue of the State to be spent for general public purposes."

The same observations were repeated in *Sri Jagannath Ramanuj Das v. State of Orissa*, AIR 1954 SC 400.

21. The matter was exhaustively dealt with by the Supreme Court in *The Indian Mica and Micanite Industries, Ltd. v. The State of Bihar*, AIR 1971 SC 1182, wherein all the case law on the subject was considered and it was held that before any levy could be upheld as a fee, it must be shown that the levy had a reasonable correlation with the services rendered by the Government. In other words the levy must be proved to bear a quid pro quo to the services rendered. But in these matters it would be impossible to have an exact correlation. The correlation expected is one of a general character and not as of arithmetical exactitude.

22. One of the cases considered by their Lordships was *The Hingir-Rampur Coal Co. Ltd. v. The State of Orissa*, AIR 1961 SC 459, wherein the following observations appear in paras 9 and 13 of the report:—

"9. It is true that between a tax and a fee there is no generic difference. Both are compulsory exactions of money by public authorities; but whereas a tax is imposed for public purposes and is not, and need not, be supported by any consideration of service

rendered in return, a fee is levied essentially for services rendered and as such there is an element of quid pro quo between the person who pays the fee and the public authority which imposes it. If specific services are rendered to a specific area or to a specific class of persons or trade or business in any local area, and as a condition precedent for the said services or in return for them cess is levied against the said area or the said class of persons or trade or business the cess is distinguishable from a tax and is described as a fee. Tax recovered by public authority invariably goes into the consolidated fund which ultimately is utilised for all public purposes, whereas a cess levied by way of fee is not intended to be, and does not become, a part of the consolidated fund. It is ear-marked and set apart for the purpose of services for which it is levied. There is, however, an element of compulsion in the imposition of both tax and fee. When the Legislature decides to render a specific service to any area or to any class of persons, it is not open to the said area or to the said class of persons to plead that they do not want the service and therefore they should be exempted from the payment of the cess. Though there is an element of quid pro quo between the tax-payer and the public authority, there is no option to the tax-payer in the matter of receiving the service determined by public authority. In regard to fees there is, and must always be, correlation between the fee collected and the service intended to be rendered. Cases may arise where under the guise of levying a fee Legislature may attempt to impose a tax; and in the case of such a colourable exercise of legislative power Courts would have to scrutinise the scheme of the levy very carefully and determine whether in fact there is a correlation between the service and the levy or whether the levy is either not correlated with service or is levied to such an excessive extent as to be a pretence of a fee and not a fee in reality. In other words, whether or not a particular cess levied by a statute amounts to a fee or tax would always be a question of fact to be determined in the circumstances of each case. The distinction between a tax and a fee is, however, important, and it is recognised by the Constitution. Several Entries in the Three Lists empower the appropriate Legislatures to levy taxes; but apart from the power to levy taxes thus conferred each List specifically refers to the powers to levy fees in respect of any of the matters covered in the said List excluding of course the fees taken in any Court." (Emphasis supplied).

"13. It is true that when the Legislature levies a fee for rendering specific services to a specified area or to a specified class of persons or trade or business, in the last analysis such services may indirectly form part of ser-

vices to the public in general. If the special service rendered is distinctly and primarily meant for the benefit of a specified class or area, the fact that in benefiting the specified class or area the State as a whole may ultimately and indirectly be benefited would not detract from the character of the levy as a fee. Where, however, the specific service is indistinguishable from public service, and in essence is directly a part of it, different considerations may arise. In such a case it is necessary to enquire what is the primary object of the levy and the essential purpose which it is intended to achieve. Its primary object and the essential purpose must be distinguished from its ultimate or incidental results or consequences. That is the true test in determining the character of the levy." (Emphasis supplied).

In that case, the Act under consideration was the Orissa Mining Areas Development Fund Act (27 of 1952), which had been passed for the purpose of developing mining areas in the State. The basis for the operation of the Act was the constitution of a mining area and it was in regard to mining areas thus created that the provisions of the Act came into play. The provision for the constitution of an Advisory Committee for a notified mining area was made in Section 4 of the Act which showed that the policy of the Act was to be carried out with the assistance of the mine owners and their workmen. A cess was levied on the mine owners and lessees of mines for the development of the notified mining area. That cess was held to be a fee and not a tax with the following observations:—

"Thus the scheme of the Act shows that the cess is levied against the class of persons owning mines in the notified area and it is levied to enable the State Government to render specific services to the said class by developing the notified mineral area. There is an element of quid pro quo in the scheme, the cess collected is constituted into a specific fund and it has not become a part of the consolidated fund, its application is regulated by a statute and is confined to its purposes, and there is a definite correlation between the impost and the purpose of the Act which is to render service to the notified area. These features of the Act impress upon the levy the character of a fee as distinct from a tax."

23. In *Sudhindra Thirtha Swamiar v. The Commissioner for Hindu Religious and Charitable Endowments, Mysore*, AIR 1963 SC 966, the Supreme Court was called upon to consider whether the levy impugned in that case could be justified as a fee. That levy, which was an annual contribution levied under the Madras Hindu Religious Endowments Act (19 of 1951), was upheld on the ground that those contributions, when collected, went into a separate fund and not into the Consolidated Fund of the State and were specifically ear-

marked for defraying expenses for the services rendered. Further, they were not payable to the Government but were payable to the Commissioner and were levied not as a tax but only as a fee. The Court further observed that—

"A levy in the nature of a fee does not cease to be of that character merely because there is an element of compulsion or coercion present in it, nor is it a postulate of a fee that it must have direct relation to the actual services rendered by the authority to each individual who obtains the benefit of the service. If with a view to provide a specific service levy is imposed by law and expenses for maintaining the service are met out of the amounts collected, there being a reasonable relation between the levy and the expenses incurred for rendering the service, the levy would be in the nature of a fee and not in the nature of a tax. It is true that ordinarily a fee is uniform and no account is taken of the varying abilities of different recipients. But absence of uniformity is not a criterion on which alone it can be said that it is of the nature of a tax. A fee being a levy in consideration of rendering service of a particular type, correlations between the expenditure incurred by the Government and the levy must undoubtedly exist, but a levy will not be regarded as a tax merely because of the absence of uniformity in its incidence, or because of compulsion in the collection thereof, nor because some of the contributories do not obtain the same degree of service as others may."

24. In *Corpn. of Calcutta v. Liberty Cinema*, AIR 1965 SC 1107, the validity of the levy made under Section 548 (2) of the Calcutta Municipal Act, 1951, came up for consideration before the Supreme Court and it was held that the levy in question was not a fee in return for services as the Act did not provide for any service of a special kind being rendered resulting in benefits to the person on whom it was imposed. In that case, the licence fee was increased from Rs. 400/- to Rs. 6,000/- in 1948 by changing the basis of assessment and finding it at Rs. 5/- per seat. The levy was held to be a tax and not a fee. As a tax it was upheld by majority on the ground that the Corporation was an autonomous body which had to perform various statutory functions. For the performance of those functions, it needed money and its power to collect taxes was necessarily limited by the requirement to discharge those functions and it could fix such rates as may be necessary to meet its needs. That was considered to be sufficient guidance to make the exercise of Corporation's power to fix the rates valid.

25. In para 8 of the report, the difference between 'licence fee' and 'fee' for services rendered was pointed out by reference to Articles 110 (2) and 199 (2) of the Constitution and it was observed that "a provision for the imposition of a licence fee does not necessarily lead to the conclusion that the

fee must be only for services rendered." With regard to the word "fee" it was observed that it "cannot be said to have acquired a rigid technical meaning in the English language indicating only a levy in return for services", and, therefore, the use of the word 'fee' is not conclusive of the question that it must be in return for services and that the position of a section in the Act providing for the fee cannot determine its nature; an imposition which is by its terms a tax and not a fee cannot become a fee by reason of its having been placed in a certain part of the statute.

26. It is not necessary to consider any more cases pointing out the essential characteristics of 'fee' in contradistinction to 'tax', as the specific question whether fee levied under the Agricultural Produce Markets Act is 'fee' or 'tax' has been considered in some cases which are binding on this Court and a reference to them may now be made.

27. In *Mohammad Hussain Gilam Mahammad v. The State of Bombay*, AIR 1962 SC 97, their Lordships of the Supreme Court held that the fee charged for services rendered by the market committee in connection with the enforcement of the various provisions of the Bombay Agricultural Produce Markets Act, 1939, and the provision for various facilities in the various markets established by it was not in the nature of sales tax. The mode of charging fee on the amount of produce bought and sold was only a method of realising fees for the facilities provided by the committee. The levy was thus upheld as a fee and the argument that it was in the nature of a sales tax was repelled.

28. The specific question whether a fee levied by a market committee under the Bihar Agricultural Produce Markets Act (16 of 1960), was a fee or a tax came up for consideration before their Lordships of the Supreme Court in *Lakhan Lal v. State of Bihar*, AIR 1968 SC 1408, wherein the following observations occur in para 7:—

"Counsel next submitted that the market committee has not established any market. According to Counsel, a market must be a well defined site with market equipment and facilities. The argument overlooks the definition of market in Section 2 (h). The market consists of market proper and the market yards. The market yards are well-defined enclosures, buildings or localities but the market proper is under Section 2 (k) read with Section 5 (2) (ii) a larger area. For establishing a market it is sufficient to make a declaration under Section 5 (2) fixing the boundaries of the market proper and the market yards on the recommendation of the market committee made under Rule 59 (2). Under Section 18 (1) the market committee must provide for such facilities in the market as the State Government may from time to time direct. It is not shown that the market committee refused to carry out any direction of the Government. The market committee may, in view of Sections 28 (2) and 30 (i),

acquire and own lands and buildings for the market, but it is not always obliged to do so. The market is established on the issue of a notification under Section 5 (2) declaring the market proper and the market yards. The next contention is that the fees levied by the market committee are in the nature of taxes as the committee does not render any services to the users of the market and the levy of the fees is therefore illegal. This contention is not tenable. The market committee has taken steps for the establishment of a market where buyers and sellers meet and sales and purchases of agricultural produce take place at fair prices. Unhealthy market practices are eliminated; market charges are defined and improper ones are prohibited. Correct weighment is ensured by employment of licensed weighmen and by inspection of scales, weights and measures and weighing and measuring instruments. The market committee has appointed a dispute committee for quick settlement of disputes. It has set up a market intelligence unit for collecting and publishing the daily prices and information regarding the stock, arrivals and despatches of agricultural produce. It has provided a grading unit where the technique of grading agricultural produce is taught. The contract form for purchase and sale is standardised. The provision of the Act and the Rules are enforced through inspectors and other staff appointed by the market committee. The fees charged by the market committee are correlated to the expenses incurred by it for rendering these services. The market fee of 25 naye paise per Rs. 100 worth of agricultural produce and the licence fees prescribed by Rules 71 and 73 are not excessive. The fees collected by the market committee form part of the market committee fund which is set apart and ear-marked for the purposes of the Act. There is sufficient quid pro quo for the levies and they satisfy the test of 'fee' as laid down in *Commissioner, Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt*, (AIR 1954 SC 282)."

These observations clearly show that there is close affinity between the provisions of the Bihar Act and the Act, which is for consideration before us, and the above observations supply mutatis mutandis to its provisions. Relying on these judgments of the Supreme Court, a Division Bench of this Court held the levy under S. 23 of the Act to be a 'fee' and not a 'tax' in *Ram Sarup v. The Punjab State*, ILR (1969) 1 Punj & Har 756. The relevant observations from para 8 of the report are extracted as under:—

"The market-fee is collected under Section 23 and all other moneys received by the market committee are paid into the market committee fund referred to in Section 27 of the Act. The amount received in the market committee fund can be expended by the committee only for three purposes, viz.; (a) for payment to the Market Board as con-

tribution such percentage of its income derived from licence fee as is specified in the Act to defray expenses of the office establishment of the Board, and other expenses of the Board incurred by it in the interest of the market committees : (b) for payment to the State Government the cost of any special or additional staff employed by it in consultation with the committee for giving effect to the provisions of the Act in the notified market area in question; and (c) for all or any of the seventeen purposes mentioned in Section 28 of the Act including acquisition of sites for markets and maintenance and improvement thereof, etc. In the absence of any definite material about the income which accrues to a market committee by recovery of market-fee on the one hand and the expenses it has to incur on the items specified in Ss. 27 and 28 of the Act, (all of which are admitted to be related to the functions of the committee), on the other, it is impossible to record any finding as to whether there is a quid pro quo between the amount of the fee and the services to be rendered by the committee in question or not. On the material available before us, it is obvious that the amount of market-fee which can possibly be recovered by a committee does not in any manner appear to be disproportionate to the services which it is expected to render to the assessee of such fee, by performing the duties referred to in Section 28. In our opinion, no proper foundation has in fact been laid in this case by the petitioner on which it could build the argument sought to be made out on its behalf. In any event, the petitioner has not furnished any material for substantiating the vague allegation made in sub-paragraph (ix) of paragraph 16 of the writ petition which has already been quoted. Be that as it may, it appears to be wholly futile to go any further into this matter as the market-fee of 0.40 Paise on sale of goods worth Rs. 100/- within the market area cannot be called a tax in the face of the authoritative pronouncements of the Supreme Court in *Mohammad Hussain Gulam Mohammad v. The State of Bombay*, (AIR 1962 SC 97) and in a recent unreported judgment in *Lakhan Lal v. State of Bihar* (since reported as AIR 1968 SC 1408)."

The levy of fee at the rate of forty paise for every one hundred rupees was held to be fully authorised and valid as it was within the maximum limit stated in Section 23 of the Act

29. In view of these authoritative judgments, it is futile for the petitioners to urge that the fee levied under Section 23 of the Act is not a 'fee' but a 'tax'. Shri Hira Lal Sibal, the learned Senior Advocate for the Agricultural Marketing Board, Punjab, has also argued that if the levy cannot be justified as a fee on the basis of correlation with the services rendered, the levy may be considered partly as a fee and partly as a tax and should be upheld as such, in view

of the judgment of the Supreme Court in *The Corporation of Calcutta v. Liberty Cinema*, AIR 1965 SC 1107 (supra). In that case, the so-called fee was held to be a tax and the Calcutta Municipal Corporation was held to have the power to impose the tax in order to meet its expenses for carrying out the various obligations imposed on it by the Calcutta Municipal Act. No such power has been given to the market committees by the Legislature to impose a tax to raise revenue for carrying out the objects of the Act and the ratio of the decision in *Liberty Cinema's* case does not apply. In my view, the levy permitted under Section 23 of the Act is primarily a fee and can also be called compensatory fee on the parity of reasoning with regard to compensatory tax stated in the Supreme Court judgment in *Automobile Transport (Rajasthan) Ltd., etc. v. State of Rajasthan*, AIR 1962 SC 1406 (supra). The amount of the fee collected by the market committees goes to the market committee fund constituted under Section 27 of the Act and that fund has to be utilised for the purposes mentioned in that section and S. 28.

30. Shri Hira Lal Sibal has advanced a very ingenious argument but which is not acceptable. According to him, the fee is leviable on the agricultural produce when it is bought or sold and, therefore, it cannot be said that the licensed dealers, who pay the fee as buyers of the agricultural produce, are entitled to any service, in exchange for the fee paid by them. The purchase or sale of the agricultural produce is only the fee levying event and not that the fee is leviable on the agricultural produce. The agricultural produce does not pay the fee; it is payable by the buyer of the produce and, therefore, the buyer of the produce is the payer of the fee and is entitled to services in lieu thereof. The argument is repelled.

31. From the various decisions discussed above, the following propositions emerge :—

1. That the fees are of various kinds and it is not possible to formulate a definition that would be applicable to all cases. The matter shall have to be decided in each case taking into consideration the objects of the Act and the kind of service to be rendered; (2) that the collections from the fees must not be merged in the general revenue but should be kept apart and appropriated for rendering the services; (3) that the amount of the fees charged must have a reasonable correlation with the cost of the services rendered or to be rendered to the payers of the fees. However, it is impossible to have an exact correlation and so the correlation expected is one of general character and not of arithmetical exactitude; and (4) that the amount of fees so collected are not to be spent exclusively for rendering services to the payers of the fees but can also be utilised for carrying out the purposes or objects of

the Act under which they are levied. They cannot, however, be utilised for purposes which have no connection with the main purposes of the Act for which fee is levied, as explained by the Supreme Court in *The Secretary, Government of Madras, Home Department v. Zenith Lamps and Electricals Ltd.*, AIR 1973 SC 724, with respect to Court-fees. It was said therein that the Court-fees collected can be spent for the administration of justice and the maintenance of the Courts for that purpose but not for road building or building schools etc. On the parity of reasoning it can be said that the fees collected under the Act cannot be spent for carrying out the governmental functions of the State but for rendering services to the payers of the fees in accordance with the provisions of the Act.

It is in the light of these propositions that we have to decide whether the increase in the fee effected by the various Acts stated in an earlier part of this judgment can be justified and the fee has not become so excessive or exorbitant as to change its character from fee to tax.

32. The mandate of the Legislature in Section 27 is that the Market Committee Fund has to be utilised for incurring expenditure under or for the purposes of the Act and any excess remaining thereafter is to be invested in such manner as may be prescribed. Every market committee has to contribute certain percentage of its income to the Agricultural Marketing Board to defray expenses for the office establishment of the Board and such other expenses incurred by it in the interest of the market committees generally and also has to pay to the State Government the cost of any special or additional staff employed by the State Government in consultation with the committee for giving effect to the provisions of the Act in the notified market area. The other purposes for which the market committee funds may be expended are stated in Section 28 of the Act as under:—

"28. Subject to the provisions of Section 27, the market committee funds shall be expended for the following purposes:—

(i) acquisition of sites for the market;
(ii) maintenance and improvement of the market;

(iii) construction and repair of buildings which are necessary for the purposes of the market and for the health, convenience and safety of the persons using it;

(iv) provision and maintenance of standard weights and measures;

(v) pay, leave allowances, gratuities compassionate allowances and contributions towards leave allowances, compensation for injuries and death resulting from accidents while on duty, medical aid, pension or provident fund of the persons employed by the committee;

(vi) payment of interest on loans that may be raised for purposes of the market and the provisions of a sinking fund in respect of such loans;

(vii) collection and dissemination of information regarding all matters relating to crop statistics and marketing in respect of the agricultural produce concerned;

(viii) providing comforts and facilities, such as shelter, shade, parking, accommodation and water for the persons, draught cattle, vehicles and pack animals coming or being brought to the market or on construction and repair of approach roads, culverts, bridges and other such purposes;

(ix) expenses incurred in the maintenance of the offices and in auditing the accounts of the committees;

(x) propaganda in favour of agricultural improvements and thrift;

(xi) production and betterment of agricultural produce;

(xii) meeting any legal expenses incurred by the committee;

(xiii) imparting education in marketing or agriculture;

(xiv) payments of travelling and other allowances to the members and employees of the committee, as prescribed;

(xv) loans and advances to the employees;

(xvi) expenses of and incidental to elections; and

(xvii) with the previous sanction of the Board, any other purpose which is calculated to promote the general interests of the committee or the notified market area, or with the previous sanction of the State Government, any purpose calculated to promote the national or public interest."

33. In view of the allegation that the committees were possessed of enough funds to carry out their duties under the Act and that the increases in the fees from time to time were arbitrarily made in order to provide revenue to the Government for its own governmental activities, we directed the market committees as well as the Agricultural Marketing Boards of both the States to file the statements of income and expenditure for the last five years showing in particular the heads under which the amounts were spent. The incomes in those statements are at the rate of one rupee per one hundred rupees which was the rate prevalent in those years. That direction has been complied with in a number of cases which provide the necessary data for determining the quid pro quo as the pattern of expenses in almost all the committees is the same. I shall first deal with the market committees and the Agricultural Marketing Board of Haryana.

34. It is enough to refer to the income and expenditure statements of Market Committee, Hissar, during the last five years. The statement showing the income headwise from 1969-70 to 1973-74 is as under:—

14 P. & H.	[Pr. 34]	H. D. & G. Mills v. State (Tuli J.)				A. I. R.
S. Name of head N.	1969-70	1970-71	1971-72	1972-73	1973-74	
1. Licences fee u/s. 13.	168-80	150-80	126-85	168-00	144-90	
2. Licences fee u/s. 10.	6177-00	5568-00	3832-00	5189-00	4292-00	
3. Market fee.	617723-83	937126-55	1053183-29	915375-42	1620936-23	
4. Composition fee.	6146-67	3458-60	1032-85	2732-00	1813-50	
5. Sale of forms.	539-45	—	—	—	74-00	
6. Security for Badges and other securities.	11-00	8-00	15-00	8-00	16-00	
7. Other Miscellaneous income.	3335-00	1520-00	904-00	2284-00	81525-00	
8. Interest on investment.	385117-52	408412-82	806799-15	39581-41	149836-61	
9. Loan and Advance.	17269-95	34023-22	318572-30	9986-85	5141-34	
10. Suspense a/c.	—	—	—	165000-00	123725-00	
11. Rent.	630-00	315-00	280-00	—	32-00	
12. Unclassified	1725-00	—	—	2752-60	954-40	
Total :	1038841-42	1388592-09	1382724-94	1162533-52	1891090-98	

The statement showing headwise expenditure for those years is as under :—

Sr. No.	Name of head.	1969-70	1970-71	1971-72	1972-73	1973-74
1.	Establishment.	48641-49	88479-55	94618-19	96946-39	109943-37
2.	Provident Fund	5076-94	2975-00	5947-68	3610-11	4642-12
3.	Contingencies and amenities.	95461-79	132494-61	263493-71	152073-50	158174-83
4.	Refund of securities to contractors.	350-00	8778-03	—	3784-00	84510-00
5.	Works.	487947-65	660178-59	651828-63	638131-83	1171577-00
6.	Audit expenditure.	—	—	8791-30	—	43482-62
7.	Travelling Allowance.	2202-21	3286-34	4161-60	5900-57	5552-25
8.	Medical aid	12-62	1095-14	1047-21	570-26	89-82
9.	Contribution u/s. 27.	233118-76	17221-34	288603-75	189707-96	415133-42
10.	Miscellaneous expenditure Refund of market fee and Provident funds.	11570-11	—	12513-31	—	—
11.	Suspense accounts.	—	—	—	17942-12	3777-12
12.	Investment Fixed deposit with Bank and Post Office.	105951-15	394058-35	—	—	—
Total		931132-12	1461557-55	1334703-38	1109566-64	1977664-55

The details of the amount spent on item No. 5—Works—has also been given as under :—

Sr. No.	Name of head	1969-70	1970-71	1971-72	1972-73	1973-74
1.	Deposit Works Village Link Road contribution for amount deposited with Public Works Department, Hissar	454100-00	574325-00	510000-00	440000-00	546000-00
2.	Construction of boundary wall at Model Mandi Hissar Office-cum-Rest House plot.	—	—	8205-81	—	—
3.	Construction of Link Roads carried out by Market Committee, Hissar.	26594-92	143-19	37459-22	113943-31	18278-90
4.	Construction of common platform at Balsamand Mandi.	—	—	4166-53	38500-00	6592-73
5.	Repair of Piao and Mandi gate.	41-61	91-29	—	775-03	—
6.	Culverts and Bridges in the villages of notified market area on canal water ways.	4402-00	17500-00	5490-00	—	1474-00
7.	Purchase of cement for construction of office-cum-Rest House and C. O. flooring in New Model Mandi.	—	—	—	—	67585-13
8.	Fitting of electric motor for water supply in Kisan Rest House.	2008-52	473-33	—	—	—

Sr.No.	Name of head	1969-70	1970-71	1971-72	1972-73	1973-74
9.	Repair of roads and Platform in Mandis of principal Yard.	—	54225-80	—	—	1864-08
10.	Village Gorebhi-Gawar water supply scheme.	—	—	—	—	107784-00
11.	Construction of Gamlas of shaddy trees at New Model Mandi Hissar.	—	8598-05	12880-80	—	—
12.	Providing electric fittings in Kisan Rest House.	—	—	4688-14	—	—
13.	Providing hand-pump for drinking water at Sabzi Mandi, Hissar.	—	1022-75	995-45	—	—
14.	Special repair of Kisan Rest House.	—	3788-78	16684-01	4206-45	627-80
15.	Earth filling in New Model Mandi Hissar.	—	—	—	—	12772-06
16.	Earth filling in Balsamand Mandi	—	—	2181-12	40707-14	8589-12
Total		487947-05	660178-59	651626-88	638151-93	1171577-00

From these statements it is abundantly clear that the market fee constitutes more than eighty per cent. of the income of the market committee. The amount spent on 'works' is nearly one-half of the total expenditure. The major item on which the amount has been spent under the head "works" consists of the amount deposited with the Public Works Department, Hissar, as contribution for construction of village link roads. Strong objection has been taken by the learned counsel for the petitioners to this item of expenditure on the ground that construction of roads is a governmental function and the market fees collected from the licensed dealers cannot be utilised for this purpose. It is also clear from the statement showing the details of works that construction of some link roads was carried out by the market committee itself during all the five years. The learned counsel for the petitioners, on the basis of that item of expenditure, submit that the link roads constructed by the market committee itself fall within the meaning of 'approach roads' used in clause (viii) of Section 28 of the Act and the amounts deposited with the Public Works Department, Hissar, for village link roads do not fall within any of the objects stated in Section 28 of the Act. On behalf of the respondents it is submitted that the village link roads also fall within the description of approach roads and they are necessary to be constructed for facilitating the easy transportation of Agricultural produce from the villages to the markets or market places where they are bought and sold providing the main source of income to the licensed dealers. In any case, the construction of roads within the notified market area is a work of Public importance and promotes the general interest of the committee and the notified market area which is one of the purposes enumerated in CL (xvii) of Section 28 of the Act.

35. After giving my careful consideration, I am of the opinion that the expenditure

on the construction of link roads for which amounts were deposited with the public Works Department is fully justified as it is for the benefit of the growers, the licensed dealers and the general Public and promotes the interests of the notified market area. Thus, a service is rendered to the payers of the fee by the development of the market area as per the ratio decidendi of the Supreme Court judgment in The Hingir-Rampur Coal Co.'s case AIR 1961 SC 459 (supra). In that case too, the fee was levied for the development of the mining areas, although it was payable only by the owners or lessees of the mines and not by workmen whereas the development works consisted of construction of roads, provision of electricity, sewerage and drainage and other amenities in the mining area. It was considered that by such developmental activities service was being rendered to the payers of the fee. Since transportation is very essential for the development of a market and to enable the growers of the agricultural produce to bring the same to the market places for sale, the construction of link roads becomes an essential purpose of the market committees. However, the Public Works Department must render accounts of the amounts received by it for the construction of the village link roads to each market committee to enable it to determine whether any further amount is necessary to be spent under this head and whether all the roads for which money was paid have been constructed. The Government cannot utilise that amount as a part of general revenue to carry out its governmental activity of providing main roads in the State. The amount received from the market committees has to be strictly spent only on the construction of approach roads and not main roads. Since no material has been brought to our notice by the petitioners showing that no link roads had been constructed by the Public Works Department and the amounts deposited by the market com-

mittees had been misutilised or mis-spent, it cannot be held that no more amount is required by the market committees for the purpose and that the enhancement in the market fee is arbitrary or uncalled for. However, before depositing any further amounts with the Public Works Department, every market committee must obtain the account of the amounts already paid and make further contributions only if any more approach roads are necessary to be constructed. I have pointed out above that Section 23 only lays down the maximum amount of fee that can be levied and each market committee can levy a lesser amount in case it does not stand in need of any more funds for any particular purpose. The amount collected as fees has, however, to be spent on the various purposes enumerated in Sections 27 and 28 of the Act.

36. Objection was also raised to the donations given by the various market committees to educational institutions imparting general education and not education in marketing or agriculture, as stated in clause (xiii) of Section 28. Such donations are not within Section 28 of the Act. The institutions imparting general education cannot be said to promote the general interest of the committee or the notified market area nor can they be described as promoting national or public interest. I shall dilate on this subject when I discuss the Punjab cases as this point has directly arisen there. Suffice it to say that the amounts spent by the various market committees on donations given to educational institutions not imparting education in marketing or agriculture are wholly unauthorised and no further donations to such institutions should be made. It has also been pointed out that the Market Committee, Hissar, spent Rs. 1,07,794-00 on the water supply scheme for village Gorchhi Gawar which is not covered by the various purposes mentioned in Section 28 of the Act. This objection is also sustained as the water supply schemes are primarily the concern of the Government or the local authorities like the Gram Panchayats, Panchayat Samitis or Zila Parishads. Water supply scheme for a village has no connection with the marketing of agricultural produce for which the markets have been established. The primary object of the Act, broadly stated, is "to protect the producers of agricultural produce from being exploited by middlemen and profiteers and to enable them to secure a fair return for their produce", as was said by a learned single Judge in *Mukhtiar Chand v. Marketing Committee, Malout Mandi*, 1964-66 Pun LR 836 = (AIR 1965 Punj 33). This expenditure by the Hissar Market Committee was also unauthorised and beyond the purposes of the Act. Provision of Rs. 6 lacs for the construction of a Panchayat Bhawan made by the Market Committee, Hissar, in the current years' budget is also ultra vires. Construction of Rest Houses or rest places for the temporary stay of producers and traders visiting the markets will be justified

but not the construction of a Panchayat Bhawan which may be constructed by the Panchayats concerned.

37. The statements furnished by the other market committees of Haryana are on similar lines and need not be discussed separately as Market Committee, Hissar, serves as an exemplar. However, it has been pointed out that the Market Committee, Sirsa, spent some amounts on the construction of Gandhi Park and making donations to Maternity Hospital and Arya Kanya Pathshala. If the Gandhi Park is within the market, its construction may be justified but donations to Maternity Hospital and Arya Kanya Pathshala are unauthorised and outside the purposes of the Act. No donations and contributions should be made for such purposes.

38. The Haryana Marketing Board has also filed the statements of its income and expenditure during the last five years from which it is clear that godowns for the storage of foodgrains were constructed at fourteen centres at a cost of Rs. 1,40,94,637-00 and in order to carry out those constructions the Board took a loan of Rs. 91 lacs from A. R. C. in 1972-73 and Rs. 25 lacs in 1973-74. A list of the works proposed to be undertaken to improve the various market committees in the State of Haryana to make them modern has also been filed as under:—

1. Water supply schemes.
2. Water cooler rooms for drinking water for the growers.
3. Water trough for the cattle.
4. Public toilets with all arrangements of bath and cloth washing for the growers.
5. Public urinals.
6. Gates, check-post and first-aid post.
7. Cement concrete/red stone pavement on common platforms.
8. Cattle sheds.
9. Parking places for carts and other vehicles.
10. Metalled roads.
11. Earth work, surface dressing, filling of earth and levelling etc., in mandis.
12. Special repairs, additions and alterations in existing buildings.
13. Pucca tharas in front of shops.
14. Street lighting in mandis.
15. Weigh bridges.
16. Large godowns.
17. Office buildings.
18. Kisan Rest Houses.
19. Staff quarters for (a) Secretary (b) other officials.
20. Planting of trees and parks.
21. Rate exhibiting tower.
22. Fire fighting station.
23. Canteen.
24. Library.
25. Grading laboratory.
26. Accommodation for Bank and Post and Telegraph office.
27. Agro-Industries Yard for repairs of agriculture machinery and vehicles.

28. Recreational facilities.
29. Processing units.
30. Sewerage and drainage."

The learned counsel for the petitioners have only objected to item No. 26 on the list "Accommodation for Bank and Post and Telegraph Office." In my view, the objection is meaningless as the provision for a bank and a Post and Telegraph Office is necessary to afford a necessary facility to the dealers as well as other persons coming to the markets. The water supply schemes mentioned above are

(Contd. on Column 2)

- (i) if the annual income of a committee does not exceed Rs. 10,000
- (ii) if the annual income of a committee exceeds Rs. 10,000
 - on the first Rs. 10,000
 - on the next Rs. 5,000 or part thereof
 - on the remaining income

Before amendment. After amendment.

10 per centum	20 per centum
10 per centum	20 per centum
15 per centum	25 per centum
20 per centum	30 per centum "

Since Section 23 of the Act, as applicable to the State of Haryana, only prescribes the maximum limit within which the market committees, according to their needs, can prescribe the fee to be realised from the licensed dealers, it is not possible to strike down the amendments of that section made by the various Acts enhancing the amount of maximum fee. Looking to the various projects to be undertaken for the improvement of the market committees and the funds required for the repayment of loans already taken for the construction of godowns, the levy of fee at the rate of rupees two per one hundred rupees is considered to be justified and in order. No interference seems to be called for at this time.

40. The case of the market committees in the State of Punjab is, however, different. As I have pointed out above, they have to charge the fee prescribed in Sec. 23 of the Act by the Legislature. There is no scope for flexibility. The amount of the fee has been fixed by the Legislature and it has not been let to each market committee to levy fee according to its needs within the prescribed limit. It has, therefore, to be seen whether the enhancement in the fee made by the Punjab Government is justified. In the various petitions relating to the State of Punjab it has been stated that the market committees were collecting lacs of rupees every month and the Agricultural Marketing Board was collecting crores of rupees and are thus possessed of large sums of money which have not been spent on rendering services to the payers of the fee or for the development of the notified market areas, but these amounts have been mis-utilised for giving a donation of rupees one crore to the Guru Gobind Singh Medical College which has recently been established at Faridkot. As I have pointed out above, the fee was fixed as rupee one per one hundred rupees with effect from May 22, 1969, and thereafter the amount of fee was increas-

understood to be for the markets and not for the villages situate in the notified market area of each market committee. No expenditure can be incurred by a market committee on the water supply schemes for villages.

39. In order to provide more income to the Agricultural Marketing Board, so that further loans may not have to be taken, the Haryana Legislature has amended Section 27 of the Act so as to increase the percentage of contribution by the market committees to the Board, by the Punjab Agricultural Produce Markets (Haryana Amendment) Act (21 of 1973). The comparative figures are as under :

ed to one rupee and fifty paise per one hundred rupees with effect from April 30, 1973, and two rupees and twenty-five paise with effect from April 30, 1974. In these cases also some of the market committees and the Agricultural Marketing Board have filed statements of income and expenditure during the last five years. The Punjab Government has also filed its return in the shape of an affidavit of Mrs. Shant Bhupinder Singh, Under Secretary to Government, Punjab, Development Department. In her affidavit it has been stated that—

"The Finance Minister, Punjab, in his Budget speech in Vidhan Sabha on 27-2-1974, had revealed that Government proposed to raise the rate of market fee by 50 per cent. and to utilise the additional funds so collected for the construction of link roads and bridges to provide better facilities for bringing the produce from far off villages."

Since the Vidhan Sabha adjourned without passing the Amendment Act, the necessity for promulgating the Ordinance arose and that Ordinance has since been replaced by an Act.

41. With regard to the contribution to Shri Guru Gobind Singh Education Trust for setting up the Guru Gobind Singh Medical College at Faridkot, it has been stated by the Agricultural Marketing Board that—

"About a crore of rupees have not yet been given to the Medical College, Faridkot, although the Chairman of the Board received the sanction in respect of the amounts to be contributed by the Board and the various market committees to Shri Guru Gobind Singh Educational Trust."

Along with his affidavit, the Secretary of the Punjab State Agricultural Marketing Board has filed a copy of the letter issued by the Government to the Chairman of the Board which is dated October 22, 1973, on the subject of "Contribution towards the Guru Gobind Singh Educational Trust for setting up the Guru Gobind Singh Medical College at

Faridkot." It is necessary to set out the contents of this letter in detail. It reads as under :—

"The Governor of Punjab, in exercise of the powers vested in him under Sections 28 (xvii) and 26 (xvii) of the Punjab Agricultural Produce Markets Act, 1961, is pleased to declare the contributions, made at the rates prescribed below, by the Market Committees and the Punjab State Agricultural Marketing Board to the Guru Gobind Singh Educational Trust, as a fit and valid charge on their respective funds :—

- "(i) Punjab State Agricultural Marketing Board Rs. 30,00,000/-;
- (ii) 15 committees with income exceeding Rs. 15 lacs as detailed in annexure 'A' at Rs. 2,31,000/- per committee;
- (iii) 9 committees with income between Rs. 10 to 15 lacs as detailed in annexure 'B' at Rs. 1,35,000/- per committee;
- (iv) 34 committees with income between 5 to 10 lacs as detailed in annexure 'C' at Rs. 54,000/- per committee;
- (v) 34 committees with income below Rs. 5 lacs as detailed in annexure 'D' at Rs. 14,500/- per committee.

In case the finances of the Marketing Board/Market Committees do not permit the entire contributions at the rate prescribed above during the year 1973-74, they may make the payment in 2 instalments, the first instalment being not less than 50 per cent to be paid immediately and the next instalment in the beginning of the next financial year, provided that the Marketing Board, if the state of its finances so require, may make the payment in 3 annual instalments, the first instalment to be paid immediately.

3. This sanction is being issued as a very special case in the public interest and is not to be treated as a precedent for other contributions."

From this letter it is quite clear that the market committees in the State and the State Agricultural Marketing Board have been directed by the State Government by a peremptory order to make contributions to Shri Guru Gobind Singh Educational Trust for setting up the Guru Gobind Singh Medical College at Faridkot. There is no averment in the affidavit of the Secretary of the Marketing Board or the market committees that they applied for sanction of their contribution to that Trust. The language of the letter shows that the Government itself prescribed the amounts of contribution to be made by each market committee and the Agricultural Marketing Board, whether its finances permitted or not. The order was issued under clause (xvii) of Sections 26 and 28 as being in the public interest. It has now to be decided whether the Government has any such power to direct peremptorily the market committees and the Marketing Board to make any such

contribution to any institution whatsoever. Clause (xvii) is almost the same in Sections 26 and 28. The former section deals with the purposes for which the marketing development fund is to be utilised while Section 28 enumerates the purposes for which the market committee funds may be expended. The marketing development fund is the fund maintained by the Agricultural Marketing Board while the market committee funds are maintained by the market committees. Clause (xvii) of Section 26, before it was amended by Punjab Act 23 of 1962, read as under :—

"26 (xvii) with the previous sanction of the State Government, any other purpose which is calculated to promote the general interests of the Board and the committees."

The words "or the national or public interest" were added by the said amending Act. Clause (xvii) of Section 28, before the amendment read as under :—

"28 (xvii) with the previous sanction of the Board, any other purpose which is calculated to promote the general interests of the committee or the notified market area."

and the amending Act added the following words thereto :—

"or with the previous sanction of the State Government, any purpose calculated to promote the national or public interest."

The necessity for amending these clauses, as stated in the Statement of Objects and Reasons, was as under :—

"Sections 26 and 28 enumerate the purposes for which the marketing development fund and a market committee fund can be expended by the State Agricultural Marketing Board and a market committee respectively. There is no provision in these sections authorising the State Marketing Board or a market committee to make contribution for the relief of distress caused by any natural calamity like flood or to make contribution towards the fund raised in connection with a National Emergency."

It is well-settled that the Statement of Objects and Reasons for the enactment cannot be a direct aid to the construction but it can be used for a limited purpose for finding out the purpose of the enactment by furnishing valuable historical material. To understand the historical background it may be mentioned that in October, 1962, China invaded India and a state of Emergency arose. There were also frequent droughts and floods in various parts of the country and the amendment in clause (xvii) of Sections 26 and 28 was made with a view to enable the market committees and the State Marketing Board to make some contributions for alleviating distress caused by droughts and floods and to help the nation in the event of a National Emergency. The setting-up of a Medical College does not come within the purview of clause (xvii) of Sections 26 and 28 of the Act. The way the letter dated October 22, 1973, was issued by the Punjab Government clearly shows that the Punjab Government adopted the baby of

the Guru Gobind Singh Educational Trust and became its foster father but instead of making contributions from its own revenues, it called upon the market committees and the Marketing Board to make such contributions. The education for which the market committee fund and the marketing development fund can be spent by the market committees and the Agricultural Marketing Board should be pertaining to marketing or agriculture and not any other kind of education. The issuance of the letter was, therefore, wholly unauthorised and the Punjab Government forced the market committees and the Agricultural Marketing Board to make the contributions which were wholly outside the purposes of the Act and, therefore, unauthorised and ultra vires. The market committees and the Agricultural Marketing Board cannot make any contributions to Shri Guru Gobind Singh Educational Trust for setting-up of the Guru Gobind Singh Medical College in pursuance of that letter which is quashed. I am further of the opinion that it is not open to the State Government to designate a certain institution or project as of public importance and direct the market committees and the Marketing Board to make compulsory contribution thereto. The State Government shall be well advised to compensate the Agricultural Marketing Board and the market committees for the misutilisation of their funds for this unauthorised purpose.

42. In this background, the enhancement of the fee from one rupee and fifty paise to two rupees and twenty-five paise per one hundred rupees attains importance. The market committees and the Agricultural Marketing Board were directed to make these payments in October, 1973, and the proposal for enhancing the fee came in February, 1974, during the Budget Session of the Vidhan Sabha. The link is, therefore, established that it was to provide the market committees with more money in order to carry out the purposes of the Act, after depleting their funds by forcing them to make contributions for the setting-up of Guru Gobind Singh Medical College at Faridkot, that the enhancement was necessitated. On April 1, 1973, the opening balance in the hands of the Agricultural Marketing Board was Rs. 20,13,921-00 and the income during the year 1973-74 was Rupees 1,75,84,151-00. Thus the amount available to the Agricultural Marketing Board during the year 1973-74 was Rs. 1,95,98,074-00. The expenditure during the year, including the donation of Rs. 10 lacs to Shri Guru Gobind Singh Educational Trust, amounted to Rupees 1,13,39,468-00 leaving a surplus of more than Rs. 82 lacs with the Board. The Board has not prepared any plan of constructing further development works for the market committees on which the amount has to be spent necessitating the increase in the fee, as has been done by the Haryana Marketing Board.

43. The statements furnished by the Market Committee, Barnala, with regard to

its income and expenditure during the years 1969-70 to 1973-74, which may be taken as an exemplar, reveal that the total income of the market committee during these five years was Rs. 54,55,740-91 while the expenditure amounted to 44,45,485-84, leaving a surplus of nearly Rs. 10 lacs. Out of the expenditure, the contributions made to the Marketing Board amounted to Rs. 11,95,209-03. The amount spent on the link roads was Rs. 28,47,552-54. Thus the main expenditure was on the contribution to the Marketing Board and construction of link roads. This committee also made donations of Rs. 58,000-00 to three colleges in 1970-71, Rs. 50,000-00 to a college in 1971-72 and Rs. 1,70,000-00 to colleges in 1973-74 and so it appears that it was a regular feature with this market committee to give donations to educational institutions imparting general education. To the Guru Gobind Singh Medical College, Faridkot, the donation of Rs. 1,35,000-00, as directed by the State Government in its letter dated October 22, 1973, was made. These donations to the educational institutions are wholly unauthorised. Shri Guru Gobind Singh Educational Trust became a beneficiary of one crore rupees from the Agricultural Marketing Board and the market committees under the directions of the State Government necessitating greater burden being placed on the payers of the fee for making possible these contributions. I am, therefore, of the view that the enhancement of fee from one rupee and fifty paise to two rupees and twenty-five paise per one hundred rupees by the Punjab Agricultural Produce Markets (Amendment) Ordinance (No. 4 of 1974), which was later on replaced by the Punjab Agricultural Produce Markets (Amendment) Act (13 of 1974), cannot be justified, as the amounts collected in the form of fee cannot be utilised for any purpose other than the one sanctioned by the Act, as has been held by their Lordships of the Supreme Court in *The Secretary, Government of Madras v. Zenith Lamps and Electricals Ltd.*, AIR 1973 SC 724 (supra). That case related to the matter of court-fees and it was pointed out that—

“the fees taken in courts and the fees mentioned in Entry 66, List I are of the same kind. They may differ from each other only because they relate to different subject-matters and the subject-matter may dictate what kind of fees can be levied conveniently, but the overall limitation is that fees cannot be levied for the increase of general revenue. For instance, if a State were to double court-fees with the object of providing money for road building or building schools, the enactment would be held to be void.”

In the historical background, set out above, I am convinced that the enhancement in the amount of fee from one rupee and fifty paise to two rupees and twenty-five paise per one hundred rupees was not genuine and it was made with a view to enable the market com-

mittees and the Agricultural Marketing Board to reimburse themselves for the amounts which they were directed to contribute to Guru Govind Singh Medical College at Faridkot. The market committees were having enough income and could meet their legitimate requirements from the amounts of fees which were being realised prior to the enhancement. The new projects to be undertaken by the market committees or the Agricultural Marketing Board have not been stated and, therefore, the enhancement in the fee from one rupee fifty paise to two rupees and twenty-five paise cannot be justified. This enhancement is nothing but a colourable exercise of power to levy fee with a view to raise funds for extraneous purposes not intended by the Act and the Punjab Agricultural Produce Markets (Amendment) Ordinance (No. 4 of 1974) and (Amendment) Act (13 of 1974) have to be struck down. The enhancement of fee from one rupee to one rupee and fifty paise by Punjab Act 17 of 1973 is considered to be justified for carrying out the various purposes mentioned in Sections 26 and 28 of the Act and is upheld. However, with regard to the amounts deposited with the Punjab Public Works Department for construction of link roads, the market committees should ask for the accounts before depositing any further amounts for the purpose, as has been said above while dealing with such expenditure in the case of the market committees of Haryana.

44. The petitioners in all the petitions pertaining to the State of Haryana have also challenged the validity of Rule 29 (1) of the Punjab Agricultural Produce Markets (General) Rules, 1962, which reads as under :—

“29 (1). Under Section 23 a committee shall levy fees on the agricultural produce bought or sold by licencees in the notified market area at the rates fixed by the Board from time to time :

Provided that no such fees shall be levied on the same agricultural produce more than once in the same notified market area. A list of such fees shall be exhibited in some conspicuous place at the office of the committee concerned.”

On the ground that the State Government has delegated its own delegated legislative functions to a subordinate authority, that is, the Agricultural Marketing Board, which goes against the well-known legal principle that there cannot be a delegation of delegated power. It is further submitted that neither the language of Section 23 of the Act nor the rule-making power conferred on the State Government under Section 43 of the Act permit the grant of authority to the Board to fix the market fee chargeable by the market committees. According to the petitioners, Section 43 (2) (vii) prescribes the framing of rules by the State Government with regard to the maximum fee which may be levied by a committee in respect of the agricultural produce bought or sold by licensees in the

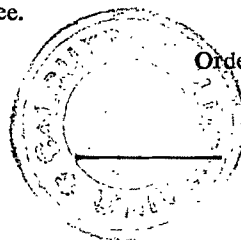
notified market area and the manner and the basis thereof and does not provide for any such power being given to the Board to determine the amount of the fee that each market committee should levy. In reply, it has been submitted on behalf of the respondents that it is not a case of excessive delegation of legislative functions by the State Government or second delegation to the Agricultural Marketing Board but Rule 29 only enables the Board to prescribe a uniform rate of fee within the maximum prescribed under Section 23 of the Act for all the market committees in the State to levy in order to carry out the purposes of the Act. In the absence of such a power, every committee shall be at liberty to prescribe the amount of the fee for itself which may result in unhealthy competition in the neighbouring markets and adversely affect the interests of the producers and buyers. I find considerable force in this submission of the respondents. The Marketing Board has the power of supervision over all the market committees in the State and, for the proper functioning of the committees, it may be necessary to prescribe a uniform rate of fee to be charged by all the committees instead of leaving it to the discretion or sweet will of each committee. The levy of uniform fee will help the committees in carrying out the various purposes of the Act with the amount becoming available to them. The challenge to the validity of this rule, therefore, fails.

45. As regards the State of Punjab, the question of fixing the rate of fee by the Agricultural Marketing Board for all the committees in the State does not arise as the Legislature itself has fixed the rate to be charged.

46. No other point has been argued.

47. As a result of the above discussion, 127 writ petitions concerning the market committees of Haryana are dismissed but the parties are left to bear their own costs. 84 writ petitions with regard to the market committees of Punjab are accepted only to the extent that the Punjab Agricultural Produce Markets (Amendment) Ordinance (No. 4 of 1974), replaced by the Punjab Agricultural Produce Markets (Amendment) Act (13 of 1974), are struck down. In all other respects, the petitions are dismissed with no order as to costs.

PRITAM SINGH PATTAR, J. :— I entirely agree.



Order accordingly.

AIR 1976 PUNJAB AND HARYANA 21

R. S. NARULA, C. J.

Rajinder Singh Nanda, Petitioner v. Kewal Krishan, Respondent.

Civil Revn. No. 175 of 1974, D/- 11-4-1975.*

(A) East Punjab Urban Rent Restriction Act (3 of 1949), Section 13 (3) (e) (i) — Ejectment of tenant — Conditions precedent — All three conditions laid down in paras (a), (b) and (c) of Section 13 (3) (a) (i) are required to be fulfilled. (1961-63 Pun LR 865 held no longer good law in view of AIR 1963 Punj 1 (FB) and AIR 1967 SC 773). (Paras 2, 2)

Cases Referred: Chronological Paras

1974 Ren CR 99 (Punj) 2

1970 Ren CR 840 = 73 Pun LR (D) 43 2

AIR 1967 SC 773 = 69 Pun LR 83 2

AIR 1963 Punj 1 = 64 Pun LR 758 (FB) 2

(1961) 63 Pun LR 865 = ILR (1962) 1 Punj 2

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H. L. Sarin Sr. Advocate with M. L. Sarin, for Petitioner; Harinder Singh Gyanj and G. C. Mital, for Respondent.

ORDER :— This is a petition under Section 15 (5) of the East Punjab Urban Rent Restriction Act (3 of 1949) (hereinafter called the Act) for revision of the order of the Appellate Authority, Ferozepore, dated January 3, 1974, upholding the decision of the Rent Controller for the eviction of the tenant-petitioner under Section 13 (3) (a) (i) of the Act, that is on the ground of bona fide personal necessity. The only ground pressed by Mr. Harbans Lal Sarin, learned Senior Counsel for the petitioner, for setting aside the decision of the Courts below is that out of the three statutory conditions precedent entitling a landlord to apply to the Rent Controller for an order directing the tenant to put the landlord in possession specified in Section 13 (3) (a) (i) of the Act, namely:—

(a) he requires it for his own occupation;

(b) he is not occupying another residential building in the urban area concerned; and

(c) he has not vacated such a building without sufficient cause after the commencement of this Act, in the said urban area;

the landlord neither pleaded nor proved conditions (b) and (c) specified above. The ground of ejectment is specified in paragraph 4 (b) of the application for ejectment. It is clear that the pleas requisite under Section 13 (3) (a) (i) (b) and (c) have not been taken therein or at any

other place in the application for ejectment. Nor has any clear evidence on those two points been led by the landlord-respondent.

2. The learned counsel for the tenant-petitioner has referred to the judgment of the Delhi High Court (Himachal Bench) in H. N. Bhasin v. Chamba Mall, 1970 Ren C. R. 840, and the judgment of a learned Single Judge of this Court (Mahajan, J., as he then was) in Darshan Singh v. Jagdish Kumar, 1974 Ren C. R. 99 (Punj) in support of his contention that the landlord cannot succeed in obtaining an order or direction against the tenant for his eviction under Section 13 (3) (a) (i) unless he pleads and proves all the three ingredients of the aforesaid provision referred to above. Mr. Gokal Chand Mittal, learned counsel for the respondent, has on the other hand relied on the earlier Division Bench judgment of this Court in Shri Krishan Lal Seth v. Smt. Pritam Kumari, 1961-63 Pun LR 865 (to which Mahajan, J., himself was a party). In that case it was held that in an application under Section 13 of the Act for the eviction of tenant on the ground of the requirement of the residential building for personal occupation, it is not necessary for the landlord to re-state in the application the statutory conditions set out in paragraphs (b) and (c) of sub-clause (i) of clause (a) of Section 13 (3) of the Act. It appears that subsequent to the decision of the Division Bench in Krishan Lal Seth's case (supra), this matter came up for consideration somewhat obliquely before a Full Bench of this Court in Sant Ram Das Raj Kalka v. Karam Chand Mangal Ram, AIR 1963 Punj. 1 (FB). While concurring with the main judgment of Mehar Singh, J., (as he then was) in that case, Shamsher Bahadur, J., (as he then was) observed that a landlord may apply under sub-section (3) of Section 13 of the Act for ejectment of the tenant from a residential building on fulfilment of all the three conditions laid down in paragraphs (a), (b) and (c) of sub-clause (i) of clause (a) of that sub-section. In a later judgment of the Supreme Court in Attar Singh v. Inder Kumar, 1967-69 Pun LR 83 = (AIR 1967 SC 773), it was held that in order to succeed under a similar provision, the landlord has not only to prove that he requires the premises in question for his own use, but he has also to prove that he is not in possession of any other such premises in the urban area in question, and also to prove that he had not vacated any such premises without sufficient cause after the commencement of the Act. It is clear that in view of the observations made by Shamsher Bahadur, J., in the Full Bench judgment of this Court in the case of Messrs. Sant Ram Das Raj Kalka (supra), and the authoritative pronouncement of

* (Against order of O. P. Saini, Appellate Authority, Ferozepur, D/- 3-1-1974.

their Lordships of the Supreme Court in Attar Singh's case (supra), the Delhi High Court and the learned Single Judge of this Court took the correct view (referred to above), and the view taken by the Division Bench in Krishan Lal Seth's case (supra) is no longer good law. In the face of the state of law referred to above, Mr. Gokal Chand Mittal could not support the order of the Rent Controller and the Appellate Authority, but has prayed that instead of dismissing his application for ejectment I should adopt the course that was adopted by the Delhi High Court in H. N. Bhasin's case (supra), and by D. K. Mahajan, J., in Darshan Singh's case (supra). I agree and accordingly remand the respondent's application for ejectment to the Rent Controller for fresh trial after allowing the landlord-respondent an opportunity to amend the application for ejectment. Mr. Sarin has no objection to this course being adopted.

3. For the foregoing reasons I allow this petition, set aside the judgment and order of the Appellate Authority and of the Rent Controller, and remand this case to the Rent Controller, Ferozepore, for rehearing and re-deciding the case on merits in the light of the observations herein made after allowing the landlord-respondent an opportunity to amend his petition for ejectment. The amended petition may be filed by the landlord before the Rent Controller on May 12, 1975, when the parties will appear before him for further proceedings. The landlord may serve an advance copy of the amended petition on the counsel for the tenant in the trial Court. The tenant would be entitled to file his fresh written statement in reply to the amended petition. As it is an old case, the Rent Controller shall make an effort to dispose it of as expeditiously as possible. There is no order as to costs incurred by the parties in this Court.

Petition allowed.

AIR 1976 PUNJAB & HARYANA 22.

R. S. NARULA, C. J. AND

M. R. SHARMA, J.

Smt. Nirmal Khosla, Appellant v. The Union of India and others, Respondents.

Letters Patent Appeal No. 284 of 1972, D/- 2-4-1975.*

(A) Letters Patent — Punjab & Haryana High Court, Cl. 10 — Limitation Act (1963), S. 5 — Appeal under Cl. 10—One day's delay in filing appeal caused by Counsel's bona fide

*(Against Judgment of R. S. Sarkaria, J. in C. W. No. 2038 of 1974, D/- 28-1-1972).

mistaken impression of law — Delay can be condoned. (Para 4)

(B) Constitution of India, Art. 226 — Limitation — No limitation is prescribed for filing writ petition — Land acquired by Govt. in 1935 — In spite of various representations no compensation paid till 1971 — Petition for mandamus to compel Govt. to determine and pay compensation filed in 1971 — Delay in filing petition held should be ignored. AIR 1969 Punj & Har 441 (FB), Expl. (Para 5)

(C) Constitution of India, Art. 226 — Land Acquisition Act (1894), S. 23 — Petitioner's land acquired by Govt. in 1935 — No compensation paid till 1971 — Petition under Art. 226 for mandamus to compel Govt. to pay compensation or restore land with mesne profits — As no person could be deprived of his property without authority of law Mandamus held should be issued. AIR 1931 PC 248 and AIR 1954 Punj 151, Rel. on. (Paras 6, 7, 8)

Cases Referred : Chronological Paras

AIR 1969 Punj & Har 441 = ILR (1969) 2

Punj & Har 96 = 1969 Lab IC 1513 (FB)

3, 5

AIR 1954 Punj 151 = ILR (1954) Punj 211 6

AIR 1931 PC 248 = 1931 AC 670 6

K. P. Bhandari, for Appellant; H. S. Brar, Sr. Dy. Advocate General (Punjab), for Respondents.

NARULA, C. J. :— The undermentioned history of this case which has led to the filing of the present appeal under clause 10 of the Letters Patent against the judgment of a learned Single Judge of this Court dismissing the writ petition of the appellant on the short ground that it involved disputed questions of fact and a dispute regarding limitation unfortunately reveals that even after the independence of the country and the establishment of a socialistic welfare State committed to the rule of law, some Government agencies continue to have a bureaucratic outlook, and their conscience is not pricked by mercilessly trampling over the legal rights of the citizens and then trying to outwit them by defenceless defences.

2. Possession of the land belonging to the appellant was taken over by the Punjab Government through the Engineer of the Aerodrome at Patiala in 1935 for State purposes. Proceedings for determining compensation payable for the acquisition of land were started, but some years later the file relating to those proceedings was lost in the Government's office. The appellant thereafter went on representing to the Government to determine and pay the compensation for her land and proceedings were restarted after many years. The Collector, Patiala, who was dealing with the matter ultimately passed an order, dated November 2, 1964 (Annexure 'B' to the writ petition), wherein it was observed that no order for acquiring the land was available on the file, and since the land-owner had not

produced a copy of the notification for acquisition of the land it was not necessary to proceed any further with the matter relating to the determination of compensation. It is a matter of regret that the Collector thought that it lay on the land-owner to produce evidence of acquisition of the land belonging to her when it was the admitted case of the Government that the land had in fact been acquired and the appellant had in fact been dispossessed of the same since 1935, and it was not disputed that the land was (as it continues till today) in the possession of the State.

Be that as it may, the fact remains that the appellant went on representing for determination and payment of compensation to her till February 11, 1971. No dent having been created on the mind of the concerned officials of the State, the appellant was driven to file a writ petition in this Court for the issuance of a writ of mandamus against the respondents (who are the Union of India, the State of Punjab, the Secretary, Patiala Aviation Club, and the Collector, Patiala) directing them to do their duty in the above-mentioned matter in accordance with law, and to proceed with the acquisition of the land in question according to the provisions of law, and to pay due compensation for the same to the appellant or in the alternative to restore possession of the land in question to the appellant along with damages for use and occupation thereof for the entire period during which the appellant has been deprived of the same.

3. At the hearing of the writ petition, an objection was raised which was noticed in the judgment of the learned Single Judge in the following words:—

"Mr. Rampal, learned counsel for the State contends that complicated questions of fact necessitating the examination of witnesses and an elaborate investigation arise in this case. It is added that such questions cannot be properly decided in these summary proceedings under Articles 226 and 227 of the Constitution and that the proper remedy of the petitioner is to seek redress by a regular suit."

Immediately after noticing the above-quoted objection the learned Judge proceeded to observe:—

"It appears to me that this objection must prevail."

The learned Single Judge purported to follow the ratio of the Full Bench judgment of this Court in *Jagdish Mitter v. The Union of India*, ILR (1969) 2 Punj and Har 96 = (AIR 1969 Punj & Har 441) for dismissing the writ petition by allowing the above-quoted preliminary objection.

4. At the hearing of this appeal, a preliminary objection has been raised by Mr. H. S. Brar, learned Senior Deputy Advocate-General for the State of Punjab, to the effect that this appeal is barred by time, and that

the application of the appellant (C. M. 2230 of 1973) for condonation of delay and extension of time by one day should be dismissed. The judgment of the learned Single Judge was pronounced on January 27, 1972. The limitation for filing an appeal under clause 10 of the Letters Patent is thirty days. The appeal if filed on February 26, 1972, would have been within time. The appellant is also entitled to exclude from the above quoted statutory period allowed for preferring the appeal the time if any spent in obtaining the requisite certified copy of the judgment of the learned Single Judge. The time spent in obtaining such a copy (if such a copy was obtained) has not been disclosed in the application. Assuming that no certified copy was obtained by the appellant, this appeal could have been filed within limitation by February 26, 1972. February 27, 28 and 29, 1972, were admittedly holidays, and the Court was closed on those days. The appeal was actually filed on 1-3-1972, by Mr. I. B. Bhandari, Advocate, who was at that time a rank junior in the profession. It appears from the application filed by him under his own signature that he did not distinguish between a month of 31 days and a month of 30 days in calculating the period of limitation for filing the appeal, and thinking that one month and not thirty days was the prescribed period of limitation and the appeal could be filed on February 27, 1972 (the closed day), actually filed it on the reopening day of the Court after the above-mentioned holidays. The above-mentioned facts stated in the application of Mr. I. B. Bhandari (filed by him under his own signature) clearly show that one day's delay was caused in the filing of this appeal due to a bona fide mistaken impression of the law by Mr. I. B. Bhandari. It is settled law that no litigant should ordinarily suffer for such a mistake of his counsel. In these circumstances we are satisfied that there was sufficient cause for one day's delay in preferring the appeal. We accordingly allow the application for condonation of delay and treat the appeal as having been filed within time.

5. On the merits of the controversy Mr. H. S. Brar, learned counsel for the State, could not point out to us as to what is that blooming disputed question of fact which would necessitate the examination of witnesses and require an elaborate investigation. He has candidly admitted that the land in question belonged to the appellant, that it was acquired by the Government, that the possession of the said land is still with the Government, that the State does not intend to give back the land, and that no compensation for acquiring that land has so far been determined or paid to the appellant. We are unable to understand as to what disputed question of fact still requires determination in the face of these admissions. The preliminary objection on the basis of which the petition was dismissed does not, therefore, appear to hold much water. Mr. Brar has then con-

tended on the authority of the Full Bench in Jagdish Mitter's case (AIR 1969 Punj & Har 441) (supra) that the question of limitation for allowing the claim of the appellant would come in. Learned counsel for the State appears to be thinking that this is a suit for payment of money. The appellant is not claiming any money in the present proceedings, but has merely come to the Court for compelling the Governmental authorities to do the duty enjoined on them by law. For the issuance of a writ of mandamus in a case of this type there is no period of limitation prescribed by the Limitation Act. Question of delay in approaching the Court can certainly be one of the valid considerations in the matter of exercise of the High Court's discretion under Article 226 of the Constitution, but no limitation is prescribed for approaching this Court. If there is any fit case in which the Court would ignore delay in coming to the Court for an appropriate writ, order or direction under Article 226, it is this one. We have, therefore, no hesitation in holding that no question of limitation is involved in the writ petition and nothing stated in Jagdish Mitter's case (supra) bars the grant of appropriate relief to the appellant.

6. The merits of the appellant's claim for a mandamus do not appear to us to present any difficulty at all. Even during the British colonial regime it had been held by their Lordships of the Privy Council in England in a case from Nigeria — Eshugbayi Eleko v. Officer Administering the Government of Nigeria, AIR 1931 PC 248, as follows:

"In accordance with British jurisprudence no member of the executive can interfere with the liberty or property of a British subject except on the condition that he can support the legality of his action before a Court of justice. And it is the tradition of British justice that Judges should not shrink from deciding such issues in the face of the executive."

[The above-quoted dictum of the Privy Council was approved by a Division Bench of this Court in Khushal Singh v. Rameshwar Dayal, AIR 1954 Punj 151. We are committed by our traditions and the Constitution to no lower norms of jurisprudence.

7. When the possession of the appellant's land was taken over in 1935 the rights of the appellant were secured by S. 299 (1) of the Government of India Act, 1935, which stated:—

"299 (1) No person shall be deprived of his property save by authority of law."

If the appellant's land had not been lawfully acquired, she was and is entitled to restoration of the possession of the land. But the fact that proceedings for determination of compensation started and went on for some time does tend to show that the acquisition was lawful. The loss of the original acquisition file accounts for non-availability of the notifications relating to the acquisition. But

the choice still lies with the Government. Either it can treat the land as having been lawfully acquired in 1935, and determine the compensation on that basis and pay the same to the appellant in accordance with law, or if it is advised that the acquisition proceedings were not regular for want of the requisite notification the Government may now issue the appropriate notifications under Sections 4 and 6 of the Land Acquisition Act, 1894, and determine the compensation on that basis and pay the same to the appellant in accordance with law. Whatever course the State may adopt, it does not lie in its mouth to deny to the appellant the compensation for her land which has admittedly been acquired and taken over by the Government unless, of course, the Government is prepared to give back the land and mesne profits for its use from 1935 to 1975.

8. For the foregoing reasons we allow this appeal, set aside the judgment and order of the learned Single Judge, grant the appellant's writ petition and issue a mandamus to the respondents to determine and pay in accordance with law the compensation to which the appellant may be found to be entitled for her land which was acquired in 1935 or to restore the possession of the land to the appellant. If the Government treats the land as having been properly acquired in 1935, the amount of compensation would be payable to her according to the market value and potential value of 1935, along with the statutory interest and solatium. If, however, the acquisition proceedings are sought to be now regularised by issuing a fresh notification, the market value at which the compensation would be payable to the appellant would be of the date on which the notification under Section 4 of the Land Acquisition Act is issued. The appellant would be entitled to her costs in the appeal as well as in the writ petition. Counsel's fee Rs. 300/-.

SHARMA, J.:— I agree.

Appeal allowed.

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A. D. KOSHAL, J.

Hazara Singh, Appellant v. Attar Kaur, Respondent.

Second Appeal No 935 of 1970, D/- 2-7-1975.*

(A) Evidence Act (1872), S. 35 — Birth register — Entry only showing that a daughter was born to a woman of village C and father of new born was H — A claiming to be that daughter of H — Absence of identity of H or that of new born — Entry, held would not support A's case. (Para 4)

* (From decree of J. S. Chatha, Addl. Dist. J. Amritsar, D/- 4-6-1970).

LS/LS/E314/75/SSG

(B) Evidence Act (1872), S. 64 — Documents — Proof — Mode.

Merely because certain personal letters were tendered in evidence and exhibited is no reason why their authorship should be taken as what it purports to be. When persons conversant with such handwriting and signatures have not been produced at the trial.

(Para 5)

(C) Evidence Act (1872), S. 50 — Opinion on relationship — Person whose evidence is admissible.

Where in A's suit question was whether A was daughter of H and two of her witnesses (being members of family and having special means of knowledge) deposed that during H's life, he and A treated each other as father and daughter respectively, the testimony squarely falls within the ambit of Section 50 inasmuch as it proves the opinion expressed by conduct.

(Para 6)

The special means of knowledge which the section speaks of are means which the person whose opinion is sought to be proved must have. The language of the section does not warrant the interpretation that such means must be had by the witness who proves the opinion in question.

(Para 6)

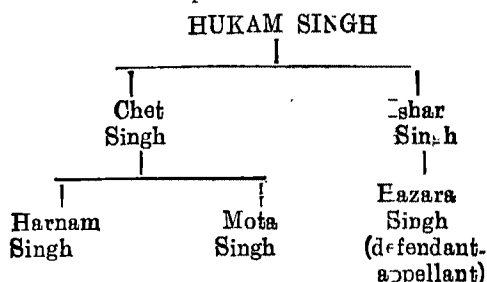
(D) Evidence Act (1872), S. 60 — Hearsay evidence — What is not.

When A claiming to be H's daughter states that the said H used to conduct himself as her father, she is speaking so from personal knowledge and her testimony cannot be rejected as being hearsay.

(Para 6)

G. R. Majithia, for Appellant; S. K. Jain with Dalip Singh, for Respondent.

JUDGMENT:— The only point requiring determination in this appeal is whether Attar Kaur plaintiff is the daughter of Harnam Singh whose name appears in the following pedigree-table which stands admitted between the parties:



The dispute relates to the estate of Mota Singh who died in Canada about six years before the institution of the suit. According to the plaintiff, she is the sole surviving heir of Mota Singh, being his brother's daughter. The defendant-appellant contests her alleged paternity without disclosing, however, as to who her father was.

2. At the trial, the plaintiff produced ten witnesses including herself. All of them

asserted that she was the daughter of Harnam Singh above mentioned. Two of them, namely, Pritam Singh (P. W. 2), a resident of village Padhri where the plaintiff is married, and Sardara Singh (P. W. 3) who hails from village Chola Sahib where part of the land in dispute is situate and to which Mota Singh and Harnam Singh belonged, have taken the stand that in his lifetime Harnam Singh used to address the plaintiff as his daughter who herself addressed him as her father. The plaintiff appearing as P. W. 10 deposed that she was the daughter of the said Harnam Singh who "regarded me as his daughter and treated me in that manner."

Apart from the oral evidence, reliance by the plaintiff was placed on copy of birth entry Exhibit P.3 as also on letters Exhibits P.5 to P.8. The entry exists in the register of births maintained at Police Station Sarhali in District Amritsar and states that a daughter was born to a Hindu Jat woman of village Chola on the 14th of April, 1903, and that the name of the father of the new born child was Harnam Singh. Letters Exhibits P.5, P.6 and P.7 purport to have been written by Mota Singh above mentioned. The first two of them are addressed to Hazara Singh husband of the plaintiff and the third to the plaintiff herself. Letter Exhibit P.8 purports to have been sent by one Bhan Singh Gill to the plaintiff. All the four letters bear Canada post marks. The evidence adduced in rebuttal consists of the depositions of seven witnesses including the defendant. None of them has categorically denied that the plaintiff was the daughter of the brother of Mota Singh whose estate is in dispute.

3. The trial Court relied on the oral testimony of the witnesses for the plaintiff as also on documents Exhibits P.3 and P.5 to P.8 to hold that Harnam Singh, brother of Mota Singh, was proved to be the father of the plaintiff. The finding was upheld in appeal by Shri J. S. Chatha, Additional District Judge, Amritsar more on the basis of the said documents than on the oral evidence which, according to him, "may not be very useful." In addition, he was impressed by the fact that the defendant was silent about the paternity of the plaintiff. Both the Courts below have decreed the plaintiff's suit for possession of the land left by Mota Singh.

4. I find myself in complete agreement with the first contention raised on behalf of the appellant that document Exhibit P.3 does not indicate the identity of Harnam Singh or that of the new born child referred to therein and that, therefore, it provides no supporting evidence to the plaintiff's case. As already pointed out, the entry shows that a daughter was born to a woman of Chola Sahib and that the father of the new born child was Harnam Singh. Now it is true that Harnam Singh, brother of Mota Singh, was a resident of Chola Sahib. But then there is nothing to indicate that no other person

by the name of Harnam Singh was residing in Chola Sahib at the relevant point of time. Harnam Singh' is a very common name amongst the Sikhs and no presumption can be raised, in the absence of evidence to that effect, that only one person by the name of Harnam Singh would be available in a particular village. Another noteworthy factor about the entry is that even if a presumption of that type could be made, the plaintiff cannot derive any benefit therefrom unless she proves that the child to whom the entry related was herself and no other child of Harnam Singh. There is, however, not an iota of evidence on the record to the effect that Harnam Singh begot only one daughter or that the plaintiff was born in or about the month of April, 1903. Entry Exhibit P.3 has thus not been connected with the plaintiff and serves no useful purpose.

5. Another contention raised on behalf of the appellant which has to be accepted is that the authorship of letters Exhibits P. 5 to P.8 remains unproved and that, therefore, it cannot be said that the first three of them were written by Mota Singh above mentioned and the fourth by Bhan Singh foresaid. Not only has every one of the Exhs. 1 to 9 remained silent on the point but the same is true of the plaintiff herself. The plaintiff, in fact, is illiterate and was not in a position to identify the handwriting or signatures of her uncle or Bhan Singh. But merely other persons who were conversant with such handwriting and signatures could and should have been produced at the trial before the plaintiff could rely on the letters as evidence in support of her case. Merely because the letters were tendered in evidence and exhibited is no reason why their authorship should be taken as what it purports to be.

6. All the same I do not agree with Mr. Majithia that the plaintiff has failed to prove that she was the daughter of Mota Singh's brother Harnam Singh. In my opinion, the oral evidence adduced by the plaintiff is sufficient proof of the fact. Reference in this connection may be made to her own deposition and that of Sardara Singh (P. W. 3). Both of them have stated on oath that during the lifetime of Harnam Singh, the latter and the plaintiff treated each other as father and daughter respectively. This testimony squarely falls within the ambit of Section 50 of the Indian Evidence Act inasmuch as it proves the opinion, expressed by conduct, as to the existence of the relationship of father and daughter between Harnam Singh and the plaintiff, both of whom being members of a family had special means of knowledge on the subject.

Mr. Majithia has argued that a witness who gives evidence about such opinion as referred to in Section 50 must himself be having special means of knowledge about the relationship in question but that is not what

the section provides. The special means of knowledge which the section speaks of are means which the person whose opinion is sought to be proved must have. The language of the section does not warrant the interpretation that such means must be had by the witness who proves the opinion in question.

Nor am I impressed by the contention raised on behalf of the appellant that the testimony of Sardara Singh (P. W. 3) and Attar Kaur (P. W. 10) should be regarded as hearsay for the reason that neither of them has stated that he or she was present at the time when Harnam Singh conducted himself as alleged. It is true that neither Sardara Singh (P. W. 3) nor Attar Kaur (P. W. 10) asserted in so many words that the relevant conduct of Harnam Singh manifested itself in his or her presence, but the circumstance, in my opinion, does not lead to the inference that the testimony of the two witnesses must be regarded as hearsay. The relevant portion of the testimony of Sardara Singh runs thus:

"I know Attar Kaur, she is the daughter of Harnam Singh of my village. Harnam Singh and Mota Singh deceased were brothers inter se. Harnam Singh used to call Attar Kaur his daughter and Attar Kaur used to address him as her father."

As already stated, the witness hails from Chola Sahib. The averments made by him in his deposition must be taken to have been made on the basis of personal knowledge unless the fact was challenged and the reality shown to be otherwise. I may add that the witness is a Lambardar and may well be presumed to be coming into contact with most of the residents of his village. In any case, the statement in the witness-box of the plaintiff herself is practically a clincher against the defendant who has not set up any alternative case in regard to the plaintiff's paternity, there being not even a suggestion that she is the daughter of any person other than Harnam Singh brother of Mota Singh. Obviously when she states that the said Harnam Singh used to conduct himself as her father, she is speaking from personal knowledge and her testimony cannot be rejected as being hearsay.

7. Holding that the concurrent finding of fact arrived at by the Courts below is correct, I dismiss the appeal with costs as being without substance.

Appeal dismissed.

AIR 1976 PUNJAB & HARYANA 27

R. S. NARULA, C. J.

Banarsi Dass, Petitioner v. Faqir Chand and others, Respondents.

Civil Revn. No. 1417 of 1971, D/- 9-7-1975.

(A) **E. P. Urban Rent Restriction Act (3 of 1949), S. 2 (c) and S. 13 (2) (i) — 'Landlord' — One of the heirs of original landlord falls within definition of 'landlord' in S. 2 (c).**

Hence payment of rent to one of the heirs of original landlord will normally absolve tenant of his liability to pay rent.

(Para 4)

(B) **E. P. Urban Rent Restriction Act (13 of 1949), S. 13 (2) (ii) (b) — Open site of land leased — Misuser — What amounts to.**

Where open site of land was leased out for making 'construction of a factory and Kutchra or pucca shop' and the tenant constructed five shops without constructing factory.

Held that by making five shops and not making the factory on the rented land, the tenant did not transgress the limits of the written consent granted to him in the lease deed in respect of manner of user of premises.

(Para 5)

(C) **E. P. Urban Rent Restriction Act (3 of 1949), S. 13 (2) (ii) (a) — Sub-letting — What amounts to.**

Where an open plot of land is leased out for making constructions therein and the tenant constructed five shops and leased them to others.

Held that there is no sub-letting of plot of land which he has taken on rent because what he has leased out are the shops constructed by him and not the land.

(Para 6)

(D) **E. P. Urban Rent Restriction Act (3 of 1949), S. 13 (2) (ii) (a) — Expression 'Written consent' — Not qualified by the word, 'prior'.**

So long as written consent is given by a landlord before filing of petition for eviction whether before or after sub-letting, the case cannot fall within the mischief of Section 13 (2) (ii) (a).

(Para 6)

(E) **T. P. Act (1882), S. 108 (c) — Provisions of — Subject of rent control imposed by E. P. Urban Rent Restriction Act, 1949 — (E. P. Urban Rent Restriction Act (3 of 1949), S. 13).**

Therefore the liability to hand over vacant possession of the premises on the expiry of the stipulated period of lease in respect of the premises covered by the 1949 Act stands abrogated by the Act so long as it remains in force.

(Para 8)

Harbans Lal, for Petitioner; K. S. Raipuri and Amarjit Markan, for Respondents.

ORDER:— An open site of land forming part of a bigger plot known as braham sarai belonged to one Kishore Chand who let it out to Banarsi Dass petitioner on July 17, 1950, for a period of 15 years ending July 16, 1965, by means of a written lease-deed Exhibit A-2. Kishore Chand died in 1964 leaving behind him two daughters, two sons namely Faqir Chand and Parkash Chand, and a grandson namely Prem Chand son of Telu Ram. After the expiry of the period of the original lease-deed, a fresh lease-deed was executed by Parkash Chand son of Kishore Chand in favour of the petitioner for a period of one year on July 27, 1965. This is Exhibit R.1. The tenancy was, however, continued even after the expiry of the period covered by the lease-deed Exhibit R.1 as the rent for two subsequent years was received by Parkash Chand against two separate receipts. He received rent for another year in advance on July 16, 1966, vide receipt Exhibit R. 2, and for the third year in advance by the receipt, dated July 23, 1967 Exhibit R. 3. Before the expiry of the period covered by the receipt Exhibit R. 3, Faqir Chand and his two sisters filed an application for the ejectment of the petitioner from the land in question on October 28, 1967. Later on Parkash Chand and Prem Chand the only other heirs of Kishore Chand were also joined as parties to the petition for ejectment. Eviction of the petitioner was sought on three grounds, namely that of (i) sub-letting without the written consent of the landlord; (ii) using the rented land for a purpose other than that for which it was leased; and (iii) on account of non-payment of rent with effect from July 17, 1965, i.e. for the entire period subsequent to the expiry of the period of the lease-deed Exhibit A.2.

2. By his judgment, dated November 26, 1968, the Rent Controller recorded findings against the landlord-respondents on all the three grounds, and dismissed the application for eviction of the petitioner. The appeal of the landlord-respondents, was, however, allowed by the judgment, dated December 10, 1971, of Shri Raghbir Singh, the Appellate Authority. He allowed the eviction of the petitioner on all the three grounds. He held that all the five heirs of Kishore Chand were the landlords of the present petitioner in respect of the demised premises and payment of rent to one of them was not enough, and, therefore, the petitioner was guilty of non-payment of rent. It is the common case of the parties that the petitioner did not make any factory building on the rented land, but made five shops which were let out by him to different persons who have been impleaded as respondents in the present proceedings. It was held by the Appellate Authority that since no written consent for letting out the shops to those persons had been obtained, he was liable to ejectment on the ground of subletting. The eviction was also allowed for using the rented land

for a purpose other than that mentioned in the lease-deed on the finding that in accordance with the terms of the original lease-deed Exhibit A-2, the petitioner took the land for constructing a factory building and one shop either kutchra or pukka, and that inasmuch as no factory building had been constructed and five shops had been made, the rented land had been misused.

3. Aggrieved by the order of the Appellate Authority, the petitioner filed the present revision petition in this Court. When this case came up for hearing before P. C. Pandit, J. (as he then was) on September 1, 1972, the learned Judge found that though eviction had been allowed on the ground of perversion of user of the rented land, no issue had been framed on that point, and, therefore, the petitioner had been prejudiced in the trial of this case on that point. The learned Judge therefore, ordered that the issue of perversion of user may be tried by the Rent Controller after giving the parties a reasonable opportunity, and that his report should be submitted to this Court through the Appellate Authority who may also record his finding thereon. In pursuance of the above-said order of this Court, the Rent Controller, Sunam, went into the question covered by the order of remand and submitted his report, dated November 24, 1972, to the Appellate Authority. As per direction given by this Court, the learned Rent Controller framed the following additional issue:

"Whether Banarsi Das respondent used the demised premises for a purpose other than that for which (those were) let out?"

The Rent Controller held that the stipulation in the lease-deed Exhibit A-2 to the effect that the plot in question was being given on lease for being used for the "construction of a factory and kutchra or pukka shop" shows that the premises were let out for their use as factory and kutchra or pukka shop, and inasmuch as admittedly there was no factory in the premises in dispute, but shops have been built thereon, the tenant had fallen within the mischief of S. 13 (2) (ii) (b) of the East Punjab Urban Rent Restriction Act (3 of 1949) (hereinafter called the 1949 Act). In the words of the Rent Controller, the finding recorded by him was that:

"Since the premises in dispute have not been used for the purposes of factory and instead of construction of one shop kachi or pucci more than one shop and rooms have been constructed and the same have been let out. Therefore, it cannot be stated that the premises are being used for the purpose for which these were let out."

4. In his report, dated January 1, 1973, the Appellate Authority agreed with the finding of the Rent Controller. At the hearing of the revision petition before me, Mr. Harbans Lal, learned counsel for the tenant-petitioner, has made out mainly three grounds. Firstly, he has submitted that the

order of eviction could not be passed on account of non-payment of rent as rent for the entire period in dispute had admittedly been paid by the petitioner to Parkash Chand who was undisputedly one of the heirs of the original landlord, and falls within the statutory definition of the expression "landlord" contained in the following words of Section 2 (c) of the 1949 Act:—

"'landlord' means any person for the time being entitled to receive rent in respect of any building or rented land whether on his own account or on behalf or for the benefit of any other person, or as a trustee, guardian, receiver, executor or administrator for any other person, and includes a tenant who sublets any building or rented land in the manner hereinafter authorised, and every person from time to time deriving title under a landlord."

I find great force in this submission of the learned counsel. Even if the fresh lease-deed Exhibit R1 had not been executed by Parkash Chand in favour of the petitioner, Parkash Chand would have been entitled to receive rent in respect of the premises in dispute as one of the heirs of the original land-owner. That being so, payment of rent to one of the heirs of the original land owner would normally absolve the tenant of his liability to pay rent. In this particular case it is significant to note that on the death of Kishore Chand in 1964, and on the expiry of the period of the original lease-deed Exhibit A-2, Parkash Chand alone executed the fresh lease-deed Exhibit R.1 for one year on July 27, 1965, and that none of the other heirs of Kishore Chand either objected to the same or served on the petitioner any notice to pay rent to them or not to pay rent to Parkash Chand. In fact it appears that later on when rents in the locality must have risen with the general inflation in the market, all the heirs of Kishore Chand joined hands to try to evict the petitioner on every conceivable ground. The petitioner having paid the stipulated rent in full for the period in question to Parkash Chand landlord, his eviction cannot be ordered on the ground of non-payment of rent. The finding of the lower appellate Court on that ground is, therefore, reversed.

5. The second finding on which eviction of the petitioner has been ordered, namely of misuser of the land, has been attacked by Mr. Harbans Lal from different angles. His first stipulation is that the lease-deed which was operative at the time when the application for eviction was filed was Exhibit R.1. He submits that though the period of that lease (one year) had expired the tenancy of the petitioner continued thereafter on the same terms and conditions particularly when rent for the subsequent period of two years had been accepted by the landlord against his written receipts. He emphasises that no mention of any factory has been made in Exhibit R.1, and on the contrary

expression "shops" has been used therein. His second argument on this point is that even under the lease-deed Exhibit A.2, he was not bound to construct a factory on the site, nor was his authority to build kutcha or pukka shop thereon confined to a single shop. I am inclined to agree with Mr. Harbans Lal that the lower appellate Court as well as the Rent Controller in his subsequent report have misunderstood the import of the relevant words in the lease-deed Exhibit A.2. The purport of the document is that the open plot of land was given on lease to the petitioner and he was permitted to make the constructions referred to therein. Though it is mentioned that the premises are being leased out for making construction on the demised premises, the object of making that mention is to make a foundation for the subsequent stipulation contained in the lease-deed about the right of the petitioner to remove the steel portion of the construction which he may put up after the expiry of the period of the tenancy. I wonder if the landlord could have claimed the eviction of the petitioner if he had not put up any building at all on the rented land, and if he had used it for running his own business thereon. Be that as it may, it is clear to me that making only shops and not the factory would not amount to misuse of the rented land which had been taken for making a factory or a kutcha or pukka shop. In the absence of some clear indication to the contrary, the expression "shop" in singular would include the plural. From the reading of the entire document I have not been able to spell out any definite restriction on the number of shops which the petitioner could construct on the plot. For the foregoing reasons I hold that while making five shops etc. and not making the factory on the rented land, the petitioner did not transgress the limits of the written consent granted to him in the lease-deed Exhibit A.2 in respect of the manner of the user of the premises. Even otherwise the intention of the parties in that respect is apparent from the tenor of the subsequent lease-deed Exhibit R.1 which recognises the accomplished fact of the shops having been built and no factory having been constructed on the premises. The findings of the Rent Controller in the post-remand proceedings and of the lower appellate Court on this issue are also, therefore, reversed.

6. The last ground on which eviction has been ordered is of subletting. Here again it appears to me that the lower appellate Court has misunderstood the correct position. What is prohibited to be sublet without the written consent of the landlord is the premises which have been let out to the tenant. What had been let out to the tenant was the open plot of land on a part of which some shops were constructed. What the petitioner has let out to the other respondents are the shops constructed by him and not the plot of land which he had taken on rent originally from Kishore Chand and subsequently from Parkash Chand. Even independent of

this consideration, I have no hesitation in holding that the expression "written consent" given in the lease-deed Exhibit R.1, dated July 27, 1965, works both backwards and forwards, and there is no warrant for qualifying the expression "written consent" used in clause (ii) of sub-section (2) of S. 13 of the 1949 Act with the word "prior". So long as written consent for subletting is given by a landlord before the filing of the petition for eviction whether before or after actually subletting, the case cannot fall within the mischief of Section 13 (2) (ii) (a) of the 1949 Act.

7. Mr. Kartar Singh Raipuri, the learned counsel for the landlord-respondents, has submitted that the documents Exhibits R.2 and R.3 are not lease-deeds, but are mere receipts for rent. Learned counsel is no doubt correct in his submission in this respect. That does not, however, go against the petitioner. The terms and conditions of the lease-deed executed by Parkash Chand are contained in the lease-deed Exhibit R.1, dated July 27, 1965. Subsequent acceptance of annual rent in advance by means of receipts Exhibits R.2 and R.3 establishes in the absence of definite evidence to the contrary that the lease was being continued on the same terms and conditions as contained in Exhibit R.1.

8. Counsel has then referred to Section 108 (c) of the Transfer of Property Act which enjoins on the tenant a duty to hand over possession of the leased premises to the landlord on the expiry of the period of the lease. The provisions of the Transfer of Property Act are subject to the rent control imposed by the 1949 Act. The liability to hand over vacant possession of the premises on the expiry of the stipulated period of lease in respect of the premises covered by the 1949 Act stands abrogated by the Act so long as it remains in force. Mr. Raipuri submitted that the consent given by Parkash Chand for subletting in Exhibit R.1 is not valid as it is not by all the heirs of Kishore Chand, and also because it was given after the shops had in fact been already sublet. I have already held that Parkash Chand is a landlord of the petitioner for purposes of the 1949 Act after the death of Kishore Chand, and that written consent need not be prior to the actual act of subletting. Though I have held that on the facts of this case there has in fact been no subletting of the leased plot within the meaning of Section 13 (2) (ii) (a), I have no hesitation in further holding that the written consent contained in Exhibit R.1 would have saved the petitioner from liability to ejectment on the ground of subletting any of the shops constructed by him even if my interpretation of the abovementioned provision is not found to be correct.

9. In the view I have taken on the merits of the controversy between the parties it is unnecessary to travel into the other arguments addressed by Mr. Harbans Lal based on ancillary proceedings relating to

partition between the different heirs of Kishore Chand of which documentary evidence is available on the record, and about the decision of the rent control authorities on certain applications which had been made by the tenant before the Appellate Authority.

10. In the circumstances referred to above I allow this petition and set aside the order of the Appellate Authority allowing the application of the respondent for the eviction of the petitioner without any order as to costs throughout.

Petition allowed.

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BAL RAJ TULI AND S. S.

SANDHAWALIA, JJ.

Parkash Chander, Petitioner v. Haryana State Electricity Board and others, Respondents.

Civil Writs Nos. 4794, 4943, 4944, 5739, 5754, 6914, and 6917 to 6919 etc. of 1974. D/- 31-3-1975.

(A) Punjab State Electricity Board (Punishment and Appeal) Regulations 1965 (as adopted by Haryana State Electricity Board), Reg. 13 (1) and Reg. 7 — Employee convicted under S. 188 Penal Code for deliberate violation of order under S. 144, Cr. P. C. — Punishing authority considering employee's conduct and circumstances of case and terminating his services — Termination order held valid under Reg. 13 (1) — AIR 1973 Punj and Har 1 (FB), Dist.

(Para 5)

(B) Constitution of India, Art. 226 — Fact asserted in writ petition denied by respondent — Assertion when cannot be accepted.

In a petition under Article 226 when a fact asserted in the petition is denied by the respondent, it is not safe to accept the assertion made by the petitioner when the case is not a fit one to examine the evidence in order to resolve the dispute concerning that fact.

(Paras 6, 18)

(C) Punjab State Electricity Board (Punishment and Appeal) Regulations 1965 (as adopted by Haryana State Electricity Board) Regs. 13 (1), 7 and 30 — Number of employees of Board going on strike convicted under S. 188, Penal Code for deliberate violation of order under S. 144, Cr. P. C. — Services of employees terminated by different punishing authorities at direction of Chairman by orders couched in same language — Orders are valid. (Per Tuli, J.; Sandhawalia, J. Contra).

Where a number of employees of State Electricity Board went on strike and were found guilty of deliberately violating the order under Section 144, Criminal P. C. which led

to their conviction under Section 188, Penal Code and the various punishing authorities in exercise of their quasi-judicial powers under Reg. 13 (1) and under policy directive from superior authority terminated the services of the employees by orders couched in the same language, it was held:—

Per Tuli, J.:— Even if the termination orders were issued by each punishing authority in consultation with the Chairman or as a result of the policy formulated by the Board the termination orders would be valid as in the circumstances of the case a general policy could be laid down by the employer as to the punishment to be imposed upon the erring employees en masse in order to avoid allegations of discrimination and victimisation and the plea of extraneous interference with the judicial discretion of each punishing authority would not be available in such a case especially when under Reg. 30 the Board had the power to inflict punishment of termination of service if the punishing authority were to pass any other order than termination of services.

Per Sandhawalia, J.:— The power under Reg. 13 (1) being quasi-judicial must be exercised independently and completely uninfluenced by any extraneous consideration and the mere fact that the employees against whom action had to be taken had acted en masse or collectively would make no difference and therefore the termination orders passed by the punishing authorities at the direction of the Chairman of the Board would be invalid. (Para 19)

(D) Constitution of India, Art. 14 — Punjab State Electricity Board (Punishment and Appeal) Regulations 1965 (as adopted by Haryana State Electricity Board) Reg. 13 (1) — Article 14 guarantees equality before law and not before judicial or quasi-judicial decision — Power to impose punishment under Reg. 13 (1) is quasi-judicial — That for same misconduct different punishments can be awarded by different punishing authorities is no ground for holding Reg. 13 (1) as violative of Art. 14. AIR 1973 SC 947 and AIR 1955 SC 191, Rel. on. (Para 12)

(E) Constitution of India, Art. 14 — Punjab State Electricity Board (Punishment and Appeal) Regulations 1965 (as adopted by Haryana State Electricity Board) Regs. 13 (1) and 18 — Reg. 13 (1) conferring power to impose punishment — Even if no appeal were provided against order under Reg. 13 (1) it could not be struck down as conferring arbitrary power on that ground, as an appeal could be filed under Reg. 18. (Para 13)

(F) Constitution of India, Art. 226 — Punjab State Electricity Board (Punishment and Appeal) Regulations 1965 (as adopted by Haryana State Electricity Board), Reg. 13 (1) — Reg. 13 (1) not providing for giving hearing to employee before inflicting punishment — Reg. 13 (1) is valid.

If a statute or regulation prescribing the conditions of service between an autonomous

body and its employees specifically provides that a hearing need not be given to an employee before inflicting punishment it has to be seen whether the provision is reasonable or not and Reg. 13 (1) which is analogous to Art. 311 (2) Proviso of the Constitution of India cannot be struck down on the ground that it does not provide for an opportunity of a hearing being afforded to the delinquent employee before passing the order of punishment because the employee has the chance of showing his innocence when he faces the criminal trial and if he is not able to exculpate himself, then a second enquiry into the same facts need not be held by the disciplinary authority under Reg. 13 (1) and therefore Reg. 13 (1) is valid. (Para 14)

Cases Referred : Chronological Paras

AIR 1975 SC 1331 = 1975 Lab IC 881	4
1975 Lab IC 646 = 77 Pun LR 602 (FB): 11	
1974 Lab IC 891 = (1973) 2 Serv LR 46	4
(Delhi)	
1974 Lab IC 1220 = ILR (1974) 2 Punj 230	4
(FB)	
1974 (2) Serv LWR 737 (Punj)	4
AIR 1973 SC 855 = 1973 Lab IC 453	4
AIR 1973 SC 947 = 1973 Cri LJ 370	12
AIR 1973 Punj & Har 1 = ILR (1972) 2	
Punj 72 = 1973 Lab IC 74 (FB)	5
1972 Serv LR 198 (Punj)	4
AIR 1971 SC 1828 = 1971 Lab IC 1129	4
AIR 1970 SC 1244 = 1970 Lab IC 1044	4
AIR 1966 SC 282 = (1965) 3 SCR 453 =	
1966 Cri LJ 189	4
AIR 1966 SC 1364 = (1966) 3 SCR 40	4
AIR 1964 SC 847 = (1964) 5 SCR 528	4
AIR 1964 SC 1680 = (1964) 3 SCR 55	4
AIR 1960 SC 160 = (1960) 1 SCR 806	7
AIR 1960 SC 219 = (1960) 1 SCR 1	3
AIR 1955 SC 191 = (1955) 1 SCR 1045 =	
1955 Cri LJ 374	12
(1943) 321 US 1 = 88 Law Ed 497	12

P. N. Lekhi Sr. Advocate with I. S. Vimal and Gian Singh, for Petitioner; J. N. Kaushal, Advocate General Haryana and C. D. Dewan Addl. Advocate General Haryana with S. K. Jain and S. P. Jain, for Respondents.

TULI, J.:— This judgment will dispose of 217 Writ Petitions Nos. 4794, 4943, 4944, 5739, 5754, 5768, 5769, 5773, 5833, 5849 to 5857, 5866, 5899 to 5904, 5922, 5929 to 5932, 5934 to 5936, 5967, 6065 to 6078, 6080 to 6085, 6087 to 6092, 6121 to 6134, 6137, 6138, 6140 to 6148, 6173 to 6179, 6182 to 6190, 6193 to 6196, 6198, 6199, 6201 to 6203, 6205, 6206, 6308 to 6315, 6317 to 6324, 6326 to 6330, 6382 to 6385, 6418 to 6423, 6465A, 6484 to 6486, 6488 to 6492, 6495, 6496, 6498 to 6501, 6507, 6509 to 6512, 6514 to 6516, 6630, 6635, 6636, 6638 to 6642, 6644, 6685 to 6687, 6689, 6693, 6697 to 6699, 6701, 6703 to 6706, 6712, 6714 to 6716, 6718, 6719, 6739, 6743 to 6745, 6755, 6757 to 6758, 6900, 6902 to 6905, 6907 to 6914 and 6917 to 6919 of 1974 as common questions of law and fact are involved.

2. The brief facts are that the petitioners were employees of the Haryana State

Electricity Board, either temporary or substantive, and in pursuance of the call of the Union they went on strike with effect from April 25, 1974. They then went to Delhi to hold demonstrations in order to bring pressure on the management of the Board to concede their demands and to invite the intervention of the Central Government in the matter. In Delhi there was already in force an order under Section 144 of the Code of Criminal Procedure prohibiting such demonstrations and assembly of more than five persons. The petitioners deliberately defied that order and thus committed an offence under Sec. 188 of the Indian Penal Code. They were arrested and tried in the Court of the Metropolitan Magistrate, New Delhi. They were convicted and sentenced to various terms of imprisonment. The strike was withdrawn on May 15, 1974, and the petitioners thereafter reported for duty, but they were not allowed to resume duty. On various dates the appointing authorities of the petitioners issued orders terminating their services under regulation No. 13 (i) of the Punjab State Electricity Board (Punishment and Appeal) Regulations, 1965 (hereinafter referred to as the Regulations) as adopted by the Haryana State Electricity Board (hereinafter called the Board). One such order is as under:—

"HARYANA STATE ELECTRICITY BOARD

OFFICE ORDER No. 124, dated 23-5-1974.

Shri Parkash Chander S/o Shri Duni Chand, an employee of the Board, posted as Meter Reader of Division Office, absented himself from duty, went to Delhi and deliberately violated on May 4, 1974, a duly promulgated order under Section 144 of the Code of Criminal Procedure by the Additional Magistrate, New Delhi, on May 4, 1974. He took out a procession along with the persons and raised slogans in spite of being warned that the prohibitory order under Section 144, Criminal Procedure Code, was in force and continued disobeying the said order and were arrested and challaned.

As such he along with other accused were prosecuted for an offence under Section 188 of Indian Penal Code in the Court of Shri Mohinder Paul, Metropolitan Magistrate, Parliament Street Courts at New Delhi, on 4-5-1974, and pleaded guilty to the charge and made a voluntary confession before the abovesaid Magistrate on the above date. The Court of Shri Mohinder Paul, Magistrate 1st Class, convicted him to an offence under Section 188, Indian Penal Code and sentenced him to undergo a simple imprisonment for 10 days vide his order dated May 4, 1974.

His conduct in deliberately violating lawful order and showing flagrant disregard to the law, has led to his conviction on the abovesaid criminal charge, so in the circumstances of the case, I deem it proper that his services be terminated.

I, therefore, hereby order the termination of the services of Shri Parkash Chander, Meter Reader, with immediate effect as per provision laid down in Regulation 13 (i) of the P. S. E. B. Employees (Punishment and Appeal) Regulation 1965, as adopted by the H. S. E. B.

Sd/-

S. E. 'OP' Circle, Hissar,"

3. The orders passed in the cases of the petitioners by their appointing authorities are exactly in the same words so much so even the typographical errors are the same. The petitioners then filed these petitions for issuance of writ of certiorari quashing the orders terminating their services and directing the respondents by a writ of mandamus to restore them to their posts and allow them all benefits like salary, dearness allowance, house rent allowance, city compensatory allowance, increments, promotion etc. as if their services were not terminated. The Board has opposed these writ petitions on various grounds. A preliminary objection has been taken that the action of the Board, which is an incorporated autonomous body, is not amenable to writ jurisdiction in the matter of termination of services of its employees. On merits it is stated that the Board is an industrial establishment and also a statutory body incorporated under the provisions of Section 5 of the Electricity (Supply) Act, 1948, (hereinafter called the 'Act'), and that the strike was not lawful as a notice of strike by the Union in a public utility service is required to be given in form 'L' and no such notice was given by the Union. It is further stated that the Union had entered into a settlement with the Board on July 21, 1972, under which it had agreed not to adopt agitational approach and disturb industrial peace for a period of two years. In reply to the allegation that each punishing authority prescribed under the Service Regulations did not act on his own judgment, while passing the orders of termination of services of the petitioners, but such orders were passed in pursuance of the directions issued by the Chairman of the Board, it has been stated in the written statement that every punishing authority independently applied his own mind and since every punishing authority wanted that the order should be in a legal form, he got into touch with the Law Department of the Board and obtained from it a draft of the order to enable him to pass a proper and correct order which may not suffer from any legal infirmity. That is why all the punishing authorities passed the orders in the same language. The allegation of mala fides and victimisation is stoutly denied. In the end it is submitted that an alternative remedy was open to the petitioners of having their dispute with the Board referred to a Labour Court or Industrial Tribunal under Sec. 10 of the Industrial Disputes Act or to file a suit for damages in a Civil Court for wrongful termination of their services.

4. The first point for determination is whether the petitioners had a right to file these writ petitions under Article 226 of the Constitution and whether this Court can make an order or direction for their reinstatement? There is no dispute that the Board is a statutory Corporation established under Section 5 of the Act and is 'the State' for the purposes of Part III of the Constitution as it falls within the category of 'other authority' mentioned in the definition of 'the State' in Article 12, but for no other purpose. Article 311 of the Constitution does not apply to the employees of this Board. The employees of the Board are, however, entitled to the fundamental rights guaranteed in Part III of the Constitution and have the right to enforce the same. The learned counsel for the Board has relied on the following judgments:—

1. Executive Committee of U. P. State Warehousing Corporation, Lucknow v. Chandra Kiran Tyagi, AIR 1970 SC 1244.
2. Indian Air Lines Corporation v. Sukhdev Rai, AIR 1971 SC 1828.
3. Jaswinder Singh Toor v. Punjab Agricultural University, Ludhiana, 1972 SLR 198.
4. Mall Singh v. Punjab State Electricity Board, 1974 (2) Serv LWR 737.

The learned counsel for the petitioners has, on the other hand, relied on the following judgments:—

1. Life Insurance Corporation of India v. Sunil Kumar, (1964) 5 SCR 528 = (AIR 1964 SC 847).
2. S. R. Tewari v. District Board, Agra, (1964) 3 SCR 55 = (AIR 1964 SC 1680).
3. Calcutta Dock Labour Board v. Jaffar Imam, (1965) 3 SCR 453 = AIR 1966 SC 282.
4. Mafatlal Naraindas Barot v. Divisional Controller, S. T. C., (1966) 3 SCR 40 = AIR 1966 SC 1364.
5. Raj Kumar v. Municipal Committee, Jullundur, ILR (1974) 2 Punj and Har 230 (FB).
6. Indian Institute of Technology v. Mangat Singh, 1973 (2) Serv LR 46 (Delhi).
7. Sirsi Municipality by its President, Sirsi v. Cecelia Kom Francis Tellis, AIR 1973 SC 855.
8. Civil Appeal No. 2137 of 1972 (Sukhdev Singh v. Bhagatram Sardar Singh Raghuvanshi) decided by the Supreme Court on 21-2-1975 = (reported in AIR 1975 SC 1331).

In view of the sharp conflict of judicial opinion and the fact that quite a large number of writ petitions have been admitted, we do not propose to decide this point and prefer to decide these petitions on their merits.

THE All India Reporter

1976

Rajasthan High Court

AIR 1976 RAJASTHAN 1

V. P. TYAGI, J.

Lalita Devi, Appellant v. Radha Mohan, Respondent.

Civil Misc. Appeal No. 52 of 1974, D/- 15-10-1975.*

(A) Hindu Marriage Act (1955). S. 10 (1) (b) — Cruelty — Meaning — Conduct of husband of indulging in love affairs with another woman and promising to marry — Married wife, mentally hurt — Conduct is cruelty within S. 10 (1) (b).

The expression 'cruelty' not only covers the physical or violent act of the spouse but also covers the mental or the psychological acts of the other partner which create apprehension in the mind of the complaining partner that it will be harmful or injurious to live with the other party. The conduct of a husband of indulging in love affairs with another woman other than wife and going to the length of promising to marry her and keeping her as his own wife in the same house wherein his married wife lived is sufficient to give rise to an apprehension that the married wife would certainly be mentally hurt and it would be difficult for a married wife to tolerate against her wishes a second wife to her husband living in the same house. The conduct of husband in such a case squarely fell within the expression 'cruelty' as used in Section 10 (1) (b) and the married wife was entitled to get a decree of judicial separation under S. 10. AIR 1965 All 280 and (1963) 2 All ER 966 and AIR 1970 Bom 312. Applied. (Para 16)

*(Against judgment of R. L. Gupta, Dist. J., Jaipur in H. M. A. Case No. 17 of 1973, D/- 24-1-1974.)

JS/JS/D928/75/SSG

1976 Raj./1 I G—40

Cases Referred: Chronological Paras

AIR 1970 Bom 312 = 71 Bom LR 569 11

AIR 1965 All 280 11

(1963) 2 All ER 966 = (1963) 3 WLR 176

11, 14, 15

N. L. Tibrewal, for Appellant.

JUDGMENT:— Smt. Lalita Devi has filed this appeal against the judgment and decree of the learned District Judge, Jaipur City, dated January 24, 1974, dismissing the suit of the petitioner appellant filed under the provisions of Hindu Marriage Act for the dissolution of the marriage with respondent Radha Mohan.

2. The facts giving rise to this appeal are in nut-shell as follows:

Lalita Devi was married to Radha Mohan at Jaipur on 5th April, 1963. Out of this wedlock she gave birth to four children, out of whom two have already died. The grievance of Lalita Devi against Radha Mohan was that Radha Mohan was addicted to liquor and that he was not doing any work to earn the livelihood to maintain the petitioner Lalita Devi. Her further grievance was that Radha Mohan was a person of loose character indulging in sex with other ladies and that he was in love with one Chandra with whom letters were exchanged by Radha Mohan assuring Chandra to marry her and to keep her as his second wife.

Lalita Devi filed a suit for the dissolution of the marriage in the District Court at Jaipur. But a compromise was effected between the parties on the assurance given by Radha Mohan that he would properly look after his wife Lalita Devi. It is alleged that for sometime Radha Mohan properly looked after her but later on he again indulged in immoral life and acted cruelly while dealing with his wife. In these circumstances the present petition for divorce was filed under

Section 12 of the Hindu Marriage Act, (hereinafter referred to as 'the Act') praying that a decree of divorce be passed in her favour and in the alternative if decree for divorce cannot be passed then a decree for judicial separation be passed.

3. Radha Mohan in spite of notice did not put his appearance in the court and therefore ex parte proceedings were taken against him.

4. Petitioner Lalita Devi examined herself as a witness and also produced one Devi Singh P.W. 2, in support of her allegations against her husband. She also filed three letters one addressed by Chandra to Radha Mohan and two written by Radha Mohan to Chandra. Learned Judge after having gone through the oral testimony produced by Lalita Devi and the documentary evidence in the form of letters exchanged between Radha Mohan and Chandra came to the conclusion that from this scanty evidence it was difficult for the court to infer that Radha Mohan was living in adultery. The petition of Lalita Devi was therefore, dismissed. It is in these circumstances that the present appeal has been filed by Lalita Devi.

5. Learned counsel appearing on behalf of the petitioner appellant Lalita Devi candidly conceded before me that he cannot press for a decree of divorce because from the letters relied upon by the petitioner Lalita Devi it is difficult to infer that Radha Mohan was actually living in adultery but he urged that a decree for judicial separation for which a prayer has been made by the petitioner, could be passed in her favour as from the circumstances proved and brought on the record it could easily be inferred that Radha Mohan treated the petitioner with such cruelty as to cause reasonable apprehension in the mind of the petitioner that it will be harmful and injurious to the petitioner to live with Radha Mohan.

6. Smt. Lalita Devi has come in the witness-box and has deposed in an unambiguous language that Radha Mohan was not earning anything for pretty long time and that he was not looking after the petitioner and her two children with a result that she had to incur a debt to the tune of Rs. 6,000 to maintain the family. She has also deposed that Radha Mohan used to beat her and when she went to police to lodge a report the police refused to register the case. According to this witness she had filed a petition for divorce previously also but it was compromised. But after a few days he reverted to his old habits of taking drinks and making overtures with other ladies.

While proving the two letters Exs. 2 and 3, she stated that the letters Exs. 2 and 3 are in the handwriting of her husband which were addressed by him to one

Chandra. For letter Ex. 1 her statement is that it was found from the custody of her husband and it was alleged to have been written by one Chandra to her husband. She, however, admitted that she does not know who this Chandra was. She also deposed that a suggestion was given by her husband to adopt immoral means to earn her livelihood and then demanding money from her.

7. Devi Singh P.W. 2, who used to visit the house of Mst. Lalita Devi, however, could not prove any fact deposed by the petitioner Lalita Devi.

8. There is no reason to disbelieve Mst. Lalita Devi on the ground that she was not properly looked after by Radha Mohan. There is no reason to disbelieve the statement about the letters produced by her which are Ex. 2 and Ex. 3 written by Radha Mohan to Chandra. She is well conversant with the handwriting of her husband and she had deposed on oath that both these letters are written by her husband. These letters by themselves show that Radha Mohan was leading a life from which it can very easily be inferred that he was not loyal to his wedded wife and that in Ex. 3 Radha Mohan gave Chandra to understand that in any case he was prepared to marry her. This assurance was given by Radha Mohan to Chandra that he would persuade Mst. Lalita Devi to give her consent to his marriage with Chandra and even if she did not agree he would marry her against her wishes.

9. Learned counsel appearing on behalf of the appellant urged that this conduct of Radha Mohan flirting with other ladies and giving Chandra an assurance that he would marry her is by itself a conduct which comes within the mischief of the word 'cruelty' as used in Section 10 of the Act. Therefore, Mr. Tibrewal argued that his client was entitled to a decree for judicial separation under Section 10 of the Act.

10. Cruelty has not been defined anywhere in the Act. But now it is a settled rule of law that the expression 'cruelty' not only covers the physical or violent acts of the spouse but also covers the mental or the psychological acts of the other partner which create apprehension in the mind of the complaining partner that it will be harmful or injurious to live with the other party. Events that took place in the life of Lalita Devi and Radha Mohan which resulted in compelling Lalita Devi to file the divorce petition, therefore, shall have to be examined with a view to find out whether they go to constitute mental cruelty as to give misapprehension in the mind of the wife that it will not be safe to live with her husband.

Looking to the provisions of Sec. 10 (1) (b) of the Act it is necessary for the Court to consider the impact of the events of the life of the petitioner on her mind in deciding whether the alleged actions of Radha Mohan could cause reasonable apprehension of harm or injury to the petitioner. While judging the mental condition and the temperamental qualities of the petitioner shall also have to be taken into account in the light of the circumstances brought on record.

11. In support of his argument Mr. Tibrewal placed reliance on *Kusum Lata v. Kampta Prasad*, AIR 1965 All 280, *Gollins v. Gollins*, (1963) 2 All ER 966 and *Dr. Narayan Ganesh Dastane v. Mrs. Sucheta Narayan Dastane*, AIR 1970 Bom 312.

12. In the Allahabad case the learned Judge while considering the meaning of the expression 'cruelty' of one spouse to another in the eye of law placed reliance on the following observations in Halsbury's Laws of England Vol. 12, 3rd Edition, page 270, paragraph 516:

"The general rule in all kinds of cruelty is that the whole matrimonial relations must be considered and that rule is of special value when the cruelty consists not of violent acts, but of injurious reproaches, complaints, accusations or taunts. Before coming to a conclusion, the Judge must consider the impact of the personality and conduct of one spouse on the mind of the other, and all incidents and quarrels between the spouses must be weighed from that point of view. In determining what constitutes cruelty, regard must be had to the circumstances of each particular case, keeping always in view the physical and mental condition of the parties, and their character and social status."

13. In the Bombay case the learned Judge held that cruelty in matrimonial law may be of infinite variety. It can be subtle or brutal. It may be physical or mental. It may be by words, gestures or by mere silence, violence or non-violence. That is the reason why Courts have never tried to give an exclusive definition of cruelty as understood in matrimonial law. While considering a question whether in the given circumstances the conduct of a spouse could or could not fall within the term 'cruelty' in the light of expression of the law as developed in England; the learned Judge referred to the following observations from Tolstoy's *Divorce and Matrimonial Causes*, Sixth Edition, 1967 at page 61:

"Cruelty which is a ground for dissolution of marriage may be defined as wilful and unjustifiable conduct of such a character as to cause danger to life, limb

or health, bodily or mental or as to give rise to a reasonable apprehension of such a danger."

14. In the same case the learned Judge considered an English Authority *Gollins v. Gollins*, (1963) 2 All ER 966 where two tests were laid down which must be satisfied for cruelty to be established: first, is the conduct complained of sufficiently grave and weighty to warrant the description of being cruel and, secondly, has the conduct caused injury to health or reasonable apprehension of such injury.

15. In *Gollins v. Gollins*, (1963) 2 All ER 966 their Lordships discussed at length whether the injury that is to be caused on account of the conduct of a spouse must be aimed at and that the intention for mens rea is necessary to be established before such a conduct can be acted upon by the Court to grant a decree of divorce. But I need not go into the reasoning given by the learned Judges in their separate judgments in that case. It would suffice to quote Lord Reid's observations which may throw light on this subject, which are as follows:

"Such an intention may readily be inferred from the fact that it is the natural consequence of his conduct, especially when the one spouse knows, or it has already been brought to his notice, what the consequences will be, and nevertheless he does it, careless and indifferent whether it distresses the other spouse or not."

16. In the light of these rulings it can safely be said that the conduct of Radha Mohan of indulging in love affairs with Chandra and going to the length of promising to marry her and keeping her as his own wife in the same house where the petitioner lived is sufficient to give rise to an apprehension that a lady of the status of Lalita Devi would certainly be mentally hurt and it would be difficult for a married wife to tolerate against her wishes a second wife to her husband living in the same house. This conduct would naturally cause mental disturbances resulting in harm or injury to the petitioner. There is no reason to disbelieve the statement of Mst. Lalita Devi that the letters Ex. 2 and Ex. 3 were addressed by her husband to Chandra, as these two letters right from A to Z are in the hands of Radha Mohan. In the circumstances the conduct of Radha Mohan will certainly have an impact on the mental peace of Mst. Lalita Devi, which conduct squarely falls within the expression 'cruelty' as used in Section 10 (1) (b) of the Act. In these circumstances I am of the opinion that Mst. Lalita Devi is entitled to get a decree of judicial separation under Section 10 of the Act.

17. The appeal is, therefore, accordingly allowed. The judgment passed by the lower court is set aside. A decree for judicial separation is awarded in favour of Lalita Devi. Though Radha Mohan has not cared to appear before the trial Court as well as before this Court, I think it proper that he must be saddled with the costs of litigation in both the courts.

Appeal allowed.

AIR 1976 RAJASTHAN 4

V P. TYAGI, J.

Mohanlal, Appellant v. Rameshwar Dayal and others, Respondents.

Civil Misc. First Appeal No. 60 of 1973, D/- 9-10-1975.*

(A) Provincial Insolvency Act (1920), S. 9 (1) (b) — "Liquidated sum" — Interpretation.

It is not necessary for the purposes of Section 9 (1) (b) of the Act that the debt that has been made the foundation for presenting the insolvency petition, must be accepted by the debtor before taking further proceedings under the provisions of the Act. If it was so, then no insolvency petition can ever lie. The only requirement of this section is that the "debt" that has been made the foundation for the petition must be of a liquidated sum, which would mean that the sum was ascertainable after simple arithmetical calculations by the parties or the court. Case law discussed. (Para 17)

The question whether the debt is or is not recoverable, does not, fall within the expression "debt is a liquidated sum payable either immediately or at some certain future time" as used in clause (b) of sub-section (1) of Section 9 of the Act. (Para 12)

In order to debar a creditor from presenting an insolvency petition against a debtor under Section 9 it is necessary for the debtor to show that the debt is of such a nature which is not capable of being easily ascertained within the mischief of Section 9 of the Act. (Para 12)

Cases Referred: Chronological Paras
1966 All LJ 476 9, 14

AIR 1956 Trav-Co 88 = 1955 Ker LT 669 9, 15

AIR 1951 Madh Bha 115 9, 13

AIR 1943 Mad 766 = (1943) 2 Mad LJ 361 9, 12

AIR 1935 Rang 435 = 160 Ind Cas 367 16

AIR 1919 Sind 1 = 13 Sind LR 187 10, 17

*(Against order of R. S. Verma, Addl. Dist. J., Alwar in Insolvency Case No. 1 of 1971, D/- 6-2-1973.)

JS/JS/D929/75/CWM

P. C. Bhandari, for Appellant; S. K. Keshote, for Respondent No. 1.

JUDGMENT :— This appeal raises an important question relating to the interpretation of the expression 'liquidated sum' as appeared in Section 9 (1) (b) of the Provincial Insolvency Act, 1920 (hereinafter referred to as "the Act").

2. Respondent No. 1 Rameshwar Dayal, who was a creditor of Messrs. Mohanlal Yadram, presented an application before the District Judge, Alwar, praying that Mohanlal and other partners of the firm be declared as insolvent. This petition was contested by the opposite parties on the ground that the credit of the petitioner was not a liquidated sum and, therefore, the petition was not maintainable under Section 9 of the Act. In order to decide the controversy raised by the opposite party Mohanlal appellant it will be necessary to set out certain relevant facts.

3. Petitioner Rameshwar Dayal carries his business in food grains and 'sarsoon' at Alwar in the name and style of 'Rameshwar Dayal Ashok Kumar'. Opposite parties Mohanlal, Kailash Chand and Ratan Lal also carry on their business through a partnership firm known as Messrs. Mohanlal Yadram. The petitioner sold 'sarsoon' to Messrs. Mohanlal Yadram on two occasions, that is, on 5-4-71 and 12-4-71. A cheque of Rs. 13,000 was given to the petitioner by Mohanlal on 19-4-71 towards the payment of the 'sarsoon' purchased on 5-4-71. It is said that Rs. 272.95 remained due against that transaction. As regards the sale of 'sarsoon' made in favour of Messrs. Mohanlal Yadram on 12-4-71, the amount due to the petitioner from the said firm was Rs. 9,994.47. It is alleged that Mohanlal and his other partners sustained losses and, therefore, they started disposing of their properties situated at Alwar. The petitioner having apprehended that respondents Mohanlal and others would defeat the claims of the petitioner, he made an application before the learned District Judge, Alwar, to declare Mohanlal and his partners as insolvent.

4. The opposite parties in their replies admitted the first transaction, but pleaded that nothing was due from them to the petitioner on account of that transaction of 5-4-71. The transaction alleged to have taken place on 12-4-71 was, however, denied and inter alia raised a plea that the petition filed by the petitioner was not maintainable, as the debt was not a 'liquidated sum' and hence under Section 9 of the Act the petition could not be filed.

5. The learned trial Judge decided this preliminary objection raised by the

respondents and declared that the amount demanded by the petitioner from the respondents was an ascertained sum and, therefore, the petition was maintainable.

6. It is against this order deciding the preliminary objection of the respondents that Mohanlal has filed this appeal before this Court.

7. It may be mentioned here that the other partners of firm Messrs. Mohanlal Yadram did not join Mohanlal as appellants and, therefore, they were impleaded as respondents.

8. Section 9 (1) (b) of the Act reads as follows:—

"9. Conditions on which creditor may petition.— (1) A creditor shall not be entitled to present an insolvency petition against a debtor unless—

(a)

(b) the debt is a liquidated sum payable either immediately or at some certain future time."

9. Mr. Bhandari, appearing on behalf of the appellant, argued that in face of the total denial of the opposite parties that no debt was due from Messrs. Mohanlal Yadram, the petition cannot be maintained as the debt cannot be said to be a debt of a liquidated sum. His contention is that unless it was decided by a competent court that a debt was due from the respondents to the petitioner, the claim of the petitioner cannot fall within the expression "debt is a liquidated sum", and hence the petition filed by the petitioner, was not maintainable. In support of this plea he placed reliance on *P. N. V. Ratnasami Naidu v. K. S. P. A. Subba Reddiar*, AIR 1943 Mad 766, *Ramchandra Narayanji v. Rameshwar Bhagwan Das*, AIR 1951 Madh Bha 115; *Balak Ram v. Kaley*, 1966 All LJ 476 and *Subramonia Iyer Sardambal v. K. R. Ramabhadra Iyer*, AIR 1956 Trav-Co 88.

10. Mr. Keshote, appearing on behalf of the respondent Rameshwar Dayal, on the other hand urged that the word "liquidated" appearing in clause (b) of sub-section (1) of Section 9 of the Act qualifies the word "sum" and not the word "debt" and, therefore, if the sum is ascertainable without making an elaborate inquiry then in that event the debt shall be a liquidated sum and, as such, clause (b) of sub-section (1) of Section 9 of the Act would not stand in its way to get the opposite party declared as insolvent. In support of his contention he cited a case of Judicial Commissioner's Court of Sind in *re Dholan*, AIR 1919 Sind 1.

11. In the present case the market rate at which the "sarsoon" was sold is not in dispute. What is in dispute is whether Mohanlal did at all purchase 'sarsoon' from the petitioner Rameshwar Dayal on 12-4-71. The amount of 'sarsoon'

cannot, therefore, be in dispute. The debt has however been denied by Mohanlal and, therefore, the Court has to see whether such a denial renders the insolvency petition as non-maintainable under Section 9 (1) (b) of the Act.

12. It is clear from a bare perusal of Section 9 of the Act that the creditor cannot present an insolvency petition against a debtor unless the debt, which he claims, is a liquidated sum payable either immediately or at some certain future time. The requirement of clause (b) of sub-section (1) of Section 9 of the Act, therefore, is that the debt must be of such a sum which can easily be ascertained. It is not the requirement of this provision of the law that the debt must be admitted by the debtor himself. If the credit of the petitioner is prima facie established then Section 9 of the Act cannot be invoked to summarily reject the insolvency petition. In the present case there is no difficulty to ascertain the exact amount of debt in respect of both the aforesaid transactions, the only point raised by Mohanlal is that debt is not recoverable by the petitioner-creditor. This question whether the debt is or is not recoverable, does not, in my opinion, fall within the expression "debt is a liquidated sum payable either immediately or at some certain future time" as used in clause (b) of sub-section (1) of Section 9 of the Act.

This contention of Mr. Bhandari that if the debt is denied by the debtor then no petition would be maintainable under Section 9 of the Act, cannot be accepted, because if the expression "debt is a liquidated sum" is interpreted in the manner in which Mr. Bhandari wants this Court to interpret it, then it would provide an easy handle to every debtor to escape the consequences under the provisions of the Act by simply raising a plea of denial about the existence of the debt. In order to debar a creditor from presenting an insolvency petition against a debtor under Section 9 it is necessary for the debtor to show that the debt is of such a nature which is not capable of being easily ascertained within the mischief of Section 9 of the Act. In *P. N. V. Ratnasami Naidu v. K. S. P. A. Subba Reddiar*, AIR 1943 Mad 766 the learned Judge while defining the expression "debt is a liquidated sum" observed as follows:—

"It is not always easy in a claim on an account to say definitely whether it is for a liquidated sum or for an unliquidated sum. It does not cease to be a liquidated sum, because it can be arrived at only after making some simple calculation; but if it is not readily ascertainable without enquiry, then it is an unliquidated claim."

13. In *Madhya Bharat case Ramchandra Narayanji v. Rameshwar Bhag-*

wandas, AIR 1951 Madh Bha 115 there was a claim for damages for breach of contract of sale and if was in that context that the learned Judge observed that,—

"An essential condition for the foundation of a creditor's petition is that the debt must be a liquidated sum. There must, therefore, be a certain sum admittedly due and payable to the person who presents the petition. A claim for damages for non-performance of a contract of a sale cannot ordinarily be within the meaning of a liquidated sum, especially where the alleged contract and its validity or the need of its performance are in question."

This authority, in my opinion, cannot be of any avail to the appellant, because the facts of that case showed that the claim for damages for the non-performance of the contract of a sale could not be accepted as a "debt" of the creditor, unless such a claim was determined by a competent authority. In my opinion this ruling cannot help the court to find out the correct interpretation of the expression "the debt is a liquidated sum", as used by the Legislature in clause (b) of sub-section (1) of Section 9 of the Act.

14. In Allahabad case Balak Ram v. Kaley, 1966 All LJ 476, the learned Judge held that a claim for damages before passing of the decree could not be termed as a liquidated sum, but in his opinion once a decree is passed, it becomes a liquidated sum payable immediately. This authority is distinguishable on the point that in that suit the debt claimed depended upon the adjudication about the quantum of damages and unless it was done that debt could not be said to be of a liquidated sum. In my opinion this authority of Allahabad High Court hardly throws any light on the question that has been posed for this court to answer.

15. In Subramonia Iyer Saradambal v. K. R. Ramchandra Iyer, AIR 1956 Trav-Co 88, the learned Judges, while examining the scope of Section 9 of the Act, observed that,—

"A debt on which the insolvency petition can be based must be one provable in insolvency or in other words it must be a subsisting debt due from the debtor on the date of the presentation of the petition. It must also be a liquidated sum payable either immediately or at some future time."

According to these observations of the learned Judges, if the debt, even though denied by the party, can be proved easily in the insolvency court, then it can act as a base or foundation for submitting a petition under the provisions of the Act.

16. There is a Bench decision of the Rangoon High Court U Ba Thwin v.

U Tun Than, AIR 1935 Rang 435 wherein the learned Judges, after taking into consideration English authorities and going through Robson's Law of Bankruptcy, Edn. 7, held,

"(1) that a sum is "liquidated" if it can be computed with certainty, and

(2) that a debt is "liquidated" if it can be readily ascertained on inquiry."

17. On going through these authorities cited before me I can say that it is not necessary for the purposes of Section 9 (1) (b) of the Act that the debt that has been made the foundation for presenting the insolvency petition, must be accepted by the debtor before taking further proceedings under the provisions of the Act. If it was so, then no insolvency petition can ever lie. The only requirement of this section is that the "debt" that has been made the foundation for the petition must be of a liquidated sum, which would mean that the sum was ascertainable after simple arithmetical calculations by the parties or the court. In the present case the claim of the petitioner is very simple and based on two transactions of sale. One of them was, however, admitted by Mohanlal.

Therefore, the debt to the extent of Rs. 272.95 is not in dispute. The amount of the second transaction is also not in dispute. The only thing which is in dispute is whether the sale on 12-4-71 was made in favour of the opposite party or not. This question whether such a sale did or did not take place, could easily be gone into in an insolvency proceeding and the amount of the debt, which was made the foundation for preferring insolvency petition, could be ascertained without undergoing an elaborate procedure to find the exact amount. In such circumstances Mohanlal could hardly take resort to the provisions of Section 9 (1) (b) of the Act to get a declaration that the insolvency petition was not maintainable. In my opinion the law laid down by Sird Judicial Commissioner in re Dholan, AIR 1919 Sind 1 lends support to the arguments advanced by Mr. Keshote that if the sum claimed as a debt by the petitioner can easily be ascertained, then such a debt would fall within the expression "the debt is a liquidated sum."

18. For the reasons mentioned above the appeal of the appellant fails and is hereby dismissed with costs.

Appeal dismissed.

AIR 1976 RAJASTHAN 7

J. P. JAIN, J.

Kishore Singh, Appellant v. Udhog Mandir, Respondent.

First Appeal No. 4 of 1974, D/- 21-2-1975.*

(A) Civil P. C. (1908), O. 21, R. 57 — Applicability — Does not apply to attachment before judgment — (Ibid, O. 38, R. 11). AIR 1924 Mad 494 (FB) and AIR 1962 Mad 383 and AIR 1960 Andh Pra 634, Dissented from.

Attachment before judgment does not become an attachment in execution after the decree has been passed within the meaning of O. 21, R. 57. That rule does not apply to an attachment before judgment. As the attachment before judgment is effected much prior to the existence of the decree, it cannot be equated to an attachment in execution. Where attachment before judgment is made by the plaintiff and his suit is decreed, Order 38, R. 11 applies and such attachment before judgment enures for all successive execution applications. It survives after dismissal of an application for execution and is available to decree-holder in fresh execution application, if submitted within limitation, until the decree is satisfied or discharged. No fresh order of attachment is, therefore, necessary for proceeding to effect sale in pursuance of fresh execution application after dismissal of earlier execution application for default. Case law reviewed. View of Calcutta and Allahabad High Courts followed. AIR 1924 Mad 494 (FB), AIR 1962 Mad 383 and AIR 1960 Andh Pra 634. Dissented from.

(Paras 20-21)

Cases Referred: Chronological Paras

AIR 1970 Orissa 164	20
AIR 1968 Punj & Har 431 = 70 Pur LR 467	18
AIR 1963 Ker 16 = 1962 Ker LT 264 (FB)	14
AIR 1963 Madh Pra 261 = 1963 Jab LJ 298	17
AIR 1962 Bom 236 = 64 Bom LR 280	13
AIR 1962 Ker 60 = 1961 Ker LT 597	14
AIR 1962 Mad 383 = (1952) 2 Mad LJ 132	5
AIR 1961 Assam 96	16
AIR 1960 Andh Pra 634 = 1966 Andh LT 666	7
AIR 1953 All 173 = 1952 All LJ 721 (FB)	14
AIR 1952 Orissa 182 = ILR (1951) Cut 335	19

*(Against order passed by Smt. Mchini Kapoor, Addl. Dist. J. No. 1, Jaipur City in Ex. Case No. 15 of 1972, D/- 5-11-1973.)

FS/GS/C150/75/VSS

AIR 1952 Trav-Co 414 = 1952 Ker LT 264 (FB) 14

AIR 1949 Cal 320 = 83 Cal LJ 104 12

AIR 1937 Pat 626 = 18 Pat LT 585 15

AIR 1929 Cal 465 = ILR 56 Cal 416 10, 19

AIR 1924 All 860 = 22 All LJ 823 9

AIR 1924 Mad 494 = 46 Mad LJ 415 (FB)

3, 4, 7, 9, 10, 12, 19; 21

AIR 1919 Mad 752 = ILR 42 Mad 1 4, 9

(1912) 16 Cal WN 1097 = 16 Cal LJ 86 10

N. M. Kasliwal, for Appellant; K. N. Tikku, for Respondent.

JUDGMENT:— This appeal by the judgment-debtor is directed against the order of the Additional District Judge No. 1, Jaipur City dated 5-11-73 passed in Execution Case No. 15 of 1972.

2. Facts leading to this appeal are as follows:

The respondent obtained a money decree against the appellant, judgment-debtor on 23-11-62. This decree was upheld in appeal by the High Court on 29-7-70. During the pendency of the suit the decree-holder got the property of the judgment-debtor attached under Order 38, Rule 5, C.P.C. He took out execution application on 3-4-63 which was dismissed on 31-8-63 for default. His second application dated 30-8-71 for execution was also dismissed on 22-1-72 on account of non-prosecution. The decree-holder then applied for the sale of the property under attachment on 29-3-72. The judgment-debtor filed an objection that the property cannot be sold as no fresh attachment has been sought. According to him the attachment had ceased to exist after the first execution application was dismissed. There were other objections as well but I am not concerned with those objections in the present appeal. The learned executing Court held that the attachment before judgment survived for every execution application, and no fresh order of attachment was necessary for proceeding to effect sale. This order has been challenged by the judgment-debtor in this appeal.

3. I have heard learned counsel for the parties at length. Various authorities representing the conflicting views were read out before me. Mr. Kasliwal learned counsel appearing for the appellant placed reliance on the view taken up by the Madras High Court in Meyappa Chettiar v. Chidambaram Chettiar, AIR 1924 Mad 494 (FB). This is a decision of Full Bench of five Judges. Three Judges were of the view that the provisions of Order 21, Rule 57 apply to an attachment before judgment which is converted into attachment in execution when the decree passed in the suit is said to be executed. It will be useful to reproduce Order 21, Rule 57 here:

"R. 57. Where any property has been attached in execution of a decree but by reason of the decree-holder's default the Court is unable to proceed further with the application for execution, it shall either dismiss the application or for any sufficient reason adjourn the proceedings to a future date. Upon the dismissal of such application the attachment shall cease."

4. Two learned Judges of that Court Schwabe C. J. and Wallace J. were of the opinion that the attachment before judgment lasts until the Court puts an end to it by an order to that effect, or until it is otherwise brought to an end by reason of any other provisions of Order 38 but that it cannot by implication be brought to an end by the provisions of Order 21, Rule 57, C.P.C. It may also be noticed here that this Full Bench considered its earlier view expressed in *Venkatasubbiah v. Venkata Seshaiya*, (1918) ILR 42 Mad 1 = (AIR 1919 Mad 752), where it was held by Phillips and Kumaraswamy Sastri JJ. that Order 21, Rule 57, C.P.C. has no application to attachment before judgment. Hence an attachment before judgment does not cease to have effect because of the dismissal of the subsequent application for execution for default of prosecution. This view was reconsidered by the Full Bench in *Meyappa Chettiar's case* (AIR 1924 Mad 494) (FB) where by majority it overruled the earlier view and held that a party, who has obtained an attachment before judgment and has subsequently had his execution petition dismissed for want of due diligence in presenting the necessary papers to the Court loses the priority that he had enjoyed by reason of his attachment before judgment. It was also held that attachment before judgment becomes an attachment in execution after the suit has been decreed.

5. This view was followed in *Kuppuswami v. Rangai Goundan*, AIR 1962 Mad 383. The learned Judge dealing with the case observed:

"Order 38, Rule 11, in effect equates an attachment before judgment made in execution of a decree and it should, therefore, follow that under Order 21, Rule 57 the Court is competent to make an order with regard to the attachment when it makes an order in relation to an execution application."

6. The learned Judge again observed:

"that even where an execution application is dismissed by the executing Court under Order XXI, Rule 57, the Court is bound to make a suitable order with regard to the subsistence of the attachment or otherwise. Whether such a dismissal of the execution application is

for statistical purposes or not, the order of the Court in so far as the attachment is concerned cannot be linked up with the scope of the order on the execution application. This order distinctly gives a definite life to the subsistence of the attachment and thereafter the attachment ceases. I can see no provision of law whereunder an attachment which was brought to a termination by an order of Court can be revived. It follows therefore that before the property could be brought to sale, a decree-holder must necessarily ask for its attachment. Since the respondent has not done so his petition is liable to be dismissed on that ground alone."

7. Another case which follows the Madras view is *Kangayya Naidu v. Jayamangala Reddeyya*, AIR 1960 Andh Pra 634. Following the Full Bench decision in *Meyappa Chettiar's case* (AIR 1924 Mad 494) (FB) their Lordships observed as follows:

"Attachment before judgment is also governed by Order 21, Rule 57, since the property attached in execution within ambit of Order 21, Rule 57 includes property attached before judgment where there is a decree followed by execution petition for the purpose of bringing the attached property to sale."

8. This decision copiously reproduced the observations of Coutts Trotter J. in the leading majority judgment of the Full Bench.

9. The other High Courts have expressed conflicting views. The view of this Court has not been made available in any precedent. In the decision in *Akhey Ram v. Basanti Lal*, AIR 1924 All 860, Sulaiman J. for the Bench on the plain wording of the rule, held that Rule 57 of Order XXI professedly applies to a case where a property has been attached in execution of a decree. He was not prepared to extend the meaning of the expression 'attached in execution' to the attachment before judgment. He referred to Order 38, Rule 7 and observed that it referred to the mode of attachment and not to the way in which the attachment ceased. This Bench decision of the Allahabad High Court followed the earlier Madras view expressed in *Venkatasubbiah v. Venkata Seshaiya* (1918) ILR 42 Mad 1 = (AIR 1919 Mad 752). This view was approved by the Full Bench of the High Court in *Abdul Hamid v. Mst. Ashgari Begum*, AIR 1953 All 173 (FB). They clearly dissented from the view expressed by the Madras High Court in *Meyappa Chettiar's case* (AIR 1924 Mad 494) (FB). Their Lordships observed that:

"the provisions of Order 21, Rule 57, C. P. C. do not apply to attachments effected before judgment. Consequent on the dismissal of an execution ap-

pilcation for default of the decree-holder, the attachment before judgment does not cease."

10. The view of the Calcutta High Court was for the first time expressed in *Ganesh Chandra v. Banwari Lal* ((1912) 16 Cal WN 1097). The matter again came for consideration in *Shibnath Singh v. Sabe-ruddin Ahmed*, AIR 1929 Cal 465. Rankin C. J., who spoke for the Bench, held that *Ganesh Chandra's* case was rightly decided. He also agreed with the dissenting judgments of Schwabe C. J. and Wallace J. in *Meyappa Chettiar's* case (AIR 1924 Mad 494) (FB). His Lordship observed:

"R. 57, O. 21 was a new provision introduced in 1908. It is evident from the language of the rule itself, and it is still more evident from the circumstances under which it was passed, that it was intended to provide a remedy for the grievance or inconvenience which is apt to arise, where, after an attachment in execution, the application for execution cannot further be proceeded with by reason of the decree-holder's default."

11. He also took notice of Rule 11 of Order 38 where it is provided that it shall not be necessary upon an application for execution to apply for re-attachment of the property. He further observed:

"In these circumstances it seems reasonably clear to me that it is no part of the intention of this rule to say that an attachment before judgment, which existed before any application could be made in execution and which prima facie would continue to have effect if no application for execution had been made, should fall to the ground merely because a subsequent application for execution has come to nothing."

12. He also laid down that there is nothing under Order 38, Rule 11, C.P.C. to give colour to the view that for the purposes of Order 21, Rule 57 'attachment in execution' is a phrase which covers attachment before judgment. He dissented from the majority view expressed by Madras High Court in *Meyappa Chettiar's* case (AIR 1924 Mad 494) (FB). The view expressed by Rankin C. J. was followed by Das Gupta J. in *Ayezali Mir v. Mahanandabarui*, AIR 1949 Cal 320. It was held that the dismissal of the execution case for the default of the decree-holder, the attachment before judgment does not cease. Order 21, Rule 57, C.P.C. cannot be extended to such attachment. The attachment subsists even after the dismissal of the execution.

13. The Bombay High Court took the same view as expressed in *Dattatraya Baliram v. Rambhabai*, AIR 1962 Bom 236. The Bench held that Rule 57 of Order 21 does not come into operation in the case of an attachment before judgment.

14. The Full Bench of the Kerala High Court in *Valli Ammal Arumughom Ammal v. Narayan Panicker*, AIR 1963 Ker 16 (FB) overruled the earlier view of its High Court contained in *Muhammed Abdul Khadir v. Padmanabha Pillai* (AIR 1952 Trav-Co 414) (FB) and in *Arumugham Ammal v. Nayinar Paniker*, (AIR 1962 Ker 60), and held that attachment in execution is not the same thing as attachment before judgment and even by virtue of Order 38, Rule 11 attachment before judgment is not transformed into the attachment in execution. It accepted the Allahabad view expressed in *Abdul Hamid v. Mst. Asghari Begum* (AIR 1953 All 173) (FB).

15. Decision in *Motijha v. Jowala Prasad*, AIR 1937 Pat 626 represents the Patna view. Their Lordships observed:

"There is nothing in Order 38, Rule 11, Civil P. C. to give colour to the view that for the purposes of Order 21, Rule 57, 'attached in execution' is a phrase that covers 'attachment before judgment'. The word 'attachment' in the sentence 'attachment shall cease' in Order 21, Rule 57 must mean the attachment in execution of the decree. Hence the dismissal of the decree-holder's application for execution for default does not terminate the attachment before judgment."

16. The Assam High Court follows the Calcutta view and it is expressed in *Dungar Mall Agarwalla v. Amiya Kumar Chattopadhyay*, AIR 1961 Assam 96. The view has been expressed in the following words:

"An attachment of a property before judgment does not stand on par with attachment in execution of a decree, in which case alone the provisions of Order 21, Rule 57, Civil Procedure Code applies."

17. The Madhya Pradesh High Court in *Hakimuddin v. Gulam Ali*, AIR 1963 Madh Pra 261 adopted the Calcutta view and it was observed by the Bench dealing with the case that an attachment before judgment survives even after an execution petition filed after the passing of a decree has been dismissed due to the default of the decree-holder, which prevented the Executing Court from proceeding further in execution.

18. The view expressed by Punjab and Haryana High Court in *Bhagwan Das v. Santekh Singh*, AIR 1968 Punj & Har 461 is in keeping with the view expressed by the Calcutta and Allahabad High Courts. It was held by Mehar Singh C. J. for the court that by no stretch of any reasoning can attachment of the property be treated as an attachment in execution of a decree on a date on which the decree was not in existence.

19. The decision in *Durga Dei v. Sadananda*, AIR 1952 Orissa 182 represents the earliest view of the Orissa High Court. It followed the view expressed by Rankin C. J. in *Shibnath Singh v. Sabaruddin Ahmed* (AIR 1929 Cal 465). There was difference of opinion in *Durga Dei's* case between Jagannath Das and Panigrahi JJ. on account of the Madras view in *Meyappa Chettiar's case* (AIR 1924 Mad 494) (FB). The matter was referred to Ray C. J. He observed as follows:

"If I am asked to give my opinion with regard to the operation of Order 21, Rule 57, I will agree with the view taken in the Calcutta High Court as well as that of the Patna High Court, rather than with the Full Bench decision of the Madras High Court. The simple reason is that on the dismissal of the execution case all orders passed by the executing Court in course of that execution proceeding are 'nullified' while the attachment before judgment is an order passed in the suit. Secondly, it has been said in the Calcutta High Court, in the cases already referred to, that the attachment before judgment enures for all successive execution applications for the first or the second or the third only. Its period of life continues until the decree is either set aside or satisfied and discharged. It becomes an attachment in execution when you execute the decree on the basis thereof, or in other words, to use the words of Sir George Rankin C. J., which I have just now quoted, when you want to make that the basis of the sale that you are going to hold for the purpose of execution and realisation of the decree."

This view was subsequently followed in *Ramchandra Gochhikar v. Ramchandra Biswal*, AIR 1970 Orissa 164.

20. From the reading of the above decisions it is abundantly clear that all the High Courts except Madras and Andhra Pradesh are of the view that Order 21, Rule 57, C.P.C. does not apply to the attachment before judgment. As noticed earlier the two Judges out of five have given dissenting judgments in *Meyappa Chettiar's case* (AIR 1924 Mad 494) (FB) and their view has been accepted by various other High Courts.

21. From the plain reading of Order 21, Rule 57, C.P.C. it is difficult to accept the contention of Mr. Kasliwal that attachment before judgment becomes an attachment in execution after the decree has been passed, within the meaning of Order 21, Rule 57. I am therefore inclined to hold that Order 21, Rule 57, C.P.C. does not apply to an attachment before judgment. It is also for the reason that the attachment is effected much prior to the existence of the decree and it cannot, therefore, be equated to an attach-

ment in execution. With all respects, I am unable to agree with the majority view of the Madras High Court in *Meyappa Chettiar's case*. I accordingly hold that where attachment before judgment is made by the plaintiff and his suit is decreed, Order 38, Rule 11, C.P.C. applies and such attachment enures for all successive execution applications. It survives and is available to the decree-holder, if submitted within limitation until the decree is satisfied or discharged.

22. Another contention of Mr. Kasliwal is that claims against attachment before judgment are dealt with under Order 21, Rule 58, C.P.C. Rule 58 also uses the similar expression 'attached in execution'. His submission is that on this analogy Order 21, Rule 57 is applicable to attachment before judgment. This argument does not bear much scrutiny. Reference may be made to Order 38, Rule 8, C. P. C. which provides specifically about the investigation of claims to property attached before judgment. The rule reads as follows:—

"Where any claim is preferred to property attached before judgment, such claim shall be investigated in the manner hereinbefore provided for the investigation of claims to property attached in execution of a decree for the payment of money"

23. In the result the appeal fails and it is hereby dismissed. In the circumstances there will be no order as to costs.

Appeal dismissed.

AIR 1976 RAJASTHAN 10

S. N. MODI, J.

Girdharsingh and another, Appellants v. Gokul and others, Respondents.

Second Appeal No. 159 of 1967, D/- 30-7-1975.*

(A) Easements Act (1882), S. 15 — Tenant irrigating field from well of landlord uninterruptedly for series of years — Tenant acquires easementary rights on basis of immemorial user.

A tenant who has been irrigating his field from the well of his landlord for the last half a century uninterruptedly can acquire an easementary right. A tenant cannot acquire a prescriptive right of easement in land or well belonging to the landlord but he may claim a right or easement based on immemorial user, for, in such a case. There is presumption that

* (Against judgment and decree of Surajmal Mittal, Addl. Civil J., Ajmer, in Civil Appeal No. 24 of 1966, D/- 23-11-1966.)

the enjoyment of the rights had its origin under an agreement or grant. Held in the circumstances of the case, that the tenant had acquired an easement to irrigate his land from the well of landlord under a presumed grant. (Case law discussed).

(Para 3)

(B) Civil P. C. (1908), O. 14, R. 1 — Suit for injunction — Court failing to frame issue — Parties knowing case fully and leading evidence to their respective contentions — Suit cannot be dismissed for want of issues.

Mere omission to frame issues is not necessarily fatal to the trial of the suit unless such omission has affected the disposal of the case on merits.

In the instant case tenants have filed the suit alleging that they have been irrigating their field from the well of the landlord. The parties went to trial fully knowing the rival case and led all evidence in support of their contentions. Held in the circumstances that it could not be said that the absence of the issue was fatal to the case or that there was such mistrial which vitiated the entire proceedings.

(Para 3)

Cases Referred: Chronological Paras
 (1913) 20 Ind Cas 359 (Cal) 3
 (1913) 18 Ind Cas 597 (Cal) 3
 (1903) ILR 30 Cal 281 3
 (1880) 7 Ind App 240 = ILR 6 Cal 394 (PC) 3
 (1878) 6 Ind App 33 = ILR 4 Cal 633 (PC) 3

N. M. Kasliwal and Dilipsingh, for Appellants; R. N. Surolia, for Respondents.

JUDGMENT:— This second appeal arises out of a suit filed by the plaintiffs-respondents for injunction restraining the defendants-appellants from interfering with the right of the plaintiffs to irrigate their fields bearing khasra Nos. 390, 390/1, 391/2, 392/1, 392/2 and 407 situate at village Dantri from the well bearing khasra No. 389.

2. The plaintiffs' case is that they have been irrigating their fields with the water drawn from the well bearing khasra No. 389 for more than 100 years as of right and without interruption. It is not in dispute that the said well is owned by the defendants. Formerly too, it was owned by the defendants and their ancestors in the capacity of their being Jagirdars of village Dantri. The defence of the defendants is that the irrigation of the plaintiffs' fields from the said well was permissive and in lieu of certain payment made by the plaintiffs. Both the courts below on consideration of the evidence led by the parties came to the conclusion that the plaintiffs-respondents have been irrigating their fields from the water

drawn from the said well for a period of more than 45-50 years and further that they paid no amount to the defendants for using the water of the said well. This is a pure finding of fact and I see no reason to disturb that finding.

3. While arguing the appeal, it is submitted by the learned counsel for the defendants-appellants that respondent No. 1 Girdharsingh was admittedly the Jagirdar of village Dantri before 1956 when his jagir was resumed under the Rajasthan Land Reforms and Jagir Resumption Act, 1952. That being the case, it is argued that upto 1956 Girdharsingh was not only the owner of the said well but he was also the owner of the lands irrigated by the plaintiffs-respondents. It is further argued that since the ownership over the lands and the well vested in one and the same person and the relations between the parties being that of the landlord and tenant, the question of immemorial exercise of right of irrigation does not arise so as to justify the inference of a legal origin of such enjoyment.

The learned counsel laid considerable stress on the fact that the plaintiffs have been paying chachi-lagan of the lands irrigated by them. The argument, though attractive, is wholly untenable. As pointed out above, it stands proved that the plaintiffs have been irrigating their fields from the said well for the last half a century uninterruptedly. As the relationship between the parties was that of the landlord and the tenant, it is but natural that the tenants must have paid the rent to the landlord for the lands cultivated by them. So nothing turns out on the fact that the plaintiffs paid chachi-lagan to the defendants. It is true that a tenant cannot acquire a prescriptive right of easement in land or well belonging to his lessor but he may claim a right of easement based on immemorial user, for, in such a case, there is a strong presumption that the enjoyment of the right had its origin under an agreement or grant.

It has been laid down by the Judicial Committee in *Rajroop Koer v. Abdul Hosain*, (1880) 7 Ind App 240 (PC) that when enjoyment of a right has continued uninterrupted for a long series of years, such enjoyment should be attributed to a legal origin and the court should presume a grant or agreement. The relationship of the landlord and tenant does not render inapplicable the above consideration. Again, in *Bhupendranath v. Anandaprosad*, (1913) 20 Ind Cas 359 (Cal) there was a tank belonging to the landlord and it was proved that from long time the tenants of the lands surrounding the tank had irrigated their fields with water drawn from the tank. Relying upon the decision of their Lordships of the Privy

Council in Rameshwar Pershad v. Koonj Behari, (1878) 6 Ind App 33 (PC), it was held that inference could legitimately be drawn that the tenants had acquired an easement to irrigate their lands from the water drawn from the tank under a presumed grant. The same principle was applied in Madhubdass v. Jageshchandra, (1903) ILR 30 Cal 281 and Babujan v. Ramjaddi, (1913) 18 Ind Cas 597 (Cal). The case in hand, in my opinion, is clearly governed by the principle laid down in the aforesaid decisions.

The next contention of the learned counsel for the defendants-appellants is that although a plea had been taken in the written statement that the suit was bad for misjoinder of the parties and causes of action, no issue on the point was framed by the trial court. A similar contention was raised before the lower appellate court but it was repelled. It may be stated at once that mere omission to frame issues is not necessarily fatal to the trial of the suit unless such omission has affected the disposal of the case on merits. In the present case, the suit was filed by six persons alleging that they have been irrigating their fields from well bearing khasra No. 389. One of the plaintiffs, namely, Gokul who possessed more than half of the land, came into the witness-box and supported the plaintiffs' case put forward in the plaint. There was no conflict of interest between the plaintiffs inter se. The parties went to the trial fully knowing the rival case and led all the evidence in support of their respective contentions. In such circumstances, it cannot be said that the absence of the issue was fatal to the case or that there was such mistrial which vitiated the entire proceedings. The suit cannot be dismissed on this narrow ground. I also see no good reason to remand the case as the evidence which has been led in the case is sufficient to arrive at the conclusion to which the courts below did.

4. No other point has been pressed before me.

5. There is no force in this appeal and it is hereby dismissed. I pass no order as to costs as the learned counsel for the respondents was not called upon to answer.

6. The prayer for Leave to Appeal is refused.

Appeal dismissed.

AIR 1976 RAJASTHAN 12

D. P. GUPTA, J.

Nathulal, Petitioner v. State of Rajasthan and others, Respondents.

Civil Writ Petn. No. 2570 of 1974, D/- 14-3-1975.

(A) Constitution of India, Arts. 226 and 299 — Government agreeing to grant lease for collection of "Ratanjot Seeds" from forest area — Petitioner depositing amount and installing machinery at heavy cost for extraction of oil — Cancellation of agreement by Government without hearing petitioner — Relief can be granted under Art. 226.

It is well established that not only in judicial proceedings but also in cases where the executive authority is called upon to adjudicate matters involving civil consequences and affecting the rights of subjects, the fundamental principles of natural justice ought to be observed. If the State or its officers intend to pass any order to the prejudice of a party, which involves civil consequences or attaches a disability affecting right to property then fair play requires that before such an order is passed the party should be told the case he is required to meet and he should be afforded a reasonable opportunity to represent his case before the authority concerned. Case law discussed.

(Para 11)

Further, the High Court in its extraordinary jurisdiction under Art. 226 of the Constitution is empowered to enforce the equity arising in favour of the petitioner out of the representations amounting to a promise made to him by the government or a public body and as a result of which the petitioner altered his position to his prejudice, even though a contract as envisaged by the relevant provisions had not come into existence.

(Para 13)

Held in the circumstances of the case the State Government was bound to give a notice to the petitioner of its intention to cancel the contract of collecting 'Ratanjot' seeds from a forest division, and was bound to afford the petitioner a reasonable opportunity of having his say in the matter, before proceeding to pass the order of cancellation.

(Para 12)

Cases Referred: Chronological Paras

AIR 1975 SC 266 = (1975) 1 SCWR 13	10
AIR 1974 Pat 230 = 1973 BLJR 657	14
AIR 1974 Raj 4 = 1973 Raj LW 387	13
AIR 1973 SC 205 = 1970 SCD 181	9
AIR 1971 SC 1021 = (1970) 3 SCR 854	7
AIR 1968 SC 718 = (1968) 2 SCR 366	6

K. N. Joshi, for Petitioner; M. D. Purohit, Addl. Govt. Advocate, for the State.

ORDER :— This is a petition under Article 226 of the Constitution of India praying for the quashing of the order of the State Government dated August 8, 1974, and for ancillary reliefs.

2. The facts briefly are that on November 15, 1965 the petitioner submitted an application to the Chief Conservator of Forests, Rajasthan praying that he may be allowed to collect and take away on contract basis like other forest products, 'Ratanjot seeds' which are a natural product of the forests in Udaipur forest area and which might be used for extracting oil. The petitioner made an offer for the collection and removal of 'Ratanjot' seeds from the Udaipur forest division during a period of ten years on making payment of an annual lease amount of Rs. 10,000 in respect thereof. The State Government by an order dated August 6, 1970 agreed to grant a lease in favour of the petitioner for the collection of 'Ratanjot' seeds from the entire Udaipur forest division for a period of ten years, on payment of the sum of Rupees 10,000 per annum as the lease amount therefor. However, for some reason, which is not very clear, the aforesaid order was cancelled by the State Government on June 19, 1971. Thereupon the petitioner made a representation and the State Government again by its order dated January 22, 1973 directed the Chief Conservator of Forests to grant a lease to the petitioner on the same terms as mentioned above for the collection of 'Ratanjot' seeds and the order dated June 19, 1971 was withdrawn. The Divisional Forest Officer, Udaipur, in pursuance of the aforesaid order of the State Government, directed the petitioner on May 7, 1974 vide Ex. 9 to deposit a sum of Rs. 25,000 representing the 1/4th of the contract amount and also directed him to execute a contract. The petitioner deposited the aforesaid amount of Rs. 25,000 on May 21, 1974. It appears that on the next following day i.e. on May 22, 1974 the petitioner also executed a contract in the prescribed form for the collection of 'Ratanjot' seeds from Udaipur forest division. On that day the Divisional Forest Officer, Udaipur also issued a letter (Ex. 10) to the petitioner acknowledging the receipt of Rs. 25,000 representing 1/4th of the contract amount and also admitting the execution of the agreement by the petitioner. The petitioner was also directed by the aforesaid letter to deposit a sum of Rs. 8,500 in respect of the first year of the contract, namely for the year 1974-75 within 15 days of the receipt thereof.

It appears that some dispute cropped up at that stage between the petitioner and the State Government as to whether the petitioner would be entitled to collect

'Ratanjot' seeds from the forest lying within the Panchayat areas or not. The petitioner did not make a deposit of the amount of Rs. 8,500 within 15 days of the receipt of the letter Ex. 10. However, he made a deposit of the aforesaid amount of Rs. 8,500 on August 13, 1974. It may be mentioned here that in the contract executed by the petitioner, a copy of which has been placed on record as Ex. R/4- it was stipulated that out of the amount of Rs. 25,000 deposited by the petitioner, a sum of Rs. 1,500 would be adjusted every year towards the yearly lease amount and that the petitioner would be required to make payment of the remaining sum out of the yearly lease amount within 15 days of the acceptance of the contract during the first year and upto 30th April every year thereafter. After making the deposit of Rs. 8,500 the petitioner demanded that he should be put in possession, but the Divisional Forest Officer, Udaipur intimated to him on August 21, 1974 vide his letter Ex. R/3 that the State Government by its order dated August 8, 1974 had cancelled the lease granted to the petitioner in respect of the collection of 'Ratanjot' seeds and that the petitioner could obtain a refund of the amount deposited by him in accordance with law. The Divisional Forest Officer, Udaipur also issued a public notice on August 19, 1974 to the effect that the contract for collection of 'Ratanjot' seeds in all the ranges of Udaipur Forest Division for the year 1974-75 would be given by public auction, which would take place on September 23, 1974. The petitioner thereupon protested against the unilateral revocation of the sanction of the State Government for giving a lease to him in respect of the collection of 'Ratanjot' seeds for a period of ten years, so far as Udaipur forest division was concerned, yet as no further action was taken by the State Government in the matter to redress the grievance of the petitioner, he proceeded to file the present writ petition.

3. The respondents in their reply admitted that the State Government had sanctioned the grant of a lease to the petitioner for the collection of 'Ratanjot' seeds from the Udaipur forest division for a period of ten years by its order dated January 22, 1973 and also admitted that the petitioner deposited the amount of Rs. 25,000 representing the 1/4th of the contract amount as also the sum of Rs. 8,500 on account of the balance of the first year's lease money. However, it is averred on their behalf in para 20 of their reply that the contract was cancelled by the State Government vide their order dated August 8, 1974 as the petitioner failed to make the deposit of the yearly lease money within the stipulated time. The respondents also produced a copy of the order dated August 8, 1974 along

with their reply to the writ petition. The aforesaid order runs as under:—

"I am directed to say that the contract of Ratanjot for the Udaipur Division sanction in favour of Shri Nathu Lal s/o Shri Bhairulal, contractor, Jaswantpura, Jalore vide this Department letter of even number dated 21-1-1973 and subsequent orders in this behalf may be treated as cancelled.

Action may be taken to auction this produce according to the Rules and Procedures.

Yours faithfully,

Sd/-

BY, SECRETARY TO THE GOVT."

4. Learned counsel for the petitioner has raised several grounds in support of the writ petition but the principal submission urged by him is that the State Government acted in utter violation of the principles of natural justice in cancelling the order sanctioning the grant of the lease for the collection of 'Ratanjot' seeds to him for a period of ten years and that no reason was assigned for such cancellation in the order dated August 8, 1974. Learned counsel urged that the petitioner had invested considerable amount in establishing an industry for extracting oil from the 'Ratanjot' seeds and had deposited a sum of Rs. 25,000 in the first instance and a further sum of Rs. 8,500 thereafter with the State Government in pursuance of the order dated January 22, 1973 granting a contract to the petitioner for a period of ten years in that respect and that the State Government was not empowered to unilaterally cancel the grant made in favour of the petitioner without affording him a reasonable opportunity of hearing. Learned Additional Government Advocate submitted that the petitioner was directed to deposit the amount of Rs. 8,500 within a period of 15 days by the order of the Divisional Forest Officer, Udaipur dated May 22, 1974, but as the petitioner failed to do so, the State Government acted within its rights in cancelling the contract granted in favour of the petitioner.

5. It is not disputed by the respondents that before the grant made in favour of the petitioner by the order of the State Government dated January 22, 1973 was cancelled by its subsequent order dated August 8, 1974 the petitioner was not given any notice of the intention of the State Government to cancel the same nor the petitioner was afforded an opportunity of hearing. Learned Additional Government Advocate contends that it was not necessary, because no contract in accordance with the provisions of Art. 299 of the Constitution had come into being and no right had been created in

favour of the petitioner. It is apparent that the petitioner had approached the State Government since 1965 for the grant of a lease for the collection of 'Ratanjot' seeds for a period of ten years and had offered to pay Rs. 10,000 per year as the lease amount. The petitioner's offer was accepted by the State Government, which by its order dated January 22, 1973 agreed to grant a contract for the collection of 'Ratanjot' seeds in the Udaipur forest division to the petitioner on the terms offered by him and the Chief Conservator of Forests was directed to get a contract executed from the petitioner in respect thereof. The petitioner was asked to deposit the sum of Rs. 25,000 representing 1/4th of the contract amount which he did and the petitioner also executed a formal deed of contract on the prescribed form. Thus the petitioner did all that he was required to do for completing the contract on his part and acted to his prejudice and it cannot be denied in these circumstances, that equities were created in favour of the petitioner, because he had acted on the basis of the assurance contained in the order of the State Government dated January 22, 1973. It is well established by now that in such cases, even if a contract in accordance with the provisions of Article 299 of the Constitution has not come into being, then the State Government is bound to comply with the principles of natural justice before bidding a good bye to the promise made by it in pursuance of which the other party has acted to its detriment, and thereby disturb the equities created in favour of the petitioner.

6. In *Union of India v. M/s. Anglo Afghan Agencies*, AIR 1968 SC 718 it was held by their Lordships of the Supreme Court that where a person had acted upon the representations made by a governmental authority he could not be deprived of the equities created in his favour and the departmental authority could not be released from honouring its solemn promise, relying on which the petitioner had acted to his detriment, merely on the ground that the act was executive in character. In that case the Textile Commissioner published a scheme called the Export Promotion Scheme providing incentives to exporters of woollen goods and it was represented that such exporters would be entitled to import raw materials of an amount equal to 100% of the f.o.b. value of the exports. The petitioner in that case, on the basis of the representations contained in the Export Promotion Scheme, exported woollen goods to Afghanistan and he claimed certificates for importing materials of the value equal to 100% of the f.o.b. value of the goods exported. As the petitioner's claim was rejected by the Textile Commissioner, he

filed a writ petition under Article 226 of the Constitution. The same argument which has been advanced before me was advanced before their Lordships of the Supreme Court in that case, namely that no contract in accordance with Article 299 of the Constitution was executed and the petitioner had no right because the Export Promotion Scheme was merely a set of executive rules. Their Lordships rejected this contention and observed:—

"We are unable to accede to the contention that the executive necessity releases the Government from honouring its solemn promises relying on which citizens have acted to their detriment. Under our constitutional set up, no person may be deprived of his right or liberty except in due course of and by authority of law: if a member of the executive seeks to deprive a citizen of his right or liberty otherwise than in exercise of power derived from the law—common or statute—the Courts will be competent to, and indeed would be bound to, protect the rights of the aggrieved citizen."

It was further observed by their Lordships that a party who has acted on a representation made by the Government can claim that the Government should be bound to carry out the promise made by it even though the promise is not recorded in the form of a formal contract as required by Article 299 of the Constitution.

7. In *Century Spinning and Manufacturing Co. Ltd. v. Ulhasnagar Municipal Council*, AIR 1971 SC 1021 their Lordships of the Supreme Court observed:—

"Public bodies are as much bound as private individuals to carry out representations of facts and promises made by them, relying on which other persons have altered their position to their prejudice. The obligation arising against an individual out of his representation amounting to a promise may be enforced *ex contractu* by a person who acts upon the promise: when the law requires that a contract enforceable at law against a public body shall be in certain form or be executed in the manner prescribed by statute, the obligation if the contract be not in that form may be enforced against it in appropriate cases in equity."

8. It was further observed in the aforesaid case:—

"If our nascent democracy is to thrive different standards of conduct for the people and the public bodies cannot ordinarily be permitted. A public body is in our judgment, not exempt from liability to carry out its obligation arising out of representations made by it relying upon which a citizen has altered his position to his prejudice."

9. In the *D.F.O. South Kheri v. Ram Sanehi Singh*, AIR 1973 SC 205 their Lordships of the Supreme Court held that it is unnecessary to consider in that case as to whether the impugned order was made on irrelevant grounds, because before making it the officer concerned did not call for any explanation of the person concerned and give him an hearing before passing that order. It was observed by their Lordships:

"Granting that the order was administrative and not quasi-judicial, the order had still to be made in a manner consonant with the rules of natural justice when it affected the respondent's rights to property..... The rule that a party to whose prejudice the order is intended to be passed is entitled to a hearing applied alike to judicial tribunals and bodies of persons invested with authority to adjudicate upon matters involving civil consequences. It is one of the fundamental rules of our constitutional set up that every citizen is protected against exercise of arbitrary authority by the State or its officers. The Divisional Forest Officer in the present case set aside the proceeding of a subordinate authority and passed an order which involved the respondent in considerable loss. The order involved civil consequences. Without considering whether the order of the Divisional Forest Officer was vitiated because of irrelevant considerations, the order must be set aside on the simple ground that it was passed contrary to the basic rules of natural justice."

In the last mentioned case *Ram Sanehi Singh* purchased a right to cut timber from the forest lots in South Kheri. The Divisional Forest Officer, however, by an order directed that the timber which the purchaser had actually removed with the sanction of forest authorities under a particular tally be treated as if removed in another tally. It was argued before their Lordships of the Supreme Court that the dispute arose in that case out of the terms of a contract, but their Lordships held that merely because the source of the right was initially in a contract, the party could not be driven to have recourse to a suit for the purpose of obtaining relief against an arbitrary and unlawful action on the part of public authority.

10. In a recent case, *M/s. Erusian Equipment and Chemicals Ltd. v. State of West Bengal*, AIR 1975 SC 266 where the State Government had black listed the person without prior notice to him and without affording him an opportunity of hearing, their Lordships of the Supreme Court were pleased to observe:—

"The fact that a disability is created by the order of black-listing indicates that the relevant authority is to have an

objective satisfaction. Fundamentals of fair play require that the person concerned should be given an opportunity to represent his case before he is put on the black-list."

11. Thus, it is well established that not only in judicial proceedings but also in cases where the executive authority is called upon to adjudicate matters involving civil consequences and affecting the rights of subjects, the fundamental principles of natural justice ought to be observed. If the State or its officers intend to pass any order to the prejudice of a party, which involves civil consequences or attaches a disability affecting right to property then fair play requires that before such an order is passed the party should be told the case he is required to meet and he should be afforded a reasonable opportunity to represent his case before the authority concerned.

12. In view of the foregoing considerations, without entering into other aspects of the matter, I am definitely of the opinion that the State Government was bound to give a notice to the petitioner of its intention to cancel the contract of collecting 'Ratanjot' seeds from the Udaipur forest division, and was bound to afford the petitioner a reasonable opportunity of having his say in the matter, before proceeding to pass the order dated August 8, 1974. It may also be observed in this connection that the State Government at no stage indicated to the petitioner that in case the amount of Rs. 8,500 towards the balance of the yearly lease amount was not paid within 15 days, the contract was liable to be cancelled. Much after the letter of May 22, 1974 (Ex. 10), the Divisional Forest Officer himself wrote to the petitioner on June 7, 1974 vide his letter Ex. 14 that he should deposit the amount of Rs. 8,500 "at the earliest" so that proceedings for delivery of possession may be taken and in case any delay caused by the petitioner then the responsibility for not handing over possession would lie on him. Thus even from the letter Ex. 14 it did not appear that in case the petitioner failed to deposit the balance of the yearly instalment of lease amount within specified time, the State Government intended to cancel the sanction granted in favour of the petitioner but it only indicated that the delivery of possession would in that event be delayed. Even the order Ex. R/2 dated August 8, 1974, which I have reproduced above, does not disclose the reason which prompted the State Government to cancel the grant of a lease in favour of the petitioner. As a matter of fact it is not disputed that the petitioner was neither given any notice nor he was afforded an opportunity of hearing before the impugned order dated

August 8, 1974 was passed by the State Government.

13. Learned Additional Government Advocate relied upon a decision of this Court in *State of Rajasthan v. Raghubath Singh*, AIR 1974 Raj 4. It may be stated here that the aforesaid decision is clearly distinguishable for the simple reason that it was given in appeal arising out of a suit wherein the plaintiff had desired to enforce a contract and it was held that such a suit was not maintainable in view of the fact that no contract in accordance with the provisions of Article 299 of the Constitution had come into existence. In the *Anglo Afghan Agencies' case* and the *Century Spinning & Manufacturing Company's case* their Lordships of the Supreme Court have definitely laid down that this Court in its extraordinary jurisdiction under Article 226 of the Constitution is empowered to enforce the equity arising in favour of the petitioner out of the representations amounting to a promise made to him by the Government or a public body and as a result of which the petitioner altered his position to his prejudice, even though a contract as envisaged by the relevant provisions had not come into existence.

14. Learned Additional Government Advocate also relied upon the decision in *B. K. Sinha v. State of Bihar*, AIR 1974 Pat 230 wherein their Lordships of the Patna High Court held that a writ of mandamus cannot be issued to compel the authorities to remedy a breach of contract pure and simple. In that case the decisions of their Lordships of the Supreme Court in *Anglo Afghan Agencies' case* and *Century Spinning and Manufacturing Company's case* were distinguished on the ground that the doctrine of estoppel was not applicable to the facts of the case before their Lordships. It was observed in the aforesaid case by their Lordships of the Patna High Court:

"There is no question of the petitioner changing his position because of some representations of the governmental authorities. The principle decided in *Century Spinning and Manufacturing Co.'s case* cannot be invoked and applied in the present case."

However, in the present case, as I have observed above, the petitioner certainly changed his position to his disadvantage on the representations of the State Government and had invested considerable amount in setting up an industry, besides making a deposit with the State Government of the amount of Rs. 25,000 and a further amount of Rs. 8,500. Moreover, the question in the present case is that the salutary principles of natural justice were not followed by the State Government while passing the order dated August 8,

1974 and I am fortified in the view that I have taken on this aspect of the matter by the decisions of their Lordships of the Supreme Court in D.F.O. South Kheri's case and Erusian Equipment & Chemical Ltd.'s case.

15. In view of the aforesaid discussion, the writ petition is allowed. The order of the State Government dated August 8, 1974 and the consequent order of the Divisional Forest Officer, Udaipur dated August 21, 1974 are set aside. The respondents are directed to act in furtherance of the order of the State Government dated January 23, 1973 (Ex. 3) unless and until the same is cancelled in accordance with law and after observing the principles of natural justice. The petitioner is entitled to get his costs of these proceedings from the State Government.

Petition allowed.

AIR 1976 RAJASTHAN 17

S. N. MODI, J.

Prabhashanker, Appellant v. Smt. Rukmani and others. Respondents

Second Appeal No. 195 of 1975, D/- 7-11-1975.*

(A) Rajasthan Premises (Control of Rent and Eviction) Act (17 of 1950), S. 14 (2) as amended by Ordinance No. 26 of 1975 — Amended section has retrospective application and it applies to pending suits and appeals — It does not however apply to pending execution proceedings — (Interpretation of Statutes — Retrospective legislation).

The effect of the amendment is that while previously if a landlord required the demised premises reasonably and bona fide for the use and occupation of himself or his family, he could obtain a decree for eviction of a tenant but after the amendment the court will have to further examine the question of comparative hardship of the landlord and tenant before passing a decree for eviction against the tenant. The provisions of Sec. 14 (2) as amended by the Amendment Ordinance of 1975 have retrospective effect and pending suits as also the pending appeals based on the ground under Sec. 13 (1) (h) would be governed by Sec. 14 (2) of the Act as amended. Since Sec. 14 (2) prohibits only passing of a decree for eviction, the provisions of Sec. 14 (2) as amended shall have no effect to execution proceedings pending in the executing courts wherein the decrees have been

*(Against judgment and decree of S. R. Kothari, Dist. J., Kota in Civil Appeal No. 74 of 1974, D/- 4-4-1975.)

passed against the tenants on the ground under Sec. 13 (1) (h) of the Act.

(Paras 4, 9)

It is obvious that unless a clear and unambiguous intention is indicated by the Legislature by adopting suitable express words in that behalf, no provision of statute should be given retrospective operation if by such operation vested rights are likely to be affected. Sec. 13 (1) of the Act has not been amended. It clearly indicates the intention of the Legislature that its provisions are retrospective. This subsection provides protection even to those tenants against whom execution proceedings were pending at the time of the commencement of the Act. The Amendment Ordinance of 1975 by enacting Sec. 14 (2) has provided a further rider to clause (h) of Sec. 13 (1). The amended Sec. 14 (2) being intimately connected with Sec. 13 (1) (h) of the Act should also, receive retrospective operation. This is one aspect of the case. There is yet another aspect of the case. The words "no decree for eviction..... shall be passed" used in Section 14 (2) are clearly suggestive of unmistakable indication of the legislative intention to make this sub-section retrospective, the reason being that it prohibits the passing of a decree for eviction on the ground mentioned in Sec. 13 (1) (h) unless the question of comparative hardship has been examined by the court. In other words, Sec. 14 (2) as amended must inevitably come into play for the benefit of the tenant in the pending suits as also in the pending appeals since it is well settled that an appeal is a continuation of the suit. (Paras 8, 9)

Cases Referred: Chronological Paras AIR 1964 SC 1511 = (1964) 6 SCR 876 7

C. K. Garg, for Appellant; C. L. Agarwal as Intervenor; M. L. Panwar, for Respondents; H. M. Parikh as Intervenor.

JUDGMENT :— This second appeal arises out of a suit filed by Kanhaiyalal (since deceased) and his brother Vasudeo to eject the tenant-defendant, who is appellant in this appeal.

2. The suit was filed on 11-10-71 when the provisions of the Rajasthan Premises (Control of Rent and Eviction) Act, 1950, were in force. Both the lower courts took the view that the landlords required the demised premises bona fide and reasonably for their own occupation and for the occupation of their family members. The courts below therefore decreed the suit for ejection in favour of Vasudeo and the legal representatives of Kanhaiyalal who died during the pendency of the suit in the trial court. The tenant has preferred this second appeal. During the pendency of the second appeal in this Court, the Rajasthan Premises (Control of Rent and Eviction) Act, 1950,

hereinafter referred to as the Act, was amended by the Rajasthan Premises (Control of Rent and Eviction) (Amendment) Ordinance, 1975 (Ordinance No. 26 of 1975), hereinafter called as the Amendment Ordinance of 1975, on 29-9-75.

3. It is contended on behalf of the tenant-appellant that in view of Sec. 14 (2) of the Act as amended by the Amendment Ordinance of 1975, the decree passed by the two lower courts was not proper and the same may be set aside.

4. Sec. 13 (1) (h) of the Act which has not been amended by the Amendment Ordinance of 1975 runs as under:—

"Sec. 13— Eviction of tenant—

(1) Notwithstanding anything contained in any law or contract, no Court shall pass any decree, or make any order, in favour of a landlord, whether in execution of a decree or otherwise, evicting the tenant so long as he is ready and willing to pay rent therefor to the full extent allowable by this Act, unless it is satisfied—

(a) to (g) xx xx xx

(h) that the premises are required reasonably and bona fide by the landlord—

(i) for the use or occupation of himself or his family, or

(ii) for the use or occupation of any person for whose benefit the premises are held,

(iii) for a public purpose, or

(iv) for a philanthropic use."

Section 14 of the Act as it stood before the Amendment Ordinance of 1975 ran as under:—

"Sec. 14— Restriction on eviction:

(1) xx xx

(2) No decree for eviction on the ground set forth in clause (b) of sub-section (1) of Section 13 shall be passed unless the Court is satisfied, after taking all the facts and circumstances into consideration, that it is reasonable to allow such eviction."

Section 10 of the Amendment Ordinance of 1975 has amended Section 14 of the Act. It provides that the existing sub-section (2) shall be re-numbered as sub-section (1) thereof and after sub-section (1) as so re-numbered, the following sub-sections shall be added, namely:—

"(2) No decree for eviction on the ground set forth in clause (h) of sub-section (1) of Section 13 shall be passed if the court is satisfied that, having regard to all the circumstances of the case including the question whether other reasonable accommodation is available to the landlord or the tenant, greater hardship would be caused by passing the decree than by refusing to pass it."

Where the court is satisfied that no hardship would be caused either to the

tenant or to the landlord by passing the decree in respect of a part of the premises, the court shall pass the decree in respect of such part only.

(3) Notwithstanding anything contained in any law or contract, no suit for eviction from the premises let out for commercial or business purposes shall lie against a tenant on the ground set forth in clause (h) of sub-section (1) of Sec. 13 before the expiry of five years from the date the premises were let out to the tenant."

A perusal of the above section would reveal that the effect of the amendment is that while previously if a landlord required the demised premises reasonably and bona fide for the use and occupation of himself or his family, he could obtain a decree for eviction of a tenant but after the amendment the court will have to further examine the question of comparative hardship of the landlord and tenant before passing a decree for eviction against the tenant.

5. There can be no doubt that the provisions of the Act as amended by the Amendment Ordinance of 1975 shall apply to the suits instituted by a landlord after the commencement of the Amendment Ordinance of 1975, that is, after 29-9-75. But the question that arises for consideration is whether the amended provisions of the Act shall also apply to pending proceedings which may fall under any of the following categories:

1. A suit presented by a landlord under Section 13 (1) (h) of the Act before 29-9-75 that is, before the commencement of the Amendment Ordinance of 1975 and pending disposal before the trial Court.

2. An appeal questioning the validity of a decree passed by the trial court or the first appellate court in a suit based on the ground under Section 13 (1) (h) of the Act pending decision from before 29-9-75.

3. An execution proceeding pending in the executing court in respect of the decree for eviction passed under Section 13 (1) (h) of the Act prior to the amendment, that is, 29-9-75.

6. The tenant's case is that a pending litigation is always to be decided according to the law existing at the time of its final decision and an appeal being in the nature of rehearing of the case or continuation of the suit, the appellate court is also competent to take into account the legislative changes made since the decision under appeal was given and its powers are not confined only to see whether the lower court's decision was correct according to the law as it stood when the decision was given.

7. On behalf of the landlords, it is contended that the new legislation does

not take away the rights and privileges acquired by the landlord under the earlier enactment and therefore the pending proceedings ought to be decided according to the law in force at the time the actions were commenced. According to the landlords, they had acquired the right to evict their tenants and this right had not been expressly or by necessary implication taken away by the new legislation. It is emphasised that a statute unless it be a statute dealing with the procedural matter only, should be presumed to be prospective and construed having no retrospective operation. The learned counsel on both the sides as also the Interveners cited a large number of authorities before me in support of their respective contentions. From the authorities cited before me, it follows that it is a well settled rule of interpretation of statutes that no statute shall be construed to have retrospective operation unless such a construction appears very clearly in the terms of the Act or arises by necessary or distinct implication. It appears further well established that a retrospective operation is not to be given to a statute so as to impair the existing right or obligation otherwise than as regards the matter of procedure unless that effect cannot be avoided without doing violence to the language of the enactment. It is thus clear that unless a clear and unambiguous intention is indicated by the Legislature by adopting suitable express words in that behalf, no provision of a statute should be given retrospective operation if by such operation vested rights are likely to be affected. In the words of their Lordships of the Supreme Court in *Mst. Rafiquanessa v. Lal Bahadur Chettri*, AIR 1964 SC 1511, the aforesaid principles are unexceptionable and as a matter of law no objection can be taken to them.

8. Bearing in mind the above principles, let us examine Section 14 (2) of the Act as amended by the Amendment Ordinance of 1975. Before doing so, it is necessary to consider Section 13 (1) (h) of the Act which has already been reproduced earlier. Section 13 (1) (h) provides that no court shall pass any decree or make any order in favour of a landlord whether in execution of a decree or otherwise evicting the tenant so long as he is ready and willing to pay rent therefor to the full extent allowable by this Act unless the court is satisfied that the premises are required reasonably and bona fide by the landlord for the use and occupation of himself and his family. This section prohibits a court from passing a decree or make an order in execution of a decree or otherwise evicting the tenant if such decree or order directs eviction of the tenant on a ground other than the ground

mentioned in Section 13 (1) of the Act. As already pointed out above, this sub-section has not been amended in any way by the Amendment Ordinance of 1975. But Section 13 (1) of the Act clearly indicates the intention of the Legislature that its provisions are retrospective. This sub-section provides protection even to those tenants against whom execution proceedings were pending at the time of the commencement of the Act. The Amendment Ordinance of 1975 by enacting Section 14 (2) has provided a further rider to clause (h) of Section 13 (1). Section 14 (2) as amended by the Amendment Ordinance of 1975 provides that the court shall not pass a decree for eviction against the tenant unless it is satisfied as to comparative hardship to be caused to the landlord and tenant by passing the decree than by refusing it. The new amended Section 14 (2) being intimately connected with Section 13 (1) (h) of the Act should also, in my opinion, receive retrospective operation. This is one aspect of the case.

9. There is yet another aspect of the case. The words "no decree for eviction..... shall be passed" used in Section 14 (2) are clearly suggestive of unmistakable indication of the legislative intention to make this sub-section retrospective, the reason being that it prohibits the passing of a decree for eviction on the ground mentioned in Section 13 (1) (h) unless the question of comparative hardship has been examined by the court. In other words, Section 14 (2) as amended by the Amendment Ordinance of 1975 must inevitably come into play for the benefit of the tenant in the pending suits as also in the pending appeals since it is well settled that an appeal is a continuation of the suit. If the legislature had intended that the provisions of Section 14 (2) should operate prospectively, it would not have used the words "no decree..... shall be passed", but instead used the language "no suit for eviction..... shall be passed against the tenant" as used in sub-sec. (3) of Section 14 of the Act as amended by the Amendment Ordinance of 1975. I am, therefore, of the opinion that no prospective operation to Section 14 (2) can be given without doing violence to its language. I, therefore, hold that the provisions of Section 14 (2) as amended by the Amendment Ordinance of 1975 have retrospective effect and pending suits as also the pending appeals based on the ground under Section 13 (1) (h) would be governed by Section 14 (2) of the Act as amended by the Amendment Ordinance of 1975. Since Section 14 (2) prohibits only passing of a decree for eviction, the provisions of Section 14 (2) as amended by the Amendment Ordinance of 1975 shall have no effect to execution proceed-

ings, pending in the executing courts wherein the decrees have been passed against the tenants on the ground under Section 13 (1) (h) of the Act.

10. It is common ground between the parties that none of the courts below has gone into the question of comparative hardship as envisaged under Section 14 (2) of the Act as amended by the Amendment Ordinance of 1975. The case will have to be remanded to the trial court for framing an appropriate issue in the light of the amendment and disposing it of on merits in accordance with law.

11. In the result, the appeal is allowed, the decrees of the courts below are set aside and the case is remanded back to the trial court as indicated above. The costs hitherto incurred by the parties shall abide the result.

12. The learned counsel for the respondents prays for Leave to Appeal to a Division Bench which is granted.

Appeal allowed.

AIR 1976 RAJASTHAN 20

J. P. JAIN, J.

Nand Kishore and another Appellants v. Prabhu Narain and others, Respondents.

Second Appeal No. 287 of 1972, D/- 28-7-1975.*

(A) Suits Valuation Act (1887), S. 11 (2) — Scope — Comparison with Ss. 21, 99, Civil P. C. — Objection as to valuation — No prejudice — Power of Appellate Court to interfere — (Civil P. C. (1908), Ss. 21, 99).

The policy underlying Ss. 21 and 99, C.P.C. and S. 11 of the Suits Valuation Act is the same, namely, that when a case had been tried by a Court, on the merits and judgment rendered, it should not be liable to be reversed purely on technical grounds, unless it had resulted in failure of justice, and the policy of the legislature has been to treat objections to jurisdiction both territorial and pecuniary as technical and not open to consideration by an appellate Court, unless there has been a prejudice on the merits. Clauses (a) and (b) of Section 11 of the Suits Valuation Act should be read conjunctively, notwithstanding the use of the word "Or". The plaintiffs would therefore be precluded from raising the objection about jurisdiction in an appellate Court. But

*(Against judgment passed by G. K. Sharma, Addl. Dist. J. No. 3, Jaipur City, in Civil Appeal No 48 of 1970, D/- 21-4-1973.)

even if the two provisions are to be construed disjunctively, and the parties held entitled under Section 11 (1) (b) to raise the objection for the first time in the appellate Court, even then, the requirement as to prejudice has to be satisfied.

(Paras 8, 9)

Hence, although an objection as to undervaluation was raised in the Court of first instance at the earliest possible opportunity, the appellate Court, irrespective of prejudice, is not bound to hold that the suit ought not to have been tried or heard by the trial Court. (Para 13)

A change in the forum of appeal is not by itself a matter of prejudice within the meaning of S. 11 of the Suits Valuation Act. AIR 1954 SC 340, Foll.; AIR 1924 Mad 6; AIR 1973 Punj & Har 58; AIR 1939 Lah 451; AIR 1940 Oudh 164, Rel. on; AIR 1975 Madh Pra 30, Not. Followed; AIR 1933 Lah 8 and AIR 1925 Oudh 561 held no longer good law in view of AIR 1954 SC 340. (Para 15)

(B) Civil P. C. (1908), S. 11 — Competency of Court trying former suit — Pecuniary jurisdiction — Competency must have existed at the date of former suit.

In order to determine whether a Court which decided the former suit had jurisdiction to try the subsequent suit, regard must be had to the jurisdiction of that Court at the date of the former suit and not to its jurisdiction at the date of the subsequent suit. If at that time such a Court would have been competent to try the subsequent suit, had it been then brought, the decision of such Court would operate as 'res judicata' although subsequently by a rise in the value of the property that Court had ceased to be a proper Court, so far as regards its pecuniary jurisdiction, to take cognizance of a suit relating to that very property. (1884) ILR 10 Cal 697; AIR 1954 SC 9 and AIR 1966 Pat 235, Rel. on; (1883) ILR 9 Cal 439 (PC); AIR 1962 SC 214 and AIR 1964 Pat 452, Expl. & Disting. (Paras 23, 34)

(C) Civil P. C. (1908), S. 11 — Litigating under same title.

The test of res judicata is the identity of title in the two litigations and not the identity of actual property involved in the two cases. AIR 1971 SC 664, Foll.

(Para 25)

(D) Civil P. C. (1908), O. 2, R. 2, O. 21, R. 63 — Cause of action in O. 2, R. 2 — Declaratory suit (without consequential relief) under O. 21, R. 63 decreed — Subsequent suit by plaintiff for possession — Not barred under O. 2, R. 2. (Specific Relief Act (1963), S. 34).

It is no doubt true that a suit contemplated by Order 21, Rule 63, Civil P. C., is of a comprehensive nature and the words "to establish the right" are wide enough to cover not only a mere declara-

tory suit but also one for consequential relief such as the recovery of the value of the property if it had already been sold, the recovery of possession or the enforcement of a mortgage. But the plaintiff is not bound to ask for a consequential relief. He may ask for a mere declaration of the suit and it cannot be dismissed as offending the proviso to Sec. 34 of the Specific Relief Act, 1963. If the defeated claimant asks for a bare declaration and succeeds, a subsequent suit for possession is not barred under Order 2, Rule 2, Civil P. C. The reason is that the cause of action of recovery of possession is different from the one for filing the suit for declaration under Order 21, Rule 63, Civil P. C. AIR 1966 SC 1068, Ref. (Para 33)

(E) T. P. Act (1882), S. 51 — Improvements by trespasser.

Section 51 applies in terms to a transferee who makes improvements in good faith believing himself to be an absolute owner of the property. Improvements by a person who is not a transferee and had no reason to believe that he was the absolute owner of the property, cannot be said to have made in good faith. He is not entitled to any value of the improvements either under Section 51 of the Transfer of Property Act or on principles of justice, equity and good conscience. (Para 39)

(F) Civil P. C. (1908). Ss. 100-101 — Finding of fact — Finding under S. 51, T. P. Act, that there was no proof that plaintiff spent certain amount in making alleged improvements and that certain documents in that connection were subsequently prepared — Finding supported by evidence on record and facts and circumstances of the case — Finding was one of fact — High Court would not interfere in the finding in second appeal. AIR 1963 SC 302, Rel. on. (Para 40)

Cases Referred: Chronological Paras
AIR 1975 Madh Pra 30 = 1975 Jab LJ 334 11

AIR 1973 Punj & Har 58 = 74 Pun LR 359 10

AIR 1971 SC 664 = (1971) 3 SCR 340 25

AIR 1966 SC 1068 = (1966) 1 SCR 986 35

AIR 1966 Pat 235 = 1966 BLJR 237 24

AIR 1964 Pat 452 27, 32

AIR 1963 SC 302 = (1963) 3 SCR 604 40

AIR 1962 SC 214 = (1962) 3 SCR 483 27, 32

ILR (1957) 7 Raj 473 = 1957 Raj LW 332 37

AIR 1954 SC 9 = ILR (1953) Hyd 400 23, 24, 33

AIR 1954 SC 340 = 1955 SCR 117 6, 8, 11, 13, 15, 17

AIR 1940 Oudh 164 = 1940 OWN 462 18

AIR 1939 Lah 451 = 41 Pun LR 386 18

AIR 1938 All 342 = 1938 All LJ 280 37

AIR 1933 Lah 8 = 140 Ind Cas 223 16

AIR 1925 Oudh 561 = 28 Oudh Cas 203 16

AIR 1924 Mad 6 = 45 Mad LJ 135 (FB) 17

(1884) ILR 10 Cal 697 22, 33

(1883) ILR 9 Cal 439 = 9 Ind App 197 (PC) 27, 28

P. N. Datt and K. N. Tikku, for Appellants; S. C. Bhandari and Rajesh Balia, for Respondents.

JUDGMENT:— Civil Suit No. 11 of 1959 filed by Prabhu Narain respondent No. 1 has been decreed by the Civil Judge, Jaipur City, and upheld by the Additional District Judge No. 3, Jaipur City, (Civil Appeal No. 48/1970). The first and the second defendants have come in second appeal in this court.

2. On 3-1-59 Prabhu Narain instituted the suit under appeal in the court of Civil Judge, Jaipur City, against Nand Kishore, his father Radha Vallabh and four others who are tenants in the suit property. The suit property is a haveli facing North situate in Surajpole Bazar, Chowkari Topkhana Hazuri, Jaipur. This house originally belonged to one Har Bux who died on 23-9-1949. One Govind Narain obtained a decree against Prabhu Narain as legal representative of Har Bux. He got the suit haveli attached in that decree. A claim was put up by Nand Kishore, who was at that time minor, through his father, Radha Vallabh under Order 21, Rule 58, Civil P. C. It was claimed that the suit property was in his possession and he was son of deceased Har Bux. This claim was allowed by the Execution Court on 15-7-50. The plaintiff then instituted a suit on 14-7-51 under Order 21, Rule 63, Civil P. C. in the court of Munsif (East), Jaipur seeking declaration that he was the adopted son of Har Bux, and the suit property was liable to be attached and sold in the decree against him obtained by Govind Narain. This suit was later on found to be under-valued and it was returned to be represented in the proper court. The suit was then filed in the court of Civil Judge, Jaipur, which was later on transferred in the court of Civil Judge, Jaipur District. That suit was decreed on 31-7-54 and it was held that Prabhu Narain was the adopted son of deceased Har Bux and the property could be attached and sold in the decree against him which was obtained by Govind Narain. The appeal on behalf of Nand Kishore was dismissed on 16-12-1957. There was a second appeal in the High Court. This appeal was pending in the High Court when the present suit was filed. According to the plaintiff the limitation to recover possession was about to run out and as such he filed the present suit without waiting for the final decision of the High Court. It is no longer in dispute that Nand Kishore's appeal was dismissed by the High Court as well on

30-1-63. It was also claimed by the plaintiff that Radhey Shyam, defendant No. 3, Satya Narayan defendant No. 4, Madan Lal defendant No. 5, and Allanoor defendant No. 6, were the tenants in some portions of the suit property, and defendant No. 1 had recovered during six years preceding the institution of the suit Rs. 360 @ Rs. 5 per month from each one of them. The defendant Nand Kishore was also alleged to be in possession on some part of the suit property. Plaintiff claimed damages for use and occupation of that part of the property @ Rs. 20 per month. He thus claimed Rs. 2,880 as mesne profits from the defendants Nos. 1 and 2. Besides he prayed for perpetual injunction against the defendants Nos. 3 to 6 not to pay rent henceforward to the defendants Nos. 1 and 2.

3. Nand Kishore, the principal defendant resisted the suit by his written statement dated 17-12-1959. It was contended by him that Prabhu Narain was not the adopted son of Har Bux nor was he in fact adopted. He admitted the earlier proceedings relating to Order 21, Rule 58, Civil P. C. and eventual suit proceedings at the instance of Prabhu Narain under Order 21, Rule 63, Civil P. C. He however submitted that the appeal was pending in the High Court and as such the matter was subjudice. He denied plaintiff's claim to the recovery of possession and mesne profits. It was also pleaded that the plaintiffs' suit for mesne profits for six years is not within time. He submitted in para 7 of the written statement that the suit has been undervalued. By way of additional pleas he reiterated that he was the adopted son of Har Bux. He referred to the decree dated 1-3-1948 which he obtained against Har Bux declaring that he was the adopted son of Har Bux. Reference of adoption deed dated 15-3-48 was also made. He further pleaded that the first storey of the house on the death of Har Bux was not fully constructed. He made improvements, got the house plastered, the floor done, and got the roof put up. He is also alleged to have constructed a bath-room, a lavatory, and a tin shed in the second storey. According to him the valuation of the suit property in 1951 was Rs. 4951/15 and its valuation in 1959 when the suit under appeal was filed, was Rs. 12,387/2/- as such there is encumbrance of Rs. 7,435/3/- on the suit property and without payment of the same the plaintiff's suit is not maintainable.

4. Radhavallabh also filed his written statement on the same lines. The tenants namely defendants Nos. 3 to 6 also filed the written statements. They alleged that the plaintiff is not entitled to recover any rent from them. According to them

Nand Kishore is the adopted son of Har Bux and he admitted them to tenancy. He alone could recover the rent from them.

5. On these pleadings learned trial Judge framed the following six issues on 21st August, 1963:—

(1) Whether the plaintiff is entitled to get the mesne profits as detailed in para 7 of the plaint. If so from whom? (P).

(2) Whether the valuation of the property in suit is more than Rs. 10,000/- and the suit is not cognizable by this Court. (D).

(3) Whether the suit is barred under Order 2, Rule 2, C.P.C.?

(4) Whether the defendant No. 2 at the time of minority of defendant No. 1 made constructions, repairs as detailed in para 13 of the additional pleas of written statement, if so, whether there is a charge of Rs. 7,435/3/- on the suit property, and the plaintiff cannot get possession over the suit property, without payment of the said amount?

(5) Whether the defendant is in adverse possession of the property in dispute?

(6) Relief.

6. Issue No. 2 was decided as preliminary issue on 24-5-1972(?) The valuation given by the plaintiff was accepted by the Judge and he accordingly held that he could try the suit. After trial the learned Judge decided the other issues in favour of the plaintiff and decreed the suit by his judgment dated 30-9-66. He ordered the recovery of possession of the suit property to the plaintiff. He, however, allowed mesne profits only to the extent of Rs. 1,368. A sum of Rs. 219/14/- was allowed to the defendant as price of some land spent by him. Thus the decree passed in favour of the plaintiff was for Rs. 1148/2/-. He also granted injunction against the defendants Nos. 3 to 6 directing them not to pay the rent to the defendants Nos. 1 and 2. Defendants Nos. 1 and 2 were also restrained from realising the rent of the suit property from the tenants. This decree was challenged in appeal. The case came before the learned Additional District Judge No. 3, Jaipur City, for disposal. The learned lower appellate Court reversed the finding on issue No. 2. It was held that the valuation of the suit was more than Rs. 10,000. But placing reliance on Section 11 of the Suits Valuation Act and the decision of the Supreme Court in Kiransingh v. Chaman Paswan, AIR 1954 SC 340, he held that there was no prejudice caused to the appellants and there being enough material to decide the case, he decided the appeal on merits. Other contentions raised by the appellants did not weigh with the ap-

peal Judge and accordingly he dismissed the appeal on 21-4-1973. This decision is the subject-matter of appeal in this Court, which has been filed by Nandkishore and his father Radhavallabh. Besides Prabhu Narain, only Madan Lal and Allanocr, who were defendants Nos. 5 and 6 have been impleaded in the appeal. Radhey Shyam and Satya Narayan have not been impleaded, nor have they filed any appeal against the decree. On behalf of the appellant Mr. D. D. Patodiya addressed this court at length. Mr. S. C. Bhandari represented the case of Prabhu Narain respondent. I also permitted Mr. Datt to give rejoinder in answer to the arguments of Mr. Bhandari.

7. On the basis of the finding of the learned lower appellate Court on issue No. 2 it has been vehemently argued that the Court of Civil Judge had no jurisdiction to try the suit. Reference was made to the provisions of Section 11 of the Suits Valuation Act, 1887, which corresponds to Section 49 of the Rajasthan Suits Valuation Act. There is no controversy between the parties that on the date of the suit, the Suits Valuation Act, 1887, was applicable. Mr. Patodiya urged that the plaintiff under-valued the suit and an objection to that effect was raised at the earliest possible opportunity in the written statement and as such the Civil Judge was not competent to hear and try the suit. On the other hand, it was submitted by Mr. Bhandari that even in a case where an objection has been raised in the court of first instance before settlement of the issues, the appellate Court has still to be satisfied that under-valuation has prejudicially affected the disposal of the suit on its merits. Attention was also invited to sub-section (2) of Section 11, which lays down that if the objection was taken in the manner mentioned in clause (a) of sub-section (1), but the Appellate Court is not satisfied as to both the matters mentioned in clause (b) of that sub-section and has before it the materials necessary for the determination of the other grounds of appeal to itself, it shall dispose of the appeal as if there had been no defect of jurisdiction in the court of first instance or lower Appellate Court. On having given my careful consideration to the rival contentions, I am of the opinion that the construction put on Section 11 of the Suits Valuation Act by Mr. Patodiya does not appear to be sound. Section 11 of the Suits Valuation Act reads as follows:

"S. 11 Procedure where objection is taken on appeal or revision that a suit or appeal was not properly valued for jurisdictional purposes— (1) Notwithstanding anything in Section 578 of the Code of Civil Procedure, an objection that by rea-

son of the over-valuation or under-valuation of a suit or appeal a Court of first instance or lower appellate Court which had no jurisdiction with respect to the suit or appeal exercised jurisdiction with respect thereto shall not be entertained by an Appellate Court unless—

(a) the objection was taken in the Court of first instance at or before the hearing at which issues were first framed and recorded, or in the lower Appellate Court in the memorandum of appeal to the court, or

(b) the Appellate Court is satisfied, for reasons to be recorded by it in writing, that the suit or appeal was over-valued or under-valued, and that the over-valuation or under-valuation thereof has prejudicially affected the disposal of the suit or appeal on its merits.

(2) If the objection was taken in the manner mentioned in clause (a) of sub-section (1) but the Appellate Court is not satisfied as to both the matters mentioned in clause (b) of that sub-section and has before it the materials necessary for the determination of the other grounds of appeal to itself, it shall dispose of the appeal as if there had been no defect of jurisdiction in the Court of first instance or lower Appellate Court.

(3) If the objection was taken in that manner and the Appellate Court is satisfied as to both these matters and has not those materials before it, it shall proceed to deal with the appeal under the rules applicable to the Court with respect to the hearing of appeals; but if it remands the suit or appeal, or frames and refers issues for trial, or requires additional evidence to be taken, it shall direct its order to a Court competent to entertain the suit or appeal.

(4) The provisions of this section with respect to an Appellate Court shall, so far as they can be made applicable, apply to a Court exercising revisional jurisdiction under Section 622 of the Code of Civil Procedure or other enactment for the time being in force.

(5) This section: (* * *) shall come into force on the first day of July 1887."

8. It is abundantly clear from this provision that where the objection as to jurisdiction has not been taken in the Court of first instance objection to that effect in the Appellate Court shall not be entertained at all. In cases where objection has been taken before the framing of issues in the Court of first instance, but the merits of the case have not been affected, the appellate Court has to ignore the objection and proceed as if there was no defect of jurisdiction. Conditions of clauses (a) and (b) have to be satisfied subject of course to sub-section (2) of

Section 11. If necessary material is not on record for determination of other grounds of appeal, the appeal shall have to be disposed in accordance with sub-section (3). Learned counsel for both the parties referred to the Supreme Court decision in Kiran Singh's case (AIR 1954 SC 340). In this appeal before the Supreme Court the question as to the construction of Sec. 11 of the Suits Valuation Act was involved. Venkatarama Ayyar J., who spoke for the Court, at the outset, referred to the fundamental principle well established that a decree passed by a court without jurisdiction is a nullity and that its validity could be set up whenever and wherever it is sought to be enforced or relied upon, even at the stage of execution and even in collateral proceedings. A defect of jurisdiction, when it is in respect of the subject-matter of action, strikes at the very authority of the Court to pass any decree, and such a defect cannot be cured even by consent of parties. After having dealt with the general principles governing the matter, his Lordship addressed himself to the question as to the effect of Section 11 of the Suits Valuation Act on this position. In this context, it was observed:

"Section 11 enacts that notwithstanding anything in Section 578 of the Code of Civil Procedure an objection that a Court which had no jurisdiction over a suit or appeal had exercised it by reason of over-valuation or under-valuation, should not be entertained by an appellate Court, except as provided in the section....."

The Supreme Court pointed out that reference to Section 578 (now S. 99) Civil P. C. in the opening words of the section, is significant. That section provides that no decree shall be reversed or varied in appeal on account of the defects mentioned therein when they do not affect the merits of the case. Section 99 therefore gives no protection to decrees passed on merits when the Courts which passed them lacked jurisdiction as a result of over-valuation or under-valuation. It was observed that:

"It is with a view to avoid this result that Section 11 was enacted. It provides that objections to the jurisdiction of a Court based on over-valuation or under-valuation shall not be entertained by an Appellate Court except in the manner and to the extent mentioned in the section. It is self-contained provision complete in itself and no objection to jurisdiction based on over-valuation and under-valuation can be raised otherwise than in accordance with it."

8-A. His Lordship again observed: "With reference to objections relating to territorial jurisdiction, Section 21 of the Civil Procedure Code enacts that no objection to the place of suing should be

allowed by an appellate or revisional Court, unless there was a consequent failure of justice. It is the same principle that has been adopted in Section 11 of the Suits Valuation Act with reference to pecuniary jurisdiction. The policy underlying Sections 21 and 99, C.P.C. and Section 11 of the Suits Valuation Act is the same, namely, that when a case had been tried by a Court, on the merits and judgment rendered, it should not be liable to be reversed purely on technical grounds, unless it had resulted in failure of justice, and the policy of the legislature has been to treat objections to jurisdiction both territorial and pecuniary as technical and not open to consideration by an appellate Court, unless there has been a prejudice on the merits."

9. The Supreme Court also took notice of word "or" appearing between clauses (a) and (b) and in this connection it was observed:

"There is considerable authority in the Indian Courts that clauses (a) and (b) of Section 11 of the Suits Valuation Act should be read conjunctively, notwithstanding the use of the word "Or". If that is the correct interpretation, the plaintiffs would be precluded from raising the objection about jurisdiction in an appellate Court. But even if the two provisions are to be construed disjunctively, and the parties held entitled under Section 11 (1) (b) to raise the objection for the first time in the appellate Court, even then, the requirement as to prejudice has to be satisfied....."

10. In *Sat Paul v. Jai Bhan Ananta Saini*, AIR 1973 Punj & Har 58, the learned Judge dealing with the case held that where in a case the plaintiff preferred an appeal before Senior Subordinate Judge on the basis of valuation that was put by him on the plaint and not on the valuation as determined by the trial Court with the result that in entertaining the appeal the Judge exercised jurisdiction over it by reason of under-valuation, it was held that no objection to jurisdiction of the Court could be taken unless the failure of justice was shown to have resulted from such exercise of powers.

11. Mr. Patodiya referred to *Sureshkumar v. State of Madhya Pradesh*, AIR 1975 Madh Pra 30. This was a revision application which arose out of a suit instituted in the court of Civil Judge Class II, Gwalior, the limit of whose pecuniary jurisdiction was Rs. 5,000. The trial Court passed a decree for declaration and injunction against the defendant. On appeal the learned Additional District Judge Gwalior found that the suit was under-valued and it should have been Rs. 10,000. The appellate Court therefore set aside the judgment and decree of the trial

Court and remanded the suit to the Civil Judge Class I, Gwalior to try the suit afresh. The plaintiff went in revision. The decision in *Kiran Singh v. Chaman Singh*, (AIR 1954 SC 340) was referred to. The learned Judge while observing that a defect of jurisdiction, whether it is pecuniary or territorial, or whether it is in respect of the subject-matter of the action striking at the very authority of the Court to pass any decree, cannot be cured even by consent of parties, conceded that defect of jurisdiction has to be considered subject to the provisions of Section 11 of the Suits Valuation Act. He then observed:

"Section lays down two exceptions; one of them is: unless specific objection was taken in the trial Court. In the present case a specific objection was taken in the trial Court in paragraph 12 of the written statement and an issue was also framed on that objection. (Issue No. 4). That being so, Section 11 of the Suits Valuation Act is out of the way."

12. It is quite evident that the learned Judge did not consider the second exception contained in Section 11 (1) (b) and sub-section (2) of the Act. With great respect to the learned Judge, I am unable to accept this decision as an authority for the interpretation of Section 11.

13. In view of the law laid down by their Lordships of the Supreme Court in *Kiran Singh's case* (AIR 1954 SC 340) it is difficult to accept the contention of Mr. Patodiya that on the facts of the case, an objection as to under-valuation having been raised in the court of first instance at the earliest possible opportunity, the appellate Court, irrespective of prejudice, was bound to hold that the suit ought not to have been tried or heard by the trial Court.

14. This now brings me to the question if the appellants have been prejudicially affected by the disposal of the suit. The learned lower appellate Court held that no prejudice was caused to the appellants. In this regard the learned counsel for the appellants canvassed before me that the appellants have been prejudiced for two reasons; firstly if the trial had taken place in the Court having pecuniary jurisdiction of more than Rs. 10,000 they would have had a right to come in first appeal before the High Court and in the event of dismissal of appeal, they could also go in for special appeal before the Division Bench; secondly, the defendants could raise the plea that the finding relating to the adoption of the plaintiff by Har Bux in the earlier suit did not bind them by the principle of res judicata, if the case had been tried by the Senior Civil Judge or Additional District Judge having pecuniary jurisdic-

tion of trying suits of more than Rupees 10,000. It could be urged that the former Court was not competent to hear the present suit.

15. As regards the first contention there appears to be no substance. In *Kiran Singh's case* (AIR 1954 SC 340) before the Supreme Court (1) it was argued that by reason of under-valuation their appeal was heard by a court of inferior jurisdiction while they were entitled to be heard by High Court on the facts. It was contended that the right of appeal was a valuable one, and that deprivation of the right of the appellants to appeal to the High Court on facts must therefore be held without more to constitute prejudice. In this respect it was observed,

"This argument proceeds on a misconception. The right of appeal is no doubt a substantive right and its deprivation is a serious prejudice; but the appellants have not been deprived of the right of appeal against the judgment of the subordinate court. The law does provide an appeal against that judgment to the District Court, and the plaintiffs have exercised that right. Indeed, the under-valuation has enlarged the appellants' right of appeal, because while they would have had only a right of one appeal and that to the High Court if the suit had been correctly valued, by reason of the under-valuation they obtained right to two appeals, one to the District Court and another to the High Court. The complaint of the appellants really is not that they had been deprived of a right of appeal against the judgment of the Subordinate Court, which they have not been, but that an appeal on the facts against that judgment was heard by the District Court and not by the High Court. This objection therefore amounts to this that a change in the forum of appeal is by itself a matter of prejudice for the purpose of Section 11 of the Suits Valuation Act."

This decision concludes the matter that a change in the forum of appeal is not by itself a matter of prejudice within the meaning of Section 11 of the Suits Valuation Act. The facts in the present case bearing on this question are similar.

16. On behalf of the appellant reliance has been placed on *Mathura Das v. Jalal Din*, AIR 1933 Lah 8, a decision of a Single Judge, and on *Sheoraj Singh v. Mt. Phulbasa Kuer*, AIR 1925 Oudh 561 a Division Bench decision. In the Lahore case the learned Judge observed:

"The hearing of an appeal by a Court of inferior jurisdiction must raise a presumption that the party concerned has been materially prejudiced by the hearing of the appeal by such Court."

17. In the Oudh case dissenting from the Full Bench decision in *Kelu*

Achan v. Parwathi Nethiyar, AIR 1924 Mad 6 (FB) their Lordships held that the disposal of a suit on its merits is prejudicially affected under Section 11 of the Suits Valuation Act, when that disposal is made by a District Judge, when it ought to have been made by a Bench of two Judges of the Court of highest jurisdiction in a Province. This view is no longer good law, in view of the Supreme Court's decision in Kiran Singh's case referred to above (AIR 1954 SC 340). The Supreme Court approved the Full Bench decision in Kelu Achan's case.

18. That apart learned counsel for the appellant does not appear to have taken notice of the later decisions of the Lahore High Court in Allah Baksh v. Shivji Maharaj, AIR 1939 Lah 451 and B. Kanhaiya Lal v. Hamid Ali, AIR 1940 Oudh 164. These decisions accepted the Full Bench view expressed by the Madras High Court in Kelu Achan's case.

19. Now advertent to the next contention that if the case had been tried by the Senior Civil Judge the defendants' plea that the plaintiff was not an adopted son of Har Bux, was open to them and they would not have been barred by the principle of *res judicata*. In the earlier suit which was instituted by the plaintiff a declaration was sought on the basis that Prabhu Narain was adopted son of Har Bux. This question was directly and substantially in issue before that court. This point was finally decided in favour of the plaintiff and it was held that it was Prabhu Narain who was the adopted son of Har Bux. In the present suit he claimed recovery of possession of the suit property which belonged originally to Har Bux on the ground that he was the adopted son of Har Bux and it was so held in the earlier proceedings arising under Order 21, Rule 63, Civil P. C. The suit was decreed by the trial Court and the appellate Court and the appeal before the High Court which was pending at the time of the institution of the suit under appeal, was dismissed on 30-1-63. In the written statement to the averments of the plaintiff in this regard, Nand Kishore admitted the decree having been passed against him and upheld by the District Judge in appeal. It was alleged that as the appeal in the High Court was pending, the matter was sub judice. In para. 9 it was pleaded that as the second appeal is pending in the High Court, the present suit, which raises the same question as to the plaintiff's adoption to Har Bux, be stayed under Section 10, Civil P. C. till the High Court decides the appeal. He took the plea in para 5 that the appellate decree of the District Judge does not operate as *res judicata* as the second appeal in the High Court has been pending. From

the pleadings, it is obvious that Nand Kishore did not raise the plea that he was not bound by the finding in the earliest suit. On the contrary, his plea has been that it is the decision of the High Court in appeal, (then pending before it) which could operate as *res judicata*.

20. It is not in dispute that the Civil Judge, who tried the earlier suit had the pecuniary jurisdiction to try cases upto the valuation of Rs. 10,000. The plaintiff valued the suit property at Rs. 6,400, mesne profits at Rs. 2,880 and for perpetual injunction at Rs. 100, thus the suit was valued at Rs. 9,380. The defendant Nand Kishore's pleading in this regard was that the value of the suit property was Rs. 12,387/2/-. The appellate Court while dealing with issue No. 2 did not accept the estimate of the property as given by the defendant. The two estimates Ex. A/2 of 1951 and Ex. A/5 of 1959 were relied upon. The learned appeal Judge observed:

"Thus the position is that after the preparation of the previous estimate Ex. A-2, three rooms were constructed which definitely must have costed (sic). Without incurring expenses these rooms could not have been constructed. So it is definite that the value of the property which was in the year 1951 had increased in the year 1959 when these rooms were constructed. Apart from this it is also in the evidence of the defendants that the value of the property had increased 1½ times than that of 1951. So according to this evidence, the property which was valued at about Rs. 4951/15/- was of about Rs. 7,500 in the year 1959. It is correct that the defendants should have proved the value of the property. They have led evidence in this regard also. But the evidence is not worth reliable (sic) which I will discuss later on. So how much value of the property has increased after 1951 has not been established correctly but there is no doubt that on account of new construction the value of the property must have increased and if roughly taken then the value of the property in the year 1959 would be not less than Rs. 7,500."

21. From the discussion it appears, that the learned Judge accepted the estimate of 1951 as the admitted basis. He kept in view the alleged improvements, and the fact that the prices have appreciated, and then reached the figure roughly at Rs. 7,500. Adding to this, value of the mesne profits and for the relief of perpetual injunction he held that the valuation of the suit must be of more than Rs. 10,000 (Rs. 7,500 + Rs. 2,880 + 100). In view of the finding, he was of the opinion, that the Civil Judge, whose pecuniary jurisdiction was upto Rs. 10,000 had no jurisdiction to try the present suit.

22. On this premise, the submission made on behalf of the appellant is that the Court trying the former suit was not competent to try the present suit and therefore they are deprived to take the plea that the decision in the earlier suit regarding adoption does not operate as *res judicata*. Mr. Bhandari submitted that in order to determine whether a Court, which decided the former suit had jurisdiction to try the present suit, regard must be had to the jurisdiction of the court at the date of the former suit and not to its jurisdiction at the date of the subsequent suit. According to him if the present suit had been brought at the time the earlier suit was filed, the court trying the former suit was clearly competent to hear the present suit and this fulfils the requirement of Section 11, Civil P. C. He built this argument on the admitted case of the defendant that the market value of the property in 1951 was Rs. 495/15. In the present suit mesne profits in the sum of Rs. 2,880 have also been claimed and prayed for, perpetual injunction has been asked for, thus it has been urged by the learned counsel for the respondent, if these amounts are added, the valuation of the suit remains much below Rs. 10,000. The Civil Judge, who tried the earlier suit, was well within his preliminary jurisdiction to hear the present suit. He also submitted that the value of the property if appreciated, whether on account of general rise in the value of the property or by making certain improvements cannot be taken notice of and would not affect the jurisdiction of that court. In support of this argument he has placed reliance on *Gopinath Chobey v. Bhugwat Pershad*, (1884) ILR 10 Cal 697. Their Lordships were dealing with the construction of Section 13 of the Civil Procedure Code, 1882, which corresponds to Sec. 11 of the present Code. It was observed:

"We are of opinion that this construction of Section 13 is not correct. It is well known that in this country the value of landed property is increasing every day. A suit regarding a particular property may be, so far as the pecuniary value of it, properly cognizable by a Munsiff today, and ten years hence a suit for that property, having regard to its pecuniary value then, might not be cognizable by the Munsiff. But it would be unreasonable to hold, in a suit which might be brought ten years hence, that a decision between the same parties today passed by a Munsiff having full jurisdiction would not be *res judicata* ten years hence. The reasonable construction of the words "in a Court of jurisdiction competent to try such subsequent suit" seems to us to be that it must refer to the jurisdiction of the Court at the time when the first suit

was brought, that is to say, if the Court which tried the first suit was competent to try the subsequent suit if then brought, the decision of such court would be conclusive under Section 13, although on a subsequent date, by a rise in the value of such property or from any other cause, the said Court ceased to be the proper Court, so far as pecuniary jurisdiction is concerned, to take cognizance of a suit relating to that property." (Underlinings are mine.)

23. Reliance has also been placed on a decision *Jeevantha v. Hanumantha*, AIR 1954 SC 9. It was observed that:

"It is unnecessary to go into the merits of the case because we think that the defendants have made out their plea of '*res judicata*' and the decisions of the Courts below on this issue are erroneous. It is true that in order to make out a plea of '*res judicata*' it is necessary to prove that the Court that tried the former suit was competent to try the present suit. There can be no question about it but it is also well settled that in order to determine whether a Court which decided the former suit had jurisdiction to try the subsequent suit, regard must be had to the jurisdiction of that Court at the date of the former suit and not to its jurisdiction at the date of the subsequent suit. If at that time such a Court would have been competent to try the subsequent suit, had it been then brought, the decision of such Court would operate as '*res judicata*' although subsequently by a rise in the value of the property that Court had ceased to be a proper Court, so far as regards its pecuniary jurisdiction, to take cognizance of a suit relating to that very property."

24. In *Ram Ratan Lal v. Kashinath Tewari*, AIR 1966 Pat 235, *Jeevantha's* case (AIR 1954 SC 9) has been followed and it was held that in order to determine whether a court, which decided the former suit, had jurisdiction to try the subsequent suit, regard must be had to the jurisdiction of the court at the date of the former suit and not to its jurisdiction at the date of the subsequent suit. If at that time such a court would have been competent to try the subsequent suit, had it been then brought, the decision of such court would operate as '*res judicata*', although subsequently by a rise in the value of the property that court has ceased to be a proper court so far as regards its pecuniary jurisdiction to take cognizance of the suit relating to the very property.

25. There is no dispute that the subject-matter in the present suit is identical except that it was alleged in the written statement that some improve-

mens have been made in the property. Here reference may be made to a Supreme Court decision in *Ram Gobinda Daw v. Smt. H. Bhakta Bala Dass*, AIR 1971 SC 664 where their Lordships observed that the test of *res judicata* is the identity of title in the two litigations and not the identity of actual property involved in the two cases. The property in both the litigations in the case on hand is the haveli left by Har Bux. In the earlier suit the plaintiff Prabhu Narain claimed the property on the ground that he was the adopted son of Har Bux. Here as well he claimed recovery of possession of the property left by Har Bux on the same ground. No decision taking the contrary view has been cited before me.

26. After having considered these decisions referred to above I am clearly of the opinion that the Court trying the previous suit was competent to hear the present suit. The mere fact that there has been a rise in the value of the property either on account of inflation in prices or on account of some improvements made by the defendant would not prevent the former Court to hear the present suit, particularly in view of the fact that the value of the property was admittedly Rs. 4951/15/- in the year 1951 when the earlier suit was instituted.

27. Learned counsel for appellant placed reliance on the following decisions:

(a) *Miseer Raghubardial v. Sheo Baksh Singh*, (1883) ILR 9 Cal 439 (PC).

(b) *Mst. Gulab Bai v. Manphool Bai*, AIR 1962 SC 214.

(c) *Ram Dayal Singh v. Indrasen Kuer*, AIR 1964 Pat 452.

28. The facts in the Privy Council case ((1883) ILR 9 Cal 439 (PC)) were that the first suit was brought by the appellant before the Privy Council, on 7th December, 1877 in the court of Assistant Commissioner for interest due on the balance of an interest account Rs. 1,665 giving in credit for the interest paid Rs. 2,475. In the defence it was alleged that the payment of Rs. 2,475 was not made only towards the interest but in part for principal it should have been so credited. The suit was finally dismissed. The present appellant filed another suit out of which an appeal before Privy Council arose for the principal amount of Rupees 12,000 and interest Rs. 2,475 due on the bond of 1875. The Deputy Commissioner, Sitapur, who tried the case, gave judgment for the balance of Rs. 4,790 only and interest thereon, holding the claim for Rs. 12,000 is barred under Section 13 of the Civil P. C. On appeal the Judicial Commissioner upheld the decree. In this context their Lordships observed:

"The words 'Court of competent jurisdiction' used in Section 13 of the Code

of Civil Procedure, include the meaning that the first Court must not have been precluded by the pecuniary limit of its jurisdiction from deciding the question raised in the other. The two courts must exercise such concurrent jurisdiction in regard to the pecuniary limit of their powers that the subject-matter of the second suit would not have been beyond the powers of the Court which disposed of the prior one."

29. It was held that the issue as to the amount of principal due on the bond had not been heard and finally decided by a Court of competent jurisdiction within the meaning of "Section 13. The first suit was for Rs. 1,665 for interest only. The principal not being then due, and the matter in issue was whether the interest was due. The second suit was for the principal amount.

30. Their Lordships further explained the meaning of the expression "concurrent jurisdiction":

"As to what is a Court of concurrent jurisdiction it is material to notice that there is, in India, a great number of Courts; that one main feature in the Acts constituting them is that they are of various grades with different pecuniary limits of jurisdiction; and that, by the Code of Civil Procedure a suit must be instituted in the Court of the lowest grade competent to try it..... In their Lordships' opinion it would not be proper that the decision of a Munsif upon (for instance) the validity of a will, or of an adoption in a suit for a small portion of the property affected by it, should be conclusive in a suit before the District Judge or in the High Court, for property of a large amount the title to which might depend upon the will or the adoption."

31. In the case of *Mst. Gulab Bai v. Manphool Bai*, AIR 1962 SC 214, a question arose as to the meaning of the word 'suit' occurring in the clause "in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised" of Section 11 of Civil P. C. Their Lordships of the Supreme Court discussed the legislative background and the earlier Privy Council decision and it was held that the word 'suit' in the context must be construed literally and it denotes the whole of the suit and not part of it or a material issue pending in it.

32. In *Ramdayal Singh's* case (AIR 1964 Pat 452) the earlier suit was for redemption, subject-matter of which was a small portion of area valued at Rs. 100 only and it was filed in the court of Munsif. The subsequent suit was for title and recovery of the possession of the entire area valued at Rs. 9,000. The learned Judge held placing reliance on the Sup-

reme Court decision in *Gulab Bai v. Manphool Bai* (AIR 1962 SC 214) that Munsiff's Court which decided the former suit had no jurisdiction to decide the subsequent suit.

33. The question that arises in the present case was not involved in any of the cases relied upon by the learned counsel for the appellants. He could not lay his hands on any decision taking a view different to the one expressed in *Gopirath Chobey's case* (1884-ILR 10 Cal 697). The same view has been taken by Mahajan J. in *Jeevantha's case* (AIR 1954 SC 9).

34. I am, therefore, of the view that the judicial interpretation of the expression 'competent to try such subsequent suit' in Section 11, is the competency of the former court to try the subsequent suit, at the time, when the first suit was brought. Subject-matter of the suit in both cases is the haveli left by *Nar Bux*. The fact that a Court in which the previous suit has been decided is incompetent to entertain the present suit merely because the value of the property has since increased would not bar the application of the doctrine of *res judicata*. In this view of the matter I hold that the defendants-appellants have no case to urge that they are prevented to say that the decision in the earlier suit was not barred by *res judicata*, it therefore, follows that they are not prejudiced within the meaning of Section 11 of the Suits Valuation Act.

34-A. Another contention that has been raised on behalf of the appellant is that the present suit is barred under O. 2, R. 2, Civil P. C. This controversy is the subject-matter of issue No. 3. The Courts below did not accept the plea. The basis of the argument is that in the earlier suit the plaintiff only prayed for a declaration that the property under attachment namely the suit haveli was liable to be attached and sold in the decree against him. According to learned counsel the plaintiff could have claimed recovery of possession in that suit, and since he had not done, Order 2, Rule 2, Civil P. C. comes in his way and it bars the present suit. Order 2, Rule 2 reads as follows:

"R. 2 (1) Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any court.

(2) Where a plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished.

(3) A person entitled to more than one relief in respect of the same cause of

action may sue for all or any of such reliefs, but if he omits, except with the leave of the Court, to sue for all such reliefs he shall not afterwards sue for any reliefs so omitted.

Explanation—For the purposes of this rule an obligation and a collateral security for its performance and successive claims arising under the same obligation shall be deemed respectively to constitute but one cause of action."

35. The real controversy centres round as to what was the 'cause of action' for the earlier suit. It is not disputed that the defendant Nand Kishore's claim under Order 21, Rule 58, Civil P. C. was allowed and the plaintiffs' suit was under Order 21, Rule 63, Civil P. C. It is no doubt true that the plaintiff was out of possession of the suit property but the question is whether he was bound to claim relief for recovery of possession. Order 21, Rule 63, Civil P. C. lays down that where a claim or an objection is preferred the party against whom the order is made may institute a suit to establish the right which he claims to the property in dispute, but, subject to the result of such suit, if any, the order shall be conclusive. Since the claim of the defendant Nand Kishore was allowed, the plaintiff Prabhu Narain, for the removal of that order, was bound to institute a suit to establish the right he claimed to the property in dispute. The period of limitation for this purpose is one year. It is thus manifest that the cause of action for a suit under Order 21, Rule 63, is the order passed under Order 21, Rule 58, Civil P. C. In *Sawai Singhal Nirmal Chand v. Union of India*, AIR 1966 SC 1068 their Lordships of the Supreme Court observed in para 9 as follows:

"In this connection, we ought to bear in mind that the scope of the enquiry under Order 21, Rule 58 is very limited and is confined to question of possession as therein indicated while suit brought under Order 21, Rule 63 would be concerned not only with the question of possession, but also with the question of title. Thus the scope of the suit is very different from and wider than that of the investigation under Order 21, Rule 58. In fact, it is the order made in the said investigation that is the cause of action of the suit under Order 21, Rule 63."

36. It is no doubt true that a suit contemplated by Order 21, Rule 63, Civil P. C. is of a comprehensive nature and the words "to establish the right" are wide enough to cover not only a mere declaratory suit but also one for consequential relief such as the recovery of the value of the property if it had already been sold, the recovery of possession or the enforcement of a mortgage. But the plaintiff is not bound to ask for a conse-

quential relief. He may ask for a mere declaration of the suit and it cannot be dismissed as offending the proviso to Section 34 of the Specific Relief Act, 1963. If the defeated claimant asks for a bare declaration and succeeds, a subsequent suit for possession is not barred under Order 2, Rule 2, Civil P. C. The reason is obvious that the cause of action of recovery of possession is different than the one for filing the suit for declaration under Order 21, Rule 63, Civil P. C. In this view of the matter the contention raised on behalf of the appellants is devoid of merit.

37. Next it was argued that Nand Kishore came into possession of the suit haveli in the lifetime of Har Bux and he continued to be in possession after his death on 23-9-1949. According to his case he was adopted son of Har Bux. He also obtained a decree against him on 1-3-48 and after the said decree an adoption deed was also executed by Har Bux in his favour on 15-3-1948. According to him certain constructions were made ranging from May, 1951 to February, 1952 and in these improvements he incurred an expenditure of Rs. 7435/3/-. On these facts it was urged that he held the property in good faith and was entitled to the value of the improvements under Section 51 of the Transfer of Property Act. In the alternative it was argued that if the provisions of Section 51 of Transfer of Property Act are not applicable, he was entitled to the value of the improvements on the principle of justice, equity and good conscience. Reliance was placed on *Karan Singh v. Budh Sen*, AIR 1938 All 342 and a decision of this Court in *Mst. Kesar v. Ramchander*, ILR (1957) 7 Raj 473. On the other hand, Mr. Bhandari learned counsel for the plaintiff-respondent submitted that no case of good faith has been made out in the pleadings, and Section 51, Transfer of Property Act has no application on the facts of the case. In addition to this, it was urged that Nand Kishore did not even plead that he spent Rupees 7435/3/- in making the alleged improvements in the suit property. As a matter of fact, he did not even claim that amount. It is no doubt true that Nand Kishore did not plead that he held the suit property in good faith and he made the improvements believing himself to be the absolute owner of the property. As regards improvements reference may be made to para 13 of his written statement. He did not specifically mention that he spent Rs. 7435/3/- in making the said improvements. From the case as set forth in his pleadings it was stated that in the year 1951, the market value of the property was Rs. 4951/15/- but according to the estimate in the year 1959 the value of the property was Rs. 12,387/2/-. I am not expressing my view with regard to the two

estimates Ex. A/2 of 1951 and Ex. A/5 of 1959 but here I am only concerned to observe that he did not state that he incurred such and such expenditure for making the said constructions. What he said was that in view of the two estimates of 1951 and 1959 there is a charge of Rupees 7435/3/- on the property and without payment of the said amount the suit is not maintainable. Mr. Bhandari is, therefore, right in his submission that the defendant Nand Kishore only worked out the figure of Rs. 7435/3/- on the difference of the two estimates, and he did not allege what he actually spent in undertaking the alleged improvements. That apart, it has come in evidence that the suit property was attached by one Govind Narain in a debt due to him from deceased Har Bux with regard to which he obtained a decree against Prabhu Narain as legal representative of Har Bux. This attachment took place on 20-1-1950. Against this attachment claim was preferred by Nand Kishore, himself disputing the adoption of Prabhu Narain and claiming his own adoption to Har Bux. It was opposed by Prabhu Narain. Though the claim was allowed on 15-7-50 (order on record), yet Nand Kishore became aware that Prabhu Narain is one to contest the right to stay in the suit property. The suit for declaration under Order 21, Rule 63, Civil P. C. was instituted on 14-7-51 where each party claimed himself to be the adopted son of Har Bux. Though the suit was subsequently returned to be presented in the Court of Civil Judge but Nand Kishore came to know well of the allegations of Prabhu Narain. In these circumstances it cannot be said that Nand Kishore had reason to believe that he was the undisputed owner of the property. The case of good faith or being the bona fide owner of the property has no legs to stand.

38. Section 51 of the Transfer of Property Act reads as follows:—

"S. 51 When the transferee of immoveable property makes any improvement on the property, believing in good faith that he is absolutely entitled thereto, and he is subsequently evicted therefrom by any person having a better title, the transferee has a right to require the person causing the eviction either to have the value of the improvement estimated and paid or secured to the transferee, or to sell his interest in the property to the transferee at the then market value thereof, irrespective of the value of such improvement.

The amount to be paid or secured in respect of such improvement shall be the estimated value thereof at the time of the eviction.

When, under the circumstances aforesaid, the transferee has planted or sown

on the property crops which are growing when he is evicted therefrom, he is entitled to such crops and to free ingress and egress to gather and carry them."

39. This provision applies in terms to a transferee who makes improvements in good faith believing himself to be an absolute owner of the property. Nand Kishore is not a transferee and I found above that he had no reason to believe that he was the absolute owner of the property. Constructions cannot, therefore, be said to have been done in good faith. He is not entitled to any value of the improvements either under Section 51 of the Transfer of Property Act and on principle of justice, equity and good conscience. This principle can only be invoked if Nand Kishore had acted in good faith. The case of good faith was neither pleaded nor proved rather it stands demolished. The decision relied upon on behalf of the appellants have no applicability to the circumstances of the case.

40. Again it was argued that under issue No. 4 the court should have allowed at least Rs. 7121/- to the defendant Nand Kishore before passing a decree for possession. Ex. A/3 a sanction by the Municipal Council, Jaipur and Ex. A/4 the approved plan were referred to in this connection. Evidence produced in the case by the parties bearing on this point was also read out before me. Nanag Ram D.V. 7 is said to have undertaken the constructions under the agreement Ex. A/7. Receipts of various payments Ex. A/8, Ex. A/9, Ex. A/10 and Ex. A/11 were also relied upon. It was argued that the finding of the learned lower appellate Court is perverse on this point. I have noticed above that the defendant Nand Kishore did not actually plead as to what expenditure he incurred in making the alleged improvements. He has claimed the difference of the two estimates which are said to have been prepared by his witness Shanker Lal D.W. 2. The submission of Mr. Bhandari cannot be said to be without substance when he pointed out that the actual cost must have been incurred in the year 1951-52, when the improvements were actually undertaken. The figure has been worked out by subtracting the estimated value of 1951 out of the appreciated value of the property in 1959. Nanag Ram admitted to have been working on daily wages with the firm Radha Vallabh Sitaram, who were working as contractors in 1951. Radha Vallabh father of Nand Kishore was a partner of that firm. It is not understandable why the firm of Radha Vallabh Sita Ram, which was working as contractors could not undertake the improvements itself and entrusted the work to Nanag Ram, its own employee, a boy of 20 years of age at that

time. The learned court below has considered the entire evidence and found that the plaintiff Nand Kishore has not been able to prove that he spent Rupees 7435/3/- in making the alleged improvements. It came to the conclusion that the documents Ex. A/7, Ex. A/8, Ex. A/9, Ex. A/10 and Ex. A/11 were subsequently prepared. This is a finding of fact and supported by the evidence on record and facts and circumstances of the case. In view of the law laid down by their Lordships of the Supreme Court in *V. Ramchandra Ayyar v. Ramalingam Chettiar*, AIR 1963 SC 302 I find myself unable to interfere in this finding.

41. Yet another contention is with regard to mesne profits that have been allowed to the plaintiff-respondent. It has come on record that Radhey Shyam defendant No. 3, Satya Narayan defendant No. 4, Madan Lal defendant No. 5 and Allanoor defendant No. 6 were tenants in some part of the suit property. Their rent notes have been placed on record and they also admitted in their written statements that they were tenants and they were paying rent to defendants Nos. 1 and 2. According to the admitted rent notes the defendant Nand Kishore has been recovering Rs. 19 per month from them. It is also admitted that some part of the suit property has been in personal use and occupation of Nand Kishore and his father Radha Vallabh. The rental value of that portion has been estimated at Rs. 19 per month. Thus the mesne profits have been allowed at the rate of Rs. 38 per month. The plaintiff claimed mesne profits for six years. The court rightly held that he could only claim mesne profits for three years preceding the institution of the suit.

42. On behalf of the appellants it was argued that the suit property included the improvements made by defendant Nand Kishore as such mesne profits relating to that part of the property should not have been allowed. This argument does not stand much scrutiny. The defendant Nand Kishore has not been able to prove as to what improvements have been made by him and what has been actually spent by him in that regard. In the earlier suit Prabhu Narain was held to be the adopted son of Har Bux. This finding remained upheld uptill the High Court. The possession of Nand Kishore was, therefore, wrongful. Being in wrongful possession he cannot be held to be in possession in good faith. He has been found not entitled to any compensation for the alleged improvements. As a trespasser he was not entitled to make any construction on the property left by Har Bux. He could at the most pray for the removal of the material but he did not do so. That apart, it is

not possible to allow him to remove the material that he might have used in making the improvements as the improvements are not specific and cannot be severed with from the suit property. In this view of the matter the appellant's submission that the plaintiff was not entitled to mesne profits; cannot be accepted.

43. No other point was argued.

44. In the result the appeal fails and it is hereby dismissed with costs.

45. On behalf of the appellants Mr. Datt prays for leave to appeal to Division Bench but it is refused.

Appeal dismissed.

AIR 1976 RAJASTHAN 32

S. N. MODI, J.

Ramsharan and another, Appellants
v. Ramavtar and others, Respondents.

Second Appeal No. 236 of 1967, D/- 8-8-1975.*

(A) Rajasthan Premises (Control of Rent and Eviction) Act (17 of 1950), S. 15 — Eviction suit — Suit based on bona fide and reasonable requirement of plaintiff landlord and his family members — Right of legal representatives of landlord to continue suit.

The plaintiff landlord claimed eviction of the defendants tenants from the suit premises on the ground that he required the premises for the residence of one of his two married sons in the interest of the peace of his family. On the death of the plaintiff landlord, his legal representatives claimed the right to continue the suit.

Held, the legal representatives of the plaintiff landlord had the right to continue the suit for eviction. The requirement for the residence as pleaded could not be said to be the personal requirement of the plaintiff landlord. It was the requirement of the family and as such the cause of action did not perish with the death of the plaintiff landlord. (Para 4)

Cases Referred : Chronological Paras
AIR 1975 SC 1409 = 1975 UJ (SC) 327 5
AIR 1973 SC 2110 = (1973) 3 SCR 679 3, 4

S. K. Keshote, for Appellants; R. P. Goyal, for Respondents.

JUDGMENT :— The only point involved in this second appeal by the defendant-tenants is whether the legal repre-

* (Against judgment and decree of Dist. J., Alwar, in Civil Appeal No. 767 of 1966, D/- 31-3-1967.)

sentatives of the landlord (since deceased) have no right to continue the suit for eviction based on bona fide and reasonable requirement of the premises for the residence of the plaintiff himself and for the residence of the members of his family?

2. To appreciate the point involved, it is necessary to state the relevant facts. Munshiram (now deceased) filed a suit for eviction against the defendant-appellants on two-fold grounds. Firstly, that the plaintiff required the premises reasonably and bona fide for the use and occupation of himself and the members of his family and secondly, that the defendants had committed default in payment of rent. The appellants resisted the suit and denied that the plaintiff required the premises reasonably and bona fide for his own use or for the use of his family members. The defendants further pleaded that they had tendered the rent by money order to the plaintiff and as such they committed no default in payment of rent. They also took the plea that the notice to quit sent by the plaintiff was not valid. On the pleadings of the parties, the trial court framed the following issues:—

१) आया जायदाद मृतनाजा की वादी को नेक व जायज जरूरत है ?

२) आया मुदायला ने किराया टेन्डर किया और मनीओर्डर दुबारा भेजा इसलिये किराया अदायगी में कोई डिफाल्ट नहीं किया ?

३) आया नोटिस इनखलाय नाजायज है ?

४) दादरसी क्या होगी ?

The trial court after evidence decided all the issues in favour of the defendants and dismissed the suit. The plaintiff Munshiram then preferred an appeal before the District Judge, Alwar. During the pendency of the appeal, Munshiram died and his legal representatives were impleaded in his place as the appellants. The learned District Judge on consideration of the evidence led by the parties, held that the finding of the trial court on issue No. 1 was wholly erroneous. According to the learned District Judge, it stood established from the evidence of P.W. 1 Munshiram, P.W. 2 Ramavtar, P.W. 3 Behari Lal, P.W. 4 Jwalasahai and P.W. 5 Brijlal that the accommodation with the plaintiff was not sufficient for the members of his family which expanded as a result of the marriages of his two sons and birth of grand children. The learned District Judge further held that from the evidence produced by the plaintiff it was also proved that there were frequent quarrels between the plaintiff's two sons and their wives and there was no peace

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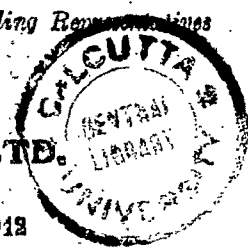
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At page 134, Col. 1.

(i) For the words 'Judgment of the Court was delivered by' read 'Judgments of the Court

were delivered by".

(ii) For 'Chandrachud J.' read "Chandrachud, J. (On behalf of himself and Bhagwati, J.)"

AIR 1976 AJ 42 (Jan.)

Short Note Point A.—For 'Provincial Small Cause Courts Act (1887), Section 9' Read 'Provincial Small Cause Courts Act (1887), S. 15'

and Add at the end of Short Note (U. P. Civil Laws (Amendment) Act (37 of 1952) S. 15.)

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12. It will be an implied assurance underlying every contribution that the contributor has not infringed the copyright of any other person and that he will be liable for breach of such assurance.
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14. The matter sent for publication should always be type-written, on one side of the paper only with a wide margin on the left side, and at least two spaces between lines, and should be free from mistakes of typing, grammar, etc.

Chief Editor.

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Journal Section



RIGHT HON'BLE LORD DENNING, P. C., MASTER OF THE ROLLS, U. K., VISITS INDIA TO DELIVER V. V. CHITALEY MEMORIAL LAW LECTURES



RIGHT HON'BLE LORD DENNING.

Rt. Hon'ble Lord Alfred Thomson Denning, P. C., Master of the Rolls, U. K., arrived in India with Lady Denning on 31-12-1975 at the invitation of the Trustees of the V. V. CHITALEY MEMORIAL LAW LECTURESHIP ENDOWMENT COMMITTEE.

2. Under this Lecture Series, His Lordship delivered three lectures — one at Bombay on 1-1-1976, the second at Nagpur on 3-1-1976 and the third at Delhi on 5-1-1976. The subjects of the respective lectures were: (i) CHANGING THE LAW, (ii) THE NEW EQUITY, and (iii) LET JUSTICE BE DONE.

3. Mr. Justice R. M. Kantawala, Chief Justice of High Court of Bombay, presided at the first lecture on "Changing the Law" delivered at Bombay. The Hon'ble Mr. Justice Y. V. Chandrachud, Judge, Supreme Court of India was in the Chair at the second lecture at Nagpur on "The New Equity". At the third lecture on "Let Justice be Done" at Delhi, Mr. M. Hidayatullah, Ex-Chief Justice of India, occupied the Chair.

4. Born on 23rd January, 1893, at Whitchurch, Hampshire, England, Lord Denning had a brilliant academic career both at school and college, followed by a chequered career as a Jurist and Judge. Having qualified for his Master's Degree from Oxford in 1922, he was called to the Bar in 1923. He was appointed King's Counsel in 1938 and Judge of the High Court of Justice in 1944 in which year he had the honour of being knighted too.

In 1948, he was made Privy Councillor. He was Lord Justice of Appeal from 1948 to 1957 and Lord of Appeal in Ordinary from 1957 to 1962. In 1962, he was made Master of the Rolls. His Lordship had also had the honour of holding such important offices as Chancellor of Diocese of London and of Southwark, Recorder of Plymouth, Benchers of Lincoln's Inn, etc.

5. Lord Denning had the honour to head a number of Committees and Commissions. He was Chairman of the Committee of Legal Education for Students from Africa; British Institute of International and Comparative Law; Advisory Committee on appointment of Justices of Peace for Inner London. He was President, Birkbeck College; Treasurer of Lincoln's Inn and Hon. Benchers of Middle Temple.

6. Lord Denning's name is well known to the whole world as one of the foremost pathfinders in the field of Law and Justice.

7. His Lordship had the rare distinction of being honoured by a number of distinguished Universities. The Universities of Ottawa, Glasgow, Southampton, London, Cambridge, Leeds, McGill, Dallas, Dalhousie and Oxford vied with one another in conferring LL. Ds. (Honoris Causa) on him.

8. As an editor and author, Lord Denning has to his credit Smith's Leading Cases (1929); Bullen & Leake's Precedents (1935); Freedom under the Law (Hamlyn Lectures) (1949); The Changing Law (1935) and The Road to Justice (1955).

9. During their stay at Nagpur, Lord and Lady Denning found time to visit the A. I. R. premises at Congress Nagar, along with Mr. M. Hidayatullah, Ex-Chief Justice of India, Messrs. D. W. Chitaley, General Manager, and W. W. Chitaley, Sales and Circulation Manager, took the Hon'ble guests round. His Lordship and Lady Denning evinced keen interest in the working of all the departments they visited, including Rotary Printing Press, Sales Department, Commentary Section and Proof Reading Department.

10. All the three lectures, delivered by Rt. Hon. Lord Denning under the V. V. Chitaley Memorial Law Lecture Series, were largely attended by distinguished gathering from all walks of life, including High Court Judges, high Government Officers, eminent scholars and prominent lawyers.

AN OUTSTANDING EXAMPLE OF LORD DENNING, Master of the Rolls, "CHANGING THE LAW"

(By: R. B. ANDHYARUJINA, B.A., LL.E., Advocate, Supreme Court.)

In England, every court, including the Court of Appeal, is bound to follow the decision of the House of Lords.

2. In *Broome v. Cassell and Co.*, reported in (1971) 2 All ER 187, a case arising out of a libel committed by an author of a book and its publishers, against a distinguished naval officer, a question arose whether the plaintiff should be awarded exemplary damages. The trial court awarded the plaintiff £ 15,000/- compensatory and £ 25,000/- exemplary damages, against both defendants.

3. The defendants appealed and the Court of Appeal was presided over by Lord Denning, M. R. The House of Lords had only recently laid down the law on the subject in *Rookes v. Barnard*, reported in (1954) AC 1129, and the instant case of *Broome v. Cassell and Co.*, did not fall within the two categories of the defendant's conduct, enumerated by the House of Lords, entitling the plaintiff to recover exemplary damages from the defendants, and, therefore, if the Court of Appeal were to follow the House of Lords, as it was bound to do, it should have dismissed the Plaintiff's claim for exemplary damages. The case was one of the grossest possible libel that could be wilfully committed by an author and his publishers. And Lord Denning observed that the new doctrine laid down by the House of Lords was "hopelessly illogical and inconsistent", and pointed out how that was so in his inimitable style with the greatest economy of words.

4. According to the first category of conduct laid down by the House of Lords, exemplary damages can be awarded in the case of—

"Oppressive, arbitrary or unconstitutional action by the servants of the government."

5. Lord Denning asked, "Why limit it to 'servants of the government'?" and then proceeded to show how inconsistent and illogical this doctrine was. He said:

"Other people can be just as oppressive as the servants of the government. I recall the case of *Loudon v. Ryder*, (1953) 2 Q. B. 202, which was tried by Devlin, J. himself. (The emphasis on the word "himself" has reference to the speech of Lord Devlin, holding to the contrary in the House of Lords Case in *Rookes v. Barnard*, (1954 AC 1129))* The defendant was a bully who made an outrageous attack on a young woman. He broke into her flat and beat

her about the head. The Judge directed the Jury that they could give exemplary damages. They did so. We upheld the verdict. According to *Rookes v. Barnard* we were wrong because the defendant was not a servant of the government. I do not think we were wrong.** It is open to the jury to award exemplary damages against a bully, no matter whether he is a servant of the government or not."

6. Then, Lord Denning deals with the second category of conduct laid down by the House of Lords. According to it, exemplary damages can be awarded when "the defendant's conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the plaintiff." In dealing with this category, Lord Denning asks:

"Why this emphasis on cold cynical calculation for profit?"

7. Then, Lord Denning observes:

"It makes me ask this question: Which of these two men is worse: the man who says to himself: I reckon I will sell enough copies to this publication to pay any damages for libel; or the man who says: 'I will smash this professional man whatever it costs me? If exemplary damages for libel can be awarded against the greedy seeker after profit, surely they should be able to be awarded against the wicked inventor of calumnies.'"

8. The above critical examination of the two categories of conduct, laid down by the House of Lords, led Lord Denning to the conclusion that, "if ever there was a decision of the House of Lords given per incuriam, this was it."

9. Then, Lord Denning uttered these memorable words:—

"Some say that it is our duty to follow the House of Lords and not to question their decision. We are not to reason why. Ours is but to do and die."

10. Lord Denning, however, is made of a sterner stuff. He reasons very much, asks 'Why' not once, but twice, as we have seen above, and does due obeisance to the doctrine laid down by the House of Lords, as we shall see hereafter, but as the result of this all, he does not "die" but survives very much, hale and hearty. He starts on the footing that he was bound by *Rookes v. Barnard*, (1954

**Parenthetically, I may state that a petition for leave to appeal to the House of Lords in *Loudon v. Ryder*, (1953) 2 QB 202) was made but dismissed: Author.

AC 1129). On that footing he interpreted the second category of the defendant's conduct, laid down by the House of Lords, broadly and not narrowly, and upheld the decision of the trial court on the question of exemplary damages.

11. It is interesting for Judges and Lawyers to know how Lord Denning performed that miracle. As stated above, the second category, as laid down by Lord Delvin in the House of Lords was one

"in which the defendant's conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the Plaintiff."

12. In the instant case, however, there was admittedly no evidence that the defendants "calculated" the profit and loss resulting from the publication of the offensive matter. Notwithstanding this fact, Lord Denning interpreted the second category, as laid down by the House of Lords, in his own way, as follows:—

"I would agree that if Lord Delvin's words are interpreted in a narrow way, there was no such evidence. But, I would not put a narrow interpretation on them. I think the second category should be construed broadly so as to include all cases where the defendant knows that his words may be libellous, and yet takes the chance, because of the profit he hopes to make from the book as a whole."

13. Not only did Lord Denning by such interpretation prevent the law of libel becoming "illogical and inconsistent" and consequently grossly unjust, but what is more, he went one step further and boldly directed all subordinate courts including the High Court, not to follow *Rookes v. Barnard*, (1954 AC 1129) but to decide cases "in accordance with the law as it was understood before *Rookes v. Barnard*", as the said House of Lords decision was arrived at per incuriam.

14. It was not for nothing that Lord Denning, Master of the Rolls, selected "Changing the Law" as the subject of his lecture in the Inaugural Series of Lectures organised by V. V. Chitale Memorial Law Lectureship Endowment Committee, at the Convocation Hall, Bombay University, on the New Year Day, 1976; and it was not at all a flourish of rhetoric, on the part of Nanji Palkhivala to say, at the conclusion of the proceedings on that day, that on the outer door of Lord Denning's Court should be engraved the words:—

"If there is any court which approximates to justice, it is this"

15. And I may be permitted to add that the posterity will echo the last words:

"it is this, it is this, it is this;....."

ENGLISH LAND LAW. By Michael Harwood, B.A., LL.B., Solicitor, Lecturer in Property Law at University of Wales Institute of Science and Technology, 1975. Sweet and Maxwell (Tripathi). Pp. xxxvii and 510. Price Rs. 95.

This book is intended as a basic text for university and other students embarking on the study of land law. It sets out and explains as clearly as possible the fundamental principles and machinery of modern land law. It gives some indication of the historical, economic and social factors which have contributed to mould English land law and to show it not just as a set of abstract rules but as a tool designed for certain purposes and people and to further their interests. It treats it not as an isolated topic but as part of the general law by, for instance, referring to the planning and public health legislation, and indicates the process by which the judicial mind interprets and develops the law. While the emphasis is on basic principles, the author has also tried to illustrate the sort of detailed point which gives rise to disputes and litigation. The public control of land use has been shown as an integral part of land law, but statutory control of landlord-tenant relationship and revenue law have been dealt with only briefly, as also modern developments such as contractual licences and proprietary estoppel.

2. The book is divided into five Parts. Part one deals with the nature of classification of interests in land, and the next Part with beneficial ownership of freeholds and leaseholds. Parts 3 and 4 cover trust ownership, i.e., strict settlements, trusts for sale, and concurrent interests in land, and third party rights over land such as easements and restrictive covenants. The transfer of land, or conveyancing, is dealt with in the final Part. The book, which carries tables of cases and statutes and an index, states the law as at 30th November 1974.

3. Many of the principles and details of modern land law are contained in the property legislation of 1925, which includes the Settled Land Act, the Trustee Act, the Law of Property Act, the Land Registration Act, the Land Charges Act and the Administration of Estates Act. It was the culmination of the 19th century statutory reforms and made many fundamental changes in the land law. Although many of the rules and principles contained in the 1925 legislation are derived from earlier statutes, this book generally ignores the earlier legislation.

4. The book takes a completely fresh look at the difficult subject of land law, and law

degree and other students should welcome this new approach. R.S.S.

LAW RELATING TO ACCIDENTS (Along with Table of Compensation for death and injury cases). By H. P. Srivastava, B. A., LL. B. Vols. I & II. The National Law House, Sikh Mohalla, Indore, 1975. Vol. I Pp. 16 and 298, Price, Rs. 35. Vol. II, Pp. (6) 14, and 427. Price, Rs. 45.

Accidents are of two types, one owing to natural causes and the other owing to neglect and acts of commission and omission. They cause damage to property, or injury to person; they may happen on land, on the seas, or in the air. An important aspect of the subject is the liability for the acts of others, e.g., of the master for the acts of his servants, agents, independent contractors, hirers and licencees. There is the liability of owners for damage caused by their animals or by their tottering houses and decayed trees.

2. We have here an exhaustive treatment of this important and difficult subject, with its own distinctive principles in substantive and procedural law. The two volumes under notice are a mine of information, drawn from every source which is not easily available. The provisions of various Acts have been clearly analysed and explained in simple language, up to date Indian and foreign case law being pressed into service.

3. Volume I deals mainly with fatal accidents, motor accidents, insurance claims under Motor Vehicles Act and insurance claims under motor accidents. The II Volume deals mainly with negligence, medical and hospital negligence, railway accidents and compensation, and State motor accident Claims Tribunal Rules. The relevant portions of the Fatal Accidents Act, the Railways Act, and the Motor Vehicles Act have been given with synopsis, commentary and notes, and there are detailed synopses for each of the Parts in the two volumes. Each volume has a separate table of cases and index.

4. The principles drawn from Indian as well as foreign law and precedents should be a reliable guide to the reader. Written in a simple style, the book should enable a lay man to grasp the principles intelligently.

R.S.S.

LAW RELATING TO PREVENTION OF FOOD ADULTERATION IN INDIA. By H. P. Srivastava, B.A., LL.B. Third (Revised and Enlarged)

Edition. 1975. Containing Act with Central and State Rules, with Exhaustive Commentary and up to date case law. The National Law House, 8 G.G.S. Market, Indore. Pp. xii, 589, and 12. Price, Rs. 65.

The object of this book is to enable the reader to understand and grasp the principle of the Prevention of Food Adulteration Act 1954, as amended upto 1964, so as to assist him in tackling the problems relating to it. The scope and meaning of the different sections are explained in detail with illustrations and references to other laws where needed.

2. The Prevention of Food Adulteration Act 1954 came into force with effect from 1st June 1955 and by virtue of section 23 of the Act, the Central Government framed the Prevention of Food Adulteration Rules, 1955 under the different heads. The 1964 amendment of the Act provides for rigorous punishment to the offender, and for greater powers for the Food Inspector for searches, seizure, etc. There are provisions against the arbitrary and vexatious acts of the Food Inspector, and, it is well known that an offender has more than ample protection under the law to defend himself.

3. The Prevention of Food Adulteration Act has in ten out of its twenty-five sections covered the Central Committee for Food Standards and Central Food Laboratory, general provisions as to food and analysis of food, while the other sections deal with preliminary and miscellaneous matters. The Central Rules deal with the Central Food Laboratory, definition and standard of quality, public analyst and food inspector, sealing, fastening and despatch of samples, colouring matter, and packing and labelling of food. They are concerned with the prohibition and regulation of sales, conditions for sale and licence, preservatives and poisonous metals, anti-oxidants and emulsifying and standardising agents. They cover flavouring agents, insecticides and pesticides, solvent-extracted oils and special dietary uses. Forms and definition and standard of quality are indicated in the Appendices. There are also the Rules framed by about fifteen States, which occupy nearly a half of the book.

4. The present edition, with its table of cases and index, has been thoroughly revised and practically re-written, the case law being brought upto date. The book should be useful to tradesmen, members of the legal profession, food inspectors and other health authorities.

R.S.S.

THE VICTIMS. By Frank G. Carrington, Arlington House Publishers, New Rochelle, N. Y. U. S. A. Pp. 326. Price, \$9.95.

That the rights of the victims of crime in America have been disregarded and subordinated to the rights of the lawless and the violent is the thesis of this book. It makes it abundantly clear that the victim's rights can be recognised and protected without transgressing the concept of fundamental fairness to the accused and of fundamental humanity to the convicted criminal. What is called for is balance between the rights of the law-abiding and the rights of the criminal accused. The book makes its point by presenting actual examples of cases and situations drawn from every part of America in order to emphasise the incredibly horrible plight of the victims of crime.

2. This extensively researched indictment of the way in which the American criminal justice system works has been justified by several key decisions of the Supreme Court dealing with the admissibility of evidence. These decisions are said to have created numerous legal requirements and technicalities which have led to endless delay and have permitted the release of patently guilty offenders. Artificial, rigid, and impractical requirements, says the author, have been placed on the police and the courts.

3. A climate of permissiveness and leniency, opines the author, seems to have become the order of the day. He documents their pervasiveness in every area—low bail for confirmed offenders, and a corresponding increase in serious crimes by those out on bail, excessive pleading for those charged with serious crimes, and the grant of time consuming pretrial and trial delays, seemingly endless appeals and lenient, short and concurrent sentences for repeater offenders. Overcrowded Courts, with their large backlog of cases, are an important part of the problem. Various pre-trial procedures prescribed by the Supreme Court have been contributing factors. The author offers several proposals to speed up justice which are deserving of consideration.

4. The author's ideas are fresh and original. He wants to force criminals to make restitution to their victims. He has a plan for making judges and parole boards pay for their softness. He shows us different ways of dealing with Court delay. He proposes a victims' Rights Commission and, finally, points, to a host of techniques now followed in England. "There is so little deterrent now in our criminal justice system", warns the

author, "that the only truly surprising thing is that more people have not turned to crime." Indeed, the system is so perverted that criminals are suing their victims.

R. S. S.

READINGS IN UNIFORM CIVIL CODE. Edited by Narmadakhodje, LL.M. (Bom.), M. Phil. (London), Department of Law, University of Bombay. Thacker & Co. Ltd., Bombay, 1975. Pp. 221, Price, Rs. 50.

The adoption of a uniform system of family law would appear to be necessary for achieving full national integrity. This book contains articles on various aspects of the problem, which is analysed clearly and for solving which ways and means are suggested. Divided into three distinct groups, the articles deal with the fundamental issue, the scope and scheme of the code, and the true interpretation of Islamic law. R. S. S.

EIGHT YEARS' GUJARAT LAW REPORTER DIGEST, 1966-1973. Vol. II (D-Z) A Digest of cases reported in Gujarat Law Reporter, Gujarat Law Times, and allied journals. By Babubhai A. Soni, B.A. (Hons.), LL.B., Editor, Gujarat Law Reporter, and Jagdish B. Soni, B. Com., LL.B., Advocate. Published by Gujarat Law Reporter Office, Ahmedabad. Price, Rs. 100 per set.

This is a digest of cases, civil, criminal and revenue, which should be of practical assistance to the busy lawyer. In the case of every statute a synopsis is given at the outset treating it section-wise and furnishing appropriate sub-headings where necessary. The noting of points is done analytically. There is a subject index, a table of cases, and a list of cases distinguished, followed, not followed, overruled, dissented from, and reversed. R. S. S.

V. N. SHUKLA: THE CONSTITUTION OF INDIA. Sixth Edition, 1975 (Silver Jubilee Edition) by D. K. Singh, LL.M. (Luck.), Ph. D. (Canberra), Professor of Law, University of Delhi. Eastern Book Company, 34, Lalbagh, Lucknow. Pp LXXXVI & 714. Price Rs. 55/-.

An attempt has been made in the present book to comment upon and explain the Constitution of India, with its 395 Articles and nine

Schedules. Where relevant the Constitutions of other countries have also been studied for a comparative point of view. There is a well-arranged summary of the principles of the law and their application in various situations. The book gives a coherent and integrated picture of the constitutional provisions and lays emphasis on the theoretical aspects of the law, but makes no reference to socio-economic and political theories to advance a particular point of view or to criticise a judicial opinion.

2. In bringing out the present edition, the scheme of the book remains unchanged, but it has been thoroughly revised and brought up-to-date, keeping in view the recent developments and the historical perspective in which the changes have come about; deletions and additions have been made at a number of places, and some portions have been extensively re-written. The *Kesavananda Bharati* case decision of the Supreme Court (1973), about the "basic structure or framework of the Constitution", is discussed at appropriate places, giving an objective survey of the opinions delivered.

3. There has been a growing volume of case law, especially in the area of Fundamental Rights. The approach to fundamental rights as enunciated in *Gopalan* (1950) does not hold good after *Bank Nationalisation* (1969) and *Bennet Coleman* (1972). The alternative theory relating to preventive detention under Article 22(4) & (7) as evolved in the *Gopalan* case has been rejected in *Shambhunath Sarkar* (1973). *Maganlal Chhaganlal* (1974) overruled in *Northern India Caterers* (1967) and brought the Equal Protection Clause in line with the thinking of Justice Das in *Anwar Ali Sarkar* (1952). Such changes required the statement of the Law to be re-written. The statement of Law in the last edition on which some recent judgments have cast doubts have had to be modified or qualified. A number of decisions had not received adequate attention, but now they have been given fuller treatment, as for instance, the *Gujarat University* case (1963) and the *Sea Customs* case (1963).

4. The introduction, revised and re-written, has been retained as it gives in brief the historical retrospect before the present Constitution came into force, and also some of the basic features of the Constitution. The text of the book has been brought up to cover the Constitution (Thirty-sixth Amendment) Act 1975. In Appendix I are included all the latest Amendments. Important Supplementary Legislative Acts have been included in Appendix II while Selected Readings form

Appendix III. A table of cases and Subject Index are useful annexes. R.S.S.

BRETT & MCLEAN'S THE CRIMINAL LAW & PROCEDURE OF THE SIX SOUTHERN STATES OF NIGERIA. Second Edition by C. O. Madarikan, of Lincoln's Inn, Barrister-at-law. President of the Court of Appeal, Western State of Nigeria, formerly Judge of the Supreme Court of Nigeria, & J. Akinola Aguda, LL.M., Ph.D. (Lond.), of Lincoln's Inn, Chief Justice of Botswana, Formerly a Judge of the High Court of Justice, Western State of Nigeria. Sweet and Maxwell (Tripathi), 1974. Pp. XXII & 992 Price. Rs. 390/-.

In the ten years since the publication of the first edition of the volume under review, there have been profound constitutional changes in Nigeria. The Federal Republic Constitution, introduced in October, 1963, contained provisions for three Regions, viz. Northern, Eastern and Western Regions, and the Federal Territory of Lagos. In the following years the Western Region was divided into two, Western and Midwestern. In 1967, the country was split into twelve States, six of which were carved out of the existing Northern Region, while the other six States were carved out of the other three Regions and the Federal Territory of the Lagos. It is the criminal law and procedure, and evidence in force in these latter States that this book deals with in the main.

2. The principal statutes contained in the book are the *Criminal Procedure Act*, the *Evidence Act*, legislation relating to appeals, and the *Criminal Code Act*, to which the *Criminal Code* forms the Schedule. Each of them has effect in each of the six States, though a number of amendments have been enacted by each State which apply to that State only. Each of these parts of the book contains a short introductory note, followed by the text of the statute or statutes and the commentary. The three Acts are printed in full in the form in which they apply to the Lagos State, with a note of State variations and commentary. For the legislation governing appeals, the relevant sections of a number of statutes are printed with their commentary. A number of other statutes bearing on the criminal law have been included, besides the Fundamental Rights contained in Ch. 3 of the Constitution of the Federation. At the outset the book starts with a General Introductory Note which deals with constitutional definitions and the distribution of legislative

functions; the citation of statutes; the text of statutes and text variations, the citation of reports and the interpretation of statutes and judicial precedent. The statute law is stated as at 1st January 1973 and reference is made to all known decisions published before 1st June 1973.

3. The book is designed to be used in conjunction with the 38th edition by *Archbold on Criminal Pleading*, already received in these pages. The present editors have of course drawn attention to the matters in which the law of Nigeria differs from that of England. At the same time they have cited all relevant Nigerian decisions on any point. The present editors have also suggested, on general principles, the correct interpretation of a number of sections which do not appear to have received any interpretation from the courts.

4. The editors have thoroughly revised the text to bring it into line with the current position of the law in Nigeria, and the new *Brett and Mclean* should be a valuable acquisition to any lawyer in Nigeria and useful in other countries where similar statutes are in force.

5. There is a table of cases, a table of Nigerian Statutes, and a table of United Kingdom Legislation, as well as an Index.

R. S. S.

"THE JUNGLE OF CUSTOMS LAW & PROCEDURES." By H. L. Manukhani. Vikas Publishing House Private Ltd., 5, Daryaganj, Ansari Road, Delhi, pp. xx & 722, Price Rs. 65.

The book before us explains systematically the complex characteristics of the Customs Act and many practices and procedures which have acquired the force of the Customs law. A comprehensive enactment containing 161 sections and 27 Chapters, the Customs Act is a wide piece of preventive, punitive, and enforcement legislation, with executive, police, and quasi-judicial powers. The Act has provisions for adjudicating on all matters and imposing fines and penalties. Parallel but independent prosecutions can also be launched by the Customs authorities. Although they have to follow the general principles of jurisprudence, no specific rules of procedure such as those derived from the Codes of Civil and Criminal Procedure or specific provisions of the Indian Evidence Act would seem to bind them down.

2. The present book is divided into five parts. Part one deals with the customs law administration. It projects in a limited measure some of the problems and processes, and

pin-points a small field for the simplification and codification of the entire Customs Law. Part two gives a bird's-eye view of the main legislative provisions of the Customs Act, which are of vital concern to traders in their day-to-day dealings with the Customs department. This part also deals with mixed topics of law as derived from Court cases with a view to initiating the reader into the legal intricacies of the Customs Law. Part three covers certain select facts such as the powers of prohibitions and interrogations, and the special privilege of using incriminating statements and the reversed basis of the burden of proof. It provides extensive answer material to serve as a useful guide to all concerned.

3. Part four supplies abundant case law. Each case has been treated from the point of view of spotlighting, another angle, so that taken together, the cases present a pattern of a wide spectrum. Each case has been provided with a key heading, the quintessence of the subject-matter, case in outline, main ruling, and the condensed version of the judgment in the Court's own language. The last part includes important decisions summarised in terms of different subjects, several definitions, with short descriptions, an assortment of celebrated cases, and a few pertinent dicta.

4. The book is designed to serve the purpose of a comprehensive text book for degree level students and will prove very useful to customs officials as a dependable guide and reference book. It should be of immense help to litigants and lawyers as well.

5. The book carries a case index and a subject index.

R. S. S.

DAYA VIBHAGA : or the Individualisation of Communal Property and the Communalisation of Individual Property in the Mitakshara Law. By I. S. Pawate, M.A., LL.B. Karnatak University, Dharwar. Second Edition, Revised and Enlarged. 1975. Pp. XIV & 458. Price Rs. 20.

This edition contains all the Chapters of the first edition, but each of them incorporates much new matter also, and seven new chapters have been added. But the fundamental thesis of the book remains unchanged. In 1960 the Adyar Library published the *Vishnumriti*, with the Commentary *Vaijayanti* of Nanda pandita, and important statements made in the first edition on the basis of inference seem to have found support in the words of Nanda pandita.

2. The book analyses and explains the fundamental Mitakshara concepts of *Sapindaship*, of *daya* of *Svayam-arijana*, of *Pratibandha* and of *Vibhaga*. It explains the rule of prohibited degrees in marriage, and shows that the son, the grandson, and the great-grandson get their property by their birth and no heir gets it by the ancestor's death; the ancestor and heir are co-owners, even during the life of the ancestor, of each other's property. The heir obtains his property in all cases by survivorship.

3. According to the Mitakshara law, all male-acquired property goes to male heirs, and female-acquired property to female heirs, the burden of maintaining the family being put on the males. Every piece of property is simultaneously both individual and communal. The cardinal principles of Hindu analytical jurisprudence and of the dialectical methods of the Commentators and digest-writers like Vijnaneswara are here presented as well as the points of departure made by Anglo-Hindu law from pure Mitakshara. It makes it easy to understand the present problems of Hindu Society about marriage, family, inheritance, and the proprietary relation between the two sexes. Even if the modern changes in the Hindu law of marriage, adoption, and inheritance show a marked movement from a largely patriarchal to a matriarchal pattern of society, the main Mitakshara concepts, opines the author will still continue to be valid.

4. The Volume includes an appendix and index.

R. S. S.

**THE ALDINE CRIME & JUSTICE
ANNUAL 1974; Aldine Publishing Co.,
529, South Wabash Avenue, Chicago,
Ill. Pp. XXI & 541.**

This second volume of the *Annual* presents, as before, an authoritative selection of the most important work on the subject that appeared in the past year. The criteria of selection are those of the members of the Editorial Board, whose interests reflect the several main trends in this field of study as well as its general scope. They are academic as well as professional psychiatrists, criminologists, social workers, and sociologists. The final selection and organisation of material to be included is each year made by a member of the Editorial Board who also presents an overall view of work and trends in the field. Seymour Halleck of the Department of Psychiatry at the University of North Carolina, took up these responsibilities for the current volume.

2. The articles in this Year's Volume have been divided into four sections; approaches, delinquent and criminal behaviour, criminal justice, and programmes and policies. There is heavier emphasis than last year on criminal justice and that section is divided into three parts: police, courts, and prisons. The articles in the first section focus largely on current arguments regarding the sociology of deviance. One of the research articles presents evidence that certainty and not severity of punishment is the chief deterrent of most crimes.

3. In the second section there is much valuable information about how various subgroups in American Society view the seriousness of various crimes which is useful in understanding the offender's perception of his own behaviour and society's response to that behaviour. There is in this section a study of nineteenth century crime which provides evidence for ecological theories of crime and uses statistical methods to analyse data that are over one hundred years old to substantiate an historical hypothesis regarding criminal behaviour, and another article provides an example of the rich material that can be obtained by a detailed analysis of social phenomena.

4. The use of research methods to evaluate the police function is becoming common. A certain experiment in Kansas City has shown that routine preventive patrol in marked police cars has little value in preventing crime or making citizens feel safe. There are some surprising research findings on police professionalism, and citizen evaluation, while another research suggests that domestic police-citizen encounters are relatively infrequent and are handled efficiently and temperately by the police. The current disarray of the American system for dealing with troubled and troubling juveniles has been examined in the third section, as well as the apparent influence of extra-legal factors such as race, socio-economic status, age, and sex in determining sentencing, as also of the moral standards of the local community to which the law is applied. The important manner in which psychiatric testimony influences the criminal Courts is underlined in the Editor's article, which reviews some recent litigation protecting the rights of both patients and offenders. In the section on prisons, there is a powerful attack on the beliefs of reform-minded criminologists. One of the articles lays down clear guide lines for the rise of imprisonment to accomplish deterrence and retribution.

5. The book includes an useful index.

R.S.S.

LABOUR LAW JOURNAL DIGEST (1966-75), Volume I (A.D). Editorial Committee:—R. Venkatraman, Managing Editor, L. L. J., S. Viswarathan, C. R. Pattabhi Raman and B. R. Dolia; Editors L. L. J. Sole Selling Agent, Wadhwa Sales Corporation, Mahadia Square, Dhantoli, Nagpur-440012, India. Published by: M/s. Wadhwa and Company, Law Publishers, Agra and Nagpur, India. Pp. XLVI + 1007, Price in India Rs. 80/- Price abroad \$ 25 (American).

Publishers must be congratulated for bringing out this excellent digest on Labour Law in India, specially in these days of rising prices of paper and other material. The Labour Law in India, is still in fluid stage, though in some fields, the Supreme Court has in most of its pronouncements resolved the uncertainty in the law. In many of its decisions the Supreme Court has expounded the theory of social justice as enumerated in the Preamble of the Constitution. In no other field social justice plays a greater part than in administering and interpreting the law on labour. The present Digest comprising the period of 1966-1975, can be considered as crucial period, wherein the courts have laid down the norms of social justice.

The Digest has been prepared for the use not only of lawyers, labour leaders and trade unionists, but also for the use of laymen, industrialists and factory owners who will equally find the Digest useful and instructive.

The Labour Law Journal Digest is so arranged that even a layman not well acquainted with statutory law, will get the point required by him. The points are noted fully under appropriate heads, either topical or statutory. Complete headnotes with relevant facts are reproduced in their entirety from the Labour Law Journal, in one place. This way, the reader will have a complete understanding of the entire case under study, in all its aspect. Other points contained in the main points are briefly indicated under relevant headings, either statutory or topical with cross references to the main point. Similarly profuse cross references are given to topical headings to enable a non-lawyer reader to get at his point in the shortest time. This single feature of the Digest makes it indispensable to a reader, besides enhancing its usefulness.

A heading containing more than twenty points is invariably given a synopsis. This will help in locating the point in the plethora of case law under the point. This is yet another notable feature of the digest.

Case law on labour law is gathered from all the reports published during the period. Besides the Labour Law Journal, comparative citations are given to other law journals like A. I. R., L. I. C., F. J. R. and F. L. R. In the Digest even relevant English cases from W. L. R. and ALL E. R. are given. A complete list of cases overruled, reversed, dissented from, not followed and disapproved is given in the beginning of the Volume. The list is arranged chronologically. This will enable a lawyer to know beforehand whether a certain case has been overruled or reversed and whether it has been dissented from or not followed in any other case.

Besides, a Nominal Index of cases included in the volume, the Contents give the synopses of the topics. This is a model feature of the Digest. This volume of the Digest can easily stand comparison with Butterworths and Sweet & Maxwell of London.

The Publishers have spared no pains to make the Digest, an unique example of what a good publication, can and should be. The get-up and printing leave nothing to be desired.
R.G.D.

7. PRINCIPLES OF FORENSIC BALLISTICS. Part I: Firearms, Ammunition, Their Identification and Physical Aspects of Wounding. By Dr. D. N. Matoo, A. K. Wani & M. D. Asgekar (From the Forensic Laboratory, Bombay). Part II: Some Medical Aspects of Firearm Injuries. By Dr. C. K. Parikh, from the Department of Forensic Medicine and Toxicology. Seth G. S. Medical College, Bombay; Corresponding Member (Forensic Pathology), American Academy of Forensic Sciences; Medicolegal Consultant, Bombay. Medical Publications, 6 Owners Court, Colaba, Bombay. Pp. 56. Price. Rs. 25.

This monograph is a perspective study of the subject and the role it plays in law enforcement operations, illustrated with case reports, diagrams and photographs, and should be of great benefit to the specialised group of personnel entrusted with the work of enforcing law and order and detecting crime. Even if the use of firearms for homicidal or suicidal shooting is not extensive in India, firearm offences do take place often in some of the States. Firearms and ammunition of diverse types, both standard factory-made, whether licensed or not, and country made firearms are used in these offences.

2. The subject is dealt with in great detail, with a description of the different firearms in

rise throughout the world and the types of ammunition that is used with them as well as the nature of the injuries that these would cause in suicidal, homicidal, and accidental shooting. The monograph clearly describes the significance of the pattern of firearms injuries. The subject is covered under the heads of cartridge, classification of firearms, identification of firearms, physical aspects of firearms injuries, shot gun injuries, rifle injuries, appearance of firearms wounds, suicide, homicide, or accident, physical activity after fatal firearm injury, and autopsy.

3. Doctors, public officers, and forensic scientists concerned with the science of forensic ballistics will find this monograph surprisingly compendious, as observed by Dr. D. J. Reddy, M.D., F.A.M.S., M.C. (Path.), Vice-Chancellor of the Venkateswara University, in his Foreword. This masterly short work has been compiled by members of the Forensic Science Laboratory, Bombay, and by a noted forensic pathologist.

R. S. S.

BUILDING SOCIETY LAW : CASES AND MATERIALS, by C. E. J. Thornton, F. Inst. L. Ex. F.B.S., Solicitor of the Supreme Court, & J. B. McBrien, F.B.S., Solicitor of the Supreme Court. Published under the auspices of the Building Societies Institute. Second Edition. 1975. Sweet & Maxwell (Tripathi) Pp. XX & 174. Price Rs. 50.

This revised and expanded edition is designed to provide students of the Building Societies Institute, London and those concerned with the business of building societies with the source material of established principles, as laid down by statute and as expounded by case law. The book is prescribed by the Institute for students sitting for their associateship examinations. It had appointed a panel of lawyers to commission authors to undertake this work, for it was felt that the existing literature on building society law gave inadequate attention to the judgments of Courts applying the statute to specific circumstances. A more comprehensive understanding of case law was although desirable, and the courses included in this work were therefore selected from the many reported cases which involved building societies or had an important effect on their activities, many cases of mortgage have involved building societies.

2. In preparing this new edition the authors have adhered to the layout adopted for the first edition. The new case material has been

linked to the relevant statutes with additional commentaries and notes, so providing a more comprehensive statement of the law than would be possible from the cases alone. Footnotes have again been avoided so that the text could be read narratively without cross-reference. The authors have up dated statements of law where no longer valid, and have introduced new material, both statutory and judicial. The book can serve as a companion volume to *Building Society Law* by E. A. Wurtzburg and John Mills.

3. The present statutory basis for building societies in England is the Building Societies Act, 1962, a consolidating statute embracing the Building Societies Acts 1874 to 1960. The first reference to building societies in the statute book was an Act passed in 1836. The purpose of a building society is to raise a fund for making advances to members out of the finances of the society upon security by way of mortgage. The present book contains four chapters of which the first deals with objects, membership, commencement of business, rules, direction and officers. The next chapter covers investments, Chapter III being concerned with advances by societies, and the last chapter dealing with Chief Registrar of Friendly Societies amalgamations, and investment of surplus funds. The book includes a table of cases, a table of statutes, a table of statutory instruments, and an index.

R. S. S.

COMPENSATION FOR COMPULSORY PURCHASE : (Papers from a Conference organised by the Law Society, The Bar Council, and the Royal Institution of Chartered Surveyors) Sweet & Maxwell (Tripathi) : Pp. 53, Price Rs. 40/-; £ 2/-.

The object of the 1974 Conference organised jointly by the Law Society, The Bar Council, and the Royal Institution of Chartered Surveyors was to consider some current problems encountered in England in the Law of Compensation for compulsory purchase. In 1845 was passed the Lands Clauses Consolidation Act to provide a standard Code of compensation which could be incorporated into every relevant Act of Parliament, and the basis of compensation is still said to rest substantially with this Act, though the Land Compensation Act, 1961 and the Compulsory Purchase Act, 1965 also contain statutory provision regarding compensation. At the Conference under notice, two specific problems were considered: The "scheme" and the principle of equivalence in the entitlement to compensation for disturbance. The "scheme" comprises those cases

listed in the first Schedule to the Land Compensation Act, 1961 and schemes identified by the application of the common law rule in *Poite Gourde Quarrying & Transport Co. v. Sub-Intendent of Crown Lands*.

2. The leading paper at the Conference is concerned with the principle that compensation shall be based on the value of the land to the owner, and not its value to the purchaser. It considers the difficulties that have arisen in the application of this principle and the place of the Land Compensation Act, 1961 in compensation law generally, and makes suggestions for modifying the law governing the assessment of compensation. Many of the valuation implications of "the Scheme" were dealt with in two complementary papers, one of which refers to some points of practical importance to the valuer and puts before the Conference an illustrative valuation for consideration. The other paper discusses some of the legal history which has led up to the present valuation scene, for compensation matters are mixed questions of law and valuation.

3. The second part of the Conference discussed the adequacy of the law of disturbance to meet actual losses and there was an authoritative review of the circumstances where the principle of equivalence is not being satisfied. The two parts of the Conference were linked by an address by Mr. Douglas Frank, Q. C., Chairman of the Land Tribunal, who drew their attention to some of the procedural problems of the Tribunal and the steps which have been taken to resolve them.

R.S.S.

11. **LLOYD'S MARITIME & COMMERCIAL LAW QUARTERLY**: May 1974. Editorial Board: G. M. Hall, Barrister, Editor of 'Lloyds' Law Reports', E. R. Hardy Ivamy, LL.B., Ph. D., LL.D., Prof. of Law, University College, London; Maurice Megrah Q.D., M. Com. Lond., & Paul F. Vivian Pp. 120.

In these days of increasing inter-state trade, commercial men and lawyers have to know at first hand about the legal developments in their own countries and others as well, and the object of this new *Quarterly*, the first issue of which is under notice, is to review these developments in a manner that is of real value to both businessmen and lawyer. It will publish articles on the practical aspects of legal problems written by authors on topical questions as they arise. In the international case note section details are given of decisions of Courts in other jurisdictions in

digest form, because they are of practical importance to the banker, the carrier, and the insurer. The *Quarterly* will contain the tests of international convention of assistance to the busy lawyer, and its international legislation section will give news of current legal developments in the world. *UNCTAD* and *UNICTRAL* conventions on international trade, and trade programmes and proposals within the Common Market, will be included and they will give useful information in a convenient form to the commercial lawyer.

2. In addition to the more or less regular features, we have referred to, the present issue includes articles on "the Practice of Scuttling," "Highjacking in road transport law", "Speed and consumption warranties"; "Receiver/Contractor relationships", "Time charter-Doctrine of overlapping" and "References to Charter-parties in bills of lading."

R.S.S.

10. **SENTENCING BY COURTS OF INDIA**. By G. N. Sabhahit. First Edition, 1975. Dixit Publications. 10 Yellappa Gardens, Malleswaram, Bangalore. Pp. 301 & XV. Price Rs. 40 : & 4.

The application of the principles of sentencing in a criminal court one of special interest to the many complainants, defendants, and witnesses who have to appear in it. The main aims of sentencing are retribution individual deterrence, General deterrence, protection of the public and rehabilitation. Deterrence through punishment, prevention through restraint, and denunciation of the community are as important as rehabilitation. In bringing out the present monograph on sentencing the author has elaborated on the sentencing process and sentencing pattern as indicated in the amended Criminal Procedure Code, the suggested amendments to the Indian Penal Code, and modern trends in criminology. The case law emanating from the Supreme Court of India and the various High Courts form the basis of what is contained in the book.

2. In the first chapter we have the views of the Supreme Court on modern trends in criminology and a section on the dichotomy in the trial of criminal cases in the present Criminal Procedure Code. Theories of punishment, habitual offenders and recidivism, offences under I. P. C. and socioeconomic offences, constructive liability and sentencing the co-accused, non-custodial punitive measures, forfeiture of property, capital punishment, extenuation, and imprisonment, form the subjects of several of the chapters, each of which is introduced by an useful synopsis.

3. As observed by Mr. D. K. Naikar in his Foreword the author has ably explained and fully illustrated the mandatory legal requirement of making the "Primary Decision" under the new Cr. P. C. and dwelt at length on the process of arriving at the "Secondary Decision". The author has placed the necessary emphasis on the need to compensate the victim of the offence and on the need for training the magistracy and suggests the establishment of a research wing under the aegis of the High Court.

4. The volume, which carries a table of cases, index and three appendices, should be very useful to prosecutors, defence counsel and magistrates and should be of interest to the students of criminology, the police and probation officers.

R.S.S.

6. ON GUILT, RESPONSIBILITY AND PUNISHMENT. By Alf Ross, Ph. D. (Uppsala), Jur. D. (Copenhagen), Hon. Jur. D. (Oslo & Lund). Sometime Professor of Law at the University of Copenhagen. 1975. Stevens (Tripathi). Pp. X & 183. Price, Rs. 80.

The Concepts of guilt, responsibility, and punishment are common to law and morality; guilt determines responsibility, and responsibility punishment. But the conditions under which a person incurs guilt differ according to whether the guilt is moral or legal, as do also the manner in which the responsibility takes effect and its penal reaction. The juridical theory of guilt is only a more precise rendering of current moral ideas adopted to the special institutions of law. This foundation of moral ideas underlying the juridical theory of guilt and responsibility is more or less latent.

2. The book before us, comprising six essays, by one of the most distinguished jurists of Europe, examines the problems of guilt, responsibility, and punishment, some of the most controversial topics in criminology. In the two introductory chapters, the author discusses the legal concepts of guilt and responsibility, and compares these with their moral and philosophical counterparts. In the next two chapters he examines the justifications for punishment and argues that retribution cannot by itself be an aim of punishment. Finally he challenges the opinion that determination as an explanation of criminal behavior; is necessarily inconsistent with morality.

3. The Danish original edition of this book appeared in 1970, but several of the essays

had been published before. All the essays, except the last one, have been translated from Danish by Mr. Alastair Hanmay, Ph. D., Institute of Philosophy, University of Oslo; the last essay was similarly, translated by Mr. Thomas E. Sheahan, Ph. D. In his clear and learned style, the author has proved that the scope for philosophical analysis in criminology is not really restricted. All students of criminology, and jurisprudence generally, should greatly benefit by this provocative study.

4. Prof. Alf Ross, the author, spent eight years in Denmark State legal department, and then took to the scientific study of law. He took his Doctorate of Philosophy from the University of Uppsala in Sweden, and worked until 1969 as Professor of Law at the University of Copenhagen. He acted as legal counsel for the Chamber of Commerce of the Provinces in Denmark, and advised the Danish Government frequently on constitutional and administrative committees.

R. S. S.

THE INDIAN YEAR BOOK OF INTERNATIONAL AFFAIRS, 1974. Published under the auspices of the Indian Study Group of International Law and Affairs, University of Madras, Madras. Editor : T. S. Rama Rao. Pp. 624. Price Rs. 18.

Started in 1952 under the editorship of Prof. C. H. Alexandrowicz, the Journal in its first section, on International and comparative law, contains ten articles and in its second section, on international affairs, carries five Contributions. The book review section and the index are usual features, but there is also a review article on secularism and the Constitution of India, which is more or less a critical review of the book of the same name by Mr. P. B. Gajendragadkar, a distinguished jurist and reputed exponent of social justice and secularism.

2. In an analysis of some aspects of Indian Maritime law, one of the papers in the journal examines enactments and judicial decisions on this subject and has made extensive use of the debates and discussions in the United Nations Conferences on the Law of the Sea held in Geneva in 1958 and 1960. Another article calls for the establishment of a totally new organisation within or without the framework of the U. N. and the enactment of a new Code of principles governing the activities on the ocean floor and seabed, while another writer points out the not insignificant influence of the Third World countries upon

the emerging principles of space law, which represent a compromise between the Soviet and American viewpoints.

3. Another contributor discusses the physical and strategic features of Antarctica, which could easily become one of the potential spots of threat to international peace and security and urges, therefore, that it should be controlled by the United Nations in conformity with the wider community expectations. There is a verbatim transcript of a lecture given in Berlin for Ethiopian local Government officers, and some indication of the Indian Union Constitutional law has been inserted in the notes, so as to stimulate the interest of non-Ethiopians by showing the ubiquity of some of the problems discussed.

4. A survey of the working of the Commonwealth as an international organisation reveals how it has become multiracial and world wide, and consists of member-states of independent status, somewhat loosely knit, grown out of the dismemberment of the British Empire and recognising the Queen. This article has been kept up to date by a summary of the latest developments in the affairs of the Commonwealth. Referring to Inter State River Water disputes in India, the writer stresses the need for a "give and take attitude" on the part of the States and urges that the inter-linking of rivers was a good solution for many of our problems. Finally, the Editor examines how far the Indian Constitution and its laws have served the ends of bringing about the much vaunted renaissance and social transformation.

5. The expansion of local remedies and the international protection of human rights, and the application of successive treaties dealing with the same subject matter, are the titles of two other articles in this section. The second section contains inter alia, articles on the Hindu responses to modern Western Challenges, Russia's attitude towards political developments in India, and Asian Relations and Gandhi.

R. S. S.

HUMAN RIGHTS & FUNDAMENTAL FREEDOMS (Tagore Law Lectures). By Jagadish Swarup, Advocate, Formerly Solicitor General of India, Tripathi. 1975. Pp. XX & 408. Price, Rs. 55.

Philosophers and Jurists have always emphasised and developed the concept of human rights from the beginning of civilised life and the Indian constitution has only reaffirmed them. In the course of these twelve lectures, the author has attempted to treat the evolution and development of these rights in

different countries. The development of the concept of individual rights in the various countries at different times has been traced and separate lectures have been devoted to liberty, the security of the person, freedom of assembly and association, freedom of movement, right to carry on business and the right to privacy. Other lectures deal with equality, freedom of thought and speech, freedom of religion, academic freedom and right to property.

2. The various human rights and fundamental freedoms recognised in the Universal Charter of the United Nations are enshrined in Part III of the Indian Constitution, and the State, which expression includes, the Government, the legislatures and all local and other authorities, is prevented from making any law which, in normal times, takes away or abridges the fundamental right and any law made in contravention of this is void to the extent of this contravention. Among these fundamental rights is the right of free speech, free press, free worship, and freedom from unreasonable searches and seizures. A new basis of security and prosperity is sought to be ushered in by the Directive Principles of State Policy given in Part IV of the Constitution. These Directive Principles are not enforceable in any Court, and as these Principles are subordinate to the Fundamental rights, Parliament has amended the constitution by adding Article 31.C.

3. The book is claimed to be a pioneering effort towards an integral presentation and a first attempt to offer a comprehensive treatment of the origin and development of human rights and fundamental freedoms in the different countries. The views expressed by well-known philosophers and jurists in the history of the world are clearly explained. First full sized book to be published under this title, the publishers claim that it is the first of its kind to appear in this country.

4. Besides the index, table of cases, and select bibliography, there is an appendix which gives the reader the text of Part III of the Constitution on Fundamental Rights.

R. S. S.

AN OUTLINE OF THE DUTIES OF THE JUSTICES OF THE PEACE IN NEW SOUTH WALES. By Judge D. S. Edwards. Eighth Edition, by C. H. McKay, LL. B., Solicitor, Clerk of the Peace and I. G. Tyson, LL. B., Solicitor, Deputy Clerk of the Peace. The Law Book Co. Ltd., Sydney. 1975.

The seventh Edition was published fourteen years ago. During this period many of the

statutes affecting the role of Justices of the Peace have been either amended or repealed and re-enacted. That has meant extensive re-drafting of that Edition. As a result of recent legislative activity, the functions formerly discharged by Justices have in some instances come to be reserved to Stipendiary Magistrates. Still the position of the Justice of the Peace remains a vital one in the system of law in this State. Since early this year (1975) the office of Chief Secretary was abolished with the appointment of Justices of the Peace.

2. Before considering the duties a Magistrate has to perform or the manner of performing them, the book sets forth some of the general principles which should guide every J. P. in his conduct as a Magistrate. His duties are either judicial or ministerial. Judicial duties are those in which he performs the functions of a judge, and ministerial duties are those in which he acts as a servant under the provisions of some statute. Before stating the preliminary steps that must be taken before a case is ready for trial, the book gives a brief summary of the classes of cases which Magistrates may be called upon to deal with. The subject of credibility of witnesses is then discussed and an outline is given of some of the more important points of the law of evidence. There are chapters on the appointment and removal of Justices, the Magistrate's jurisdiction, compelling witnesses to attend for the purpose of being examined, and the sources of law. There is a glossary and index in this book.

3. In this neat little book is given an outline of the duties which a Justice of the Peace may have to discharge. There seems to be no other single book on the subject. R. S. S.

THE LAW OF ARBITRATION (CONCISE COLLEGE TEXTS). Second Edition by William H. Gill, F. R. I. B. A., A. M. R. T. P. I., of Gray's Inn, Barrister-at-Law. With a Foreword by Anthony Walton, Q.C., Editor of 'Russell on Arbitration.' Sweet & Maxwell (Tripathi) 1975. Pp. xxx & 139. Price Rs. 48.

This established handbook on arbitrations and their procedure is now in its second Edition, its main purpose being, as always a clear indication of the law and procedure in as succinct a manner as possible but with complete accuracy. Since the publication of the last edition nine years ago, the subject has gained mostly in importance. A very large number of new cases have been added in the present edition, including important decisions in the Court of appeal and House of Lords. The law has been stated as at 1st October 1974.

2. The work opens with an account of the nature of an arbitration, including the rights of parties, after which it considers the arbitration agreement, the powers contained in them, and the capacities of parties. The appointment of arbitrators and umpires is explained in detail, and procedure prior to the hearing and at the hearing itself are fully dealt with. A full discussion follows on the question of evidence, irregularity, waiver and delegation, and the Court control of arbitration. The three concluding chapters deal with the actual awards, and costs and statutory arbitration. Every proposition put forward by the author is supported by authority, a particularly valuable feature of the book being the inclusion of relevant parts of the Arbitration Act, 1950. Besides the tables of cases and statutes, there is an useful index.

3. The book should be highly useful to lawyers, surveyors, arbitrators, civil servants, trade union officials and economists, who should greatly benefit by this general survey, in simple language of the law and practice of arbitration.

4. In India the Arbitration Act, 1940 made improvements in the old laws and inserted new sections for the smooth working of arbitration proceedings. It standardised the law relating to arbitration throughout British India. R. S. S.

DIGEST OF THE GUJARAT CO-OPERATIVE SOCIETIES CASES. (Decisions of Gujarat Co-operative Tribunal and Gujarat High Court from 1960 to 1975). By B. K. Amin, B. A. (Bom.), B. Sc. (Lond.), Bar-at-law, Advocate, Supreme Court. The New Gujarat Law House, Three Gates, Ahmedabad. 1975. Pp. 151, Price Rs. 23.

This exhaustive digest contains more than 400 judgments of the Gujarat High Court and Gujarat Co-operative Tribunal. The book opens with the Sections 1 to 169, and this is followed by a topic-wise arrangement of the decisions. The different headings comprise the claims of servants, injunctions, interest, loan, refund of share money, remand, Society, its Chairman, Secretary and others, and Societies. The comments are adequate as well as the subject index.

2. The book is a useful addition to any bar library and should be of assistance to advocates, Government offices, and Co-operative banks. Mr. Amin has also written on the law of easement, Bombay Court Fees Act, and the Bombay Rent Control Digest. R. S. S.

TENANCY LAW IN RAJASTHAN. By N. L. Pokhran, M.A., LL.B. Government Advocate (Sales Tax and Excise) Board of Revenue for Rajasthan, and also Lecturer in Law, Government College, Ajmer. Published by Asha Law Publishers, Naya Bazar, Ajmer, Pp. liv & 424+115 : Price Rs. 50/-.

This is a compilation of the case and statute law as on 15.1.1975 on the subject of tenancy law in the State of Rajasthan. This book incorporates text of the Rajasthan Tenancy Act, the Rajasthan Tenancy (Govt.) Rules, 1955, the Rajasthan Tenancy (Board of Revenue) Rules, 1955 and Notifications under the Rajasthan Tenancy Act, 1955. There has been a long felt genuine need for a lucid and exhaustive commentary on the subject though the learned author has observed in the Preface to the book that during the last ten years the law on the subject has been very much settled by the Board of Revenue. This useful, base and reference book will go a long way to meet this need and the efforts of the author deserve appreciation.

2. The book carries a table of cases and index.

3. The Book will doubtless be of considerable assistance to the students of tenancy laws and to the members of the Bar and the Bench.

R.E.K.

WHO'S WHO IN MALAYSIA 1975-1976 AND GUIDE TO SINGAPORE, Edited and Published by J. Victor Morais, S.B.St.J. Ground Floor, B. P. House, Jalan Davidson, Kuala Lumpur (Malaysia). Printed by Perchetakan MAS Sendirian Berhad, 31 and 33, Jalan Lima, Off Jalan Chan Sow Lin, Kuala Lumpur (Malaysia), pp. 364 + 140 + 16 Price \$ 30.00 (Inland); U. S. \$ 20.00 (Overseas).

"A good Book is the precious Life-blood of its Master's Spirit", says Ruskin. Tested on this touch-stone, "WHO'S WHO IN MALAYSIA" stands the test triumphantly for its Editor and Publisher, Mr. J. Victor Morais, has literally spared no pains and imagination in presenting to the public the finest book of its kind.

2. The book presents in the most systematic, classified and up-to-date manner biographies of prominent people in almost all walks of life both in Malaysia and Singapore and also of Malaysians who are overseas. The book has not forgotten those who have passed away while this book was being prepared for publication. The Obituary Section provides brief notes

on them. The biographical sketches have been written in an elegant style and easily capture the attention and interest of the reader. They are sufficiently detailed without being lengthy. The sketches, despite being so different from one another are knit so nicely in the scheme of the book that the interest of the reader is sustained upto the end without the least element of monotony creeping up anywhere any time. It will be no exaggeration to say that going through the pages of the book gives the same pleasure and delight to its readers as they would derive while traversing through the picturesque and panoramic landscapes of a beautiful country. The lively photographs of the biographees virtually produce the effect on its readers of meeting them in flesh and blood.

3. The book lives upto its primary purpose of being informative and of course to the confident hope of its Editor, Mr. Morais, as the most comprehensive reference guide of its kind — but not only to the important people in different walks of life in Malaysia and Singapore but also to various institutions, Organisations, Statutory bodies in these Republics. To top all this, the book closes with a trade guide which acquaints its readers, both inland and overseas, with enterprising trade and commercial organisations in Malaysia.

4. "WHO'S WHO IN MALAYSIA" is not only the finest book of its kind produced in this part of the world but can easily compare with similar works produced in highly advanced countries like U. K., U. S. A., U. S. S. R., France and Germany.

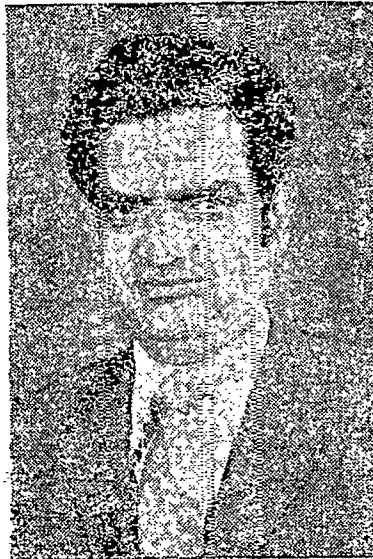
5. Quality of paper used, printing, photographs, attractive binding, cover design and the overall get-up of the book leave an indelible impression on the minds of its readers and it will be no hyperbolic statement that placed amongst a thousand other books, Morais's "WHO'S WHO IN MALAYSIA" will not fail to catch the viewer's eye and once it comes to his hand it will be rather irresistible for him to go through its pages.

6. The book is more than worth its price, looking to its utility and usefulness not only to the people of Malaysia and Singapore but even to the people abroad who are in search of a dependable guide to these countries or have any trade link or interest in them.

7. The book is absolutely flawless and bays all encomiums that should be bestowed on its learned and painstaking Editor, Mr. Morais.

E. K. S.





The Hon'ble
Mr. P. R. MRIDUL

Recently appointed Judge of Bombay High Court

Mr. P. R. Mridul, a recently appointed Judge of the Bombay High Court, was sworn in on 2.1.1976 at 4.00 p.m. by the Hon'ble the Chief Justice of Bombay. Mr. Mridul brings to his office large experience of commercial litigation and Constitutional matters. Mr. Mridul was enrolled to the Bar in 1958 and was in the chamber of Mr. M. H. Shah. Later he set up his own chamber. Mr. Mridul has been appearing in Supreme Court since 1962 and has argued his major appeal in Supreme Court in the year 1965. Mr. Mridul has appeared in several other High Courts of India in Constitutional and other matters. He recently appeared before the Full Bench of the Supreme Court constituted to review the *Kesavanand Bharati* ruling, A.I.R. 1973 S.C. 1461. In the Bombay High Court recently he has appeared in the *Backbay Reclamation matter*.

8. This appeal arises out of a suit instituted on 19th November, 1957 for partition of properties. Properties mentioned in Schedules A and B to the plaint belonged to the mother of defendant No. 3. Properties mentioned in Schedule C to the plaint were joint properties of the father and the mother of defendant No. 3.

9. The plaintiff and defendant No. 2 are the sons of one of the brothers of the mother of defendant No. 3. Defendant No. 1 is the son of another brother of the mother of defendant No. 3. Defendant No. 4 is the son of defendant No. 3's father's brother.

10. Defendant No. 3 died during the pendency of the suit. Thereafter defendant No. 1 filed his additional written statement and claimed half share in the property of defendant No. 3 on the ground that defendant No. 1 had married defendant No. 3 on 30th August, 1959.

11. The trial Court allotted to defendant No. 3 3/6th share in properties mentioned in Schedules A and B to the plaint. The plaintiff and defendant No. 1 and defendant No. 2 were each given 1/6th share in properties in Schedules A and B to the plaint. With regard to Schedule C properties the plaintiff and defendant No. 1 and defendant No. 2 were each given 9/96th share and defendant No. 3 was given 51/96th share and defendant No. 4 was given 18/96th share.

12. The trial Court found that defendant No. 4 was alone entitled to the share of defendant No. 3 on the ground that marriage of defendant No. 3 with defendant No. 1 was not proved. The trial Court also found that defendant No. 3 was mentally unsound to enter into any marriage.

13. Defendant No. 1 preferred an appeal. The High Court set aside the judgment of the trial Court and held that defendant No. 1 was married to defendant No. 3 and defendant No. 3 was in a lucid interval at the time of marriage.

14. Counsel for the appellant defendant No. 4 impeached the finding of the High Court both with regard to the fact of marriage and the finding that defendant No. 3 was married in a lucid interval.

15. Defendant No. 4 relied on three documents in support of the submission that defendant No. 3 was not a sane person to enter into marriage with defendant No. 1. The first document is Exhibit B-34 which is an order dated 8th November, 1958 declaring defendant No. 3 to be a person of unsound mind. In that order defendant 4 was appointed guardian of the property of defendant No. 3 and

defendant No. 1 was appointed guardian of the person of defendant No. 3. The second document is Exhibit B-8 dated 7th September, 1959. The appellant submitted that on 7th September, 1959, defendant No. 3 wanted to get herself declared as a person of sound mind. By an order dated 5th February, 1960 being Exhibit B-31 the District Judge dismissed the application of defendant No. 3. The third document on which the appellant relied is the suit in this appeal where defendant No. 3 on 19th November, 1957 was impleaded as a person of unsound mind.

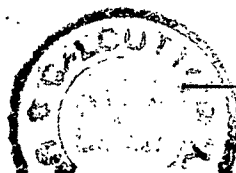
16. The appellant contended that though Exhibit B-34 namely, order dated 8th November, 1958 declaring defendant No. 3 as a person of unsound mind was not a judgment in rem but it was a judgment inter-partes and it would, therefore, be admissible under Sections 11 and 13 of the Evidence Act. The appellant also contended relying on the decision in *Amanchi Seshamma v. Amanchi Padamanabha Rao*, ILR 40 Mad 660 = (AIR 1917 Mad 265) that once a person is adjudged insane it is presumed that state of unsoundness will continue until proved to the contrary.

17. Counsel for the appellant therefore contended that the conclusion of the High Court that defendant No. 3 was in a lucid interval at the time of marriage was against the overwhelming documentary evidence.

18. The documents relied on by the appellant do not rule out lucid interval at the time of marriage on 30th August, 1959. The High Court relied on the evidence of D.W. 4 who attended the marriage. D.W. 4 was a teacher. His evidence was that defendant No. 3 at the time of marriage talked with Musaliar. His further evidence was that Musaliar called defendant No. 3 and she went near him and told him that he was being authorised by her to give her in marriage to defendant No. 1. The High Court rightly found that defendant No. 3 gave her consent to the marriage and was in her lucid interval.

19. The High Court reversed the finding of the trial Court and held that the marriage took place. The High Court relied on the oral evidence and found that marriage in fact was held. The conclusion of the High Court on both the questions is correct. The appeal is therefore dismissed. No order as to costs.

Appeal dismissed.



AIR 1976 SUPREME COURT 226

A. N. RAY, C. J., M. H. BEG,
R. S. SARKARIA AND
P. N. SHINGHAL, JJ.

Ram Charitra Ray, Petitioner v. The High Court of Patna and another, Respondents.

Writ Petn. No. 56 of 1972, D/- 2-12-1975.

(A) Constitution of India, Art. 16 (1) — Violation of.

Petitioner, a clerk in Additional Sub-Judge's Court, in charge of land acquisition case not putting up record of the case before presiding officer expeditiously and not getting date fixed for consideration of Serishtedar's report — Held he had deliberately shelved the issue of a payment order in order to harass the litigant — His object was dishonesty — He had acted in violation of Rule 24 and directions given to him — District Judge's order that petitioner be promoted with effect from the date from which he was entitled to such promotion subject only to the condition that he will not be entitled to arrears of salary from date of promotion — Held no aspect of Article 16 (1) could arise in the case and the petitioner was punished very lightly. (Para 2)

Cases Referred: Chronological Paras AIR 1952 Pat 309 = ILR 30 Pat 405 (FB)

Mr. Mohan Bihari Lal, Advocate, for Petitioner; Mr. L. N. Sinha, Solicitor General of India (M/s. S. P. Nayar and U. P. Singh, Advocates, with him), for Respondents.

The Judgment of the Court was delivered by

BEG, J.:— The petitioner under Article 32 of the Constitution makes the following allegations:

(1) He was a Bench Clerk in the Additional Sub-Judge's Court, Purnea, in 1967. On 20th May, 1967, the District Judge, Purnea, asked for an explanation from him with regard to a land acquisition case No. 119 of 1958 as to why the record of the case was not put up expeditiously before the presiding officer and a date fixed for consideration of the Serishtedar's report. He gave the explanation that he was not the dealing Assistant for land acquisition cases. On 15th June, 1967, the District Judge, Purnea, rejecting the correctness of the petitioner's stand, required the petitioner to show cause why his increments and promotion should not be stopped. The petitioner repeated his explanation. He was called by the District Judge on 1st August, 1967, in his chamber and heard personally. On 8th August, 1967, the District Judge passed

an order that the petitioner's increment and promotion be stopped for two years from 1st August, 1967.

(2) On 30th August, 1967, the District Judge, Purnea, drew up a list of persons promoted but did not include the name of the petitioner in it. The petitioner appealed to the High Court. By its letter dated 10th September, 1970, the High Court allowed it and asked the District Judge to reconsider his case. On 7th November, 1970, the then District Judge of Purnea ordered that the petitioner be promoted with effect from the date from which he was entitled to such promotion subject only to the condition that he will not be entitled to arrears of salary from the date of promotion. The petitioner then made a representation to the District Judge for the alleged arrears of his salary which he had not received but this was rejected. The petitioner again appealed to the Chief Justice of the Patna High Court against the order of the District Judge passed on 7th November, 1970, refusing the arrears of salary. He represented that other Clerks had received their arrears. He also alleged that his pension would also be affected by stoppage of increments.

(3) He had not approached the High Court under Article 226 of the Constitution, because, he says, a Full Bench of the High Court of Patna in AIR 1952 Pat 309 (FB) (in Re: Babul Chandra Mittra) had laid down that no writ petition lay in the High Court against orders of the High Court in its administrative capacity. He alleged that he had been punished contrary to the provisions of Article 311 (2) of the Constitution. He also alleged violation of his fundamental right under Article 16 (1) of the Constitution.

2. No one has appeared on behalf of the petitioner to explain to us how any fundamental right of the petitioner has been affected. From the reply filed on behalf of the High Court it appears that there was a very detailed order by the District Judge of Purnea setting out the responsibility of the petitioner for delaying land acquisition case No. 119 of 1958. (Mrs. Dhana Laxmi Lal v. Rasik Lal) and the payment of compensation money of Rs. 24,140/- to the lady concerned. The circumstances indicated that the petitioner, who was in charge of the case, had acted in violation of Rule 24 and directions given to him. The finding was that he had deliberately shelved the issue of a payment order in order to harass the litigant who was running from pillar to post for redress. Presumably, his object was dishonesty. He had been punished very lightly after his case had been sent back for further opportunity to be given

to him to be heard. His appeal had been dismissed by the Chief Justice of the Patna High Court on 8th November, 1971, by a detailed order with full reasons disclosed there. No aspect of Art. 16 (1) of the Constitution can arise in this case. This writ petition is, therefore, dismissed, but, in the circumstances of the case, we make no order as to costs.

Petition dismissed.

AIR 1976 SUPREME COURT 227

(From: Allahabad)*

K. K. MATHEW, P. K. GOSWAMI AND
N. L. UNTWALIA, JJ.

Jugilal Kamlapat Oil Mills, Appellant
v. Union of India, Respondent.

Civil Appeal No. 922 of 1968, D/-
3-12-1975.

(A) Railways Act (1890), Section 47 — General Rules framed under, Rule 43 — Case under old Rule analogous to Rule 48 — Re-consignment of goods — Requirements — Goods sent by appellant from Kanpur to Calcutta — After goods had reached Calcutta, application to Goods Inspector at Kanpur for returning wagon to Kanpur — Original railway receipt also not forwarded with the application — Held there was no obligation under the Rule upon the Railway Administration to direct the return of the wagon from Calcutta to Kanpur and to give delivery at Kanpur, since there was no compliance with the Rule. (Para 5A)

Under the Rule, the application for re-consignment ought to have been made to the Station Master of Calcutta, the station where the consignment was stored, and the original railway receipt also should have been forwarded with the application for re-consignment. Both the requirements were not satisfied in the instant case. (Para 5A)

(B) Railways Act (1890) (Prior to amendment of 1961), Section 72 — Non-delivery — Oil consigned under Risk Note Z from Kanpur to Calcutta — Goods, after reaching Calcutta safely, seized by Health Authorities and destroyed as adulterated under High Court orders — Railway is not responsible for non-delivery and is not liable in damages — Failure on the part of Railway to give notice to consignor before seizure and destruction — Effect — Plea being mixed question of law and fact before Supreme Court for the first time — Cannot be taken — (i) Constitution of India, Art. 136, (ii) Contract Act (1872), Sections 151 and 152).

The responsibility of the Railway Administration, with respect to the goods en-

trusted for carriage, was, prior to the amendment of 1961, that of a bailee. A bailee is excused from returning the subject-matter of the bailment to the bailor or his agent where the subject-matter was taken away from him by authority of law exercised through regular and valid proceedings. Corpus Juris Secundum, Vol. 8, page 308, Ref. (Para 6)

Where the consignment of oil from Kanpur to Calcutta was accepted by the Railway under Risk Note Z and after the wagon had reached Calcutta with the locks and the seal intact, the delivery could not be made as the oil was seized by the Food Inspector of Calcutta in pursuance of an order of Health Officer of the Calcutta Corporation under Section 419 of the Calcutta Municipal Act, and was destroyed under the orders of the Calcutta High Court as the contents were found to be adulterated, the non-delivery of the oil was not due to any accident, nor was it due to fire or any other circumstance within the control of the Railway. As the wagon containing the oil reached Calcutta safely, there was no room for inferring any misconduct on the part of the Railway Administration. The Railway could not therefore be held liable in damages under Risk Note Z.

(Para 9)
Even under the general law, the Railway could not be liable for non-delivery of the consignment. The tank wagon was seized at Calcutta by the Food Inspector not because of any negligence of the Railway authorities, but because the Health Officer of the Calcutta Corporation suspected that the oil was adulterated.

(Para 10)
Where the consignor (bailor) was aware of the seizure and was also a party to the proceedings for the destruction of the oil before the Courts, no prejudice was caused to the consignor by the failure to give him notice about the seizure of the tank wagon, and the failure would not make the Railway Administration liable in damages. The object of the notice is to give an opportunity to the bailor to litigate his rights to the property bailed.

(Para 13)
The plea that the failure to give notice has resulted in prejudice to the consignor cannot be taken for the first time before the Supreme Court as it involves a mixed question of law and fact: Corpus Juris Secundum, Vol. 8, p. 309, Ref.; F. A. No. 295 of 1955, D/- 6-10-1964 (All), Affirmed.

M/s. J. P. Goyal and S. N. Jain, Advocates, for Appellant; M/s. S. N. Prasad and S. P. Nayar, Advocates, for Respondent.

The Judgment of the Court was delivered by

MATHEW, J.:— In this appeal, by certificate, the question for consideration

*(F. A. No. 295 of 1955, D/- 6-10-1964 — (All.))

Is whether the respondents were liable to the appellant in damages for non-delivery of mustard oil consigned by the appellant to the employees of Eastern Railway at Kanpur Central Station on 29-8-1949 for carriage and delivery to the appellant at Saheb Bazar Jagannath Ghat Railway Station, Calcutta.

2. There is no dispute that the consignment was duly accepted by the railway employees and that it was carried to the particular station at Calcutta on 4-9-1949. However, on 6-9-1949, the appellant wrote to the railway authorities at Kanpur to redirect the consignment to Kanpur and to deliver the same to the appellant there. But the appellant was asked by the railway authorities at Kanpur to take delivery of the consignment at Calcutta. Delivery could not be made at Calcutta on 6-9-1949, as the oil was seized by the Food Inspector of Calcutta in pursuance of an order of the Health Officer of the Calcutta Corporation under Section 419 of the Calcutta Municipal Act. On 17-9-1949, two samples of mustard oil contained in the tank were taken under the order of the Municipal Magistrate before whom the case was placed for orders and they were sent for analysis to the Public Analyst. The Public Analyst reported on 20-9-1949 that the samples were adulterated. It then became necessary for the Magistrate to decide whether he should pass orders for destruction of the oil as prayed for by the Corporation. After hearing the appellant, he passed an order acquitting the appellant and rejecting the prayer for destruction of the oil. The Corporation filed a revision against the order rejecting its prayer for destruction of the oil before the High Court of Calcutta. The Court directed the destruction of the oil on the basis of the report of Public Analyst.

3. The appellant thereafter issued a notice under Section 80 of the Civil P. C. to the respondent claiming damages on the basis that the railway authorities were bound to deliver the oil at Kanpur as subsequently directed by the appellant and since the railway authorities did not deliver the oil at Kanpur or at Calcutta, they were guilty of negligence. Thereafter the appellant filed the suit from which this appeal arises.

4. The trial court found that the Railway had no obligation to deliver the oil at Kanpur as subsequently directed by the appellant and that it was not in any way negligent in not delivering the oil to the appellant at Calcutta as the oil was seized under the lawful orders of the competent authority under the Calcutta Municipal Act and dismissed the suit. The appellant filed an appeal against the decree to the High Court and the Court dismissed the appeal.

5. The two courts concurrently found that the oil which was consigned by the appellant was carried by the railway to the particular station at Calcutta and that the wagon containing the oil reached Calcutta on 4-9-1949. The courts further found that there was no tampering with the tank containing the oil as the padlocks on the tank wagon put by the appellant were intact when the wagon reached Calcutta on 4-9-1949.

5-A. One contention of the appellant before us was that the Railway authorities ought to have taken the tank wagon containing the mustard oil to Kanpur as requested by it and given delivery of the oil to it at Kanpur. This contention was negatived by the High Court on the basis of the rule analogous to Rule 48 of the General Rules framed under the Indian Railways Act which was in force at the relevant time. Under that rule, the consignor had to apply for re-consignment to the Station Master of the station where the consignment was stored. The appellant admittedly requested only the Goods Inspector at Kanpur on 6-9-1949 for returning the wagon to Kanpur. By this time, the tank wagon had reached Calcutta. So, the appellant ought to have applied for reconsignment to the Station Master of the station at Calcutta. The rule also required that the original Railway Receipt should be forwarded with the application for reconsignment. There is nothing in evidence to indicate that the original Railway Receipt was forwarded by the appellant along with the application. The High Court was right in holding that there was no obligation upon the Railway administration to direct the return of the tank wagon from Calcutta to Kanpur and to give delivery to the appellant at Kanpur. Quite apart from that, on 6-9-1949, the wagon was seized in pursuance of the orders of the competent authority under the Calcutta Municipal Act. This in itself would be a sufficient answer for the failure to comply with the appellant's request.

6. The obligation of a bailee is set out in Section 151 of the Indian Contract Act. The section says that a bailee is bound to take as much care of the goods bailed to him as a man of ordinary prudence would, under similar circumstances, take of his own goods of the same bulk, quality and value as the goods bailed. Section 152 of that Act says that the bailee, in the absence of any special contract, is not responsible for the loss, destruction or deterioration of the thing bailed, if he has taken the amount of care of it described in S. 151. A bailee is excused from returning the subject-matter of the bailment to the bailor or his agent where the subject-matter was taken away from

him by authority of law exercised through regular and valid proceedings.*

7. The consignment in question was accepted by the Railway authorities at Kanpur under the risk note in form Z (Exhibit A). The material portion of Ex. A runs:

"I do hereby agree and undertake to hold the said Railway Administration harmless and free from all responsibility for any loss, destruction or deterioration of or damage to all or any of such consignment from any cause whatever, except upon proof that such loss, destruction, deterioration or damage arose from the misconduct on the part of the Railway Administration or its servants, provided that in the following cases:—

(a) non-delivery of the whole of a consignment — where such non-delivery is not due to accidents to trains or to fire:

The Railway Administration shall be bound to disclose to the consignor how the consignment was dealt with throughout the time it was in its possession or control and, if necessary, to give evidence thereof before the consignor is called upon to prove misconduct, but, if misconduct on the part of the Railway Administration or its servant cannot be fairly inferred from such evidence, the burden of proving such misconduct shall lie upon the consignor."

8. So, if the loss, destruction or damage arose from the misconduct on the part of the Railway Administration or its servant, then the Railway would be liable to pay damages. The question then is whether the loss or destruction of the oil resulted from any misconduct on the part of the Railway Administration.

9. The non-delivery of the oil was not due to any accident to the train, nor was it due to fire or any other circumstance within the control of the Railway. As already indicated, when the tank wagon reached Calcutta, the locks put by the appellant on it and the railway seal were found to remain intact. There was, therefore, no loss or destruction of the goods during transit between Kanpur and Calcutta. The inability of the Railway Administration to deliver the consignment at Calcutta was due to the fact that the tank wagon was seized by a competent authority and its contents destroyed under the orders of the High Court of Calcutta. The risk note lays down the rule of presumption on the question of misconduct. The respondents having proved that the wagon containing the mustard oil reached Calcutta safely, there is no room for inferring any misconduct on the part of the Railway Administration or its servants. The respondent cannot, therefore, be held liable under Exhibit A.

10. Even under the general law, the respondent cannot be held liable for non-delivery of the consignment. The tank wagon was seized at Calcutta by the Food Inspector not because of any negligence of the Railway authorities, but because the Health Officer of the Calcutta Corporation suspected that the oil was adulterated.

11. In Exhibit-11 — the notice given under Section 80 of the Civil P. C., it was stated that since the tank wagon was not returned to Kanpur according to the direction of the appellant and the goods delivered to the appellant there, the respondents were liable in damages. On reading Ex. 11, it would seem that the main grievance of the appellant was that the respondents failed to return the tank wagon to Kanpur as requested by it and give delivery of the oil at Kanpur. In that notice, the appellant did not complain about the non-delivery of the oil at Calcutta or about tampering with the padlocks by the Railway Authorities.

12. Mr. Goel, on behalf of the appellant, however, contended on the strength of certain observations in *Corpus Juris Secundum*** that a notice ought to have been given by the Railway authorities to the appellant about the seizure of the tank wagon on 6-9-1949 or within a reasonable time and that the failure to do so would make the Railway Administration liable in damages.

13. The object of the notice is to give an opportunity to the bailor to litigate his rights to the property bailed. The appellant was a party to the proceedings before the Magistrate and the High Court. The High Court passed the order for destruction of the oil after finding that the tank wagon was lawfully seized by the Food Inspector and that the samples of oil were taken in accordance with law. We fail to see what prejudice was caused to the appellant by the failure to give the notice. There is also great force in the contention of the respondents that the appellant was aware of the seizure of the wagon on 6-9-1949 as the appellant was to take delivery of the oil on its arrival in Calcutta. Quite apart from this, the case that the Railway authorities ought to have given notice to the appellant of the seizure of the tank wagon within a reasonable time and that the failure to give notice has prejudiced it was not pleaded either before the trial court or the High Court. We think the appellant is not entitled to urge this plea before this Court for the first time as it involves a mixed question of law and fact.

14. We dismiss the appeal but without costs.

Appeal dismissed.

* (See *Corpus Juris Secundum*, Vol. 8, p. 308.)

** (See Vol. 8, p. 309).

AIR 1976 SUPREME COURT 230

(From: Punjab and Haryana)*

P. K. GOSWAMI AND N. L. UNTWALIA, JJ.

Balwant Singh, Appellant v. State of Punjab, Respondent.

Criminal Appeal No. 301 of 1975, D/- 11-11-1975.

(A) Criminal P. C. (1974), Section 354 (3) — Conviction under Section 302 — Sentence — Death sentence can be awarded only under special reasons. Cr. Appeal No. 1325 of 1974 and Murder Ref. No. 59 of 1974, D/- 25-4-1975 (Punj & Har), Reversed.

Under Sec. 354 (3) the Court is required to state the reasons for the sentence awarded and in the case of sentence of death, special reasons are required to be stated. It would thus be noticed that awarding of the sentence other than the sentence of death is the general rule now under the new Code and only special reasons, that is to say, special facts and circumstances in a given case, will warrant the passing of the death sentence. It is unnecessary nor is it possible to make a catalogue of the special reasons which may justify the passing of the death sentence in a case. But to indicate just a few, such as, the crime has been committed by a professional or a hardened criminal, or it has been committed in a very brutal manner or on a helpless child or a woman or the like. (Para 4)

Since there were no special reasons the High Court was not justified in confirming death sentence by relying on some decisions of the Supreme Court given under the old Code. Cr. Appeal No. 1325 of 1974 and Murder Ref. No. 59 of 1974, D/- 25-4-1975 (Punj & Har), Reversed. (Para 5)

Cases Referred: Chronological Paras
AIR 1975 SC 76 = 1975 Cri LJ 36 5

AIR 1975 SC 95 = 1975 Cri LJ 51 5
M/s. S. K. Mehta, M. Qamaruddin and K. R. Nagaraja, Advocates for Appellant; Mr. O. P. Sharma, Advocate, for Respondent.

*(Criminal Appeal No. 1325 of 1974 and Murder Reference No. 59 of 1974, D/- 25-4-1975—Punj. and Har.)

LS/LS/E302/75/MVJ

Judgment of the Court was delivered by

UNTWALIA, J.:— Balwant Singh, the sole appellant in this appeal, was convicted under Section 302 of the Penal Code and sentenced to death by the Trial Court. His conviction and sentence have been confirmed by the High Court of Punjab and Haryana. Special leave to appeal was granted by this Court limited to the question of sentence only. We have, therefore, to see whether on the facts of this case the High Court was right in confirming the death sentence imposed upon the appellant or was it a case where the lesser sentence of life imprisonment ought to have been awarded.

2. The appellant was aged about 60 years at the time of the occurrence. He was working as a Granthi of a Gurudwara in village Salihna District Faridkot. Mohan Singh the deceased was a member of the Managing Committee of the Gurudwara. He made certain complaints against the appellant to the President of the Managing Committee and asked for his removal from the post of the Granthi. The appellant, therefore, bore a grudge against the deceased. In the early hours of April 13, 1974 the appellant gave Karah Parshad of Granth Sahib to Mohan Singh mixing opium in it. As soon as Mohan Singh took the Parshad he felt sick and his heart began to sink. In spite of the medical aid he could not survive and died about 4 hours after the administering of the poison to him by the appellant. On the facts found by the learned Sessions Judge and as affirmed by the High Court, the appellant was convicted under Section 302 of Penal Code. The question for consideration is whether the sentence of death was rightly passed. It may be noticed that the occurrence took place on April 13, 1974 after coming into force of the Criminal Procedure Code, 1973 on and from April 1, 1974. Provisions of Section 354 (3) of the new Code, as noticed by the High Court, governed this case. Yet the High Court confirmed the sentence of death relying upon two decisions of this Court which were not concerned with the application of law engrafted in Section 354 (3) of the

Code of Criminal Procedure, 1973 but were given with reference to the Code of Criminal Procedure 1898 as it stood at the relevant time.

3. It is well-known that in many parts of the world an agitation has been going on against the imposition of death penalty even in murder cases. And in many countries or States death penalty has been abolished. In India the Legislature in its wisdom has not thought it fit and proper to abolish the death penalty altogether but there has been a gradual swing against the imposition of such penalty. Under the Code of Criminal Procedure, 1898 as it stood before its amendment by Act 26 of 1955, sub-s. (5) of Sec. 367 required:

"If the accused is convicted of an offence punishable with death, and the Court sentences him to any punishment other than death, the Court shall in its judgment state the reason why sentence of death was not passed":

Under the provision aforesaid if an accused was convicted for an offence punishable with death then imposition of death sentence was the rule and awarding of a lesser sentence was an exception and the Court had to state the reasons for not passing the sentence of death. By the Amending Act 26 of 1955 the said provision was deleted. Thereafter it was left to the discretion of the Court, on the facts of each case, to pass the sentence of death or to award the lesser sentence. In the context of the changed law if in a given case the passing of the death sentence was not called for or there were extenuating circumstances to justify the passing of the lesser sentence then the lesser sentence was awarded and not the death sentence.

4. Section 354(3) of the new Criminal Procedure Code says:

"When the conviction is for an offence punishable with death or, in the alternative, with imprisonment for life or imprisonment for a term of years, the judgment shall state the reasons for the sentence awarded, and, in the case of sentence of death, the special reasons for such sentence." Under this provision the Court is required to state the reasons for the sentence awarded and in the case of sentence of death, special reasons are

required to be stated. It would thus be noticed that awarding of the sentence other than the sentence of death is the general rule now and only special reasons, that is to say, special facts and circumstances in a given case, will warrant the passing of the death sentence. It is unnecessary nor is it possible to make a catalogue of the special reasons which may justify the passing of the death sentence in a case. But we may indicate just a few, such as, the crime has been committed by a professional or a hardened criminal, or it has been committed in a very brutal manner or on a helpless child or a woman or the like. On the facts of this case, it is true that the appellant had a motive to commit the murder and he did it with an intention to kill the deceased. His conviction under Section 302 of the Penal Code was justified but the facts found were not such as to enable the Court to say that there were special reasons for passing the sentence of death in this case.

5. The High Court has referred to the two decisions of this Court namely in Mangal Singh v. State of U. P., AIR 1975 SC 76 and in Perumal v. The State of Kerala, AIR 1975 SC 95 and has then said "There are no extenuating circumstances in this case and the death sentence awarded to Balwant Singh appellant by the Sessions Judge is confirmed....." As we have said above, even after noticing the provisions of Sec. 354(3) of the new Cr. P. C. the High Court committed an error in relying upon the two decisions of this Court in which the trials were held under the old Code. It wrongly relied upon the principle of absence of extenuating circumstances — a principle which was applicable after the amendment of the old Code from January 1, 1956 until the coming into force of the new Code from April 1, 1974. In our judgment there is no special reason nor any has been recorded by the High Court for confirming the death sentence in this case. We accordingly allow the appeal on the question of sentence and commute the death sentence imposed upon the appellant to one for imprisonment for life.

Sentence reduced.

AIR 1976 SUPREME COURT 232

(From: Punjab)*

R. S. SARKARIA AND A. C. GUPTA, JJ.

Swarn Singh and another, Appellants v. State of Punjab and others, Respondents.

Civil Appeal No. 888 of 1968, D/- 19-11-1975.

(A) Constitution of India, Art. 226 — Certiorari, writ of — Limits of jurisdiction of High Court to interfere — Finding of fact — Error of law or of jurisdiction — Order by Collector under Punjab Security of Land Tenures Act (10 of 1953), excluding certain portion from area declared as surplus area of landholder — Interference under Art. 226 — (Punjab Security of Land Tenures Act (10 of 1953) Section 6.)

It is well settled that Certiorari jurisdiction can be exercised only for correcting errors of jurisdiction committed by inferior courts or tribunals. A writ of Certiorari can be issued only in the exercise of supervisory jurisdiction which is different from appellate jurisdiction. The Court exercising special jurisdiction under Art. 226 is not entitled to act as an appellate Court. This limitation necessarily means that findings of fact reached by the inferior court or Tribunal as result of the appreciation of evidence cannot be re-opened or questioned in writ proceedings. An error of law which is apparent on the face of the record can be corrected by a writ, but not an error of fact, however grave it may appear to be. AIR 1964 SC 477, Foll. (Para 12)

In regard to a finding of fact recorded by an inferior tribunal, a writ of Certiorari can be issued only if in recording such a finding, the tribunal has acted on evidence which is legally inadmissible, or has refused to admit admissible evidence, or if the finding is not supported by any evidence at all, because in such cases the error amounts to an error of law. The writ jurisdiction extends only to cases where orders are passed by in-

ferior courts or tribunals in excess of their jurisdiction or as a result of their refusal to exercise jurisdiction vested in them or they act illegally or improperly in the exercise of their jurisdiction causing grave miscarriage of justice. (Para 13)

Where the Collector, who had earlier declared certain land as surplus area of the land-owner under the Punjab Security of Land Tenures Act, 1953, later on, excluded portion of that area from the surplus pool on the ground that the father of the respondents was in occupation of that land as a tenant on the crucial date 15-4-1953 (when the Act came into force) and the order was passed after examining the oral and documentary evidence on record:

Held that the finding was one of fact and as it could not be said to be patently wrong, (much less could it be a finding based on no evidence or on inadmissible evidence), the High Court could not interfere with the order by writ of Certiorari under Art. 226 of the Constitution. (Para 15)

According to the scheme of the Act, the Collector has to fix separately the permissible areas of the land-owner as well as the tenants as on 15-4-1953. Accordingly, the Collector put the land in dispute in the permissible area of the tenant (father of the respondents) and excluded it from the surplus area of the landowner. Thus, the order of the Collector did not suffer from any error of law or of jurisdiction. L. P. A. No. 384 of 1967, D/- 31-10-1967 (Punj & Har), Affirmed. (Para 10)

(B) Constitution of India, Article 226 — Certiorari — Finding of fact based on relevant and existing grounds as well as irrelevant and non-existing grounds — Interference under Art. 226.

Where the order of a domestic tribunal makes reference to several grounds, some relevant and existent, and others irrelevant and non-existent, the order will be sustained if the Court is satisfied that the authority would have passed the order on the basis of the relevant and existing grounds, and the exclusion of irrelevant or non-existing grounds could not have affected the ultimate deci-

*(L. P. A. No. 384 of 1967, D/- 31-10-1967—Punj. and Har.)

sion. AIR 1963 SC 779 and AIR 1967 SC 1353, Ref. (Para 18)

Cases Referred: Chronological Paras

AIR 1967 SC 1353 = (1967) 2 SCR 583 10, 18

AIR 1964 SC 477 = (1964) 5 SCE 64 10, 12

AIR 1963 SC 779 = (1963) Supp 1 SCR 648 18

M/s. R. K. Garg, S. C. Agarwala and V. J. Francis, Advocates of M/s. Ramamurthi & Co. Advocates, for Appellants; Mr. Hardayal Hardy, Sr. Advocate, (Mr. S. K. Bagga, Mrs. S. Bagga and Miss Yash Bagga, Advocates of M/s. S. Bagga, Advocates), for Respondent No. 6; Respondents Nos. 1, 5, and 7, Ex parte.

Judgment of the Court was delivered by

SARKARIA, J.:— This appeal by special leave is directed against a judgment of the Punjab and Haryana High Court summarily dismissing the Letters Patent Appeal filed by the present appellants.

2. Mahant Gurnarain, Respondent No. 5, owned 182 standard acres and $11\frac{1}{4}$ units of land in several villages in the Districts of Ambala, Hoshiarpur and Jullundur. The Special Collector, Chandigarh, Respondent No. 4 herein, by an order dated 3-3-1961, declared an area of 132 standard acres, $11\frac{1}{2}$ units, out of the aforesaid land, as surplus area of the Mahant under the Punjab Security of Land Tenures Act, 1953 (to be hereafter called the Act). Out of this surplus area, land admeasuring 13 standard acres and $1\frac{1}{2}$ units situate in the revenue estate of Dosanjh Kalan Tehsil Phillaur was allotted by the Circle Revenue Officer to the appellants and Respondent No. 7, and possession thereof was given to them on 15-6-61 in accordance with Rule 20 of the Punjab Security of Land Tenures Rules, 1956 (hereinafter called the Rules).

3. On 18-9-1961, the Special Collector excluded the entire area of Respondent 5 in the revenue estate of village Dosanjh Kalan from the surplus pool. This excluded area included the aforesaid 13 standard acres and $11\frac{1}{2}$ units that had been allotted to the appellants. The Collector allowed this area to Jagga (Respondent 6)

and his brother, Meet Singh, as their permissible area on the ground that they were tenants of this land on 15-4-1953.

4. Aggrieved, the appellants carried an appeal to the Commissioner (Respondent 3), contending inter alia that Jagga and Meet Singh were not tenants of this land on the crucial date i.e. 15-4-1953. The Commissioner dismissed this appeal. A revision preferred by the appellants before the Financial Commissioner met the same fate on 25-1-1963. To impugn these orders of the Special Collector, the Commissioner and the Financial Commissioner, the appellants filed a writ petition (No. 173 of 1963) in the High Court. The petition was accepted by a learned Judge (Shamsher Bahadur J.) who set aside those orders and remanded the case to the Special Collector with the direction that he should proceed afresh to determine the question after giving an opportunity of hearing to the writ-petitioners. Against that order of the learned Judge, Jagga preferred an appeal before a Division Bench of the High Court. The Bench dismissed the appeal.

5. After the remand, the Special Collector reheard the parties and gave them opportunity to adduce further evidence on the point at issue. Jagga's contention was that in the agricultural year 1952-53, he and his brother, Meet Singh, sons of Rattan Singh, were in possession of this land as tenants under the land-owner, and consequently this area could not be included in the surplus area of the land-owner. The contention was accepted by the Special Collector, in these terms:

"In support of this, oral as well as documentary evidence has been produced by Jagga, claiming to be an old tenant. In oral evidence, two witnesses have been examined. One is Shanti Sarup, Lambardar of village Dosanjh Kalan where the land in dispute is situated. The other is Karam Singh, who is one of the new tenants resettled on the land already declared surplus with Mahant Gurnarain (Landowner). In documentary evidence, certified copies of Khasra Girdawaries Ex. PB and PC, certi-

fied copies of Pedigree table, Exhibit PD and receipt showing payment of lease money to Mahant Gurnarain and land revenue paid to Lambardar by Rattan Singh, the father of Jagga, Exhibits PI, PII, PIII, PIV, PV, PVI, PVII, PVIII, PIX and PX, have been produced. From the perusal of the entries in the certified copies of Khasra Girdawaries it appears that from 1948 to 1952 the cultivation of Rattan Singh son of Isher Singh i.e. Jagga's father is entered. In 1952-53, however the cultivation of Rattan Singh son of Dalip Singh is entered. Thereafter, again in 1953-54, Meet and Jagga sons of Rattan Singh are entered upto 1961. It seems that the mistake made in the parentage of Rattan Singh, recording him as son of Dalip Singh in 1952-53 in Khasra Girdawari is nothing but a clerical error. Because further these entries find full support from the oral as well as other documentary evidence mentioned above, the continuance of tenancy of a son after the father is a solid proof which can safely be relied upon. I have, therefore, no hesitation in accepting the plea that Jagga is an old tenant and his area, therefore, should not be included in the surplus pool."

6. In the result, the Special Collector by his order dated 11-5-1965, rejected the pleas taken by the appellants and excluded the area in dispute, admeasuring 13 standard acres and 1½ units, from the surplus area of the landowner and held it as permissible area of Respondent 6 (Jagga) and his brother, Meet Singh.

7. Against this order of the Special Collector, the appellants appealed to the Commissioner who by an order, dated 25-5-1965, dismissed the same and affirmed the order of the Special Collector. The appellants moved the Financial Commissioner in revision under Sec. 24 of the Act. The Financial Commissioner dismissed the Revision on 31-10-1966 and affirmed the orders of the Special Collector and the Commissioner. A review petition filed by the appellants was also rejected by the Financial Commissioner on 25-11-1966.

8. The appellants then on 13-12-1966, filed a writ petition under Arts. 226/227 of the Constitution for

the issuance of an appropriate writ, order or direction, quashing the orders of Respondents 2 to 4. A learned Single Judge (Tek Chand J.) by his judgment, dated 14-9-1967, dismissed the petition and upheld the orders passed by Respondents 2 to 4. A Letters Patent Appeal filed by the appellants was also dismissed by a Bench of the High Court on 31-10-1967. It is against this order that the appellants have come in appeal before us.

9. The main contentions of Shri R. K. Garg, learned Counsel for the appellants are that in first appeal, the Commissioner wholly misconceived the points for determination; that he never applied his mind to the contentions advanced by the appellants; that he referred with approval to the previous orders of the Commissioner and the Financial Commissioner which had been quashed by Shamsher Bahadur J.; that the Special Collector totally mis-read the entries in the Khasra Girdawari and failed to note that there was no diagonal line in the relevant column of the Khasra Girdawari for the year 1952-53 which indicated that the tenant who was cultivating this land in the preceding crop, had ceased to do so in the succeeding crop. The point pressed into service is that according to Khasra Girdawari for Rabbī 1952-53, the land was in the cultivation of Rattan Singh s/o Dalip Singh, and that there was no evidence or basis for the Special Collector's finding that the parentage of this Rattan Singh had been wrongly recorded as Dalip Singh, instead of Isher Singh, due to a clerical error. It is submitted that there is a report in the Patwari's Roznamcha showing that in the year 1952-53, Rattan Singh s/o Isher Singh had ceased to be in cultivation of this land, and in his place Rattan Singh s/o Dalip Singh became its cultivator, and that this report also did not receive the attention of the Special Commissioner or the Higher authorities. Another error, according to Counsel, committed by the Special Collector, was that after he had reserved the final orders in the case, he allowed respondent 5 to furnish a copy of the Khatuani Ishtemal at the back of the appellants, and examined the patwari

also. This procedure contends Mr. Garg, was manifestly illegal and unfair. It is urged that the Commissioner went off at a tangent and did not apply his mind to the real points in controversy and that the order of the Financial Commissioner was equally perfunctory. It is stressed that the Commissioner and the Financial Commissioner wrongly assumed that the appellants were claiming as protected tenants whereas they were claiming as allottees of surplus area, and that Jagga and Meet Singh were not entitled to this land because there was no evidence to show that on 15-4-1953 they were tenants of this land.

10. On the other hand, Shri Hardayal Hardy, learned Counsel for the respondents submits that in proceedings under Arts. 226/227, the High Court has no jurisdiction to interfere even with an erroneous finding of fact, however grave the error may be. The Collector's order, it is maintained, does not suffer even from an error of fact; that there was ample evidence on the record to show that on 15-4-1953, Jagga's father Rattan Singh was a tenant of this land. Counsel contends that the mere reference to some irrelevant matters by the Commissioner, did not affect the result of the appeal before him because he had, in the penultimate paragraph of his order, considered the appellant's contention that Jagga was not an old tenant, and as such, the area under his tenancy could not be left out of the surplus pool. This contention, it is emphasised was negatived by the Commissioner after examining the record. It is further submitted that the Financial Commr. considered the point in issue and after going through the evidence, fully affirmed the finding of the Special Collector that in the year 1952-53, Rattan Singh son of Isher Singh who was the father of Jagga and Meet Singh, cultivated the land in dispute as a tenant, and that the entry in the Khasra Girdawari showing Dalip Singh as the father of Rattan Singh was a clerical error. Our attention has also been invited to the fact that the learned Judge (Tek Chand J.) also referred to the evidence in writ proceedings to satisfy

himself that the Special Collector's finding was not erroneous but was based on a proper appreciation of evidence. It is argued that the reference made by the Commissioner to irrelevant matters had not resulted in a wrong decision, nor in a miscarriage of justice. Learned Counsel has further pointed out that there was no evidence on the record to show that the Patwari made any report in his Roznamcha showing that instead of Rattan Singh son of Isher Singh, Rattan Singh son of Dalip Singh had come in cultivation of the land in question in the year 1952-53. On the contrary, says the Counsel, the evidence on the record, oral and documentary, relied upon by the Collector, showed that Rattan Singh son of Isher Singh was a long-standing tenant of this land since the year 1948-49; that the entries in the Khasra Girdawari for four years preceding the year 1952-53 continuously stand in his name and those for the succeeding 7 or 8 years also stand in the name of his sons Jagga and Meet, he having died in the meantime. According to the pedigree table and other evidence on the record, it is contended, Dalip Singh was the real brother of Isher Singh father of Rattan Singh. Counsel concludes, that in these circumstances, the finding of the Collector that the entry in the Khasra Girdawari for the year 1952-53 showing 'Dalip Singh' instead of 'Isher Singh', as the father of the tenant Rattan Singh was due to a clerical error, was not incorrect, and even if it was erroneous, it could not be interfered with in writ proceedings. Reference has been made to this Court's decision in *Syed Yakoob v. K. S. Radhakrishnan*, (1964) 5 SCR 64 = (AIR 1964 SC 477) and *State of Maharashtra v. B. K. Takkamore*, (1967) 2 SCR 583 = (AIR 1967 SC 1353).

11. Counsel further discounts the contention of his learned friend opposite that the evidence of the Patwari was recorded by the Collector at the back of the appellant. It is asserted that the Patwari was, in fact, examined in the presence of the parties and was cross-examined on behalf of the appellants.

12. Before dealing with the contentions canvassed, it will be useful to notice the general principles indicating the limits of the jurisdiction of the High Court in writ proceedings under Article 226. It is well-settled that Certiorari jurisdiction can be exercised only for correcting errors of jurisdiction committed by inferior courts or tribunals. A writ of Certiorari can be issued only in the exercise of supervisory jurisdiction which is different from appellate jurisdiction. The Court exercising special jurisdiction under Art. 226 is not entitled to act as an appellate Court. As was pointed out by this Court in *Syed Yakooob's case* (AIR 1964 SC 477) (supra) "this limitation necessarily means that findings of fact reached by the inferior court or Tribunal as a result of the appreciation of evidence cannot be re-opened or questioned in writ proceedings. An error of law which is apparent on the face of the record can be corrected by a writ, but not an error of fact, however grave it may appear to be."

13. In regard to a finding of fact recorded by an inferior tribunal, a writ of Certiorari can be issued only if in recording such a finding, the tribunal has acted on evidence which is legally inadmissible, or has refused to admit admissible evidence, or if the finding is not supported by any evidence at all, because in such cases the error amounts to an error of law. The writ jurisdiction extends only to cases where orders are passed by inferior courts or tribunals in excess of their jurisdiction or as a result of their refusal to exercise jurisdiction vested in them or they act illegally or improperly in the exercise of their jurisdiction causing grave miscarriage of justice.

14. Now in the case before us, as will be apparent from the passage extracted earlier from the order of the Special Collector, the finding in question was a finding of fact arrived at by him after an appraisal of the oral and documentary evidence on record. His finding that for the year 1952-53, Rattan Singh s/o Dalip Singh entered in the Khasra Girdawari as a tenant of the land was a misdescription of 'Rattan Singh son of Isher Singh' could not be said to be

patently wrong. According to the Collector, the tenancy of Rattan Singh son of Isher Singh continued without a break from 1948 to 1961, although after his death, from 1953-1954, onwards the tenancy was in the name of his sons, Jagga and Meet. The Collector found that for the year 1952-53, due to a clerical error, in the Khasra Girdawari, the name of Rattan Singh's father was shown as 'Dalip Singh', instead of Isher Singh. This mistake, according to the Special Collector, occurred because 'Dalip Singh' was, according to the pedigree table on record, the real brother of Isher Singh, the father of Rattan Singh.

15. Before the Collector, it was contended on behalf of the appellants that for the year 1952-53, the land in dispute was, in fact, cultivated by Rattan Singh s/o Gulzarsingh. This Gulzar Singh, though alive, was not examined. In any case, it was common ground that the parentage of Rattan Singh as entered in the Khasra Girdawari for the year 1952-53, was erroneous. This being the case, even on facts, the finding of the Special Collector that on 15-4-1953, Rattan Singh son of Isher Singh, the father of Jagga and Meet respondents, was in occupation of this land as a tenant, could not be said to be patently wrong, much less could it be a finding based on no evidence or on inadmissible evidence.

16. According to the scheme of the Act, the Collector has to fix separately the permissible areas of the landowner as well as the tenants as on 15-4-1953. Accordingly, the Collector put the land in dispute in the permissible area of the tenant, Rattan Singh s/o Isher Singh, and excluded it from the surplus area of the landowner. Thus, the order of the Collector did not suffer from any error of law or of jurisdiction.

17. The contention that some evidence was allowed to be tendered at the back of the appellant, also does not appear to be tenable. According to Mr. Garg, the evidence which was let in this manner, was a copy of the Khatauni, and the examination of the Patwari after the case had been heard and reserved for orders. There is no reference to

this Khatauni in the Order of the Special Collector which is not based on it. The Patwari was obviously examined in the presence of the parties or their Counsel. Indeed, he is said to have been cross-examined by the parties including the appellants. This belated examination of the Patwari did not prejudice the appellants or any other party. It is true that the Commissioner at the outset misconceived the real point in issue and wrongly assumed that the appellants were claiming as protected tenants. But from a reading of his order as a whole, it appears that he did examine the evidence on record and towards the end of his order in the penultimate paragraph, did advert though briefly to the real point for determination and concurred with the Collector, that Jagga was an old tenant and as such the areas under his tenancy had to be excluded from the surplus area of the land-owner. In any case, the Financial Commissioner in revision discussed the matter in controversy with sufficient reference to the documentary and oral evidence on record, and came to a well-considered conclusion that the finding of the Collector as to the father of Jagga and Meet being an old tenant in occupation of the land in the crucial year 1952-53, was correct. He found no reason to disturb that concurrent finding of fact.

18. In view of this, the deficiency or reference to some irrelevant matters in the order of the Commissioner had not prejudiced the decision of the case on merits either at the appellate or revisional stage. There is authority for the proposition that, where the order of a domestic tribunal makes reference to several grounds, some relevant and existent, and others irrelevant and non-existent, the order will be sustained if the Court is satisfied that the authority would have passed the order on the basis of the relevant and existing grounds, and the exclusion of irrelevant or non-existing grounds could not have affected the ultimate decision, (see *State of Maharashtra v. B. K. Takkamore*, (AIR 1967 SC 1353) (supra); *State of Orissa v. Bidyabhu-*

shan Mahapatra, (1963) Supp 1 SCR 648 = (AIR 1963 SC 779).

19. For the foregoing reasons, we are of opinion that the High Court was right in holding that there was no justification for interference with the impugned orders in the exercise of Certiorari jurisdiction. Accordingly, we dismiss this appeal but without any order as to costs.

20. Before we part with this judgment, we would like to observe that if the appellants are landless tillers and one of them is an ex-serviceman, then their claims for allotment of land from the surplus pool in this revenue estate or elsewhere should be given due consideration and priority by the authorities concerned under any scheme relating to the allotment of surplus area framed in pursuance of the Act, rules or any other law.

Appeal dismissed.

AIR 1976 SUPREME COURT 237

(From: 1972 All LJ 491)

A. ALAGIRISWAMI, P. K. GOSWAMI
AND N. L. UNTWALIA, JJ.

New India Insurance Co. Ltd.,
Appellant v. Smt. Shanti Misra, Respondent.

Civil Appeal No. 210 of 1975, D/-10-10-1975.

(A) Motor Vehicles Act (1939),
Sec. 110A — Accident occurring prior
to constitution of Claims Tribunal —
Jurisdiction of Civil Court. AIR 1961
Madh Pra 295, AIR 1964 Madh Pra
133; AIR 1970 Pat 172, Overruled.

On the plain language of Sections 110A and 110F the change in law was merely a change of forum i.e. a change of adjectival or procedural law and not of substantive law. Such a change of law operates retrospectively and the person has to go to the new forum even if his cause of action or right of action accrued prior to the change of forum. The jurisdiction of the Civil Court is ousted as soon as the Claims Tribunal is constituted and the filing of the application before the Tribunal is the only remedy available to the claimant. Apropos the bar of limitation provided in Section 110A (3), one can say that strictly speaking, the bar does not operate in relation to an application for compensation arising

JS/KS/D864/75/DHZ

ing out of an accident which occurred prior to the constitution of the Claims Tribunal. But since in such a case there is a change of forum, the reasonable view to take would be that such an application can be filed within a reasonable time of the constitution of the Tribunal, which ordinarily and generally, would be the time of limitation mentioned in sub-section (3). If the application could not be made within that time from the date of the constitution of the Tribunal; in a given case, the further time taken in the making of the application may be held to be the reasonable time on the facts of that case for the making of the application or the delay made after the expiry of the period of limitation provided in sub-section (3) from the date of the constitution of the Tribunal can be condoned under the proviso to that sub-section. AIR 1961 Madh Pra 295, AIR 1964 Madh Pra 133; AIR 1970 Pat 172, Overruled. (Paras 5, 6, 10)

Cases Referred: Chronological Paras
AIR 1970 Pat 172 = 1969 BLJR 919

AIR 1969 Delhi 3 = 1968 Acc LJ 86

AIR 1969 Raj 316 = 1969 Raj LW 542

ILR (1967) Guj 495 = 8 Guj LR 779

AIR 1965 Mad 149 = (1965) 1 Mad LJ 203

ILR (1965) 2 Mad 145 = (1965) 2 Mad LJ 285

AIR 1965 Punj 102 = 66 Pun LR 1083

AIR 1964 Madh Pra 133 = 1962 Jab LJ 661

AIR 1961 Madh Pra 295 = 1961 Jab LJ 710

AIR 1916 Mad 912 = ILR 39 Mad 645

AIR 1914 Cal 806 = ILR 41 Cal 1125 (FB)

(1877) 4 Ind App 127 = ILR 3 Cal 47 (PC)

Mr. D. D. Chawla, Sr. Advocate, (Mr. H. K. Puri, Advocate, with him), for Appellant; M/s. J. P. Goyal, D. P. Mukherjee and S. P. Singh, Advocates, for Respondents Nos. 1-3.

Judgment of the Court was delivered by

UNTWALIA, J.:— This is an appeal by certificate of fitness granted

by the Allahabad High Court. The question of law which falls for determination in this appeal is whether an application for compensation filed under Section 110A of the Motor Vehicles Act, 1939 (for brevity, the Act), arising out of an accident which occurred more than 60 days before the constitution of the Motor Accidents Claims Tribunal under Section 110 could be entertained by the Tribunal or the remedy of the aggrieved person was to institute a civil suit.

2. On the 11th Sept. 1966 occurred an accident in which Shri Amar Nath Misra, husband of respondent No. 1 and father of respondents 2 and 3 met his death due to collision between his motor-cycle and a truck owned by appellant No. 2 and insured with appellant No. 1. A cause of action accrued to the respondents 1, 2 and 3 (hereinafter called the respondents) to claim compensation as legal representatives of the deceased under the Indian Fatal Accidents Act, 1855. A suit could be brought under Article 82 of the Limitation Act, 1963 within two years of the occurrence of the accident. But in the meantime the Government of Uttar Pradesh constituted the Claims Tribunal under Section 110 of the Act, by a notification published in the Gazette of the 18th March, 1967. The respondents filed an application under Section 110A on the 8th July 1967. The appellants objected to the jurisdiction of the Tribunal to entertain the application. The Tribunal overruled the objection and held that it had jurisdiction to entertain the application. The appellants filed a writ application in the High Court which was allowed by a learned single Judge. In appeal filed by the respondents there was a difference of opinion between the two Judges constituting the Division Bench. On reference to a third Judge the ultimate view taken by the High Court was that the Tribunal had jurisdiction to entertain this application. Hence this appeal.

3. The Act was amended by Central Act 100 of 1956 with effect from the 16th February, 1956. The original Section 110 was deleted and new Sections 110 to 110F were intro-

duced. The Claims Tribunals, however, were not constituted by the State Governments at one and the same time. They were constituted with different dates for different areas. Until and unless the Claims Tribunals were constituted the provisions of the new sections introduced in the year 1956 could not be availed of. But as soon as a Claims Tribunal was constituted the jurisdiction of the Civil Court was barred by Section 110F which reads as follows:

"Where any Claims Tribunal has been constituted for any area, no Civil Court shall have jurisdiction to entertain any question relating to any claim for compensation which may be adjudicated upon by the Claims Tribunal for that area, and no injunction in respect of any action taken or to be taken by or before the Claims Tribunal in respect of the claim for compensation shall be granted by the Civil Court."

But difficulties arose in giving full effect to the bar of jurisdiction of the Civil Court because of the language of Section 110A providing for the filing of an application for compensation. There could not be any debate or dispute that if an accident occurred after the constitution of the Claims Tribunal, the only remedy of the claimant was to file an application under Section 110A. The jurisdiction of the Civil Court in such a case was ousted in express language. Suits which had been instituted prior to the constitution of the Claims Tribunal remained unaffected and had to proceed to disposal in Civil Courts. In a third type of cases also there could not be much scope for debate where an accident had occurred prior to the constitution of the Tribunal and the remedy of the suit was barred on the date of such constitution. A barred remedy under no circumstances was meant to be revived under Section 110A. But the difficulty arose in cases where accidents had occurred prior to the constitution of the Claims Tribunal, the remedy of action in Civil Court was alive but no suit had been filed. In such cases the vested right of action was not meant to be extinguished. The remedy of either an application under Section 110A or a civil suit must be

available; surely, not both. Majority of the High Courts have expressed the view that in such a situation the only remedy available was that of filing an application before the Tribunal and the jurisdiction of Civil Court was barred. Vide *Unique Motor and General Insurance Co. Ltd., Bombay v. Kartar Singh*, AIR 1965 Punj 102; *M/s. V. C. K. Bus Service (P) Ltd. Coimbatore v. H. B. Sethna*, AIR 1965 Mad 149; *Palani Ammal v. Safe Service, Ltd., Salem*, ILR (1965) 2 Mad 145; *Natverlal Bhikhalal v. Thakarda Khodaji*, ILR (1967) Guj 495; *Yadav Motor Transport Co. v. Jagdish Prasad*, AIR 1969 Raj 316 and *Thomas v. M/s. Hotz Hotels Ltd.*, AIR 1969 Delhi 3. A contrary view was taken by the Madhya Pradesh High Court in *Khetumal Ghanshamdas v. Abdul Qadir Jamaluddin*, AIR 1961 Madh Pra 295; *Sushma Mehta v. Central Provinces Transport Services Ltd.*, AIR 1964 Madh Pra 133. In the first case of Madhya Pradesh observations were obiter dicta because on facts it was a case of a pending suit. Similar obiter dicta were made by a Bench of the Patna High Court following the Madhya Pradesh decisions in the case of *The Bihar Co-operative Motor Vehicles Insurance Society Ltd. v. Rameshwar Raut*, AIR 1970 Pat 172 (paras 7 and 8). The question falls for determination in this Court for the first time and we have to decide which of the two views is correct.

4. We shall now read Section 110A as it stood at the relevant time:

"110A. (1) An application for compensation arising out of an accident of the nature specified in subsection (1) of Section 110 may be made—

(a) by the person who has sustained the injury; or

(b) where death has resulted from the accident, by all or any of the legal representatives of the deceased; or

(c) by any agent duly authorised by the person injured or all or any of the legal representatives of the deceased, as the case may be;

Provided that where all the legal representatives of the deceased have not joined in any such application

for compensation, the application shall be made on behalf of or for the benefit of all the legal representatives of the deceased and the legal representatives who have not so joined, shall be impleaded as respondents to the application.

(2) Every application under sub-section (1) shall be made to the Claims Tribunal having jurisdiction over the area in which the accident occurred, and shall be in such form and shall contain such particulars as may be prescribed.

(3) No application for compensation under this section shall be entertained unless it is made within sixty days of the occurrence of the accident:

Provided that the Claims Tribunal may entertain the application after the expiry of the said period of sixty days if it is satisfied that the applicant was prevented by sufficient cause from making the application in time."

A period of six months was substituted in place of sixty days in sub-section (3) by Act, 56 of 1969 with effect from 2-3-1970.

5. On the plain language of Sections 110A and 110F there should be no difficulty in taking the view that the change in law was merely a change of forum i.e. a change of adjectival or procedural law and not of substantive law. It is a well-established proposition that such a change of law operates retrospectively and the person has to go to the new forum even if his cause of action or right of action accrued prior to the change of forum. He will have a vested right of action but not a vested right of forum. If by express words the new forum is made available only to causes of action arising after the creation of the forum, then the retrospective operation of the law is taken away. Otherwise the general rule is to make it retrospective. The expressions "arising out of an accident" occurring in sub-section (1) and "over the area in which the accident occurred", mentioned in sub-s. (2) clearly show that the change of forum was meant to be operative retrospectively irrespective of the fact as to when the accident occurred. To that extent there was no difficulty in giving the answer in

a simple way. But the provision of limitation of 60 days contained in sub-section (3) created an obstacle in the straight application of the well-established principle of law. If the accident had occurred within 60 days prior to the constitution of the Tribunal then the bar of limitation provided in sub-section (3) was not an impediment. An application to the Tribunal could be said to be the only remedy. If such an application, due to one reason or the other, could not be made within 60 days then the Tribunal had the power to condone the delay under the proviso. But if the accident occurred more than 60 days before the constitution of the Tribunal then the bar of limitation provided in sub-section (3) of Section 110A on its face was attracted. This difficulty of limitation led most of the High Courts to fall back upon the proviso and say that such a case will be a fit one where the Tribunal would be able to condone the delay under the proviso to sub-section (3), and led others to say that the Tribunal will have no jurisdiction to entertain such an application and the remedy of going to the Civil Court in such a situation was not barred under Section 110F of the Act. While taking the latter view the High Court failed to notice that primarily the law engrafted in Sections 110A and 110F was a law relating to the change of forum.

6. In our opinion in view of the clear and unambiguous language of Sections 110A and 110F it is not reasonable and proper to allow the law of change of forum give way to the bar of limitation provided in sub-section (3) of Section 110A. It must be vice versa. The change of the procedural law of forum must be given effect to. The underlying principle of the change of law brought about by the amendment in the year 1956 was to enable the claimants to have a cheap remedy of approaching the Claims Tribunal on payment of a nominal court fee whereas a large amount of ad valorem court fee was required to be paid in Civil Court. It is legitimate to think that the legislature did not think it necessary to affect the pending suits but wanted the cheap remedy to be available as

soon as the Tribunal was constituted by the State Governments, in all cases irrespective of the date of the accident, provided the remedy of going to the Court was not barred on the date of the constitution of the Tribunal. Then, how is the difficulty of limitation in such cases to be solved is the question.

7. In our opinion taking recourse to the proviso appended to sub-section (3) of Section 110A for excusing the delay made in the filing of the application between the date of the accident and the date of the constitution of the Tribunal is not correct. Section 5 of the Limitation Act, 1963 or the proviso to sub-section (3) of Section 110A of the Act are meant to condone the default of the party on the ground of sufficient cause. But if a party is not able to file an application for no fault of his but because the Tribunal was not in existence, it will not be a case where it can be said that the "applicant was prevented by sufficient cause from making the application in time" within the meaning of the proviso. The time taken between the date of the accident and the constitution of the Tribunal cannot be condoned under the proviso. Then, will the application be barred under sub-section (3) of Section 110A? Our answer is in the negative and for two reasons:

(1) Time for the purpose of filing the application under Section 110A did not start running before the constitution of the Tribunal. Time had started running for the filing of the suit but before it had expired the forum was changed. And for the purpose of the changed forum, time could not be deemed to have started running before a remedy of going to the new forum is made available.

(2) Even though by and large the law of limitation has been held to be a procedural law, there are exceptions to this principle. Generally the law of limitation which is in vogue on the date of the commencement of the action governs it. But there are certain exceptions to this principle. The new law of limitation providing a longer period cannot revive a dead remedy. Nor can it suddenly extinguish vested right of action by pro-

viding for a shorter period of limitation.

8. In *Delhi and London Bank, Ltd. v. Melmoth A. D. Orchard*, (1877) 4 Ind App 127 (PC) Sir Barnes Peacock delivering the judgment on behalf of the Board said at page 135:

"Indeed, if the construction put upon the Act by the High Court at Bombay, and by the Chief Court in the Punjab, is correct, a judgment creditor could not, after the three years, have enforced a judgment which was in force in the Regulation Provinces when Act XIV of 1859 was passed, or a judgment which was in force in the Punjab at the time when the Act was extended to that province, however diligent he might have been in endeavouring to enforce his judgment, and however unable, with the use of the utmost diligence, to get at the property of his debtor. Such a construction would cause great inconvenience and injustice, and give the Act an operation which would retrospectively deprive the creditor of a right which he had under the law as it existed in the Regulation Provinces at the time of the passing of the Act, and in the Punjab at the time of the introduction of it."

9. In *Gopeshwar Pal v. Jiban Chandra*, ILR 41 Cal 1125 = (AIR 1914 Cal 806) (FB), Jenkins J. delivering the judgment on behalf of the majority of the Full Bench said at page 1141 (of ILR Cal) = (at p. 810 of AIR):

"Here the plaintiff at the time when the amending Act was passed had a vested right of suit, and we see nothing in the Act as amended that demands the construction that the plaintiff was thereby deprived of a right of suit vested in him at the date of the passing of the Amending Act. It is not (in our opinion) even a fair reading of Section 184 and the third Schedule of the Bengal Tenancy Act, as amended, to hold that it was intended to impose an impossible condition under pain of the forfeiture of a vested right, and we can only construe the amendment as not applying to cases where its provisions cannot be obeyed."

The majority of the Full Bench of the Madras High Court in *Rajah of*

Pittapur v. Venkata Subba Row, (1916) ILR 39 Mad 545 = (AIR 1916 Mad 912) has taken the same view following the Full Bench decision in Gopeshwar Pal's case at page 650 (of ILR Mad) = (at p. 913 of AIR Mad). Amendment of the law of limitation could not destroy the plaintiff's right of action which was in existence when the Act came into force. We are conscious of the distinction which was sought to be made in the application of these principles. It was said that the right could not be destroyed but recourse to suit would be available under the old law of limitation. We, however, think that giving retrospective effect to the change of law in relation to the forum, in the context of the object of the change, is imperative. That being so the principles aforesaid for overcoming the bar of limitation will be applicable.

10. Appropos the bar of limitation provided in Section 110A (3), one can say, on the basis of the authorities aforesaid, that strictly speaking, the bar does not operate in relation to an application for compensation arising out of an accident which occurred prior to the constitution of the Claims Tribunal. But since in such a case there is a change of forum, unlike the fact of the said cases, the reasonable view to take would be that such an application can be filed within a reasonable time of the constitution of the Tribunal, which ordinarily and generally, would be the time of limitation mentioned in sub-section (3). If the application could not be made within that time from the date of the constitution of the Tribunal, in a given case, the further time taken in the making of the application may be held to be the reasonable time on the facts of that case for the making of the application or the delay made after the expiry of the period of limitation provided in sub-section (3) from the date of the constitution of the Tribunal can be condoned under the proviso to that sub-section. In any view of the matter, in our opinion, the jurisdiction of the Civil Court is ousted as soon as the Claims Tribunal is constituted and the filing of the application before the Tribunal is the only

remedy available to the claimant. On the facts of this case, we hold that the remedy available to the respondents was to go before the Claims Tribunal and since the law was not very clear on the point, the time of about four months taken in approaching the Tribunal after its constitution can be held to be either a reasonable time or the delay of less than 2 months could well be condoned under the proviso to sub-section (3) of Section 110A.

11. For the reasons stated above, we dismiss this appeal with costs to respondents 1, 2 and 3.

Appeal dismissed.

AIR 1976 SUPREME COURT 242

(From:— Disciplinary Committee of the Bar Council of India New Delhi)*

V. R. KRISHNA IYER, R. S. SARKARIA, A. C. GUPTA, AND S. MURTAZA FAZL ALI, JJ.

The Bar Council of Maharashtra, Appellant v. M. V. Dabholkar etc., Respondents.

Civil Appeals Nos. 1461 to 1468 of 1974, D/- 3-10-1975.

(A) Advocates Act (1961), Section 35 (1) — "Reason to believe" — Meaning.

The requirement of 'reason to believe' cannot be converted into a formalised procedural road block, it being essentially a barrier against frivolous enquiries. It is implicit in the resolution of the Bar Council, when it says that it has considered the complaint and decided to refer the matter to the disciplinary committee, that it had reason to believe, as prescribed by the statute. (Para 4)

(B) Advocates Act (1961), Section 35 — Rule 36 of Bar Council of India on standard of Professional Conduct and Etiquette — Rule 36 is not the only nidus of professional ethics — Canons of ethics and propriety for legal profession.

The central function of the legal profession is to promote the adminis-

* (D. C. Appeals Nos. 15 to 19 and 21, 22 and 25 of 1973, D/- 14-4-1974— D. C. of B. C. of India New Delhi.)

tration of justice. If the practice of law is thus a public utility of great implications and a monopoly is statutorily granted by the nation, it obligates the lawyer to observe scrupulously those norms which make him worthy of the confidence of the community in him as a vehicle of justice — social justice. The Bar cannot behave with doubtful scruples or strive to thrive on litigation. Canons of conduct cannot be crystallised into rigid rules but felt by the collective conscience of the practitioners as right.

(Para 15)

It has been universally understood, wherever there is an organised bar assisting in administering justice, that an attorney, solicitor, barrister or advocate will be suspended or disbarred for soliciting legal business. And the 'snatching' species of solicitation are more revolting than 'ambulance chasing', advertising and the like.

(Para 19)

The high moral tone and the considerable public service the bar is associated with and its key role in the developmental and dispute-processing activities and, above all, in the building up of a just society and constitutional order, has earned for it a monopoly to practise law and an autonomy to regulate its own internal discipline. This heavy public trust should not be forfeited by legalising or licensing fights for briefs, affrays in the rush towards clients, under-cutting and wrangling among members.

(Para 20)

Rule 36, fairly construed, sets out wholesome rules of professional conduct although the canons of ethics existed even prior to Rule 36. Rule 36 is not the only nidus of professional ethics.

(Para 20)

The canons of ethics and propriety for the legal profession totally taboo conduct by way of soliciting, advertising, scrambling and other obnoxious practices, subtle or clumsy, for betterment of legal business. Law is no trade, briefs no merchandise and so the leaven of commercial competition or procurement should not vulgarise the legal profession.

(Para 23)

(C) Advocates Act (1961), Section 35 (2) and (3) — Consolidation of 16 Cases and trying them all joint-

ly although charges were different episodes — It is obviously violative of fair trial.

(Para 21)

Cases Referred: Chronological Paras
AIR 1963 SC 1313 = (1964) 1 SCR 697 23

AIR 1957 SC 149 = 1956 SCR 811 23

AIR 1936 Cal 158 = (1936) ILR 63 Cal 367 = 37 Cri LJ 534 (SB) 23

AIR 1929 Bom 335 = 31 Bom LR 625 23

Mr. V. S. Desai, Sr. Advocate, (Mr. Vimal Dave and Miss Kailash Mehta, Advocates of M/s. Mehta Dave & Co., Advocates with him), for Appellant; Respondents in Civil Appeals Nos. 1461 and 1467-1468, In Person. Mr. Zakiuddin P. Bootwala, and Mrs. Urmila Sirur, Advocates, for Respondents in Civil Appeals Nos. 1462-1464, Mr. V. N. Ganpule, Advocate, for Respondent in Civil Appeal No. 1465 of 1974, Mr. D. V. Patel, Sr. Advocate, (Mrs. K. Hingorani, Advocate with him), for the Bar Council of India. Mr. S. K. Sinha, Advocate, for the Bihar State Bar Council.

Judgment of the Court was delivered by

KRISHNA IYER, J.:— These appeals have filled us as much with deep sorrow as with pained surprise. The story of the alleged 'professional misconduct' and the insensitivity of the disciplinary authority to aberrant professional conduct have been the source of our distress, as we will presently explain, after unfurling the factual canvas first.

2. The first chapter of the litigation in this Court related to the standing of the State Bar Council to appeal to this Court, under Sec. 38 of the Advocates Act, 1961 (the Act, for short) against an appellate decision of the Disciplinary Tribunal appointed by the Bar Council of India. This Court upheld the competence to appeal, thus leading us to the present stage of disposing of the eight cases on merits.

3. The epileptic episodes — what other epithet can adequately express the solicitation circus dramatised by the witnesses as practised by the panel of advocate-respondents before us? — make us blush in the nar-

ration. For, after all, do we not all together belong to the 'inner republic of bench and bar'? The putative delinquents are lawyers practising in the criminal courts in Bombay City. Their profession ordains a high level of ethics as much in the means as in the ends. Justice cannot be attained without the stream being pellucid throughout its course and that is of great public concern, not merely professional care. Briefly expressed, these practitioners, according to testimony recorded by the State Disciplinary Tribunal, positioned themselves at the entrance to the Magistrates' Courts, watchful of the arrival of potential litigants. At sight, they rushed towards the clients in an ugly scrimmage to snatch the briefs, to lay claim to the engagements even by physical fight, to undercut fees, and by this unedifying exhibition, sometimes carried even into the Bar Library, solicited and secured work for themselves. If these charges were true, any member of the Bar with elementary ethics in his bosom would be outraged at his brethren's conduct and yet, in reversal of the State Disciplinary Committee's finding, the appellate Tribunal at the national level appears to have entered a verdict, based on three-point formula, that this conduct, even if true, was, after all, an attempt to solicit practice and did not cross the borderline of misconduct. The Bar Council of the State of Maharashtra (the appellant before us) and the Bar Council of India which is a party-respondent, have expressed consternation at this view of the law of professional misconduct and we share this alarm. Were this view right, it is difficult to call the legal profession noble. Were this understanding of deviant behaviour sound, there is little to distinguish between railway porters and legal practitioners although we do not mean to hurt the former and have mentioned a past practice, to drive home our present point. We do not wish to dilate further on the evidence in so far as it concerns each of the respondent-advocates in view of certain developments which we will presently notice. There are eight cases but we are relieved from dissecting the evidence against most of them for

reasons which we will hopefully and shortly state.

4. The Bar Council of Maharashtra, by its resolution No. 29, dated August 8, 1964 considered the complaint received from the High Court against one Kelawala and 15 other Advocates among whom are those charged with professional misconduct and covered by the present appeals, under Sec. 35 (1) of the Act, and presumably having reason to believe that the professional misconduct alleged required a further probe referred the case to its disciplinary committee. This procedure is in due compliance with Sec. 35 (1) of the Act and, although the respondent in C. A. 1467/74 (A. K. Doshi) has contended that the resolution of the Bar Council does not *ex facie* disclose that it had reason to believe that the advocates involved were guilty of professional misconduct, we see no merit in it. The requirement of 'reason to believe' cannot be converted into a formalised procedural road block, it being essentially a barrier against frivolous enquiries. It is implicit in the resolution of the Bar Council, when it says that it has considered the complaint and decided to refer the matter to the disciplinary committee, that it had reason to believe, as prescribed by the statute.

5. Such blanket reference to the disciplinary body, so far as we are concerned, related to the respondent in C. A. 1461/74 (Dabholkar), C. A. 1462/74 (Bhagtani), C. A. 1463/74 (Talati), C. A. 1464/74 (Kelawala), C. A. 1465/74 (Dixit), C. A. 1466/74 (Mandalia), C. A. 1467/74 (Doshi) and C. A. 1468/74 (Raisinghani). All the cases were tried together as a unified proceeding and disposed of by a common judgment by the Disciplinary Committee, a methodology conducive to confusion and prejudice as we will explain later in this judgment. The respondents in the various appeals before us were found guilty 'of conduct which seriously lowers the reputation of the Bar in the eyes of the public' and they were suspended from practising as Advocates for a period of three years. Appeals were carried to the Bar Council of India and, in accordance with the statutory provision, they were referred to the Disci-

iplinary Committee appointed by it under Sec. 37 (2) of the Act. The Appellate Disciplinary Committee heard the appeals and absolved them of professional misconduct. Aggrieved by this verdict of reversal, the Bar Council of Maharashtra has appealed to this Court. The initial hurdle of locus standi has been surmounted, as stated earlier, we have been addressed arguments on the merits by Shri V. S. Desai on behalf of the appellant. He has canvassed the correctness of the finding of fact in each case, although with varying degrees of diffidence, but turned his forensic fusillade on the somewhat startling concept of professional misconduct adopted by that disciplinary Tribunal.

6. We will proceed to deal with each appeal separately so far as the factual foundation for the charges is concerned but discuss the legal question later as it affects not merely the advocates ranged as respondents but the Bar in India and the public in the country. The profound regret of these cases lies not only in the appellate disciplinary tribunal's subversive view of the law of professional conduct that attempted solicitation by snatching briefs and catching clients is of no ethical moment, or contravention of the relevant provisions, but also in the naive innocence of fair and speedy procedure displayed by the State Disciplinary Tribunal in clubbing together various charges levelled against 16 advocates in one common trial, mixing up the evidence against many, recording omnibus testimony slipshodly, not maintaining a record of each day's proceedings, examining witnesses in the absence of some respondents, taking eight years to finish a trial involving depositions of four witnesses and the crowning piece, omission to consider the evidence against each alleged delinquent individually in the semi-penal proceedings. True, a statutory tribunal may ordinarily regulate its procedure without too much rigidity, subject to the rules of natural justice, but large-scale disregard of well-known norms of fair process makes us wonder whether some at least of the respondents have not been handicapped and whether justice may not

be a casualty if the tribunal is not alerted about its processual responsibilities. We have some observations to make about the Tribunals at the State and at the appellate levels in the further stages of this judgment. However, we find it convenient to dispose of the appeals on the evidence on the assumption that if, in fact, there have been snatching and fighting and like solicitation exercises indulged in by any of the respondents, such conduct is in gross breach of professional behaviour and invites punishment.

7. A case-by-case disposal is desirable and so we begin with Dabholkar (respondent in C. A. 1461/74) who appeared in person to plead in defence. The evidence against him is far from satisfactory and suffers from generalised imputation of misconduct against a group of guilty lawyers. To dissect and pick out is an erroneous process, except where individualised activities are clearly deposed to. Moreover, the only witness who implicates him swears: 'I have not seen him actually snatching away the papers. I did not hear the talk Mr. Dabholkar had with the persons'. Moreover, he was a senior public prosecutor. We also record the fact that he expressed distress as the arguments moved on. Apart from the weak and mixed evidence against him, there is the circumstance that he is around 68 years old. With a ring of truth he submitted that he was too old to continue his practice in the profession and had resolved to retire into the sequestered vale of life. He frankly admitted that, even apart from the evidence, if there were any sins of the past, he would not pursue the path of professional impropriety hereafter having decided virtually to step out of the Bar except for a limited purpose. He had just four cases left with him which he desired to complete, having received fees. He further represented that he did not intend to accept any new briefs or appear in any Court except to the little extent that the Bombay Paints and Allied Products Limited (Chembur, Bombay), a large company which occasionally engaged him in small cases chose to brief him. We are inclined to take him at his word, particularly because he has

put himself out of harm's way by a clear assurance about his future plans. On the evidence, we exonerate him from professional misconduct and otherwise we record his solemn statement to the Court.

8. Shri Bhagthani, respondent in Civil Appeal 1462/74, has not engaged counsel, nor appeared in person, but as we examined the evidence, assisted by Shri Desai, we found precious little against him. That extinguishes the charge. No need, therefore, arises for punishing him or reversing the appellate Tribunal's acquittal.

9. The respondent in C. A. 1463/74 is Talati. He has been found 'not guilty' in appeal but, as we perused the evidence, it became fairly clear that some acts of misconduct had been made out, although the evidence suffered from omnibus implication. His counsel, Mr. Zakiuddin F. Bootwala, however made a submission which has moved us into showing some consideration for this respondent. Shri Zaki represented that his client had stood the vexatious misfortune of a long, protracted, litigation before the two tribunals, and a later round in this Court when the question of locus standi of the State Bar Council was gone into. He was in poor circumstances and had suffered considerably on this score. Further, he has given an undertaking expressing unqualified regret for his deviant behaviour and has prayed for the clemency of the Court, promising to turn a new leaf of proper professional conduct, if he were permitted to practice. Taking note of the compassionate conspectus of circumstances attendant on his case and in view of the tender of unconditional regret which expiates, in part, his guilt, we allow the appeal, but reduce the period of suspension inflicted by way of punishment by the Maharashtra Tribunal from three years to a period upto December 31, this year (1975). In short, we find him guilty and reluctantly restore the verdict of the original tribunal, but reduce the punishment to suspension from practice, as aforesaid.

10. The respondent in C. A. 1464/74 is Kelawala. His counsel,

Mr. Zaki, submitted that this practitioner had become purblind and was ready to give an undertaking to the Court that he would no longer practice in the profession. While there is some evidence against him, an overall view of the testimony does not persuade us to take a serious view of the case against him. Moreover, being old and near-blind and having undertaken to withdraw from the profession for ever, it is but fair that he spends the evening years left to him without the stigma of gross misconduct. In this view, we do not disturb the finding of the Disciplinary Committee of the Bar Council of India, but record the undertaking filed by Shri Zaki that his client Kelawala will not practice the profession of law any longer.

11. The respondent in C. A. 1465/74 is Dixit for whom Shri Ganpule appeared. Shri Desai, for the appellant, took us through the evidence against this lawyer but fairly agreed that the evidence was, by any standard, inadequate to bring home the guilt of misconduct. We readily hold him rightly absolved from professional misconduct.

12. The respondent in C. A. 1466/74 is Mandalia. He did not appear in person or through counsel. The reason is fairly obvious. The evidence is so little that it is not possible nor proper to pick out with precision and assurance any particular 'soliciting' act to infer guilt. Shri Desai, for the appellant, was fair enough to accede to this position. His exculpation cannot, therefore be interfered with.

13. The only contesting respondent is Doshi — C. A. 1467/74. He contests his guilt and pursues his plea with righteous persistence and challenges the evidence and its credibility projecting his grievance about processual improprieties. We will consider both these facts of his legitimate criticism despite his cantankerous arguments which we have heard with forbearance, remembering that a party arguing his own case may, perhaps, not be able to discipline himself to observe the minimal decorum that advocacy in Court obligates. The respondent displayed, as the proceedings in this Court ran on,

his art of irritating interruptions, his exercises in popping up and down headless of the Court's admonition, and his skill in rambling references to what was not on record. The fine art of advocacy suffers mayhem when irreverent men indelicately brush with it. The State Tribunal's records reveal that Shri Doshi had not spared their patience or sense of pertinence. Having said all this, we are bound to examine the evidence against him fairly. Such a scrutiny shows that the best witness Shri Shertukde, the President of the Bar Association and otherwise a respected Member of the Bar, has not involved him in any malpractice. Even Shri Pathare, the only one to rope him in, merely gives omnibus testimony ambivalent in places and unspecific about some, including Doshi. There is little else brought home with clarity against loquacious Doshi. To convict him out of the vague lips of Pathare may perhaps be a credulous folly. The grouping of a number of advocates in a sort of mass trial has prejudiced Shri Doshi, a consequence which could and should have been avoided. He has other grievances of denial of fair opportunity which we could not verify for want of a daily diary or order sheet. We are satisfied by a perusal of the record that this respondent has had an impressive background of social service, commendable testimonials of his legal skills from competent persons and some law practice in various Courts and consultancy work for social welfare institutions which are apt to dissuade him from the disreputable bouts in the 'pathological' area of the Esplanade Police Courts in Bombay. Ever assuming that this over-zealous gentleman had exceeded the strict bounds of propriety, we are not satisfied that the charge of professional misconduct, as laid, has been brought home to him. What we have observed about his conduct in this Court must serve as a sufficient admonition to wean him away from improper conduct. We do not interfere with the exculpation secured by him before the appellate Tribunal hopeful that he will canalize his professional energies in a more disciplined way to be useful to himself and, more importantly, to his

'unsolicited' clientele. After all, even a sinner has a future and given better court manners and less turbulent bellicosity, Shri Doshi appears to have a fair professional weather ahead in the City. We hold him unblemished so far as the vice of solicitation is concerned, but caution him to refine himself in advocacy.

14. Shri Raisinghani is the respondent in C. A. 1468/74. Shri V. S. Desai took us through the evidence against him and although he is 65 years old, the evidence shows that he has physically fought two rival advocates in the course of snatching the briefs from clients entering the Esplanade criminal courts. One of these fights resulted in his trousers being torn and the other assault by him was on Mr. Mandalia, one of the respondents in these appeals. Shri Mandalia had filed a complaint against Raisinghani but in the criminal court they lived down their earlier skirmish and compounded the case. Be that as it may, we find that Shri Raisinghani is not merely an old man but a refugee from Pakistan who, leaving his properties there, has migrated to Ahmedabad with his family. Apparently he is in penurious environs and stays in the refugee colony in Bombay, incidentally attending to his claims to the properties left behind in Pakistan and acquiring some evacuee property in lieu of what he has lost. Staying in Kalyan refugee Camp this lawyer, afflicted with distress and dotage, is also attending the Magistrate's Court to make a living. This commiserative social milieu may not absolve him of the misconduct which, we are satisfied, the testimony in the case, has established. Even so, Shri Raisinghani has appeared in person and has given an undertaking expressing remorse, praying to be shown clemency and assuring that, economic pressure notwithstanding, he will not go anywhere near professional pollution in the last years of his practice at the Bar. We are inclined to take a sympathetic view of his septuagenarian situation, record his apology and assurance, restore the verdict of guilt by the State Disciplinary Committee but reduce the punitive part of it to

a period of suspension until December 31, this year (1975).

15. Now to the legal issue bearing on canons of professional conduct. The rule of law cannot be built on the ruins of democracy, for where law ends tyranny begins. If such be the keynote thought for the very survival of our Republic, the integral bond between the lawyer and the public is unbreakable. And the vital role of the lawyer depends upon his probity and professional life-style. Be it remembered that the central function of the legal profession is to promote the administration of justice. If the practice of law is thus a public utility of great implications and a monopoly is statutorily granted by the nation, it obligates the lawyer to observe scrupulously those norms which make him worthy of the confidence of the community in him as a vehicle of justice — social justice. The Bar cannot behave with doubtful scruples or strive to thrive on litigation. Canons of conduct cannot be crystallised into rigid rules but felt by the collective conscience of the practitioners as right:

"It must be a conscience alive to the proprieties and the improprieties incident to the discharge of a sacred public trust. It must be a conscience governed by the rejection of self-interest and selfish ambition. It must be a conscience propelled by a consuming desire to play a leading role in the fair and impartial administration of justice, to the end that public confidence may be kept undiminished at all times in the belief that we shall always seek truth and justice in the preservation of the rule of law. It must be a conscience, not shaped by rigid rules of doubtful validity, but answerable only to a moral code which would drive irresponsible judges from the profession. Without such a conscience, there should be no judge."* — and, we may add, no lawyer.

*Hastings, Hon. John S., "Judicial Ethics as it Relates to Participation in Money-Making Activities" — Conference on Judicial Ethics, p. 8, The School of Law, University of Chicago (1964)

Such is the high standard set for professional conduct as expounded by courts in this country and elsewhere.

16. These background observations will serve to size-up the grave misapprehension of the law of professional ethics by the tribunal appointed by the Bar Council of India. The disciplinary body, acquitting everyone on non-violation of bounds of propriety argued:

"Rule 36 (of the Bar Council of India on Standards of Professional Conduct and Etiquette) is as follows:

"An Advocate shall not solicit work or advertise either directly, or indirectly whether by circular, advertisements, touts, personal communications, interviews not warranted by personal relations, furnishing newspaper comments or procuring his photograph to be published in connection with cases in which he has been engaged or concerned....."

Hence, in order to be amenable to disciplinary jurisdiction, the Advocates must have (1) solicited work (2) from a particular person (3) with respect to a case. Unless all the three elements are satisfied, it cannot be said that an Advocate has acted beyond the standard of professional conduct and etiquette. It has been stated that the conduct of the Advocate concerned did not conform to the highest standards of the legal profession. It is not that everybody must conform to the highest standards of the legal profession. It is enough if an Advocate conforms to the standards of professional conduct and etiquette as referred to in the rules."

x x x x x

"He (witness Mantri) says further that 7 Advocates who are personally present today I have seen each of them standing either on the ground floor, near the lift or on the first floor either near the lift or in the lobbies of the Esplanade Court and trying to solicit work from the persons coming to the Esplanade Court. This mere attempt to solicit is nothing."

x x x x x

"In order to be within the mischief of Rule 36, not merely canvassing is enough, but canvassing must be for a case with the person who had not till then engaged a lawyer.

There is nothing to show either of these things; none of the persons who might have been subjected to these solicitations as they are stated, have been examined to prove the case. Hence this evidence does not establish anything within Rule 36..... All that is necessary for us to see is whether the three items referred to have been complied with and we find that they have not been complied with because we do not know what was the nature of the communication, we do not know in connection with which case the solicitation took place and with whom the conversation took place. Hence Mr. Shertukade's evidence is not sufficient for the purpose of taking any disciplinary action under Rule 36."

x x x x x

"Mr. Krishnarao V. Pathumdi is the first witness in this case (case of Raisinghani). He says: "I had seen Kelawala, Mr. Baria, Mr. Raisinghani, Mr. Bhagtani approaching the people visiting the Court and soliciting work from them". This we have already stated is far below the requirement required to be proved under Rule 36. He says that he had seen Mr. Raisinghani approaching people and soliciting work. He did not ascertain the names of the persons who approached because it was not his business. But as stated above, this evidence does not establish the three elements required to be proved under Rule 36 because we do not know what was the personal communication between him and the persons solicited. We do not know whether it related to a case or not.".....Then the next witness is Mr. Sitaram Gajanan Shertukade. In cross-examination by Mr. Raisinghani he says: "I have seen Mr. Raisinghani accosting people. I have seen Mr. Raisinghani snatching the papers from the hands of the litigating public. I have seen this more than 10 times. The litigating public from whom the papers were snatched did not say anything that there was a fight between Mr. Raisinghani and other lawyer over the papers which were snatched. I did not contact those persons from whom the papers were snatched nor talked to them so so (sic) he was not con-

cerned with this. Therefore his evidence cannot be sufficient."

(Emphasis, ours)

17. We may, illustratively, quote an excerpt from the evidence of the Bar Association President and one-time Bar Council Member Shri Shertukde to show the injury to the profile of the profession the curious view of the disciplinary tribunal has inflicted:

"I have seen Mr. Raisinghani accosting people. I have seen Mr. Raisinghani snatching the papers from the hands of litigating public. I have seen this more than 10 times There was a fight between Mr. Raisinghani and Mr. Baria. I made oral complaint to the C. P. M. I do not remember who was present at that time. In that fight Mr. Raisinghani's pant was torn There was assault by Mr. Raisinghani on Mr. Mandalia and I had advised Mr. Mandalia to file a complaint against Mr. Raisinghani. Mr. Mandalia did file a case against Mr. Raisinghani but it was compounded."

18. How can a disciplinary authority, aware of its accountability to the Indian Bar, functioning as the stern monitor holding the punitive mace to preserve professional purity and promote public commitment and appreciative of what is disgraceful, dishonourable and unbecoming, judged by the standards of conduct set for this noble calling and deviations damaging to its public image, find its way to hold such horrendous misbehaviour as snatching, catching, fighting and under-cutting as not outraging the canons of conduct without exposing itself to the charge of dereliction of public duty on the trisection of Rule 36 and blind to the 'law for lawyers'?

19. It has been universally understood, wherever there is an organised bar assisting in administering justice, that an attorney, solicitor, barrister or advocate will be suspended or disbarred for soliciting legal business. And the 'snatching' species of solicitation are more revolting than 'ambulance chasing', advertising and the like. If the learned profession is not a money-making trade or a scramble for portage but a branch of the

administration of justice, the view of the appellate disciplinary tribunal is indefensible and deleterious. We, as a legal fraternity, must and shall live up to the second and live down the first, by observance of high standards and dedication to the dynamic rule of law in a developing country.

20. It is unfortunate that the Maharashtra tribunal has slurred over vital procedural guidelines. Professional misconduct proscribed by Section 35 of the Act has to be understood in the setting of a calling to which Lincoln, Gandhi, Lenin and a galaxy of great men belonged. The high moral tone and the considerable public service the bar is associated with and its key role in the developmental and dispute-processing activities and, above all, in the building up of a just society and constitutional order has earned for it a monopoly to practise law and an autonomy to regulate its own internal discipline. This heavy public trust should not be forfeited by legalising or licensing fights for briefs, affrays in the rush towards clients, under-cutting and wrangling among members. Indeed, we were scandalized when one of the respondents cited a decision under the Suppression of Immoral Traffic Act to prove what is 'soliciting'. The odious attempt to equate by implication the standards for the two professions was given up after we severely frowned on it. But the disciplinary tribunal's view that an attempt to solicit did not matter, that professional misconduct rested solely on Rule 36 of the Rules framed under Sec. 49 (c) and that Rule 36 was made up of three components, shows how an orientation course in canons of conduct and etiquette in the socio-ethical setting of the lawyer, the public and professional responsibility may be an educative asset to disciplinary tribunals and Bar Councils which appoint tribunals and regulate professional conduct by rules. Cicero called the law 'a noble profession', but Frederick the Great described lawyers as 'leeches'. We agree that Rule 36, fairly construed, sets out wholesome rules of professional conduct although the canons of ethics existed even prior to Rule 36 and the dissection of the said rule, the way it has been done by the dis-

ciplinary tribunal, disfigures it. It is also clear that Rule 36 is not the only midus of professional ethics.

21. Indeed, the State tribunal has, from a processual angle, fallen far short of norms like proper numbering of witnesses and exhibits, indexing and avoidance of mixing up of all cases together, default in examination of the respondents, consideration, separately, of the circumstances of each delinquent for convicting and sentencing purposes. More attention to the specificity in recording evidence against each deviant instead of testimonial clubbing together of all the respondents, would have made the proceedings clearer, fairer and in keeping with court methodology, without over-judicialised formalities. Indeed, the consolidation of 16 cases and trying them all jointly although the charges were different episodes, were obviously violative of fair trial. And 8 years for an enquiry so simple and brief! We express the hope that improvement of this branch of law relating to disciplinary proceedings will receive better attention from the Bar Council and the tribunal members. What prophylactic prescription can ensure fundamentally fair hearing or due process better than by choosing persons of sense and sensibility familiar with the basics of trial procedure and conscientious about avoidance of prejudice and delay? Rules may regulate, but men apply them. Both are important.

22. The appellate disciplinary tribunal was wholly wrong in applying Rule 36 which was promulgated only in 1965 while the alleged misconduct took place earlier. What this tribunal forgot was that the legal profession in India has been with us even before the British and coming to decades of this century, the provisions of Sec. 35 of the Advocates Act, Section 10 of the Bar Councils Act and other enactments regulating the conduct of legal practitioners have not turned on the splitting up of the text of any rule but on the broad canons of ethics and high tone of behaviour well-established by case-law and long accepted by the soul of the bar. Professional ethics were born with the organised bar, even as moral norms

arose with civilised society. The exercise in discovering the 'three elements' of R. 36 was as unserviceable as it was supererogatory.

23. The rulings in the matter of 'P' an Advocate, (1964) 1 SCR 697 = (AIR 1963 SC 1313); In re: Shri M. Advocate of Supreme Court of India, (1956) SCR 811 = (AIR 1957 SC 149); In the matter of an Advocate, (1936) ILR 63 Cal 867 (869) = (AIR 1936 Cal 158 SB); Govt. Pleader v. Siddick, 31 Bom LR 625 = (AIR 1929 Bom 335) were cited before us and no judge, nor lawyer will be in doubt, even without study of case-law, that snatching briefs by standing at the door of the court house and in-fighting for this purpose is too dishonourable, disgraceful and unbecoming to be approved even for other professions. Imagine two or three medical men manhandling a patient to claim him as a client! The law has suffered at the hands of the appellate tribunal. Lest there should be lingering doubts, we hold that the canons of ethics and propriety for the legal profession totally taboo conduct by way of soliciting, advertising, scrambling and other obnoxious practices, subtle or clumsy, for betterment of legal business. Law is no trade, briefs no merchandise and so the leaven of commercial competition or procurement should not vulgarise the legal profession. Canon 27 of Professional Ethics of the American Bar Association states:

"It is unprofessional to solicit professional employment by circulars, advertisements, through touters or by personal communications or interviews not warranted by personal relations."

24. We wish to put beyond cavil the new call to the lawyer in the economic order. In the days ahead, legal aid to the poor and the weak, public interest litigation and other rule-of-law responsibilities will demand a whole new range of responses from the bar or organised social groups with lawyer members. Indeed, the hope of democracy is the dynamism of the new frontiersmen of the law in this developing area and what we have observed against solicitation and alleged profit-making

vices are distant from such free service to the community in the jural sector as part of the profession's tryst with the People of India.

25. It is a misfortune that a disciplinary body of a dimensionally great and growing public utility profession has lost its vision, blinkered by Rule 36 (as mis-construed and trisected by it). For the practice of law with expanding activist horizons, professional ethics cannot be contained in a Bar Council rule nor in traditional cant in the books but in new canons of conscience which will command the members of the calling of justice to obey rules of morality and utility, clear in the crystallized case-law and concrete when tested on the qualms of high norms — simple enough in given situations, though involved when expressed in a single sentence. We but touch upon this call to the calling of law as more is not necessary in the facts of these cases.

26. The law has thus been set right, the delinquents identified and dealt with, based on individualised deserts and the appeals are disposed of in the trust that standards and sanctions befitting the national Bar will be maintained in such dignified and deterrent a manner that public confidence in this arm of the justice-system is neither shaken nor shocked.

27. Parties will bear their costs throughout.

Order accordingly.

AIR 1976 SUPREME COURT 251

A. ALAGIRISWAMI, P. K. GOSWAMI
AND N. L. UNTWALIA, JJ.

Bihar State Electricity Board,
Patna, Appellant v. Their Workmen,
Respondents.

Civil Appeal No. 2104 of 1969,
D/- 30-9-1975.

(A) Employees' Provident Funds Act (1952), Sec. 6 — State Electricity Board Employees' Provident Funds Scheme — Contribution whether on basis of basic wages or total wages — Capacity of Board to bear additional burden — Considerations.

JS/KS/D814/75/MBR

The Electricity Board is not an ordinary commercial concern. It is a public service institution. It is not expected to make any profit. It is expected to extend the supply of electricity to unserved areas without reference to considerations of loss that might be incurred as a result of such extension. In analysing the capacity of the Board to bear any additional burden in the matter of provident fund or other amenities, whether the same considerations that applied in the case of private commercial concerns could be applied is a rather difficult question in view of the statutory obligations laid on the Board under the various sections (Viz. Sections 59, 67 and 63) of the Electricity (Supply) Act, 1948. In fact the decision might very often depend on a close analysis of the financial condition of the Board. The various sums payable under the provisions of Section 67 of the Electricity (Supply) Act have to be deducted before the profits could be ascertained. Even with regard to the depreciation reserve the provisions of Section 68 may have to be taken into account. If it is not it would have to be met by loans on which interest will have to be paid and deduction of interest so paid will have to be taken into account in calculating the profits. The contribution to the depreciation reserve is a statutory obligation and is a definite proportion whereas it is open to an ordinary commercial concern to credit any amount to the depreciation reserve. These and other matters cannot be properly decided in the absence of a detailed examination of the finances of the Board. (1964) 2 Lab LJ 131 (SC), Distinguished.

(Paras 4. 5)

Cases Referred: Chronological Paras
1964-2 Lab LJ 131 = (1964) 9 Fac LR 10 (SC) 4

Mr. S. V. Gupte, Sr. Advocate, (Mr. U. P. Singh, Advocate with him), for Appellant; M/s. A. K. Nag and D. P. Mukherjee, Advocates, for Respondents.

Judgment of the Court was delivered by

ALAGIRISWAMI, J.:— This appeal is by special leave granted by this Court against the award of the Industrial Tribunal, Bihar at Patna in

reference No. 54 of 1966 made by the Government of Bihar on 25th November, 1966. The special leave granted is limited only to the question whether there should be a contributory provident fund scheme on the basis of basic wages or total wages. It was noted at the time of granting the special leave that the appellant Board is willing to extend that scheme to all the workers except the Government servants who are on deputation and those to whom the Employees' Provident Fund Act applies. Therefore the only item in reference No. 54 of 1966 which is relevant for the purpose of this appeal is the following:

"Whether the benefit of the Employees' Provident Funds Act, 1952 should be extended to any additional categories of workmen? If so, what should be the terms and conditions and from what date?"

2. The Employees' Provident Fund Act applies only to establishments which are factories. It could be applied to establishments which are not factories if the Central Government by notification in the Official Gazette specifies in this behalf. The industry in question, electricity — including the generation, transmission and distribution thereof, is one to which the Act applies. But as is well-known only a small proportion of employees connected with the generation of electricity is in establishments which are factories. The transmission and distribution is all over the State and the employees concerned with transmission and distribution and the maintenance of those lines of transmission and distribution are spread all over the State and probably far outnumber those working in establishments which are factories. To them the Employee's Provident Fund Act does not apply. The Board maintains a Contributory Provident Fund where the contribution is on the basis of basic wage, the Board and the employees contributing equally.

3. The workmen claimed that all workmen of the Board should have the same and similar benefits and that therefore there should be no distinction between the Board's Contributory Provident Fund scheme and the scheme under the Employees Pro-

vident Fund Act. Moreover, the contribution under the Act is 8 per cent whereas under the Board's scheme it is $6\frac{1}{4}$ per cent. The employees also contended that the services of the workmen of the Board are liable to be transferred from one establishment to another both of which may not be covered by the same scheme under the Act and therefore it will bring about serious injustice if they are deprived of their benefits under the Act, and such anomalies will be removed by making the benefits under both the scheme similar. The Board's contention was that this would impose additional financial liabilities which the Board would not be able to bear. Therefore, the main question which the Tribunal had to consider was the Board's financial capacity to implement the Provident Fund Scheme as demanded by the workmen. It seems to have been argued on behalf of the workmen that the State Government is the financier of the Board which charges interest now at the rate of $6\frac{1}{4}$ per cent as against the previous 4% per annum. It was also contended that no scheme run by the Board was running at a loss. Exhibit 17, purported to contain trading results of the Board, was shown to the Tribunal and it was argued that in the year ending March 1966 Board's gross profits amounted to Rs. 305.12 lakhs and it had been continuously rising from Rs. 59.39 lakhs in 1961. Exhibit 18 shows the loans which have been received from the Government by the Board and the balance sheet shows a very large amount in the shape of interest payable to the Government. It was argued on behalf of the Union that this amount should be taken as dividend to be paid to the Government by the Board and should not be taken into consideration while deciding matters regarding benefits to be made available to its employees. The validity of none of these contentions was considered by the Tribunal. It referred to an award made by it in 1964 in reference No. 19 of 1960 in which it had held that if the interests realised by the State were excluded from consideration, there would be surplus in favour of the Board. In that award it had been pointed out that it had

not been explained by the management how the depreciation had been calculated. That award also pointed out that one of the main reasons for the deficits shown was heavy interest on the capital investment; that in an electrical establishment capital investments are heavy in the initial stages, that the Board expected that after the load developed fully the scheme would start giving adequate profits. The Tribunal thought that the position at present was not worse than what it was earlier and that therefore the Board should extend the benefits of the Contributory Provident Fund to all workmen other than those who are covered by the Act. It therefore ordered that the contribution should be $6\frac{1}{4}$ per cent. but not on the basic wages but on the total wages.

4. The Tribunal has treated the whole matter in a very perfunctory manner. The main question for consideration by the Tribunal was the financial capacity of the Board. It has made no effort at all to analyse the balance sheet of the Board to show the actual results of its working. It has made no effort to work out the financial implications of its order. It has not made it clear what exactly are the total wages. In *Gramophone Co. v. Its Workmen* (1964) 2 Lab LJ 131 (SC) it was held by this court that:

"Before the real profit for each of the relevant years is ascertained amounts to be provided for taxation and for development rebate reserve could not be deducted in order to ascertain the financial capacity of the employer. In considering the question of provident fund and gratuity which stands more or less on the same footing the industrial tribunal has to look at the profits made without considering provision for taxation in the shape of income tax and for reserves. The provision for income tax and for reserves must take second place as compared to provision for wage-structure and gratuity, which stands on the same footing as provident fund which is also a retiral benefit. Payment towards provident fund and gratuity is expense to be met by an employer like any other expense including wages and if the financial position

shows that the burden of payment of gratuity and provident fund can be met without undue strain on the financial position of the employer, that burden must be borne by the employer. It will certainly result in some reduction in profits; but if the industry is in a stable condition and the burden of provident fund and gratuity does not result in loss to the employer that burden will have to be borne by the employer like the burden of wage-structure in the interest of social justice. While on the one hand casting of this burden reduces the margin of profit, on the other hand it will result in the reduction of taxation in the shape of income tax." That case was a case of an ordinary commercial concern. Even so it was noticed that the stability of the industry as well as the fact that the burden of provident fund and gratuity does not result in loss to the employer are to be taken into consideration. The actual burden was calculated and it was pointed out that 63 per cent of it would be met by reduction in taxation. Nothing of the sort has been done by the Tribunal in this case. It is true that in that case it was said that the amounts to be provided for taxation and for development rebate reserve could not be deducted in order to ascertain the financial capacity of the employer. Nothing was said there about the depreciation reserve which is obligatory under S. 68 of the Electricity (Supply) Act. The Electricity Board is not an ordinary commercial concern. It is a public service institution. It is not expected to make any profit. It is expected to extend the supply of electricity to unserved areas without reference to considerations of loss that might be incurred as a result of such extension. The Government makes subventions to the Board for the purposes of the Act. Section 59 of the Electricity (Supply) Act, 1948 provides that as far as practicable and after taking credit for any subventions from the State Government the Board shall carry on its operations so as not to incur a loss. Under Section 64 the State Government may advance loans to the Board and under Section 65 the Board itself has the power to borrow. Under Sec. 66 the State

Government may guarantee the payment of principal and interest of any loan proposed to be raised by the Board. Under Section 67 after meeting its operating, maintenance and management expenses and after provision has been made for the payment of taxes on its income and profits the revenues of the Board have to be distributed as far as they are available in the following order, namely—

(i) interest on bonds not guaranteed under S. 66;

(ii) interest on stock not so guaranteed;

(iii) credits to depreciation reserve under S. 68;

(iv) interest on bonds guaranteed under S. 66;

(v) interest on stock so guaranteed;

(vi) interest on sums paid by the State Government under guarantees under S. 66;

(vii) the write-down of amounts paid from capital under the proviso to Sec. 59;

(viii) the write-down of amounts in respect of intangible assets to the extent to which they are actually appropriated in any year for the purpose in the books of the Board;

(ix) contribution to general reserve of an amount not exceeding one-half of one per centum per annum of the original cost of fixed assets employed by the Board so however that the total standing to the credit of such reserve shall not exceed fifteen per centum of the original cost of such fixed assets;

(x) interest on loans advanced or deemed to be advanced to the Board under Sec. 64, including arrears of such interest;

(xi) the balance to be appropriated to a fund to be called the Development Fund to be utilised for—

(a) purpose beneficial, in the opinion of the Board, to electrical development in the State;

(b) repayment of loans advanced to the Board under Sec. 64 and required to be repaid;

Provided that where no such loan is outstanding, one-half of the balance aforesaid shall be credited to the

Consolidated Fund of the State.

Section 68 lays an obligation on the Board to make a credit to the depreciation reserve in the prescribed manner.

5. The facile assumption by the Tribunal that the interest should not be taken into account in working out the profits is not borne out by the provisions of the statute. Indeed the Tribunal did not look into the Act at all. Whether in view of the statutory obligations laid on it under the various sections just now referred to in analysing the capacity of the Board to bear any additional burden in the matter of provident fund or other amenities the same considerations that applied in the case of private commercial concerns could be applied is a rather difficult question. In fact the decision might very often depend on a close analysis of the financial condition of the Board. We do not want at present to express one view or the other. One thing at least is obvious, that the various sums payable under the provisions of Section 67 have to be deducted before the profits could be ascertained. Even with regard to the depreciation reserve the provisions of Section 68 may have to be taken into account. If it is not it would have to be met by loans on which interest will have to be paid and deduction of interest so paid will have to be taken into account in calculating the profits. The contribution to the depreciation reserve is a statutory obligation and is a definite proportion whereas it is open to an ordinary commercial concern to credit any amount to the depreciation reserve. These and other matters cannot be properly decided in the absence of a detailed examination of the finances of the Board. That is why we said that the Tribunal has dealt with the matter in a perfunctory way. It should be directed to dispose of the matter afresh in the light of the observations made in this judgment.

6. The appeal is accordingly allowed. There will be no order as to costs.

Appeal allowed.

AIR 1976 SUPREME COURT 255

(From Madras: (1969) 74 ITR 638)

Y. V. CHANDRACHUD, R. S. SARKARIA AND A. C. GUPTA JJ.

The Commissioner of Income-Tax, Madras, Appellant v. M/s. T. V. Sundaram Iyenger and Sons (P) Ltd., Madurai, Respondent.

Civil Appeals Nos. 1392 and 1393 of 1970, D/- 9-4-1975.

(A) Income-tax Act (1922), Section 23A — Statutory percentage — Calculation of — Company having composite business — Distributable profits — Apportionment. (1969) 74 ITR 638 (Mad), Reversed.

Where a Company has a composite business as for example industrial and non-industrial business, the first step is to ascertain the distributable profits of the two parts separately for the purpose of finding out the minimum dividend that the Company ought to have distributed. The proper statutory percentage as prescribed by Explanation 2 has to be applied separately to the distributable profits of the two parts as if the respective profits are the total income of the Company in relation to each part of the business. The composite dividend distributed by the Company has then to be apportioned between the two parts in the same ratio as the respective profits of the two parts bear to the total profits of the Company. (1969) 74 ITR 638 (Mad), Reversed.

(Para 18)

(B) Income-tax Act (1922), Section 23A, Expl. 2 — Scope — Words "Similarly apportioned" — Construction — Word "Similar" — Meaning — (Words and Phrases — "Similar").

The words "Similarly apportioned" which occur in the Explanation mean "apportioned with reference to the amount of profits and gains attributable to the two parts of the company's business." Thus the Explanation first refers to an apportionment or splitting up and then provides that the dividends and taxes shall be similarly apportioned, that is to say similarly split up. Thus the words "similarly apportioned" convey a definite meaning and are not ambiguous.

(Para 12)

The word "Similar" may be said to be a word of ambiguous import in the sense that the mere stipulation in a statute that something should be done similarly is insufficient by itself to signify the degree of similarity with which that thing must be done. A thing can be done similarly without its being a slavish copy of the model. But Expl. 2 to Section 23A indicates with meticulous particularity, how similarly dividends and taxes must be apportioned.

Words and Phrases Legally Defined by Saunders, Vol. V Ref.

(Para 12)

(C) Income-tax Act (1922), Section 23A, Expln. 2 — Word "apportioned" in the expression "similarly apportioned" — Meaning — Word is used in the sense of "split up"

The word "apportioned" is used in Expl. 2 to Sec. 23A in the sense of 'split up', so that "similarly apportioned" means simply "similarly split up". In case of a company having composite business namely, industrial and non-industrial the dividends have therefore to be split up similarly, that is in the same ratio as the industrial and non-industrial profits bear to each other after the total profit is split up in two parts, industrial and non-industrial. According to the Shorter Oxford English Dictionary, 3rd Ed., Vol. 1, p. 87, to 'apportion' is 'to assign as a proper portion'. An assignment as a proper portion of the dividends would mean an assignment in the same or similar ratio as the respective profits of the two segments bear to the total profits of the company. It is thus not open to the company to split up and apportion the dividends to the profits of the two segments in such manner as it finds convenient or thinks fit. The company's freedom to apportion the dividends is conditioned by the ratio which the profits of the two segments bear to the total profits. (Para 14)

(D) Income-tax Act (1922), Section 23A, Expl. 2 — Applicability — Provisions penal — Strict construction required — Onus is on Revenue to prove that conditions are satisfied — Provisions capable of only one reasonable interpretation — Liability to pay additional super-tax — Additional super-tax has to be levied on entire

undistributed balance of the net income of Company. (Interpretation of Statutes — Penal Statute — Construction). (1969) 74 ITR 638 (Mad), Reversed.

Provisions of Sec. 23A are penal in nature and the burden is on the Revenue to prove that the conditions laid down in the section are satisfied. Furthermore penal statutes have to be construed strictly in the sense that if there is a reasonable interpretation which will avoid the penalty, that interpretation ought to be adopted. But the language of sub-sec. (1) of Section 23A as also of Expl. 2 is clear and distinct and does not yield to more than one reasonable interpretation. Under the scheme contained in Section 23A, where a company has a composite business it is necessary at the outset to find out the profits attributable to the two parts of its business. The statutory percentages as prescribed by Explanation 2 have then to be applied separately to the profits of the two parts. By reason of the fiction created by Expl. 2 the profits of each part have for this purpose, and this purpose alone, to be treated as if they were the total income of that part of the company's business. By sub-sec. (1) the company becomes liable to pay additional super-tax if the dividends distributed by it are "less than the statutory percentage of the total income". Expl. 2 creates the fiction that for the purpose of sub-sec. (1) the income of the respective parts is to be regarded as the total income of each part so that the statutory percentage can be applied separately to the income of each part. The fiction operates in this limited field and is in terms created for this limited purpose. The super-tax has to be levied "on undistributed balance of the total income of the previous year" which according to sub-s. (1) means "total income as reduced by the amounts, if any, referred to in clause (a), clause (b) or clause (c) and the dividends actually distributed, if any". The additional super-tax has, therefore, to be levied on the entire undistributed balance of the net income of the company. (1969) 74 ITR 638 (Mad), Reversed. AIR 1950 Bom 1, AIR 1965 SC 1977 and (1875) 10 QB 383 and Craies on

Statute Law, Sixth Ed. Pp. 529-530
Ref. (Paras 21, 23 and 24).

Cases Referred: Chronological Paras

AIR 1965 SC 1977 = (1965) 57 ITR
176 21

AIR 1950 Bom 1 = (1949) 17 ITR
493 20

(1875) 10 QB 383 = 33 LT 11 21

Mr. D. N. Kharkhanis, Sr. Advocate, (Mr. S. P. Nayar, Advocate with him), for Appellant; Mr. S. Swaminathan, Sr. Advocate, (Mrs. S. Gopalakrishnan, Advocate with him), for Respondent.

Following Judgment of the Court was delivered by

CHANDRACHUD, J.:— These appeals by certificate granted by the High Court of Madras under Section 66A (2) of the Income-tax Act, 1922 arise out of a common judgment dated January 23, 1969 delivered by the High Court in Tax Cases Nos. 116 of 1965 and 190 of 1967. Tax Case No. 116 of 1965 arose out of the reference made by the Income-tax Appellate Tribunal under Section 66 (1) of the Act while Tax Case No. 190 of 1967 arose out of a reference made by the Tribunal in pursuance of an order made by the High Court under Section 66 (2) of the Act. The question which arises for consideration in these appeals is whether under Section 23A of the Act, the assessee-company is liable to pay additional super-tax in respect of any portion of its profits.

2. Section 23A of the Act of 1922, in so far as material read thus at the relevant time:

"23A. (1) Where the Income-tax Officer is satisfied that in respect of any previous year the profits and gains distributed as dividends by any company within the twelve months immediately following the expiry of that previous year are less than the statutory percentage of the total income of the company of that previous year as reduced by—

(a) the amount of income-tax and super-tax payable by the company in respect of its total income, but excluding the amount of any super-tax payable under this section;

(b) the amount of any other tax levied under any law for the time being in force on the company by the Government or by a local authority in excess of the amount, if any, which

has been allowed in computing the total income; and

(c) in the case of a banking company, the amount actually transferred to a reserve fund under Section 17 of the Banking Companies Act, 1949; the Income-tax Officer shall, unless he is satisfied that, having regard to the losses incurred by the company in earlier years or to the smallness of the profits made in the previous year, the payment of a dividend or a larger dividend than that declared would be unreasonable, make an order in writing that the company shall, apart from the sum determined as payable by it on the basis of the assessment under Section 23, be liable to pay super-tax at the rate of fifty per cent in the case of a company whose business consists wholly or mainly in the dealing in or holding of investments, and at the rate of thirtyseven per cent in the case of any other company on the undistributed balance of the total income of the previous year, that is to say, on the total income as reduced by the amounts, if any, referred to in clause (a), clause (b) or clause (c) and the dividends actually distributed, if any.

x	x	x	x	x
x	x	x	x	x
x	x	x	x	x

Explanation 2.— For the purposes of this section, statutory percentage means,—

(i) in the case of a company whose business consists wholly or mainly in the dealing in or holding of investments ... 100%

(ii) in the case of an Indian company whose business consists wholly in the manufacture or processing of goods or in mining or in the generation or distribution of electricity or any other form of power ... 45%

(iii) in the case of an Indian company, a part only of whose business consists in any of the activities specified in clause (ii)—

(a) in relation to the said part of the company's business ... 45%

(b) in relation to the remaining part of the company's business—

(1) if it is a company which satisfies the conditions specified in sub-clause (a) of clause (iv) ... 90%

(2) in any other case ... 60%

the said percentages being applied

separately with reference to the amounts of profits and gains attributable to the two parts of the company's business aforesaid as if the said amounts were respectively the total income of the company in relation to each of its parts, the amount of dividends and taxes also being similarly apportioned, for the purposes of sub-section (1).

x x x x x x"

3. For the assessment year 1957-58 relevant to the previous year ended December 31, 1956 the company was assessed to additional super-tax under the aforesaid provision. The business of the company consists partly in the manufacture or processing of goods and partly of an activity of a non-industrial nature. Out of a total income of Rs. 37,98,774 the profits of the company available for distribution came to Rs. 17,41,814 out of which Rs. 3,36,504 represented industrial profits and Rs. 14,05,310 represented non-industrial profits. The company distributed by way of dividends a sum of Rs. 4,20,640 only, claiming that the dividend was declared equally out of the profits of the industrial and non-industrial activities. Thus, the profits which were available for distribution but which were not distributed came to Rs. 13,21,174.

4. The Income-tax Officer, while making the assessment, allocated the dividends declared by the company to the industrial and non-industrial segments in the same proportion as the profits of the two segments bore to the total profits of the company. By this method, out of the total dividend of Rs. 4,20,640 declared by the company, a sum of Rupees 81,264 was treated as dividends declared out of industrial profits while a sum of Rs. 3,39,376 was treated as dividends declared out of non-industrial profits. Holding that under Section 23A, the company was liable to distribute by way of dividends a sum of Rs. 1,51,426 out of industrial profits and a sum of Rs. 8,43,186 out of non-industrial profits, the Income-tax Officer levied additional super-tax on the entirety of the undistributed balance of the total income, that is to say, on Rs. 13,21,174.

5. The Appellate Assistant Commissioner having rejected the ap-

peal, the company carried the matter in a further appeal to the Income-tax Appellate Tribunal, Madras Bench, contending that it had declared dividends utilising the industrial and non-industrial profits equally and since the dividends thus declared out of industrial profits exceeded the statutory percentage of the minimum distributable dividend as provided in Section 23A, the levy of additional super-tax on the industrial profits was unjustified. On the other hand, it was submitted on behalf of the Department the dividends actually declared had, for the purposes of Section 23A, to be apportioned in the same ratio in which the profits themselves were apportioned between industrial and non-industrial activities. The Tribunal rejected the method canvassed by the Department as "a Rule of thumb" but then it also rejected the method adopted by the company of allocating the declared dividend half and half to the profits of the two segments. Having rejected both the methods, the Tribunal held that in so far as profits of the industrial activity were concerned, the company must be deemed to have distributed by way of dividends out of those profits just so much, neither more nor less, as would be equal to 45% of such profits. Accordingly, the Tribunal allocated a sum of Rs. 1,51,426 as dividends out of industrial profits and the balance, namely, Rs. 2,69,214 as dividends out of non-industrial profits. On this allocation the Tribunal came to the conclusion that the company, having declared the statutory dividend on its industrial profits, was not liable to pay additional super-tax in so far as those profits were concerned. It, however, upheld the levy of additional super-tax on non-industrial profits.

6. Under Section 66(1) of the Act, the Tribunal referred the following question for the opinion of the High Court:

(1) "Whether on the facts and in the circumstances of the case, Tribunal was right in holding that the assessee company was not liable to the additional super-tax under Sec. 23A in respect of the assessee's industrial profits for the assessment year 1957-58."

Under Section 66(2) of the Act the

Tribunal referred to the High Court the following question:

(2) "Whether on the facts and in the circumstances of the case, the Tribunal is right in holding that additional super-tax is not leviable under Sec. 23A of the Act, in respect of any portion of the profits of the assessee company for the assessment year 1957-58."

The second question on which the High Court called for a reference may seem to suggest that under the judgment of the Tribunal the Company was held not liable to pay additional super-tax in respect of any portion of its profits. That is not so. The Tribunal held that the Company was not liable to pay additional super-tax on its industrial profits but was liable to pay it on non-industrial profits.

7. The High Court confirmed the Tribunal's view. It held that there was no justification in Explanation 2 for the apportionment of dividends in the ratio which the industrial profits bear to non-industrial profits, that it was open to the assessee to apportion the dividends in such a way as to conform to the requirements of Section 23A in respect of one of the two segments of its business and that the profits of the other segment only would attract the incidence of additional super-tax. The High Court demonstrated the absurdity of the contrary view with the help of a hypothetical illustration.

8. We are concerned in these appeals with the true construction of Section 23A as recast by Finance Act 2 of 1957. The section, in so far as relevant, is extracted above. It has no application to companies in which the public are substantially interested. The section provides for levy of additional super-tax at 50 per cent in the case of a company whose business consists wholly or mainly in the dealing in or holding of investments and at 37 per cent in the case of any other company. The additional super-tax is leviable if in respect of any previous year the profits and gains distributed as dividends within the 12 months immediately following the expiry of that previous year are less than the statutory percentage of the total income of the previous year as reduced by the amounts mentioned in

clauses (a), (b) and (c) of sub-section (1). The additional super-tax, which in the instant case would be 37 per cent, is payable on the undistributed balance of the total income of the previous year. By 'undistributed balance of the total income' is meant the total income as reduced by the amounts, if any, referred to in clauses (a), (b) and (c) of sub-section (1) and the dividends actually distributed, if any.

9. By Explanation 2, 'statutory percentage' means for the present purpose, 45 per cent of industrial profits and 60 per cent of non-industrial profits. These percentages have to be applied separately to the profits of the two segments as if those profits were respectively the total income of the company in relation to each segment of its business. The dividends and taxes have also to be 'similarly apportioned', for the purposes of sub-section (1).

10. Two questions arise for decision: (1) Whether the dividends distributed by the Company have to be apportioned as between the profits of the industrial and non-industrial segments of its business in the same proportion as the respective profits bear to the total profits of the Company; and (2) Whether, if on apportionment, the dividend apportionable to one of the two segments is found to be less than the statutory percentage in respect of that segment, the additional super-tax is leviable on the entire balance of the Company's undistributed profits or whether it is leviable on the balance of undistributed profits of that segment only in respect of which the short-fall has occurred. The second question may not strictly arise if on the first question it is found that the dividend apportionable to the two segments is less than the statutory percentage in respect of both the segments. All the same, it would be necessary to examine that question also as the High Court has held that the liability to pay the additional super-tax must be restricted to the undistributed profits of that segment only, in respect of which the default has occurred.

11. On the first question, the language of Explanation 2 is clear and admits of no doubt or difficulty.

It requires by its express terms that for the purposes of sub-section (1), the amount of dividends must be "similarly apportioned". But, counsel for the respondent urged that since the Explanation does not refer to any apportionment at all, the words "similarly apportioned" cannot be ascribed any rational meaning and it would therefore be open to the company to apportion the dividends 50:50 to the profits of the two segments. Relying on "Words and Phrases Legally Defined" by Saunders, Vol. V, p. 79 where it is stated that the word 'similar' is an ambiguous word, it was submitted that the benefit of an ambiguity in a taxing statute must go to the assessee and accordingly, the company would be free to make a convenient apportionment of dividends so as to attract the least incidence of the additional super-tax. Counsel also relied on Burrow's "Words and Phrases" Volume I, page 217, where it is said that so long as the apportionment is made with the desire to act as fairly and justly as possible by all parties, no uniform mode of apportionment is necessary.

12. The word 'similar' may be said to be a word of ambiguous import in the sense that the mere stipulation in a statute that something should be done similarly is insufficient by itself to signify the degree of similarity with which that thing must be done. A thing can be done similarly without its being a slavish copy of the model. But Explanation 2 indicates with meticulous particularity, how similarly dividends and taxes must be apportioned. When it says that they must be "similarly apportioned", the reference obviously is to the apportionment which is spoken of earlier in the Explanation. After specifying what particular percentages shall constitute the statutory percentage for the purposes of Section 23A, Explanation 2 provides that the said percentages shall be applied separately "with reference to the amounts of profits and gains attributable to the two parts of the company's business." The words "similarly apportioned" which thereafter occur in the Explanation mean apportioned "with reference to the amounts of profits and gains attributable to the two parts of

the company's business". Thus, the Explanation first refers to an apportionment or splitting up and then provides that the dividends and taxes shall be similarly apportioned, that is to say, similarly split up. Accordingly, the words "similarly apportioned" convey a definite meaning and are not ambiguous.

13. It is urged that the division of total profits of a company into industrial and non-industrial profits cannot be the result of any apportionment properly so-called but must conform to the company's books of account and therefore, Explanation 2 cannot be said to refer to any apportionment before speaking of the dividends and taxes being "similarly apportioned". This argument reads too much in the word 'apportioned'. That word is used in Explanation 2 in the sense of 'split up', so that 'similarly apportioned' means simply 'similarly split-up'. The dividends have therefore to be split up similarly, that is, in the same ratio as the industrial and non-industrial profits bear to each other after the total profit is split up in two parts, industrial and non-industrial. According to Burrow's Words and Phrases, Vol. I, p. 217, to 'apportion' means to 'split up'.

14. It is therefore impossible to accept the respondent's contention that though Explanation 2 requires that dividends should be similarly apportioned, it would be open to the company to make any convenient division of the dividends distributed by it. According to the Shorter Oxford English Dictionary, 3rd Ed., Vol. 1, p. 87, to 'apportion' is 'to assign as a proper portion.' An assignment as a proper portion of the dividends would mean an assignment in the same or similar ratio as the respective profits of the two segments bear to the total profits of the company. It is thus not open to the company to split up and apportion the dividends to the profits of the two segments in such manner as it finds convenient or thinks fit. The company's freedom to apportion the dividends is conditioned by the ratio which the profits of the two segments bear to the total profits.

15. The total distributable profits of the company came to Rupees

17,41,814 out of which the industrial profits are Rs. 3,36,504 and the non-industrial profits are Rs. 14,05,310. Forty-five per cent of the industrial profits comes to Rs. 1,51,426 while 60 per cent of the non-industrial profits comes to Rs. 8,43,186. The company therefore ought to have distributed a sum of Rs. 9,94,612 by way of dividends whereas it distributed a sum of Rs. 4,20,640 only. This sum of Rupees 4,20,640 has to be split up in the same proportion which the respective profits of the two segments bear to the total profits of the company. That is to say, a sum of Rs. 81,264 from out of the total dividends distributed is apportionable to the industrial profits while a sum of Rs. 3,39,376 is apportionable to the non-industrial profits. There is thus a short-fall in respect of both the segments and accordingly the company would be liable to pay the additional super-tax at the rate of 37 per cent on the entire undistributed balance of distributable profits

16. The hypothetical illustration which was cited before the Income-tax Officer and which is relied upon by the High Court may at the highest, if its fundamental premise is true, show that the interpretation canvassed by the Revenue may conceivably work out injustice. But if the language of the statute is clear and unambiguous, and if two interpretations are not reasonably possible it would be wrong to discard the plain meaning of the words used in order to meet a possible injustice. Besides, the illustration only assumes an injustice and therefore its fundamental premise is wrong. The distributable profits of the hypothetical company are said to be Rs. 1,00,000 out of which Rs. 30,000 are industrial and Rupees 70,000 non-industrial profits. Applying the statutory percentage of 45 and 60 per cent respectively, the company must distribute by way of dividends Rs. 13,500 plus Rs. 42,000, that is, Rs. 55,500. The High Court says that even if the company distributes Rupees 55,500 by way of dividends, apportioning Rs. 13,500 to industrial profits and Rs. 42,000 to non-industrial profits, it would violate Section 23A because, if the sum of Rs. 55,500 is to be apportioned in the same ratio which the profits of the two segments

bear, a sum of Rs. 16,650 will be apportionable to industrial profits and Rs. 38,850 to non-industrial profits. The fallacy of this illustration consists in its overlooking that if the company is liable to distribute Rs. 55,500 by way of dividends and it does distribute that sum, there is no violation of Section 23A. That section applies only if the "profits and gains distributed as dividends are less than the statutory percentage of the total income as reduced....."

17. If the dividends have to be apportioned in the ratio of profits of the two segments, the taxes have also to be similarly apportioned for Explanation 2 speaks of "the amount of dividends and taxes also being similarly apportioned". A "similar" apportionment of taxes, it is urged by the respondent, may in practice lead to impossible and unreal situations since the taxes on the profits of the two segments may be unequal as in the case of a newly established industrial undertaking which, in respect of its industrial income, may enjoy a tax concession. There is no merit in this contention. The method specified in S. 23A has to be worked out according to its scheme and it is no answer to the obligation to apportion the dividends and taxes, that taxes levied on the profits of the two segments are unequal or are leviable on a different basis.

18. Thus, the High Court and the Tribunal were wrong in holding in favour of the assessee on the first of the two questions which we have framed for consideration. Where a company has a composite business, as for example industrial and non-industrial business, the first step is to ascertain the distributable profits of the two parts separately. For the purpose of finding out the minimum dividend that the company ought to have distributed, the proper statutory percentage as prescribed by Explanation 2 has to be applied separately to the distributable profits of the two parts, as if the respective profits are the total income of the company in relation to each part of its business. The composite dividend distributed by the company has then to be apportioned between the two parts in the same ratio as the respective profits of the

two parts bear to the total profits of the company.

19. We have shown that in the instant case the dividend apportionable between the two parts of the company's business is less than the statutory percentage in respect of both the parts. The High Court, like the Tribunal, gave to the company the choice to allocate the dividend suitably to the two parts and held on such allocation that since the default had occurred in respect of the profits of the non-industrial part only, the company would be liable to pay the additional super-tax on the undistributed balance of the non-industrial profits only. The second question which we propose to consider, though it does not arise on our findings, is whether the company is liable to pay additional super-tax on the undistributed balance of non-industrial profits only or whether it is liable to pay the additional super-tax on the entire undistributed balance of its distributable profits. We have heard a full argument on this question and if we did not decide it the view of the High Court is likely to cause misunderstanding.

20. As observed by Chagla C. J. in *Sir Kasturchand Ltd. v. Commr. of Income-tax, Bombay City*, 17 ITR 493, at pp. 495 and 496 = (AIR 1950 Bom 1 at p. 2) Section 23A was enacted in terrorem against private companies. The object of the section is to prevent evasion of super-tax by the shareholders of a company in which the public are not substantially interested. The shareholders of a private company could avoid the high incidence of super-tax by allowing the profits of the company to accumulate in its hands so that the accumulated profits could be distributed eventually in the form of bonus shares which are not assessable as income in their hands.

21. In considering whether the company is liable to pay additional super-tax on the entire balance of distributable profits it has to be borne in mind that Section 23A is clearly penal in nature; for, in the circumstances mentioned therein, if a private company fails to distribute by way of dividends the statutory percentage of its distributable profits, it becomes liable to pay, apart from the

sum determined as payable by it on the basis of the assessment under Section 23, super-tax at 50 per cent or 37 per cent as the case may be, on the undistributed balance of its distributable profits. In the first place, this provision being penal, the burden would lie on the revenue to prove that the conditions laid down by the section are satisfied. *Commr. of Income-tax, West Bengal v. Gangadhar Banerjee and Co. (P) Ltd.*, 57 ITR 176, 184 = (AIR 1965 SC 1977 (1981).) Secondly, penal statutes have to be construed strictly in the sense that if there is a reasonable interpretation which will avoid the penalty, that interpretation ought to be adopted: "When the legislature imposes a penalty, the words imposing it must be clear and distinct". *Willis v. Thorp*, (1875) 10 QB 383, 386; See also *Craies on Statute Law*, Sixth Ed., pp. 529-530.

22. It is contended on behalf of the respondent that the language of Section 23A(1) read with Explanation 2 is ambiguous and therefore the court ought to adopt the interpretation which favours the assessee, more particularly because the relevant provisions provide for the imposition of a penalty. In this behalf, learned counsel for the respondent relied strongly on the provision contained in Explanation 2 by which the statutory percentages are required to be applied separately with reference to the amounts of profits and gains attributable to the two parts of the company's business, "as if the said amounts were respectively the total income of the company in relation to each of its parts". It is urged that the fiction created by Explanation 2 must be given its full effect and that it must be carried to its logical conclusion. As the distributable profits of the two parts are to be deemed to be the total income of the company in relation to each of those parts, the penalty, according to the respondent, can be imposed on that part of the income only in respect of which the default has occurred.

23. It is impossible to accept this contention. If two interpretations of the relevant provisions were reasonably possible, we would have readily accepted that interpretation which favours the assessee. But the language

of sub-section (1) of Section 23A as also of Explanation 2 is clear and distinct and does not yield to more than one reasonable interpretation. Sub-section (1) provides that if the dividends distributed by a company are less than the statutory percentage of the "total income" of the company as reduced by the amounts mentioned in clauses (a), (b) and (c), the Income-tax Officer shall make an order that the company shall be liable to pay additional super-tax at the prescribed rates "on the undistributed balance of the total income of the previous year", that is to say on the total income as reduced by the amounts referred to in clauses (a), (b) and (c) and the dividends actually distributed. Explanation 2 clarifies what is meant by "statutory percentage" and provides that the prescribed percentages should be applied separately with reference to the amounts of profits and gains attributable to the two parts of the company's business, "as if the said amounts were respectively the total income of the company in relation to each of its parts,.....for the purposes of sub-section (1)". The fiction created by the Explanation is thus expressly limited to the purposes of sub-section (1) and there is no justification for pursuing the fiction to its logical conclusion so as to permit it to operate beyond the limited purpose of sub-section (1). Under the scheme contained in Section 23A, where a company has a composite business it is necessary at the outset to find out the profits attributable to the two parts of its business. The statutory percentages as prescribed by Explanation 2 have then to be applied separately to the profits of the two parts. By reason of the fiction created by Explanation 2 the profits of each part have for this purpose, and this purpose alone, to be treated as if they were the total income of that part of the company's business. By sub-section (1) the company becomes liable to pay additional super-tax if the dividends distributed by it are "less than the statutory percentage of the total income". Explanation 2 creates the fiction that for the purposes of sub-section (1) the income of the respective parts is to be regarded as the total income of each part so that the statu-

tory percentages can be applied separately to the income of each part. The fiction operates in this limited field and is in terms created for this limited purpose.

24. The levy of additional super-tax under Section 23A(1) is a single levy. The super-tax has to be levied "on the undistributed balance of the total income of the previous year". Sub-section (1) itself clarifies that by these words is meant "total income as reduced by the amounts, if any, referred to in clause (a), clause (b) or clause (c) and the dividends actually distributed, if any". The additional super-tax has therefore to be levied on the entire undistributed balance of the net income of the company. In other words, even if the Income-tax Officer finds that the apportioned dividend in any part of the company's business is less than the dividend that ought to have been declared by application of the statutory percentage, the additional super-tax has to be levied on the whole of the undistributed profits of the company. The High Court was therefore in error in holding that the profits of the two parts of the company's business should be treated as if they were the total income of the company for all purposes. In taking this view, the High Court overlooked the concluding words of Explanation 2 by reason of which the legal fiction has to be limited to its duly appointed purpose.

25. In the result we set aside the order of the High Court and allow the appeals with costs. Costs shall be in one set.

Appeals allowed.

AIR 1976 SUPREME COURT 263 =
1975 Cri LJ 1993

(From: Gujarat)*

Y. V. CHANDRACHUD, P. N. BHAGWATI AND R. S. SARKARIA JJ.

Govind Lal Chaggan Lal Patel,
Appellant v. The Agriculture Produce
Market Committee and others, Res-
pondents.

Criminal Appeal No. 158 of 1972,
D/- 27-8-1975.

*(Criminal Appeal No. 219 of 1970,
D/- 12-11-1971—Guj.)

JS/JS/D241/75/KSB

(A) Gujarat Agricultural Produce Markets Act (20 of 1964), Sec. 6 (1) — Interpretation of — Requirement of publication in Gujarati in a newspaper applies equally to notification under S. 6 (5).

The requirement laid down by Section 6 (1) that a notification under "this section" shall also be published in Gujarati newspaper would govern any and every notification issued under any part of Section 6, that is to say, under any of the sub-sections of Section 6, including sub-section (5).

(Para 9)

(B) Interpretation of Statutes — Provision whether directory or mandatory — Tests to determine.

The governing factor is the meaning and intent of the legislature, which should be gathered not merely from the words used by the legislature but from a variety of other circumstances and considerations. In other words, the use of the word 'shall' or 'may' is not conclusive on the question whether the particular requirement of law is mandatory or directory. But the circumstances that the legislature has used a language of compulsive force is always of great relevance and in the absence of anything contrary in the context indicating that a permissive interpretation is permissible, the statute ought to be construed as peremptory. AIR 1961 SC 674 = (1961) 1 Cri LJ 760 and AIR 1967 SC 1074 and AIR 1972 SC 1242 and AIR 1974 SC 1682, Rel. on.

(Para 13)

(C) Gujarat Agricultural Produce Markets Act (20 of 1964), Section 6 (5) — Notification under — Requirement of publication in Gujarati in a newspaper is mandatory and not directory — Effect of non-compliance. Cr. App. No. 219 of 1970, D/- 12-11-1971 (Guj), Reversed.

Unlike the Bombay Act 1939, the notification issued under Section 6 (5) of the Gujarat Act, like that under Section 6 (1), must also be published in Gujarati in a newspaper having circulation in the particular area. This requirement is mandatory and must be fulfilled. A violation of this requirement is likely to affect valuable rights of traders and agriculturists because in the absence of pro-

per and adequate publicity, their right of trade and business shall have been hampered without affording to them an opportunity to offer objections and suggestions, an opportunity which the statute clearly deems so desirable. Furthermore Sections 6 (2), 8 and 36 show that a violation of this provision leads to penal consequences. Hence, if the notification is not at all published in a newspaper the inclusion of new varieties of agricultural produce in that notification lacks legal validity and no prosecution can be founded upon its breach. Cr. App. No. 219 of 1970, D/- 12-11-1971 (Guj), Reversed. (Paras 16, 18)

(D) Gujarat Agricultural Produce Markets Rules (1965), Rule 3 — Rule must be complied with regard to notification under Section 5 (1) and Section 6 (1) of the Act.

(Para 19)

Cases Referred: Chronological Paras
 AIR 1974 SC 1682 = (1974) 2 SCC 33 13
 AIR 1972 SC 1242 = (1973) 3 SCC 889 13
 AIR 1967 SC 1074 = (1967) 1 SCR 120 13
 AIR 1961 SC 674 = (1961) 2 SCR 890 13
 = (1961) 1 Cri LJ 760 13
 AIR 1956 SC 140 = (1955) 2 SCR 1029 16

Mr. H. S. Patel, Mr. S. S. Khanduja and Miss Lalita Kohli, Advocates, for Appellant; Mr. S. K. Zauri Sr. Advocate, (Mr. Amaresh Kumar and Mr. M. V. Goswami, Advocates with him), (for Nos. 1-2) and M/s H. R. Khanna and M. N. Shroff, Advocates (for No. 3), for Respondents.

The Judgment of the Court was delivered by

CHANDRACHUD, J.:— This is an appeal by special leave from the judgment of the Gujarat High Court convicting the appellant under Section 36 read with Section 8 of the Gujarat Agricultural Produce Markets Act, 20 of 1964 (referred to herein as "the Act"), and sentencing him to pay a fine of Rs. 10/-. The judgment of conviction was recorded by the High Court in an appeal from an order of acquittal passed by the learned Judicial Magistrate, First Class, Godhra.

2. An Inspector of Godhra Agricultural Produce Market Com-

mittee filed a complaint against the appellant charging him with having purchased a certain quantity of ginger in January and February, 1969 without obtaining a licence as required by the Act. The learned Magistrate accepted the factum of purchase but he acquitted the appellant on the ground that the relevant notification in regard to the inclusion of ginger was not shown to have been promulgated and published as required by the Act.

3. The case was tried by the learned Magistrate by the application of procedure appointed for summary trials. That circumstance together with the token sentence of fine imposed by the High Court gives to the case a petty appearance. But occasionally, matters apparently petty seem on closer thought to contain points of importance though, regretfully, such importance comes to be realized by stages as the matter travels slowly from one court to another. As before the Magistrate so in the High Court, the matter failed to receive due attention; a fundamental premise on which the judgment of the High Court is based contains an assumption contrary to the record. Evidently, the attention of the High Court was not drawn either to the error of that assumption or to some of the more important aspects of the case which the parties have now perceived.

4. It is necessary, in order to understand the controversy to notice some of the relevant statutory provisions.

5. In the erstwhile composite State of Bombay there was in operation an Act called the Bombay Agricultural Produce Markets Act, 22 of 1939. On the bifurcation of that State on May 1, 1960 the new State of Gujarat was formed. The Bombay Act of 1939 was extended by an appropriate order to the State of Gujarat by the Government of that State. That Act remained in operation in Gujarat till September 1, 1964 on which date the Gujarat Agricultural Produce Markets Act, 20 of 1964, came into force.

6. The Act was passed "to consolidate and amend the law relat-

ing to the regulation of buying and selling of agricultural produce and the establishment of markets for agricultural produce in the State of Gujarat". Section 4 of the Act empowers the State Government to appoint an officer to be the Director of Agricultural Marketing and Rural Finance. Sections 5, 6 (1) and 6 (5) of the Act read thus:—

"5. Declaration of intention of regulating purchase and sale of agricultural produce in specified area.— (1) The Director may, by notification in the Official Gazette, declare his intention of regulating the purchase and sale of such agricultural produce and in such area, as may be specified therein. Such notification shall also be published in Gujarati in a newspaper having circulation in the area and in such other manner as may be prescribed.

(2) Such notification shall state that any objection or suggestion received by the Director within the period specified in the notification which shall not be less than one month from the date of the publication of the notification shall be considered by the Director.

(3) The Director shall also send a copy of the notification to each of the local authorities functioning in the area specified in the notification with a request to submit its objections and suggestions if any, in writing to the Director within the period specified in the notification.

6. Declaration of market areas.—

(1) After the expiry of the period specified in the notification issued under Section 5 (hereinafter referred to in this section as 'the said notification'), and after considering the objections and suggestions received before its expiry and holding such inquiry as may be necessary, the Director may, by notification in the Official Gazette, declare the area specified in the said notification or any portion thereof to be a market area for the purposes of this Act in respect of all or any of the kinds of agricultural produce specified in the said notification. A notification under this section shall also be published in Gujarati in a newspaper having circulation in the said area and in such other manner, as may be prescribed.

x x x x x x
x x x x x x

6. (5) After declaring in the manner specified in Section 5 his intention of so doing, and following the procedure therein, the Director may, at any time by notification in the Official Gazette, exclude any area from a market area specified in a notification issued under sub-section (1), or include any area therein and exclude from or add to the kinds of agricultural produce so specified any kind of agricultural produce."

By Section 8, no person can operate in the market area or any part thereof except under and in accordance with the conditions of a licence granted under the Act. Section 36 of the Act provides, to the extent material, that whoever without holding a licence uses any place in a market area for the purchase or sale of any agricultural produce and thereby contravenes Sec. 8 shall on conviction be punished with the sentence mentioned therein.

7. Rule 3 of the Gujarat Agricultural Produce Markets Rules, 1965 provides that a notification under Section 5 (1) or Section 6 (1) shall also be published by affixing a copy thereof at some conspicuous place in the office of each of the local authorities functioning in the area specified in the notification.

8. The simple question, though important, is whether the notification issued under Section 6 (5) of the Act, covering additional varieties of agricultural produce like ginger and onion, must not only be published in the official gazette but must also be published in Gujarati in a newspaper. The concluding sentence of Section 6 (1) says that a notification under "this section" "shall also be published in Gujarati in a newspaper" having circulation in the particular area. The argument of the appellant (sic) (respondent?) is twofold: Firstly, that "this section" means "this sub-section" so that the procedure in regard to publication which is laid down in sub-section (1) of Section 6 must be restricted to notifications issued under that sub-section and cannot be extended to those issued under sub-section (5) of Section 6; and secondly,

assuming that the words "this section" are wide enough to cover every sub-section of Section 6, the word "shall" ought to be read as "may".

9. First, as to the meaning of the provision contained in Section 6 (1) of the Act. It means what it says. That is the normal rule of construction of statutes, a rule not certainly absolute and unqualified, but the conditions which bring into play the exceptions to that rule do not exist here. Far from it; because, the scheme of the Act and the purpose of the particular provision in Section 6 (1) underline the need to give to the provision its plain, natural meaning. It is not reasonable to assume in the legislature an ignorance of the distinction between a "section" of the statute and the "sub-sections" of that section. Therefore, the requirement laid down by S. 6 (1) that a notification under "this section" shall also be published in Gujarati in a newspaper would govern any and every notification issued under any part of Section 6, that is to say, under any of the sub-sections of S. 6. If this requirement was to govern notifications issued under sub-section (1) of Section 6 only, the legislature would have said so.

10. But the little complexity that there is in this matter arises out of a known phenomenon, judicially noticed but otherwise disputed, that sometimes the legislature does not say what it means. That has given rise to a series of technical rules of interpretation devised or designed to unravel the mind of the law-makers. If the words used in a statute are ambiguous, it is said, consider the object of the statute, have regard to the purpose for which the particular provision is put on the statute-book and then decide what interpretation best carries out that object and purpose. The words of the concluding portion of Section 6 (1) are plain and unambiguous rendering superfluous the aid of artificial guide-lines to interpretation. But the matter does not rest there. The appellant (sic) (respondent?) has made an alternative argument that the requirement regarding the publication in Gujarati in a newspaper is directory and not mandatory, despite

the use of the word "shall". That word, according to the appellant, (sic) (respondent?) really means "may".

11. Maxwell, Crawford and Craies abound in illustrations where the words "shall" and "may" are treated as interchangeable. "Shall be liable to pay interest" does not mean "must be made liable to pay interest", and "may not drive on the wrong side of the road" must mean "shall not drive on the wrong side of the road". But the problem which the use of the language of command poses is: Does the legislature intend that its command shall at all events be performed? Or is it enough to comply with the command in substance? In other words, the question is: is the provision mandatory or directory?

12. Plainly, "shall" must normally be construed to mean "shall" and not "may", for the distinction between the two is fundamental. Granting the application of mind there is little or no chance that one who intends to leave a lee-way will use the language of command in the performance of an act. But since, even lesser directions are occasionally clothed in words of authority, it becomes necessary to delve deeper and ascertain the true meaning lying behind mere words.

13. Crawford on 'Statutory Construction' (Edn. 1940, Art. 261, p. 516) sets out the following passage from an American case approvingly: "The question as to whether a statute is mandatory or directory depends upon the intent of the legislature and not upon the language in which the intent is clothed. The meaning and intention of the legislature must govern, and these are to be ascertained, not only from the phraseology of the provision, but also by considering its nature, its design, and the consequences which would follow from construing it the one way or the other." Thus, the governing factor is the meaning and intent of the legislature, which should be gathered not merely from the words used by the legislature but from a variety of other circumstances and considerations. In other words, the use of the word 'shall' or 'may' is not conclusive on the question whether the particular require-

ment of law is mandatory or directory. But the circumstance that the legislature has used a language of compulsive force is always of great relevance and in the absence of anything contrary in the context indicating that a permissive interpretation is permissible, the statute ought to be construed as peremptory. One of the fundamental rules of interpretation is that if the words of a statute are themselves precise and unambiguous, no more is necessary than to expound those words in their natural and ordinary sense, the words themselves in such case best declaring the intention of the legislature. *Shriram v. State of Bom.*, (1961) 2 SCR 890 at p. 898 = (AIR 1961 SC 674 at pp. 677-678) = (1961) 1 Cri LJ 760 at p. 764. Sec. 6(1) of the Act provides in terms, plain and precise, that a notification issued under the section "shall also" be published in Gujarati in a newspaper. The word 'also' provides an important clue to the intention of the legislature because having provided that the notification shall be published in the Official Gazette, Sec. 6(1) goes on to say that the notification shall also be published in Gujarati in a newspaper. The additional mode of publication prescribed by law must in the absence of anything to the contrary appearing from the context of the provision or its object, be assumed to have a meaning and a purpose. In *Khub Chand v. State of Rajasthan* (1967) 1 SCR 120 at pp. 124, 125 = (AIR 1967 SC 1074 at p. 1077) it was observed that "The term 'shall' in its ordinary significance is mandatory and the court shall ordinarily give that interpretation to that term unless such an interpretation leads to some absurd or inconvenient consequence or be at variance with the intent of the legislature, to be collected from other parts of the Act. The construction of the said expression depends on the provisions of a particular Act, the setting in which the expression appears, the object for which the direction is given, the consequences that would flow from the infringement of the direction and such other considerations". The same principle was expressed thus in *Haridwar Singh v. Begum Sumbrui*; (1973) 3 SCC 889 at p. 895 = (AIR 1972 SC 1242 at p. 1247)

"Several tests have been propounded in decided cases for determining the question whether a provision in a statute, or a rule is mandatory or directory. No universal rule can be laid down on this matter. In each case one must look to the subject-matter and consider the importance of the provision disregarded and the relation of that provision to the general object intended to be secured." Recently in the Presidential Election case, (1974) 2 SCC 33 at p. 49 = (AIR 1974 SC 1682 at p. 1686) the learned Chief Justice speaking on behalf of a seven-Judge Bench observed:

"In determining the question whether a provision is mandatory or directory, the subject-matter, the importance of the provision, the relation of that provision to the general object intended to be secured by the Act will decide whether the provision is directory or mandatory. It is the duty of the courts to get at the real intention of the legislature by carefully attending to the whole scope of the provision to be construed. 'The Key to the opening of every law is the reason and spirit of the law, it is the animus imponentis, the intention of the law maker expressed in the law itself, taken as a whole'."

14. The scheme of the Act is like this: Under Section 5(1) the Director of Marketing and Rural Finance may by a notification in the Official Gazette declare his intention of regulating purchase and sale of agricultural produce in the specified area. Such notification is also required to be published in Gujarati in a newspaper having circulation in the particular area. By the notification, the Director under Section 5(2) has to invite objections and suggestions and the notification has to state that any such objections or suggestions received by the Director within the specified period, which shall not be less than one month from the date of the publication of the notification, shall be considered by the Director. After the expiry of the aforesaid period the Director, under Section 6(1), has the power to declare an area as the market area in respect of the particular kinds of agricultural produce. This power is not absolute because by the

terms of Section 6(1) it can only be exercised after considering the objections and suggestions received by the Director within the stipulated period. The notification under Section 6(1) is also required to be published in Gujarati in a newspaper. The power conferred by Section 5(1) or 6(1) is not exhausted by the issuance of the initial notification covering a particular area or relating to a particular agricultural produce. An area initially included in the market area may later be excluded, a new area may be added and likewise an agricultural produce included in the notification may be excluded or a new variety of agricultural produce may be added. This is a salutary power because experience gained by working the Act may show the necessity for amending the notification issued under Sec. 6(1). This power is conferred by Sec. 6(5).

15. By Section 6(5), if the Director intends to add or exclude an area or an agricultural produce, he is to declare his intention of doing so in the manner specified in Section 5 and after following the procedure prescribed therein. Thus, an amendment to the Section 6(1) notification in regard to matters described therein is equated with a fresh declaration of intention in regard to those matters, rendering it obligatory to follow afresh the whole of the procedure prescribed by Section 5. That is to say, if the Director intends to add or exclude an area or an agricultural produce, he must declare his intention by notification in the Official Gazette and such notification must also be published in Gujarati in a newspaper. Secondly, the Director must invite objections or suggestions by such notification and the notification must state that any objections or suggestions received within the stipulated time shall be considered by him. The Director must also comply with the requirement of sub-s. (5) of Section 3 by sending a copy of the notification to each of the local authorities functioning in the particular area with a request that they may submit their objections and suggestions within the specified period. After the expiry of the period aforesaid and after considering the objections or suggestions

received within that period, the Director may declare that the particular area or agricultural produce be added or excluded to or from the previous notification. This declaration has to be by a notification in the Official Gazette and the notification has to be published in Gujarati in a newspaper having circulation in the particular area. The last of these obligations arises out of the mandate contained in the concluding sentence of S. 6(1).

16. The object of these requirements is quite clear. The fresh notification can be issued only after considering the objections and suggestions which the Director receives within the specified time. In fact, the initial notification has to state expressly that the Director shall consider the objections and suggestions received by him within the stated period. Publication of the notification in the Official Gazette was evidently thought by the legislature not an adequate means of communicating the Director's intention to those who would be vitally affected by the proposed declaration and who would therefore be interested in offering their objections and suggestions. It is a matter of common knowledge that publication in a newspaper attracts greater public attention than publication in the Official Gazette. That is why the legislature has taken care to direct that the notification shall also be published in Gujarati in a newspaper. A violation of this requirement is likely to affect valuable rights of traders and agriculturists because in the absence of proper and adequate publicity, their right of trade and business shall have been hampered without affording to them an opportunity to offer objections and suggestions, an opportunity which the statute clearly deemes so desirable. By Section 6(2), once an area is declared to be a market area, no place in the said area can be used for the purchase or sale of any agricultural produce specified in the notification except in accordance with the provisions of the Act. By S. 8 no person can operate in the market area or any part thereof except under and in accordance with the conditions of a licence granted under the Act. A

violation of these provisions attracts penal consequences under Section 36 of the Act. It is therefore vital from the point of view of the citizens' right to carry on trade or business, no less than for the consideration that violation of the Act leads to penal consequences, that the notification must receive due publicity. As the statute itself has devised an adequate means of such publicity, there is no reason to permit a departure from that mode. There is something in the very nature of the duty imposed by Sections 5 and 6, something in the very object for which that duty is cast, that the duty must be performed. "Some Rules", as said in *Thakur Pratap Singh v. Sri Krishna* (1955) 2 SCR. 1029 at p. 1031 = (AIR 1956 SC 140 at p. 141) "are vital and go to the root of the matter: they cannot be broken." The words of the statute here must therefore be followed punctiliously.

17. The legislative history of the Act reinforces this conclusion. As stated before, the Bombay Agricultural Produce Markets Act, 1939 was in force in Gujarat till September 1, 1964 on which date the present Act replaced it. Section 3 (1) of the Bombay Act corresponding to Section 5(1) of the Act provided that the notification 'may' also be published in the regional languages of the area. Section 4 (1) of the Bombay Act which corresponds to Section 6(1) of the Act provided that "A notification under this section may also be published in the regional languages of the area in a newspaper circulated in the said area." Section 4 (4) of the Bombay Act corresponding to Section 6(5) of the Act provided that exclusion or inclusion of an area or an agricultural produce may be made by the Commissioner by notification in the Official Gazette, "subject to the provisions of Section 3". Section 4(4) did not provide in terms as Sec. 6(5) does, that the procedure prescribed in regard to the original notification shall be followed if an area or an agricultural produce is to be excluded or included. The Gujarat legislature, having before it the model of the Bombay Act, made a conscious departure from it by providing for the publication of the notification in a newspaper and by substituting the word 'shall' for the

word 'may'. These are significant modifications in the statute which was in force in Gujarat for over 4 years from the date of reorganisation till September 1, 1964. These modifications bespeak the mind of the legislature that what was optional must be made obligatory.

18. We are therefore of the opinion that the notification issued under Section 6(5) of the Act, like that under Section 6(1), must also be published in Gujarati in a newspaper having circulation in the particular area. This requirement is mandatory and must be fulfilled. Admittedly, the notification (Ex. 10) issued under Section 6(5) on February 16, 1968 was not published in a newspaper at all, much less in Gujarati. Accordingly, the inclusion of new varieties of agricultural produce in that notification lacks legal validity and no prosecution can be founded upon its breach.

19. Rule 3 of the Gujarat Agricultural Produce Markets Rules, 1965 relates specifically and exclusively to notifications "issued under sub-s. (1) of Section 5 or under sub-section (1) of Section 6". As we are concerned with a notification issued under sub-section (5) of Section 6, we need not go into the question whether Rule 3 is complied with. We may however indicate that the authorities concerned must comply with Rule 3 also in regard to notifications issued under Sections 5(1) and 6(1) of the Act. After all, the rule is calculated to cause no inconvenience to the authorities charged with the duty of administering the Act. It only requires publication by affixing a copy of the notification at some conspicuous place in the office of each of the local authorities functioning in the area specified in the notification.

20. The prosecution was conducted before the learned Magistrate in an indifferent manner. That is not surprising because the beneficent purpose of summary trials is almost always defeated by a summary approach. Bhailalbai Chaturbhai Patel, an Inspector in the Godhra Agricultural Produce Market Committee, who was a material witness for proving the offence, said in his evidence that he did not know whether or not

the notifications were published in any newspaper or on the notice board of the Godhra Municipality. The learned Magistrate acquitted the appellant holding that the prosecution had failed to prove beyond a reasonable doubt that the notifications were published and promulgated as required by law.

21. In appeal, the High Court of Gujarat began the operative part of its judgment with a wrong assumption that Ex. 9 dated April 19, 1962 was a "notification constituting the Godhra Market area." In fact Ex. 9 was issued under Section 4-A(3) of the Bombay Act as amended by Gujarat Act XXXI of 1961 declaring certain areas as "market proper" within the Godhra Market area. The High Court was really concerned with the notification, Ex. 10, dated February 16, 1968 which was issued under Section 6(5) of the Act and by which new varieties of agricultural produce like onion, ginger, sunhemp and jowar were added to the old list. The High Court set aside the acquittal by following the judgment dated February 12, 1971 rendered by A. D. Desai J. in Cr. Appeal 695 of 1969. That judgment has no application because it arose out of the Bombay Act and the question before Desai J. was whether Section 4(1) of the Bombay Act was mandatory or directory. That section, as noticed earlier, provided that the notification "may" also be published in the regional languages of the area in a newspaper circulated in that area. The High Court, in the instant case, was concerned with Section 6(5) of the Act which has made a conscious departure from the Bombay Act in important respects. The High Court did not even refer to the provisions of the Act and it is doubtful whether those provisions were at all brought to its notice. Everyone concerned assumed that the matter was concluded by the earlier judgment of Desai J.

22. For these reasons we set aside the judgment of the High Court and restore that of the learned Judicial Magistrate, First Class, Godhra. Fine, if paid, shall be refunded to the appellant.

Appeal allowed.

AIR 1976 SUPREME COURT 271

(From: Gujarat)*

**A. ALAGIRISWAMI, P. K. GOSWAMI
AND N. L. UNTWALIA, JJ.**Harisingh Pratapsingh Chawda,
Appellant v. Popatlal Mulshanker
Joshi and others, Respondents.Civil Appeal No. 90 of 1973, D/-
19-9-1975.

(A) Representation of the People Act (1951), Sec. 123 (i) (B) (3) — Bribery — Meaning — Payment to a third person with view that he induces other person to vote for bribe giver — Not bribery on part of person paying money — Receiving money is, however, bribery on part of person receiving money.

The law contemplates that when a person makes any payment to another person in order to make him use his influence to induce a third person to vote for him that is not bribery by the person who pays but the receipt of money by the second person for inducing or attempting to induce another elector to vote is bribery. It is also bribery for the voter himself to receive the money. Where, therefore, gratification is paid to a person in order that he may induce the other persons to vote for the bribe giver, it is not bribery on the part of the bribe giver. It is, however, bribery on the part of the bribe taker even when he takes it in order to induce an elector to vote for the bribe giver. Election Petn. No. 2 of 1971, D/- 25-7-1972 (Guj), Affirmed. AIR 1975 SC 1634, Approved. (Para 6)

(B) Representation of the People Act (1951), Sec. 123 — Corrupt practice — Payment made not for inducing to vote but for defecting to Ruling Congress is not a corrupt practice.

Where the payment is made to a person not for the purpose of inducing him to vote but to make him defect from the Organisation Congress to the Ruling Congress, it is not a corrupt practice under the Representation of the People Act. Even if the payment has been received by the person with the promise that he would induce the

*(Ele. Petn. No. 2 of 1971, D/- 25-7-1972—Guj.)

JS/KS/D770/75/GGM

voters to vote for the bribe giver, it will not be bribery on the part of the bribe taker. The defection of such person to the Ruling Congress if it takes place might mean that he would be expected to work for the Ruling Congress. That incidentally he might vote for the Ruling Congress candidate does not mean that the payment was made to him in order to make him vote for the Ruling Congress candidate. The position would, however, be different if there was a specific request that he should vote for the person making payment.

(Para 7)

(C) Representation of the People Act (1951), Section 123 — Corrupt practice — Gift or promise of gratification for working for the person does not amount to gift for inducing to vote.

A distinction between a gift or offer combined with the request to vote and the gift or offer to a person asking him to work for him with the incidental result that that person might vote for him should always be kept in mind. In such a case there is no specific bargain for the vote. Were it not so it would be impossible for persons standing for election to get any person to work for them who is not also a voter in the constituency.

(Para 8)

(D) Representation of the People Act (1951), Section 123 — Promise to construct a hostel for a particular community if voters vote for the promisor — Voters need not accept such promise — They should, however, have a knowledge of such promise — Promise made to a person mainly to secure his defection to Ruling Congress — Defection not taking place — Voters having no knowledge of promise — Action does not amount to bribery. AIR 1976 SC 27, Ref.

(Para 10)

Cases Referred: Chronological Paras
AIR 1976 SC 27 10
AIR 1975 SC 1634 6
(1968) 39 Ele. LR 477 = 1969 D. E. C. 445 (SC) 8

S. N. Andley, Sr. Advocate, (M/s. K. J. John and Shri Narain Advocates of M/s. J. B. Dadachanji and Co. with him), for Appellant; Mr. F. S. Nariman, Sr. Advocate, (Mr. P. H. Parekh, Mrs. S. Bhandare, Advocates of M/s.

Bhandare Parekh and Co. and Miss. Manju Jaitley, Advocates with him), for Respondent No. 1.

Judgment of the Court was delivered by

ALAGIRISWAMI, J.:— This appeal arises out of an election petition questioning the election of 1st respondent in the election held in March 1971 to the Lok Sabha from the Banaskantha constituency in Gujarat. In that election the 1st respondent, a nominee of the Ruling Congress was declared elected securing 1,16,532 votes as against 92,945 votes secured by the 2nd respondent, a nominee of the Organisation Congress. The appellant, a voter in the constituency, also belonging to the Organisation Congress, filed a petition challenging the validity of the election on various grounds out of which only those covered by issue No. 10, hereinafter set out, survive for consideration:

"(10) Whether respondent No. 1 or his agents or/other persons with his consent made a gift or promise of gratification to the petitioner with the object directly or indirectly of inducing the petitioner to vote for respondent No. 1 or to refrain from voting for respondent No. 2?"

2. The allegation relating to this charge in the election petition is that the 1st respondent and his agent Maulvi Abdul Rehman and the 1st respondent's son Bipin Popatlal Joshi with the consent of the 1st respondent had made a gift and a promise of gratification to the appellant for voting in 1st respondent's favour. The appellant as well as one Madhusudansinhji, who has been examined as P. W. 10, seem to have been at that time prominent members of the Organisation Congress and also leaders of the Kshatriya community which formed about 20 to 25 per cent of the votes in the Banaskantha constituency. It was alleged that on February 9, 1971 the 1st respondent and Maulvi Abdul Rehman came to the appellant's residence and persuaded him to leave Congress (O) and join Congress (R) offering (1) to secure a party ticket for the appellant for the election to the Gujarat Legislative Assembly in 1972. (2) to meet all his expenses for that election and to pay

him Rs. 10,000/- in cash towards the said expenses, and (3) to construct a hostel for the Kshatriya students of the Banaskantha district. A specific allegation was made that the 1st respondent wanted the appellant to vote for him. It was also alleged that the 1st respondent asked the appellant to convey to Madhusudansinhji an offer of a party ticket for the Legislative Assembly election in 1972 and to pay him also a sum of Rs. 10,000/-. The Prime Minister was addressing a meeting at Palanpur on that day. The appellant, his wife and Madhusudansinhji were taken to the helipad, Palanpur when the Prime Minister landed there and also to dais from which the Prime Minister was addressing a public meeting. One Akbarbhai Chavda, convener of the District Congress Committee announced that the appellant and Madhusudansinhji had joined Congress (R) and asked the appellant to say a few words. The appellant went to the microphone, took out the bundle of notes of Rs. 10,000/- given to him and flung it in the air and told the gathering that he and his colleagues could not be purchased and that they would remain loyal to the Organisation Congress.

3. During the trial of the election petition Madhusudansinhji, who had by that time joined the Ruling Congress and Maulvi Abdul Rehman were examined as witnesses on behalf of the appellant.

4. The learned Judge of the High Court after considering the evidence before him held that Bipin Popatlal Joshi, son of the 1st respondent, handed over Rs. 10,000/- to the appellant as a bribe to bring about the appellant's defection from the Organisation Congress. But he took the view that the object of the gift was to bring about the appellant's defection from the Organisation Congress and not to induce directly or indirectly any voters to cast their votes for the Ruling Congress candidate or to refrain from voting in favour of the 2nd respondent. As regards the offer to build the hostel for Kshatriya students he held that the fact that a person who defects from another party to the Ruling Congress would be expected to work

for that party and would be expected to use his personal influence in support of the candidate of that party does not mean that the object of bringing about the defection was to indirectly induce the Kshatriya voters to cast their votes for the 1st respondent. He therefore held that payment of such money and holding out such inducement does not amount to any offence under the Election Law and it was with regret that he had to decide the case in favour of the 1st respondent.

5. We are in entire agreement with the finding of the learned Judge as regards the payment of Rs. 10,000/- to the appellant and also the offer to build hostel for Kshatriya students and do not consider it necessary to go into the evidence in support of that finding. That finding is supported not only by the evidence of Madhusudansinhji and Maulvi Abdur Rehman but also the letter Ex. T, passed by the latter to the appellant and Madhusudansinhji.

6. The question is whether that finding is enough to establish the charge of bribery against the 1st respondent. There is still another finding necessary in regard to the allegations made in the petition in respect of which the learned Judge has given no finding and that is with regard to what happened on the 9th of February 1971. We are at one with the view of the learned Judge that the payment of Rs. 10,000/- to the appellant was with a view to induce him to defect from Organisation Congress to the Ruling Congress. It may carry with it the implication that he was expected to use his influence with the voters to vote for the candidate set up by the Ruling Congress. It has been held by this Court in *Kalya Singh v. Genda Lal*, (C. A. No. 16 of 1973 decided on 28-2-1975) = (reported in AIR 1975 SC 1634) to which two of us (Untwalia and Alagiriswami JJ.) are party, that a payment made to a person in order to induce him to canvass votes on behalf of the bribe giver would not be bribery within the definition of that word in Section 123(1) of the Representation of the People Act. It was held that it is only in a case where the payment to a third person

by itself induces the voter to vote for the bribe giver that it would fall under Sec. 123(1). Mr. Andley appearing on behalf of the appellant tried to persuade us that that decision requires reconsideration. After having considered his arguments we are still of the opinion that the view taken in that decision is correct. The object of providing that a payment should not be made to a person in order that that payment should induce some other person to vote for the bribe giver is obvious. It is apparently intended to cover situations where payment to a husband, wife, son or father is intended to induce the wife, husband, father or son to vote for the bribe giver. That would be indirect inducement. Otherwise it would be easy for the bribe giver to say that he did not bribe the voter himself and therefore it is not bribery. That this provision was not intended to cover a case where money is paid to a certain person in order to make him induce another person to vote for the person who paid him the money would be obvious by looking at the converse case. Under Sec. 123(1)(B)(b) the receipt of, or agreement to receive, any gratification, whether as a motive or a reward by any person whomsoever for himself or any other person for voting or refraining from voting, or inducing or attempting to induce any elector to vote or refrain from voting, or any candidate to withdraw or not to withdraw his candidature is bribery. Under this clause any person who receives or agrees to receive any gratification as a reward for inducing or attempting to induce any elector to vote etc. would be receiving a bribe. The law therefore contemplates that when a person makes any payment to another person in order to make him use his influence to induce a 3rd person to vote for him that is not bribery by the person who pays but the receipt of money by the second person for inducing or attempting to induce another elector to vote is bribery. It is also bribery for the voter himself to receive the money. We, therefore, reiterate the view that when a candidate or anybody on his behalf pays any gratification to a person in order

that the payment made to him may induce the voter to vote for the bribe giver it is bribery. But where the gratification is paid to a person in order that he may induce the other persons to vote for the bribe giver it is not bribery on the part of the bribe giver. It is, however, as we have explained above, bribery on the part of the bribe taker even when he takes it in order to induce an elector to vote for the bribe giver.

7. In this case it is obvious that the primary object of the payment made to the appellant was to induce him to defect from the Organisation Congress to the Ruling Congress. That is not a corrupt practice under the Representation of the People Act. Even if the payment was received with the promise that he would induce the voters to vote for the bribe giver it will not be bribery on the part of the bribe giver but only bribery on the part of the bribe taker. The defection of the appellant to the Ruling Congress, if it took place, might mean that he was expected to work for the Ruling Congress. Equally it may not. A person who changes his party allegiance at the time of the election probably might not command much respect among electors if the electors knew that he had done so after receiving some money. Otherwise the fact that two important persons the appellant and Madusudansinhji, a younger brother of the ex-ruler of Danta State had joined the Ruling Congress, might be expected to influence the voters to vote for the candidate set up by the Ruling Congress. But that would be not because of the payment made to the appellant and Madusudansinhji. Nor would such payment be bribery. To reiterate, it is the payment to the appellant that must induce the voters to vote for the candidate set up by the Ruling Congress in order that it might amount to bribery. It is not enough that his defection from Organisation Congress to the Ruling Congress induces voters to vote for the Ruling Congress candidate. As we said earlier, if the payment to the appellant came to be known as the cause for his changing allegiance it may have a boomerang effect. It is therefore clear that the payment

made to the appellant would not have induced the voters to vote for the Ruling Congress candidate. While after his defection therefore the appellant might have been expected to work for the Ruling Congress candidate or equally might not have been, it is perhaps implicit that he would also vote for the Ruling Congress candidate. Is this enough to make the payment made to the appellant bribery? The payment was made not for the purpose of inducing him to vote but to make him defect to the Ruling Congress. That was the purpose for which the payment was made. That incidentally he might vote for the Ruling Congress candidate does not mean that the payment was made to him in order to make him vote for the Ruling Congress candidate. The bargain was not for his vote, the bargain was for his defection. Therefore, on this point we agree with the learned Judge of the High Court. But if there was a specific request by the 1st respondent to the appellant that he should vote for him then the position would be different. In that case it would be bribery and even bribery to one person is enough to make an election void. A specific allegation to that effect has been made in the election petition and that has not been considered by the learned Judge of the High Court. We shall now proceed to do so.

8. The appellant gave evidence to the effect that the 1st respondent asked him on 9th February to vote for him and made the three promises earlier referred to. He was not cross-examined on that point but the 1st respondent in his turn denied this when he gave evidence. Maulvi Abdul Rehman speaks to his having met the appellant on February 9, 1971 but he says that the 1st respondent was not with him at that time. Madhusudansinhji says that he had met the appellant before the 14th and that at that time the appellant told him that the Maulvi and the 1st respondent were insisting that the appellant and he (Madhusudansinhji) should join Congress (R). He also denied a suggestion put to him in cross-examination that it was not true that the appellant had told him before the 14th

of February anything about the Maulvi or the 1st respondent telling the appellant that the appellant and he (Madhusudansinh) should join the Congress (R) on certain terms. This is the evidence relied on to show that on the 9th the 1st respondent also had met the appellant. If the appellant and Madhusudansinhji had met at Palanpur before the 14th and the appellant then told him that Maulvi and the 1st respondent were insisting that they should join the Ruling Congress the meeting should have been on the 13th or earlier and the request to him on the 12th or earlier. Naturally having chosen to examine Madhusudansinhji, who had by that time joined the Ruling Congress, as his witness the appellant would not have risked putting questions about the exact date on which Maulvi and the 1st respondent had met him. Quite possibly there was no such meeting on the 9th of February and that was why that question was not specifically put to him. When that question was put to Maulvi Abdul Rehman, who was examined as P. W. 8 a little earlier, he denied that the 1st respondent was with him on the 9th February. Coming to the conversation which the appellant and Madhusudansinhji had before the 14th, if the Maulvi and the 1st respondent were insisting either on the 12th or earlier that the appellant should join the Ruling Congress there should have been a meeting between them a little earlier than the 12th and it should have been on the 9th is the argument on behalf of the appellant. But there are many imponderables in this argument. If the Maulvi and the 1st respondent were insisting that the appellant and Madhusudansinhji should join the Ruling Congress it does not mean that they both did so at the same time. They could have been doing it on different occasions separately. Nor does it follow that the Maulvi and the 1st respondent met him on the 9th. Nor does it follow that on that date the 1st respondent asked the appellant to vote for him. The statement of Madhusudansinh is too slender a foundation on which this argument could be built. It is thus a case of the appellant's oath against 1st

respondent's oath and in a case of a serious charge like bribery we would not be satisfied merely on the basis of an oath against oath to hold that it has been satisfactorily established that the 1st respondent asked the appellant on the 9th February to vote for him. We may also mention that with regard to the alleged visit of the Maulvi and the 1st respondent to the appellant three other possible witnesses including the appellant's wife, Pushpaben, who could have been examined to establish that the 1st respondent accompanied the Maulvi to the appellant had not been examined. A further fact which improbabilises this story is that in the election petition it is stated that the 1st respondent told the appellant that he would arrange for a ticket for Madhusudansinh in the 1972 elections and pay him Rs. 10,000/- if Madhusudansinh left Organisation Congress and joined the Ruling Congress and voted and worked for him (1st respondent) and asked him to convey the offer to Madhusudansinh. No evidence was let in about the voting and what is more Madhusudansinh was not a voter in the Banaskantha Constituency. This shows that the allegation regarding the request to appellant to vote for 1st respondent is of the same character as the request to Madhusudansinh and put in merely for the purposes of the election petition and not a fact. On broader considerations also it is very unlikely that when the talk was about the appellant and Madhusudansinh defecting to the Ruling Congress from the Organisation Congress there would have been any talk about the voting itself. All parties would have proceeded on the understanding that when they defected to the Ruling Congress they would both work and vote for the Ruling Congress. The distinction between a gift or offer combined with the request to vote and the gift or offer to a person asking him to work for him with the incidental result that that person might vote for him should always be kept in mind. In such a case there is no specific bargain for the vote. Were it not so it would be impossible for persons standing for election to get any person to work for them who is not also

a voter in the constituency. This was brought out by this Court in the decision in *Onkar Singh v. Ghasiram Majhi*, (1968) 39 ELR 477 (SC). We would, therefore, hold that the case that the 1st respondent bargained for the appellant's vote has not been satisfactorily made out.

9. On behalf of the 1st respondent it was urged that the actions of the appellant and Madhusudansinhji immediately after the payment of Rs. 10,000/- and the dramatic developments at the meeting addressed by the Prime Minister show that there would not have been any bargaining for the appellant's vote. The points relied upon were (1) that it was not said by the appellant when he threw the money into the crowd on the 18th that he was asked to vote for the 1st respondent, (2) that it was not mentioned in the statement (Ex. 5) made by the appellant and Madhusudansinhji on 18-2-71, (3) that that was not mentioned in the interview given to the newspaper reporters found in Ex. 7 or in the newspaper report Ex. 8. We do not consider that these things are of much importance. At that time the most important factor was the attempt to persuade the appellant and Madhusudansinhji to defect to the Ruling Congress and any request to the appellant to vote for the 1st respondent would have been insignificant even as we have held that when requesting the appellant and Madhusudansinhji to defect to the Ruling Congress it is not likely that they would have been asked to vote for the 1st respondent. The reference to the piece of evidence just mentioned cannot be said to establish that there was no request made to the appellant to vote for the 1st respondent. That would have to be decided on other factors and other evidence and on the basis of that evidence we have already held that it is not established that the 1st respondent requested the appellant to vote for him.

10. Now remains the question of the offer to build a hostel for Kshatriya boys. Strictly speaking this does not arise on issue 10. This is probalised by the evidence of Madhusudansinhji, Maulvi Abdul Reh-

man and the appellant as well as Ex. T. Whether it was to be in Danta or Banaskantha does not make much difference as long as it was for the Kshatriya boys. The two places are near to each other though in different Parliamentary constituencies and in whichever place it was situate it will benefit Kshatriya boys and there is no doubt that if the hostel were constructed by respondent No. 1 or the Ruling Congress party at his instance that would induce the voters to vote for the Ruling Congress candidate. But before that happens the matter should come to the knowledge of the voters. Only if the voters knew that the promise had been made to the appellant and Madhusudansinhji that promise would induce the voters to vote for the 1st respondent. But the knowledge of the promise remained confined to the appellant and P. W. 10, in addition of course to Maulvi Abdul Rehman and the 1st respondent's son. If the payment or the promise was to induce the voters, it cannot induce the voters unless they come to know about the payment or the promise. There is no evidence here that the voters knew about the promise to build the hostel. The bargain in such cases as we have mentioned in the judgment delivered by us today in *S. Iqbal Singh v. Gurdas Singh*, (C. A. No. 1172 of 1973) = (Reported in AIR 1976 SC 27) is really an offer on the part of the bribe giver that he would do such and such a thing if the voters would vote for him. It is not necessary that the voters should have accepted it. But the voters should have a knowledge about the offer. Then only it would be a bargain. An offer contemplated and retained in the mind of the offerer and not articulated and made known to the offeree will not be a bargain. It therefore follows that in this case the offer to build a hostel does not also amount to bribery.

11. In the result we uphold the judgment of the High Court and dismiss this appeal. We make no order as to costs.

Appeal dismissed.

AIR 1976 SUPREME COURT 277

(From Rajasthan: 1968 Lab IC 607)

**A. ALAGIRISWAMI, P. K. GOSWAMI
AND N. L. UNTWALIA, JJ.**State of Rajasthan and another,
Appellants v. Hari Ram Nathwani
and others, Respondents.Civil Appeal No. 1800 of 1969,
D/- 3-9-1975.**(A) Minimum Wages Act (1948),
Sec. 9 — 'Independent persons' —
Government official can be appointed
as independent member. 1968 Lab IC
607 (Raj), Reversed.**

Quaere: Where a government official can be appointed as an independent member where question of fixation of minimum wages in a scheduled employment in which the Government is directly interested — Question left unanswered in view of the fact that in the instant case the Government was not an employer in the Mica Mines in respect of which employment only minimum wages were fixed. 1968 Lab IC 607 (Raj), Reversed. (Para 5)

**(B) Minimum Wages Act (1948),
Ss. 7, 9 — Procedure — Advisory
Board cannot appoint rival sub-committee to the one appointed by the Government and include in such committee persons who are not members of the Board — Whether report of the Advisory Board is vitiated.**

No procedure has been prescribed in the Act as to the method which the Advisory Board is to adopt before making its recommendations to the State Government. It can devise its own procedure and collect some informations by appointment of a sub-committee consisting only of some of its members. But the Advisory Board has no power to appoint a rival sub-committee to the one appointed by the Government and take in such sub-committee persons who are not members of the Board, as was done in this case.

It, however, does not necessarily follow that the report of the Advisory Board is thereby vitiated. Held the irregularity, even characterising it as an illegality, committed by the Advisory Board in taking into consideration the report of the sub-committee

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was not such as to nullify its recommendation contained in its report, or, in any event, the final decision of the Government contained in the impugned notification. (Para 6)

Cases Referred: Chronological ParasAIR 1973 SC 1307 = (1973) 1 Lab LJ
476 = 1973 Lab IC 878 5AIR 1962 Bom 97 = (1961) 1 Lab LJ
702 6

S. M. Jain, Advocate, for Appellants; Respondents Ex parte.

Judgment of the Court was delivered by

UNTWALIA, J.— The hearing of this appeal filed by the State of Rajasthan and another by special leave proceeded ex parte against the respondents. After examining all the pros and cons of the dispute involved in this appeal with the assistance of the learned counsel for the appellants we have come to the conclusion that the appeal should be allowed.

2. From time to time the Government of Rajasthan fixed or revised the minimum rates of wages for employees in the Mica Mines throughout the State of Rajasthan under Section 5(2) of the Minimum Wages Act, 1948 — Central Act 11 of 1948 — hereinafter called the Act. The employment in the Mica Mines is a scheduled employment within the meaning of Section 2(g) of the Act. Eventually the minimum rates of wages were fixed by the Government by a notification dated the 31st July, 1965, the validity of which was challenged in the Rajasthan High Court by several employers in the Mica Mines in Civil Writ No. 406/1966 and 15 other writs. Several proceedings initiated on the basis of the impugned notification were also challenged by the employers. A Bench of the Rajasthan High Court allowed the writ applications, quashed the impugned notification and the proceedings taken in pursuance thereof. This appeal arises out of civil writ No. 406/1966 in which the employer is respondent No. 1.

3. The notification dated 31-7-1965 was challenged on several grounds and we will be concerned with some of them in this appeal. The relevant facts are these. For the purpose of revising the minimum

wages fixed by the earlier notification dated the 24th April, 1959, the State Government in the first instance appointed a committee consisting of five members on the 17th May, 1962. The constitution of the committee was, however, revised by notification dated the 26th November, 1962. This committee consisted of five members, two representatives of the employers, two representatives of the employees and one Professor K. S. Mathur, Head of the Department of Economics Degree College, Ajmer. The last was taken as an independent member of the committee. It submitted its report to the Government. The matter was referred by the Government to the Advisory Board constituted under Section 9 of the Act. It appears that a Sub-committee was appointed by the Advisory Board to go into the matter further and to consider the report of the Wage Committee appointed earlier by the Government on the 26th November, 1962. In the Sub-committee were taken some persons who were not members of the Advisory Board. The Sub-committee also submitted its report to the Advisory Board which consisted of 21 members, 8 employers' representatives, 8 employees' representatives and 5 Government officers appointed in the category of independent members. The proceedings of the Board dated the 7th May, 1965 showed that it considered the recommendations of the Wage Committee and the Sub-committee and then submitted its report containing its recommendation of the wage structure suggesting an alternative scale of minimum wages according as the linking of Dearness Allowance with the consumer-price indices. The State Government accepted the wage structure recommended by the Board but with slight variation in the matter of the linking basis with Dearness Allowance and made it all inclusive rates of minimum wages per month.

4. The learned Acting Chief Justice of the Rajasthan High Court who delivered the leading judgment in the case, on a consideration of the various divergent decisions of the High Courts came to the conclusion that the constitution of the Wage Committee was not valid as the Professor of the Government College was

not an independent member. Similarly the constitution of the Advisory Board was also bad as the five Government officers on the Board could not be said to be independent members. He was also of the view that the Board had exceeded its power in appointing a Sub-committee and committed an illegality in taking into consideration its report while making recommendations to the Government. The other learned Judge with some amount of reservation and diffidence agreed to the order proposed by the learned Acting Chief Justice. It may be stated here that the fixation of the minimum wages in the notification dated the 31st July, 1965 was also challenged before the High Court on certain grounds relating to the merits of the fixation but the High Court has overruled such objections.

5. Section 5 of the Act provides the procedure for fixing and revising minimum wages in respect of any scheduled employment. There are two types of procedure indicated in clauses (a) and (b) of sub-section (1). Obviously in the present case the procedure followed was the one provided in clause (a). We shall now read sub-section (2) of Section 5 with the proviso appended thereto:

"After considering the advice of the committee or committees appointed under clause (a) of sub-section (1), or as the case may be, all representations received by it before the date specified in the notification under clause (b) of that sub-section, the appropriate Government shall, by notification in the Official Gazette, fix, or, as the case may be, revise the minimum rates of wages in respect of each scheduled employment, and unless such notification otherwise provides, it shall come into force on the expiry of three months from the date of its issue:

Provided that where the appropriate Government proposes to revise the minimum rates of wages by the mode specified in clause (b) of sub-section (1), the appropriate Government shall consult the Advisory Board also."

It would be noticed that the power to fix the minimum wages is of the

Government. Under clause (a) of sub-section (1) the Government can appoint as many committees and sub-committees as it considers necessary to hold enquiries and advise it in respect of such fixation or revision of minimum wages. Section 7 of the Act says:

"For the purpose of co-ordinating the work of committees and sub-committees appointed under Sec. 5 and advising the appropriate Government generally in the matter of fixing and revising minimum rates of wages, the appropriate Government shall appoint an Advisory Board."

If the procedure provided in clause (a) is followed, consultation with the Advisory Board is not required in terms but is resorted to while it is mandatory in case of procedure (b). Section 9 provides:

"Each of the committees, sub-committees and the Advisory Board shall consist of persons to be nominated by the appropriate Government representing employers and employees in the scheduled employments, who shall be equal in number, and independent persons not exceeding one-third of its total number of members; one of such independent persons shall be appointed the Chairman by the appropriate Government."

The question as to whether a Government officer could be appointed on a Committee, Sub-committee or the Advisory Board as an independent person came up for consideration before the various High Courts. Majority of them took the view that it could be so. A few High Courts, however took a contrary view. In the judgment under appeal the High Court of Rajasthan has fallen in the line of the minority. But recently the point has been set at rest by a decision of this Court in *State of Andhra Pradesh v. Narayana Velur Beedi Manufacturing Factory*, (1973) 1 Lab LJ 476 = (AIR 1973 SC 1307). We consider it appropriate to quote the whole of paragraph 10 of that judgment:

"In our judgment the view which has prevailed with the majority of the High Court must be sustained. The committee or the advisory board can only tender advice which is not

binding on the Government while fixing the minimum wages or revising the same as the case may be. Of course, the Government is expected, particularly in the present democratic set up, to take that advice seriously into consideration and act on it but it is not bound to do so. The language of Sec. 9 does not contain any indication whatsoever that persons in the employment of the Government would be excluded from the category of independent persons. These words have essentially been employed in contradistinction to representatives of employers and employees. In other words, apart from the representatives of employers and employees there should be persons who should be independent of them. It does not follow that persons in the service or employ of the Government were meant to be excluded and they cannot be regarded as independent persons vis-a-vis the representatives of the employers and employees. Apart from this the presence of high Government officials who may have actual working knowledge about the problems of employers and employees can afford a good deal of guidance and assistance in formulating the advice which is to be tendered under Section 9 to the appropriate Government. It may be that in certain circumstances such persons who are in the service of the Government may cease to have an independent character if the question arises of fixation of minimum wages in a scheduled employment in which the appropriate Government is directly interested. It would, therefore, depend upon the facts of each particular case whether the persons who have been appointed from out of the class of independent persons can be regarded as independent or not. But the mere fact that they happen to be Government officials or Government servants will not divest them of the character of independent persons. We are not impressed with the reasoning adopted that a Government official will have a bias or that he may favour the policy which the appropriate Government may be inclined to adopt because when he is a member of an advisory committee or board he is expected to give an impartial and in-

dependent advice and not merely carry out what the Government may be inclined to do. Government officials are responsible persons and it cannot be said that they are not capable of taking a detached and impartial view."

The learned Acting Chief Justice of the High Court considered many of such decisions of the High Courts in his judgment and posed a question "Suppose, the Government is an employer in the particular scheduled employment for which wages are sought to be fixed under the Act. Could it be postulated in such a case that an officer of the Government can be properly appointed as an "independent" person on any of the statutory bodies in question?" An answer in the negative was given. He then said "I need hardly add in this connection that if the Government be not an employer in any of the scheduled employments, there would be no objection to the Government officers of the requisite calibre and experience being appointed as independent persons within the meaning of the section." But thinking that in the list of the scheduled employments are included "employments such as public motor transport, and construction and maintenance of roads and building operations and may be, for aught we know, in certain other employments also" in which the State Government is an employer and the Advisory Board constituted is meant for advising the Government in those employments also he held the constitution of the Advisory Board to be bad. In the extract which we have given above from the decision of this Court a sentence is to be found resembling the line of thinking of the learned Acting Chief Justice. This Court has said "It may be that in certain circumstances such persons who are in the service of the Government may cease to have an independent character if the question arises of fixation of minimum wages in a scheduled employment in which the appropriate Government is directly interested." The question as to whether in such a situation a Government officer appointed on the Board or a Committee can be said to be an independent member or not will have

to be cautiously considered when an appropriate occasion arises for the same. After all, even in such cases the final authority fixing or revising the minimum wages in a scheduled employment is the Government. Government officers can undoubtedly come on the Board or the Committee as representatives of the employers. Whether in such a situation more Government servants can come in the category of the independent members, is a question which is open to serious debate and doubt. But in the instant case on the authority of this Court it is clear that the constitution of either the wage Committee or the Advisory Board was not bad, as the Government was not an employer in the Mica Mines in respect of which employment only minimum wages were fixed by revision in the notification dated the 31st July, 1965.

6. No procedure has been prescribed in the Act as to the method which the Advisory Board is to adopt before making its recommendations to the State Government. It can devise its own procedure and collect some informations by appointment of a sub-committee consisting only of some of its members as was the case in the decision of the Bombay High Court in *Gulamahamed Tarasaheb, a Bidi Factory by its proprietors Shamrao v. State of Bombay*, AIR 1962 Bom 97. But surely the Advisory Board has no power to appoint a rival sub-committee to the one appointed by the Government and take in such sub-committee persons who are not members of the Board, as was done in this case. There is, therefore, no doubt that the Advisory Board committed an irregularity in taking into consideration the report of the sub-committee invalidly appointed by it. Does it necessarily follow from this that the impugned notification dated 31-7-1965 based upon the report of the Advisory Board which in its turn had taken into consideration not only the report of the Committee appointed by the Government but also that of the sub-committee appointed by the Board is bad? On a careful consideration of the matter we give our answer in the negative. The irregularity, even characterising it as an ille-

gality, committed by the Advisory Board in taking into consideration the report of the sub-committee was not such as to nullify its recommendation contained in its report, or, in any event, the final decision of the Government contained in the impugned notification. It must be remembered that the procedure followed in this case was the one provided in Section 5(1) (a) in which case it was not mandatory for the Government to take the opinion of the Advisory Board. After all, the recommendations made by the Board even on consideration of the report of the Sub-committee along with that of the Committee was the advice of the Board. The Government did accept it but accepted it after some modification. In such a situation we do not think that the notification, dated 31-7-1965 deserves invalidation. It follows as a corollary that the proceedings started pursuant to the notification cannot also be quashed.

7. In the result we allow this appeal, set aside the judgment and order of the High Court and dismiss the connected writ application filed by respondent No. 1. Since he has not appeared there will be no order as to costs.

Appeal allowed.

AIR 1976 SUPREME COURT 281

(From: Punjab & Haryana)*

P. N. BHAGWATI AND R. S. SARKARIA JJ.

Bhim Sen, Appellant v. State of Punjab, Respondent.

Criminal Appeal No. 139 of 1971, D/- 10-10-1975.

(A) Prevention of Food Adulteration Act (1954), Sec. 7 read with Section 16 — Prevention of Food Adulteration Rules (1955), App. B, Item A-01.01 — "Aerated water" containing 0.38 per cent sucrose or no sucrose, if can be condemned as adulterated — Its seller if guilty of offence punishable under S. 7 read with Section 16.

*(Cri. Revn. No. 453 of 1971, D/- 21-5-1971—Punj. & Har.)

JS/KS/D872/75/VSS

Cri. Revn. No. 453 of 1971, D/- 21-5-1971 (Punj. & Har.), Reversed.

According to standard of quality laid down in Item A-01-01 of Appendix B of the Rules, carbonated water which is the same as aerated water, may or may not contain sugar. If it does not contain sugar, it would not in any way detract from the standard of quality prescribed for aerated water in this item. The requirement of sucrose content being not less than 5 per cent under the proviso to that item does not apply where what is sold is not "sweetened aerated water" but merely "aerated water" which may or may not contain sugar.

Therefore, conviction of seller of aerated water containing only 0.38 per cent sucrose, or no sucrose for an offence punishable under Section 7 read with Section 16 is unsustainable. Cri. Revn. No. 453 of 1971, D/- 21-5-1971 (Punj. & Har.), Reversed. (Para 5)

Mr. S. K. Bagga and Mrs. S. K. Bagga, Advocates of M/s. Bagga Advocates, for Appellant; Mr. O. P. Sharma Advocate, for Respondent.

Judgment of the Court was delivered by

BHAGWATI, J.:— This appeal lies in a very narrow compass and a brief narration of a few relevant facts would be sufficient to appreciate the point which arises for consideration in the appeal.

2. The appellant is the owner of a restaurant called Kailash Restaurant where he manufactures aerated water sold under the name of Fresh Cola. On 11th July, 1968, the Food Inspector visited the restaurant of the appellant and took a sample containing 1800 Millilitres of aerated water for analysis on payment of a sum of Rs. 2.50 after giving requisite notice to the appellant. This sample of aerated water was divided into three equal parts and each part was bottled in a dry cleaned bottle and out of the three sample bottles so prepared, one was handed over to the appellant, the other was retained by the Food Inspector and the third was sent to the Public Analyst, Chandigarh. The report of the analysis by the Public Analyst showed that sucrose content

in the sample of aerated water sent to him was 0.38 per cent, whereas, according to him, the sucrose content should have been not less than 5 per cent. The sample of aerated water was, thus, in his opinion, adulterated and, in view of this report, a criminal case was filed against the appellant for an offence under Section 7 read with Section 16 of the Prevention of Food Adulteration Act, 1954 for selling adulterated aerated water.

3. During the course of the trial before the Chief Judicial Magistrate the appellant made an application for sending the sample of aerated water which was lying with him to the Director, Central Food Laboratory for a certificate and the Chief Judicial Magistrate accordingly despatched that sample of aerated water to the Director, Central Food Laboratory as required by Sec. 13, sub-s. (2) of the Act. The Director of the Central Food Laboratory analysed the sample of aerated water sent to him and submitted a certificate stating that the sucrose content was absent and there was non-permitted Coal Tar dye in the sample. The Chief Judicial Magistrate obviously did not take into account the fact that the certificate of the Director, Central Food Laboratory showed the presence of non-permitted Coal Tar dye in the sample since that did not form the subject-matter of the charge against the appellant, but taking the view that under Item A-01-01 in Appendix B of the Prevention of Food Adulteration Rules, 1955 the sucrose content should not be less than 5 per cent, the Chief Judicial Magistrate held that the sample of aerated water sold by the appellant to the Food Inspector was adulterated since the sucrose content in it was negative and he accordingly convicted the appellant and sentenced him to suffer rigorous imprisonment for one year and to pay a fine of Rs. 2,000/- or in default to suffer rigorous imprisonment for a further period of four months.

4. The appellant preferred an appeal to the Additional Sessions Judge, but the appeal was successful only in part. The conviction of the appellant was confirmed and only the sentence was reduced from two years to one year's rigorous imprison-

ment and from a fine of Rs. 2,000/- to a fine of Rs. 1,000/-. The appellant thereupon preferred a revision application to the High Court, but the revision application was summarily rejected. Hence the present appeal with special leave obtained from this Court.

5. It is apparent from the record of the case that the conviction of the appellant suffers from a serious infirmity and it is impossible to sustain it. It is indeed surprising how the attention of the Chief Judicial Magistrate or the Additional Sessions Judge or the High Court was not drawn to this patent infirmity which stares in the face. The charge against the appellant was that on 11th July, 1968 he sold to the Food Inspector 1800 millilitres of "aerated water" which was found on analysis to have sucrose content of 0.38 per cent as against the prescribed standard of 5 per cent and thereby committed an offence punishable under Section 7 read with Section 16 of the Act. The basis of the charge was that the sucrose content of "aerated water" sold by the appellant should have been at least 5 per cent whereas in fact it was very much less, namely, 0.38 per cent according to the report of the Public Analyst and nil according to the report of the Director, Central Food Laboratory. But, if we look at Item A.01.01 in Appendix B of the Prevention of Food Adulteration Rules, 1955, it is clear that this postulate on which the charge is based, namely, that sucrose content of "aerated water" should necessarily be (not?) less than 5 per cent is incorrect. This item lays down the standard of quality of carbonated water which is the same as aerated water and it says that carbonated water may contain any of the ingredients there enumerated, singly or in combination and one of those ingredients is sugar. It is, therefore, obvious that "aerated water" may contain sugar or may not contain sugar and if it does not contain sugar, it would not in any way detract from the standard of quality prescribed for "aerated water" in this item. It is only the proviso to this item which requires that the sucrose content shall not be less than 5 per cent, but that is in case of "sweetened carbonated water".

If what is sold is "sweetened aerated water", then it must contain sucrose of not less than 5 per cent or else it would not be in conformity with the standard of quality prescribed by this item and would have to be regarded as adulterated. But this requirement of sucrose content being not less than 5 per cent does not apply where what is sold is not "sweetened aerated water", but merely "aerated water" which may or may not contain sugar. Here in the present case, the charge against the appellant was not that he sold "sweetened aerated water" nor was any evidence led on behalf of the prosecution to show that what was sold by the appellant was "sweetened aerated water". The charge against the appellant mentioned only "aerated water" and nothing more and that was also the evidence on behalf of the prosecution. Even in the examination of the appellant under Section 342 of the Code of Criminal Procedure it was not suggested to him that he sold "sweetened aerated water". The case which he was called upon to meet was only in regard to sale of "aerated water". It was, therefore, entirely immaterial that the sample of aerated water sold by the appellant contained only 0.38 per cent sucrose, or for the matter of that, no sucrose at all. The so-called deficiency in sucrose content did not involve any violation of the standard of quality prescribed for aerated water in Item A.01.01 and the sample of "aerated water" sold by the appellant could not be condemned as adulterated. The Chief Judicial Magistrate, the Additional Sessions Judge and the High Court were, therefore, clearly in error in convicting the appellant of the offence under Section 7 read with S. 16 of the Act.

6. Before we part with this case, we must refer to one other contention urged on behalf of the respondent in a desperate attempt to sustain his conviction. That contention was that according to the certificate of the Director, Central Food Laboratory, which superseded the report of the Public Analyst, the sample of "aerated water" sold by the appellant contained non-permitted coal tar dye and consequently, it was adulterated and the appellant was

rightly convicted for selling it. But the short answer to this contention is that it did not form the subject-matter of the charge against the appellant nor was it put to him in his examination under Sec. 342 of the Code of Criminal Procedure, and it is, therefore, not open to the State to urge this ground for the first time at this stage in order to support the conviction.

7. We accordingly set aside the conviction and sentence recorded against the appellant and acquit him of the offence under Sec. 7 read with Sec. 16 of the Act. The bail bonds executed by the appellant will stand cancelled.

Appeal allowed.

AIR 1976 SUPREME COURT 283

(From Patna: 1970 Lab IC 907)

A. ALAGIRISWAMI, P. K. GOSWAMI
AND N. L. UNTWALIA, JJ.

The Management of National Projects Construction Corporation Ltd., Appellant v. Their Workmen and others, Respondents.

Civil Appeals Nos. 2163-2164 of 1969, D/- 8-10-1975.

(A) Industrial Disputes Act (1947), Section 10-A — Certain questions settled by parties and rest referred to arbitration — Tribunal giving award on question not referred to it — Effect. 1970 Lab IC 907 (Pat) Partly Reversed.

The appellant the National Projects Construction Corporation Ltd., was engaged in execution of certain projects. There were three categories of workmen in these projects (1) regular staff, (2) workcharged staff and (3) casual Labour (borne on muster roll.) There was a dispute and as a result of a settlement the question of pay scales of the muster roll workmen was decided and certain other questions regarding other categories of workmen were referred to Industrial Tribunal. The Tribunal gave an award allowing 25 per cent increase in the wages of all labour including muster roll workmen and allowed project al-

JS/KS/D809/75/MVJ

allowance. As regards the project allowance the Industrial Tribunal took the view that mere fact that the work charged staff and the muster roll staff are appointed for a particular work and some of them happen to be local people should not stand in the way of their getting project allowance and those of these two classes of workmen who come from distant places should be given this allowance in the same way as the members of the regular staff.

Held, that the question of pay scales of the muster roll workmen was decided as a result of the settlement and that was not one of the questions referred to the arbitrator. By the award they would be getting double benefit. Therefore, the award in so far it granted 25 per cent wage increase to the muster roll workmen being beyond its jurisdiction was invalid and was liable to be set aside. 1970 Lab IC 907 (Pat) Partly Reversed. (Paras 3, 6)

The document by which the reference is made is in a standard form which mentions the total number of workmen employed in the undertaking affected and the estimated number of workmen affected or likely to be affected by settlement. In filling those columns the parties may or may not necessarily take into consideration the number of workmen whose case is already covered by the settlement and no argument could be built upon the basis of the entries in those two columns. (Para 4)

As regards granting of project allowance to muster roll workmen that part of the order of the Tribunal seems to arise out of a confusion of thought on the part of the Industrial Tribunal. On the other hand it cannot be said that no question regarding muster roll workmen was at all referred to arbitration. In the circumstance there is no justification for interfering with the award in so far as the question of project allowance is concerned even though it may be difficult to work it in practice. (Para 5)

F. S. Nariman Sr. Advocate, (Mr. K. J. John Advocate, for M/s. J. B. Dadachanji and Co. Advocate with him), for Appellant; J. N. Chaudhary (In person) for Respondent No. 1.

R. C. Prasad Advocate, for State of Bihar.

Judgment of the Court was delivered by

ALAGIRISWAMI, J.— The appellant, the National Projects Construction Corporation Ltd., was engaged in execution of two projects, Chandan Dam Project and the Gandak Dam Project. On 31st January 1967 the N. P. C. C. Workers' Union of the Chandan Dam Project gave a notice of strike and on 1st April 1967 the Labour Union of the Gandak Dam Project gave a similar notice. These notices were accompanied by a charter of demands which are practically the same in both cases. Thereafter a settlement was arrived at with both these Unions on 11-4-1967 in the presence of the Labour Commissioner, Bihar, the terms of which were also similar. By that settlement certain questions were agreed to be referred to arbitration and those questions are found in paragraph 4 of both the settlements. The dispute with both the Labour Unions was accordingly referred to the arbitration of the Presiding Officer, Industrial Tribunal, Bihar, Patna on 3rd May, 1967. The arbitrator's award was sought to be quashed by means of a writ petition filed by the appellant before the High Court of Patna. A Division Bench of the High Court dismissed the writ petition except in respect of one point which is not important for the purpose of this appeal. This appeal is filed against the judgment of the Patna High Court by way of certificate granted by the High Court.

2. The points canvassed before us were regarding the wages of the muster-roll workmen and the project allowance for them. In the settlements referred to earlier the relevant portion regarding these workmen reads thus:

"Keeping in view the drought conditions in the State and consequential steep rise in prices of commodities since the wages of workmen in this unit were increased in the year 1966, management agrees that no muster roll workmen will be paid less than Rs. 3/- per day with effect from 11-4-1967. Management agrees to the flat increase of 0.50 paise

per day per workman in the daily wage rates of such muster roll workmen who are getting Rs. 3/- or above."

In these two projects there were three categories of workmen (1) regular staff, (2) work-charged staff, and (3) casual labour (borne on muster-roll). The regular staff consisted of engineering, administrative, accounts and finance, supervisory as well as non-supervisory personnel. The work-charged staff was monthly paid and was of two categories, that is, civil and mechanical. The casual workman was one whose employment was of an occasional or casual nature and was borne on the muster-roll on daily wages for such purpose. In fact the charter of demands by both the Labour Unions also makes clear this distinction between muster-roll employees, who are called daily rated workmen, and work charged employees and regular employees. The demand in respect of the muster roll employees as far as the wages are concerned was that they should be given a minimum of Rs. 4/- per day. Another demand was that the muster roll employees who had served for 240 days must be brought on work charged cadre. By the settlements already referred to the wages of the muster-roll workmen were raised to a minimum of Rs. 3/- and an increase of 50 paise in the case of persons who were getting Rs. 3/- or more earlier. In respect of them there had also been earlier settlement in 1966. When, therefore, in Clause 4 of the settlement it was agreed that certain questions were to be referred to arbitration that can only be in reference to workmen other than muster-roll workmen. That clause in the settlement reads thus:

"4. Parties agree for reference of the demands regarding revision of pay scales, introducing of C. F. F. Scheme, house rent allowance, dearness allowance, project allowance, travelling allowance and security of service of workmen to arbitration for which they are submitting separate petitions as required under the Industrial Disputes Act and the rules framed thereunder to the State Government. The Arbitrator will be re-

quested to give his award within two months."

As the revision of pay scales of the muster roll workmen was already covered by the settlement the revision of their pay scales was not one of the points agreed to be referred to arbitration. Nor can the question of introducing C. P. F. scheme, house rent allowance, dearness allowance, project allowance, travelling allowance arise in their case. The daily rated or muster roll workmen would be local recruited workmen.

3. What the Industrial Tribunal has done is to allow a 25 per cent increase in the wages of all labour including muster roll workmen. The result was that the muster roll workmen got a double advantage, that is, the increase which they secured as a result of settlement and the further increase of 25 per cent granted by the Tribunal whereas the other categories of workmen got only the 25 per cent increase. It appears that before this settlement the daily rates of muster roll workmen were Rs. 1.75 in Chandan Dam and Rs. 2.25 in Gandak Dam. As a result of the settlement they got more than 40 per cent which was demanded in the charter of demands in the strike notice in respect of other categories. In that charter what was demanded for muster roll workmen was a minimum daily wage of Rs. 4/-. In any case these things make it absolutely clear that the question of pay scales of the muster roll workmen was decided as a result of the settlement and that was not one of the questions referred to the arbitrator. The Industrial Tribunal was therefore acting beyond its jurisdiction in allowing a 25 per cent increase in the wages of the muster roll workmen. The only reason the Industrial Tribunal has given for holding that the wages of the muster roll workmen was also a matter referred to it is that the point under reference by itself does not exclude muster roll workmen and that it clearly mentions that the parties had agreed that the demands regarding revision of pay scales etc. of the workmen should be referred to arbitration and no exception has been made against the muster roll workmen. As we have al-

ready pointed out this is a wrong reading of the reference. That clause in the settlement should be read along with the rest of the settlement and charter of demands and if that had been done there would have been no room for this misunderstanding.

4. On the other hand the only point relied upon by the High Court for holding that the wages of the muster roll workmen was also one of the items referred to arbitration is that the reference in the case of Chandan Dam Project mentions all the two thousand workmen employed in the project as workmen affected or likely to be affected by the dispute. But it failed to notice that the similar agreement in respect of Gandak Dam Project does not refer to the number of workmen involved at all. Therefore no distinction can be made between the two cases on this ground. The document by which the reference is made is in a standard form which mentions the total number of workmen employed in the undertaking affected and the estimated number of workmen affected or likely to be affected by settlement. In filling those columns the parties may or may not necessarily take into consideration the number of workmen whose case is already covered by the settlement and no argument could be built upon the basis of the entries in those two columns. We are therefore clearly of the opinion that the wages of the muster roll workmen was not one of the points agreed to be referred to the arbitrator for adjudication.

5. As regards the project allowance the Industrial Tribunal took the view that the mere fact that the work charged staff and the muster roll staff are appointed for a particular work and some of them happen to be local people should not stand in the way of their getting project allowance and those of these two classes of workmen who come from distant places should be given this allowance in the same way as the members of the regular staff. The Industrial Tribunal itself realises that the basis on which project allowance is granted to the regular staff is to compensate them for depriving them of the amenities in posting them to out of the

way places during construction periods. Once that is admitted the question of giving the work charged workmen and the muster roll workmen, who do not have a regular place where they are expected to work and in whose case therefore there is no question of their being posted to any place, any project allowance would not arise. The question of posting can arise only in the case of regular staff. Moreover, it is difficult to check in each case who among those two categories of staff have come on transfer from other places and belong to places more than 50 miles away. Also there can be no question of work charged workmen and muster roll workmen coming on transfer. This part of its order seems to arise out of a confusion of thought on the part of the Industrial Tribunal. On the other hand it cannot be said that no question regarding muster roll workmen was at all referred to arbitration. Clause 4 is all comprehensive. One item in the charter of demands was project allowance for all workmen and the settlement covered only wages for the muster roll workmen. The High Court has not dealt with the question of project allowance at all. Apparently this question was not urged before the High Court. Nor is it raised in the petition for leave. Before us only the question of project allowance granted to muster roll workmen was challenged. There is therefore no justification for interfering with the award of the Industrial Tribunal in so far as the question of project allowance is concerned even though it may be difficult to work it in practice.

6. In the result therefore the award of the Arbitrator is set aside insofar as it granted a 25 per cent wage increase to the muster roll workmen. There will be no order as to costs.

Order accordingly.

AIR 1976 SUPREME COURT 287

(From: AIR 1972 Delhi 182)

**A. ALAGIRISWAMI, P. K. GOSWAMI
AND N. L. UNTWALIA, JJ.**The Vulcan Insurance Co., Ltd.,
Appellant v. Maharaj Singh and an-
other, Respondents.Civil Appeal No. 2228 of 1972,
D/- 3-10-1975.**(A) Deed — Construction — Clau-
ses in insurance policy — Construc-
tion — (1969) Acc. C. J. 12 (Delhi),
Overruled. AIR 1972 Delhi 182, Re-
versed.**

A mortgaged his properties with bank B and B insured the properties with the Insurance Company C. Fire broke out in the premises and A claimed certain amount as damages. C however totally repudiated its liability under the insurance policy. The clauses of the Insurance policy ran as follows:— "If the claim be made and rejected and an action or suit be not commenced within three months after such rejection, or (in case of an arbitration taking place in pursuance of condition of this Policy) within three months after the Arbitrator or Arbitrators or Umpire shall have made their award, all benefit under this Policy shall be forfeited."

"If any difference arises as to the amount of any loss or damage such difference shall independently of all other questions be referred to the decision of an Arbitrator."

Held that the repudiation of the claim by C could not amount to the raising of a dispute as to the amount of any loss or damage alleged to have been suffered by A. If the rejection by C of the claim made by A be on the ground that he had suffered no loss as a result of the fire or the amount of loss was not to the extent claimed by him, then and then only, a difference could have arisen as to the amount of any loss or damage within the meaning of later clause in the policy. The dispute raised by C appertained to its liability to pay any amount of damage whatsoever. Therefore, the dispute raised by the Company C was not covered by the arbitration clause. On the rejection or repudiation of the

claim by C, A was under an obligation to start a legal proceeding within three months of such rejection, and hence obtaining of an award in such a case could not be a condition precedent. It was not possible to go to arbitration for determination of the said dispute. (1969) Acc. C. J. 12 (Delhi), Overruled. AIR 1972 Delhi 182, Reversed. Case law discussed.

(Paras 11, 14)

**(B) Arbitration Act (1940), Sec-
tion 20 — Application under — Limi-
tation — Clause in insurance policy
providing that Company will not be
liable for loss after expiration of 12
months after loss — Validity — (Con-
tract Act (1872), S. 28).**

A clause in the insurance policy provided:—"In no case whatever shall the Company be liable for any loss or damage after the expiration of twelve months from the happening of the loss or damage unless the claim is the subject of pending action or arbitration."

Held that such a clause was not hit by Sec. 28 of the Contract Act and was valid. The clause had not prescribed a period of 12 months for the filing of an application under Section 20 of the Act. There was no limitation prescribed for the filing of such an application under the Limitation Act, 1908 or the Limitation Act, 1963. Art. 181 of the former Act did not govern such an application. The period of three years prescribed in Article 137 of the Act of 1963 might be applicable to an application under Sec. 20. AIR 1914 Bom 225 (2) and AIR 1949 Cal 390 and AIR 1950 East Punj 352, Rel. on. (Para 23)

**(C) Arbitration Act (1940), Sec-
tion 20 — Application under —
Maintainability.**

Held if the difference which had arisen between the parties was the one to which the arbitration clause in question applied then the application under Sec. 20 could not be dismissed on the ground that the claim would not ultimately succeed either on facts or in law. The matter was to be left for the decision of the arbitrator. AIR 1967 SC 990, Rel. on. (Para 23)

Cases Referred: Chronological Paras
1969 Acc C J 12 (Delhi) 21
AIR 1967 SC 990 = (1967) 1 SCR 303
23

AIR 1963 Ker 270 = 1963 Ker LJ 277 20
 AIR 1957 Punj 152 = 27 Com Cas (Ins.) 4 20
 AIR 1953 Punj 50 = 54 Pun LR 497 20
 AIR 1950 East Punj 352 23
 AIR 1949 Cal 390 = ILR (1945) 1 Cal 638 23
 (1942) 1 All ER 337 = 1942 AC 356 14
 AIR 1923 Bom 249 = ILR 47 Bom 509 19
 1915 AC 499 = 84 LJ KB 640 14, 19
 AIR 1914 Bom 225 (2) = ILR 38 Bom 344 23
 (1894) 2 Ir LR 723 = 28 Ir LT 95 16
 1893 AC 85 = 9 TLR 146 15
 (1887) 20 QBD 172 = 58 LT 26 15, 20
 (1856) 25 LJ Ex 303 = 5 HLC 811 14, 18

Mr. F. S. Nariman, Sr. Advocate, (Mr. Vineet Kumar, Advocate with him), for Appellant; Mr. S. N. Andley, Sr. Advocate, (Miss Uma Mehta, Mrs. S. Bagga and Mr. S. K. Bagga, Advocates of M/s. Bagga Advocates and M/s. Ramesh Chand, R. K. Mehta, Advocates with him), (for No. 1) and M/s. S. K. Mehta, K. R. Nagaraja, M. Qamaruddin and P. N. Puri, Advocates, (for No. 2), for Respondents.

Judgment of the Court was delivered by

UNTWALIA, J.:— This appeal by special leave was filed by the Vulcan Insurance Co. Ltd. The general insurance business of the Company was nationalised during the pendency of this appeal and, therefore, in place of the original appellant was substituted United India Fire and General Insurance Company Ltd. by order 28-2-1975 passed in CMP No. 84/1975. For the sake of facility hereinafter in this judgment by the appellant would be meant the original appellant company. The respondent no. 1 in the appeal is Maharaj Singh, sole proprietor of Khatauli Manure Mills, Khatauli, District Muzaffarnagar. Respondent No. 2 is Punjab National Bank.

2. Respondent No. 1 carries a business of manufacturing Bone Manure etc. in his mills at Khatauli. He entered into an arrangement with respondent no. 2 for taking advance of

money on the security of the factory premises, machineries and the stock of goods. A mortgage deed was executed by him in favour of the respondent bank for that purpose. The Bank insured the mortgage properties from time to time with the appellant company under three insurance policies, the terms governing the same being identical.

3. A fire is said to have broken out in the factory premises of respondent No. 1 in the night between 28-2-1963 and 1-3-1963. The Bank informed the Insurance Company about the fire. Thereupon representatives of the Bank and the Insurance Company and some surveyors visited the factory premises on 1-3-1963 and after. Respondent No. 2 claimed that due to fire he had suffered a loss of Rs. 24,800/- on account of damage to the fixed assets and Rs. 2,73,000.40 due to damage caused to the stock of goods. Eventually M/s. R. K. Bhandari & Sons, Surveyors of the Insurance Company wrote a letter dated 26th April, 1963 to respondent No. 1 informing him that they had assessed the total damage caused to him due to fire at Rs. 4,620/-. They, however, added at the end of their letter.

"This is without prejudice to the terms and conditions of the policy and without any commitment of liability on the part of the Insurance Company."

Further correspondence between the parties ensued and ultimately the appellant intimated to respondent No. 1 by its letter dated 5th July, 1963—

"Referring to the previous correspondence relating to the above mentioned claim, we regret to inform you that we repudiate the claim under the above mentioned policies."

Respondent No. 1 seems to have written a letter dated 22nd July, 1963 to the appellant, to which it sent a reply dated 29th July, 1963 categorically stating—

"We are advised to repudiate your claim *inter alia* under Clause 13 of the Fire Policies. We regret that survey report and any other reports, cannot be furnished to you."

4. Respondent No. 1 thereupon wrote a letter dated 1-10-1963 to the

Insurance Company informing it that since it had repudiated his claim under Clause 13 of the Insurance policy a difference had arisen between the parties and hence respondent No. 1 proposed to appoint one Shri K. N. Bannerjee as the sole arbitrator, to decide the disputes as per the arbitration agreement incorporated in the policies. He said further that if the company was not agreeable to the appointment of Shri Bannerjee as the sole arbitrator, he may be treated as a nominee of respondent No. 1 and the company may appoint its own. In reply to the said letter dated the 1st October, 1963 the company wrote a letter dated 10th October, 1963 to respondent No. 1 that since it had repudiated his claim the arbitration clause in the policies was rendered inoperative and no arbitration proceeding could be commenced by appointment of any arbitrator.

5. Respondent No. 1 in the first instance filed the application under Sec. 20 of the Arbitration Act, 1940 — hereinafter called the Act on 20-1-1964 in the Court at Muzaffarnagar in Uttar Pradesh. The appellant appeared and, inter alia, took an objection to the jurisdiction of that Court to entertain the application. In view of a special clause in the policies excluding the jurisdiction of courts other than the court at Delhi, the Muzaffarnagar court allowed that objection and directed the return of the application by its order dated 1-5-1964. Respondent No. 1 refiled it on 19-5-1964 in the Delhi Court. Appellant resisted it.

6. On reading clauses 13, 18 and 19 of the Insurance Policies which are in identical terms and on appreciation of the other materials in the case the Trial Court at Delhi dismissed the application holding that the dispute arising out of the repudiation of the liability under clause 13 by the Insurance company was within the scope of the arbitration agreement contained in clause 18 and a reference to arbitration could be made, but, as per clause 19, the petition was barred by limitation.

7. On appeal by respondent No. 1 the Delhi High Court has held — (1) Clause 18 does not include in its scope all kinds of differences or

disputes that may arise between the parties in respect of the subject-matter of the insurance policies. The scope of clause 18 is restricted to differences as to the amount of loss or damage. (2) Yet reference to arbitration is not ousted and the arbitration clause covers the dispute even if the company has repudiated the claim in toto. (3) The arbitration Clause 18 is inoperative unless the conditions contained in Clause 19 are satisfied and (4) the condition aforesaid was satisfied because respondent No. 1 had commenced the arbitration on the date when he issued the notice dated the 1st October, 1963; as such, his claim was the subject of a pending arbitration within the meaning of Clause 19. The High Court, therefore, set aside the order of the Trial Court and remanded the case to it for appointment of arbitrators under S. 20 of the Act. Hence this appeal by the Insurance Company.

8. It appears in this case that arguments have been advanced on either side in the courts below as also in this Court widening the scope of the matters in issue resulting in the missing of the crucial point in controversy. Really only one point need be decided in this appeal and that is this — whether in view of the repudiation of liability by the appellant under Clause 13 of the Insurance Policy, a dispute was raised which could be referred to arbitration? Incidentally in this judgment reference will be made to the other question as to whether the claim of respondent No. 1 and the proceeding commenced by him were barred by Clause 19.

9. In order to discuss and determine the questions which fall for determination in this appeal it is necessary to read the relevant clauses of the Insurance policies.

"13. If the claim be in any respect fraudulent, or if any false declaration be made or used in support thereof, or if any fraudulent means or devices are used by the insured or any one acting on his behalf to obtain any benefit under this Policy; or, if the loss or damage be occasioned by the wilful act, or with the connivance of the insured; or, if the claim be made and rejected and an action or

suit be not commenced within three months after such rejection, or (in case of an arbitration taking place in pursuance of the 18th condition of this Policy) within three months after the Arbitrator or Arbitrators or Umpire shall have made their award, all benefit under this Policy shall be forfeited."

"18. If any difference arises as to the amount of any loss or damage such difference shall independently of all other questions be referred to the decision of an Arbitrator, to be appointed in writing by the parties in difference, or, if they cannot agree upon a single Arbitrator to the decision of two disinterested persons as Arbitrators

..... And it is hereby expressly stipulated and declared that it shall be a condition precedent to any right of action or suit upon this policy that the award by such arbitrator, arbitrators or Umpire of the amount of the loss or damage if disputed shall be first obtained."

"19. In no case whatever shall the company be liable for any loss or damage after the expiration of twelve months from the happening of the loss or damage unless the claim is the subject of pending action or arbitration."

10. The correspondence between the parties makes it clear that at one time the surveyors had assessed the damages at Rs. 4,620/- in their letter dated 26-4-1963. But the said assessment was, in express terms, without commitment of any liability on the part of the Insurance Company. The Company, however, completely repudiated the liability under Clause 13.

11. Although the surveyors in their letter dated 26-4-1963 had raised a dispute as to the amount of any loss or damage alleged to have been suffered by respondent No. 1, the appellant at no point of time raised any such dispute. The appellant company in its letter dated the 5th and the 29th July, 1963 repudiated the claim altogether. Under Clause 13 the company was not required to mention any reason of rejection of the claim nor did it mention any.

But the repudiation of the claim could not amount to the raising of a dispute as to the amount of any loss or damage alleged to have been suffered by respondent No. 1. If the rejection of the claim made by the insured be on the ground that he had suffered no loss as a result of the fire or the amount of loss was not to the extent claimed by him, then and then only, a difference could have arisen as to the amount of any loss or damage within the meaning of Clause 18. In this case, however, the company repudiated its liability to pay any amount of loss or damage as claimed by respondent No. 1. In other words, the dispute raised by the company, appertained to its liability to pay any amount of damage whatsoever. In our opinion, therefore the dispute raised by the appellant company, was not covered by the arbitration clause.

12. As per Clause 13 on rejection of the claim by the company an action or suit, meaning thereby a legal proceeding which almost invariably in India will be in the nature of a suit, has got to be commenced within three months from the date of such rejection; otherwise, all benefits under the policy stand forfeited. The rejection of the claim may be for the reasons indicated in the first part of Clause 13, such as, false declaration, fraud or wilful neglect of the claimant or on any other ground disclosed or undisclosed. But as soon as there is a rejection of the claim and not the raising of a dispute as to the amount of any loss or damage, the only remedy open to the claimant is to commence a legal proceeding, namely, a suit, for establishment of the company's liability. It may well be that after the liability of the company is established in such a suit, for determination of the quantum of the loss or damage reference to arbitration will have to be resorted to in accordance with Clause 18. But the arbitration clause, restricted as it is by the use of the words "if any difference arises as to the amount of any loss or damage", cannot take within its sweep a dispute as to the liability of the company when it refuses to pay any damage at all.

13. Mr. S. N. Andley, learned counsel for respondent No. 1 submitted that in view of the last part of Clause 18 which makes the award of an arbitration a condition precedent to any right of action or suit, it should be held that even when there is a repudiation of liability, the matter has to go to the arbitration first. In support of such a submission, learned counsel placed reliance upon certain decisions of the courts in India as also in England. We shall presently show that on the facts and in the circumstances of this case, none of them is of help to respondent No. 1.

14. A clause like the last part of Clause 18 making the award a condition precedent to any right of action or suit first came up for consideration in the case of *Scott v. Avery*, (1856) 25 LJ Ex 308 = 5 HLC 811 and since then such clauses are commonly called 'Scott v. Avery clauses'. Generally it has been found that if the arbitration clause is couched in a comprehensive language taking within its ambit any kind of dispute arising under the policy, then obtaining of an award by arbitration is a condition precedent to the starting of any other legal proceeding. A clause like *Scott v. Avery* has repeatedly been held to be a valid one.

"Even a clause of this type, however, is not absolute in effect: where the court orders that the arbitration agreement cease to have effect in relation to a particular dispute, it has a discretion to order further that the *Scott v. Avery* clause cease to have effect, too" (vide pages 57, 58 of *Russell on Arbitration*, Eighteenth Edition).

The said statement of the law, however, has been made with reference to Section 25(4) of the English Arbitration Act, 1950. The corresponding provision in our Act is contained in Section 36. But that apart, when an arbitration clause is not operative on the dispute raised, as in this case, then it is wholly unreasonable, almost impossible, to hold that still the parties have to obtain an award before starting any legal proceeding. What dispute will be referred to arbitration? The dispute raised is not within the purview of arbitration. Reading

Clauses 13 and 18 together it must be held that on the rejection or repudiation of the claim by the insurer, the insured is under an obligation to start a legal proceeding within three months of such rejection, and hence obtaining of an award in such a case cannot be a condition precedent. It is not possible to go to arbitration for determination of the said dispute. Clauses similar to the ones contained in clauses 13 and 18 in this case were the subject matter of consideration before the House of Lords in the case of *Jureidini v. National British and Irish Millers Insurance Co. Ltd.* 1915 AC 499. The claim made by the insured was rejected by the insurer as being fraudulent. When the former brought an action the latter resisted it on the *Scott v. Avery* clause. The House gave a unanimous opinion that the repudiation of the claim on a ground going to the root of the contract precluded the company from pleading the arbitration clause as a bar to an action to enforce the claim. The matter put in that form in some of the speeches of the Law Lords does not seem to have received full approval of the House in later decisions including the one in *Heyman v. Darwins Ltd.*, 1942 AC 356 as it would appear from the speech of Lord Macmillan at page 346. But the real ratio of the decision which remains unshaken even till today is to be found in the speech of Lord Parmoor at page 508 when his Lordship said that since no difference had arisen which could be covered by arbitration Clause 17 and the company had raised an issue on which, if it had succeeded, the insured would have lost all benefit under the policy, the arbitration clause had no application.

15. Learned counsel for respondent No. 1 placed reliance upon some decisions of the English courts in support of his contention that in spite of the repudiation of the liability by the appellant his client could not commence any legal proceeding without going to arbitration. Only two may be noticed here: In *Viney v. Bignold*, (1887) 20 QBD 172 it was held that the determination of the amount by arbitration was a condition precedent to the right to recover on the policy and if any action was

brought without an award obtained in an arbitration it was not maintainable. It should, however, be noticed that the language of arbitration Clause 21 in that case was wide enough to cover any dispute and from the facts stated in the judgment it is nowhere to be found that the dispute raised by the company was not covered by the arbitration clause. If the dispute is such that can go to arbitration then no action or suit can be commenced without obtaining an award. But the condition of obtaining an award prior to any action or suit can never be attracted if the dispute raised cannot be referred to arbitration and has got to be determined in a legal proceeding. The other case is the decision of the House of Lords in *Caledonian Insurance Co. v. Andrew Gilmour*, 1893 AC 85. That was again a case of a comprehensive arbitration clause and thus justifying the application of the *Scott v. Avery* clause as a bar to the maintainability of an action without an award.

16. In *O'Connor v. Norwich Union Fire and Life Insurance Society*, (1894) 2 Ir LR 723 the decision in the case of *Viney v. Bignold* (supra) was distinguished and the *Scott v. Avery* clause was held to be inapplicable because the dispute raised was not covered by the arbitration clause. Holmes, J. pointed out at page 728:

"Now, if it was a term of the contract that a difference of this kind was to be settled by arbitration, I should not hesitate to stay the action

.....

 But there is no provision in the plaintiff's policy that such a controversy as has arisen is to be referred to arbitration. There is a carefully drawn clause, by which it is agreed that the amount to be paid, as distinguished from liability to pay anything, is to be settled by arbitrators, and that no action can be commenced until they shall have determined such amount. One result of this clause may be to render two proceedings necessary where there is a dispute as to the amount of the loss as well as a denial of all liability; but this ought not to be a ground of complaint to either of the parties who have made it a term of the contract;"

17. We agree with this.

18. Mr. Andley placed reliance upon paragraphs 1983 to 1986 at pages 964 and 965 of the Fifth edition of MacGillivray on Insurance Law. On the basis of the decision in *Scott v. Avery*, (1856) 25 LJ Ex 308 (supra) as also certain other decisions it is said in paragraph 1983:

"There is a rule of law that parties cannot by their private contract oust the jurisdiction of the court; but it has been held that parties to a contract may nevertheless agree that no cause of action shall arise upon it until any matter in dispute between them shall have been determined by arbitration and then only upon the arbitrators' award."

The discussion in paragraph 1986 relates to whether arbitration is a condition precedent or is merely a collateral agreement. But the relevant paragraph which applies on all fours to the facts of the case on hand, as pointed out by Mr. F. S. Nariman, counsel for the appellant, is paragraph 1987 at page 966:

"As a rule, where the amount of the loss or damage is the only matter which the parties refer to arbitration, then if the insurers repudiate any liability on the policy there is no obligation on the assured to arbitrate as to the amount before commencing an action on the policy."

To the same effect is to be found the statement of the law at pages 328 to 332 in the Fourth edition of Welford and Otter-Barry's *Fire Insurance*.

19. Following the decision of the House of Lords in *Jureidini's* case (1915) AC 499 (supra) a Bench of the Bombay High Court in *The Eagle Star and British Dominions Insurance Co. v. Dinanath*, ILR 47 Bom 509 = (AIR 1923 Bom 249) while interpreting an identical Clause 13 said at p. 521 (of ILR) = (at p. 252 of AIR):

"But in Clause 13 there are various contingencies set out which if established entitle the insured to bring an action without an award having been made by arbitrators. One of these contingencies is 'if the claim be made and rejected' which if established gives a right of action, the period of limitation provided for

the suit being fixed at three months from the date of the rejection. While it is also provided that where arbitration takes place in pursuance of condition 18 of the policy, three month's time should be allowed for a suit to be brought after the award has been made. Therefore it is quite obvious that a right of action accrued after the company rejected the claim. Naturally that question would have first to be decided by suit as under Clause 18 that question could never have been referred to arbitration."

We approve the law so enunciated by the Bombay High Court.

20. Mr. Andley placed reliance upon some decisions of the High Courts in India in support of his contention. We briefly refer to 4 of them. In the *Great American Insurance Co. Ltd. v. Bodh Raj*, AIR 1953 Punj 50 some observations by Harnam Singh, J. with whom Weston C. J. agreed in paragraph 16 do not seem to be quite accurate although on facts as found in paragraph 17 the case was rightly decided. The decision of Falshaw, J. in *Great American Insurance Co. Ltd. v. Dina Nath*, AIR 1957 Punj 152 again relates to the dispute which was held to have, on the facts of that case, fallen in the arbitration clause. It would appear from the facts of the case decided by Mathew, J. in *The Vanguard Fire and General Insurance Co. Ltd., Madras v. N. R. Sreenivasa Iyer*, AIR 1963 Ker 270 that condition 7 of the policy was couched in a wide language so as to cover the dispute and the difference including the one as to liability, which arose between the parties. In such a situation on a consideration of various authorities including the one in the case of *Viney v. Bignold*, (1887) 20 QBD 172 (*supra*) the learned Judge said at page 275 column 1:

"This condition may either mean that the arbitrators have to decide the question whether there is any liability at all under the contract or that they have to decide the quantum of that liability. In either case an award by the arbitrators is a condition precedent to any right of action. There is no difference between a case where the arbitrators have to decide the question of the liability itself and

a case where he has to decide the question of the quantum of that liability. In both cases if the contract makes the decision of the arbitrators a condition precedent that has to be fulfilled before a suit can be instituted."

21. In *Charanjit Lal Sodhi v. Caledonian Insurance Co. Ltd.*, 1969 Acc C. J. 12 (Delhi) a learned single Judge of the Delhi High Court seems to have gone wrong in treating the dispute raised by the insurer as one falling under the arbitration clause. The company had said that the insured had made a false claim. The learned Judge thought that even the restricted arbitration clause covering only the difference as to the amount of any loss or damage was "wide enough to include a case of some loss or damage as well as a case of no loss or damage."

22. The two lines of cases clearly bear out the two distinct situations in law. A clause like the one in *Scott v. Avery* bars any action or suit if commenced for determination of a dispute covered by the arbitration clause. But if on the other hand a dispute cropped up at the very outset which cannot be referred to arbitration as being not covered by the clause, then the *Scott v. Avery* clause is rendered inoperative and cannot be pleaded as a bar to the maintainability of the legal action or suit for determination of the dispute which was outside the arbitration clause.

23. We do not propose, as it is not necessary, to decide whether the action commenced by respondent No. 1 under Section 20 of the Act for the filing of the arbitration agreement and for appointment of arbitrators was barred under Clause 19 of the policy. It has been repeatedly held that such a clause is not hit by Section 28 of the Contract Act and is valid; vide — *The Baroda Spinning and Weaving Co. Ltd. v. The Satyanarayan Marine and Fire Insurance Co. Ltd.*, ILR 38 Bom 344 = (AIR 1914 Bom 225 (2)); *Dawood Tar Mahomed Bros. v. Queensland Insurance Co. Ltd.*, AIR 1949 Cal 390 and *The Ruby General Insurance Co. Ltd. v. The Bharat Bank Ltd.*, AIR 1950 (East) Punj 352. Clause 19 has not

prescribed a period of 12 months for the filing of an application under Section 20 of the Act. There was no limitation prescribed for the filing of such an application under the Indian Limitation Act, 1908 or the Limitation Act, 1963. Article 181 of the former did not govern such an application. The period of three years prescribed in Article 137 of the Act of 1963 may be applicable to an application under Section 20. Nor are we concerned in this case to decide whether the time taken by respondent No. 1 in prosecuting his application in Muzaffarnagar court could be excluded under Sec. 14 (2) of the Limitation Act, 1963. Nor do we propose to decide whether the application under Section 20 could be defeated on the ground of the extinction of the liability of the company under Clause 19. We may, however, observe in passing that in view of the decision of this Court in *Wazirchand Mahajan v. Union of India*, (1967) 1 SCR 303 at p. 308 = (AIR 1967 SC 990 at p. 993) if the difference which had arisen between the parties was the one to which the arbitration clause applied then the application under Section 20 of the Act could not be dismissed on the ground that the claim would not ultimately succeed either on facts or in law. The matter will have to be left for the decision of the arbitrator. Without any discussion we may just state that the High Court is not right in its view that respondent No. 1's claim was not barred under Clause 19 because of the provision of law contained in Section 37 (3) of the Act.

24. But in this case on a careful consideration of the matter we have come to the definite conclusion that the difference which arose between the parties on the company's repudiation of the claim made by respondent No. 1 was not one to which the arbitration clause applied and hence the arbitration agreement could not be filed and no arbitrator could be appointed under Section 20 of the Act. Respondent No. 1 was ill-advised to commence an action under Section 20 instead of instituting a suit within three months of the date of repudiation to establish the company's liability.

25. For the reasons stated above, we allow this appeal, set aside the judgment and orders of the courts below and dismiss respondent No. 1's application filed under Section 20 of the Act. Since he fails on technical grounds, in the circumstances of the case, we shall direct the parties to pay and bear their own costs throughout.

Appeal allowed.

AIR 1976 SUPREME COURT 294

(From: Delhi)*

P. N. BHAGWATI AND R. S. SARKARIA, JJ.

Sat Paul, Appellant v. Delhi Administration, Respondent.

Criminal Appeal No. 137 of 1971, D/- 30-9-1975.

(A) Evidence Act (1872), Ss. 154 and 155 — Scope — Discretion of court is untrammelled — It is to be exercised liberally.

The discretion conferred by S. 154 on the Court is unqualified and untrammelled and is apart from any question of 'hostility.' It is to be liberally exercised whenever the court from the witness's demeanour, temper, attitude, bearing, or the tenor and tendency of his answers, or from a perusal of his previous inconsistent statement, or otherwise, thinks that the grant of such permission is expedient to extract the truth and to do justice. The grant of such permission does not amount to an adjudication by the court as to the veracity of the witness. Therefore, in the order granting such permission, it is preferable to avoid the use of such expression, such as "declared hostile", "declared unfavourable", the significance of which is still not free from the historical cobwebs which, in their wake bring a misleading legacy of confusion, and conflict that had so long vexed the English Courts.

(Difference in English law pointed out). (Para 37)

*(Cri. Appeal No. 151 of 1970, D/- 9-3-1971—Delhi.)

KS/LS/D813/75/GGM

(B) Evidence Act (1872), S. 145 — Criminal trial — Cross-examination of his own witness by party — Evidentiary value of such witness — Evidence cannot be discarded as a whole.

Even in a criminal prosecution when a witness is cross-examined and contradicted with the leave of the court by the party calling him, his evidence cannot, as a matter of law, be treated as washed off the record altogether. It is for the Judge of fact to consider in each case whether as a result of such cross-examination and contradiction, the witness stands thoroughly discredited or can still be believed in regard to a part of his testimony. If the Judge finds that in the process, the credit of the witness has not been completely shaken, he may, after reading and considering the evidence of the witness, as a whole, with due caution and care, accept, in the light of the other evidence on the record, that part of his testimony which he finds to be creditworthy and act upon it. If in a given case, the whole of the testimony of the witness is impugned, and in the process, the witness stands squarely and totally discredited, the Judge should, as a matter of prudence, discard his evidence in toto. AIR 1931 Cal 401 (FB), AIR 1927 Bom 501, AIR 1933 Mad 137, AIR 1940 Pat 289, AIR 1969 Pat 415, AIR 1955 Raj 65, AIR 1941 Oudh 130, AIR 1955 NUC (Punjab) 5715, AIR 1964 Madh Pra 30, AIR 1965 Orissa 31, AIR 1966 Mys 248, 1951 Ker LT 471, AIR 1953 J & K 41, Approved, AIR 1971 SC 1656, Ref. (Para 51)

(C) Prevention of Corruption Act (1947), Sections 5 (2), 5 (1) (d) — Motive — Appreciation of evidence — Accused a police officer — Prosecution witnesses proved to be pimps and facing trial under Suppression of Immoral Traffic in Women and Girls Act — It could not be said that prosecution witnesses had no motive to falsely implicate the accused. AIR 1967 Delhi 26 Explained. (1. Evidence Act (1872), Section 3 — Appreciation of evidence — Character of witnesses. 2. Penal Code (1860), Section 161). (Para 20)

(D) Evidence Act (1872), Section 3 — Appreciation of evidence — Trial under Prevention of Corruption Act — Interested witness — Appreciation — Corroboration — Necessity — Witnesses of poor moral fibre — Corroboration necessary.

There is no absolute rule that the evidence of an interested witness cannot be accepted without corroboration. But where the witnesses have poor moral fibre and have to their discredit a load of bad antecedents which indicates their having a possible motive to harm the accused who was an obstacle in their immoral activities, it would be hazardous to accept the testimonies of such witnesses without corroboration on crucial points from independent sources. AIR 1973 SC 498, Ref. (Para 23)

(E) Criminal P. C. (1898), S. 162 Proviso — Statement of witnesses recorded by police during investigation — Can be used only for contradicting witness — Cannot be used for seeking assurance for prosecution story. Cr. Appeal No. 151 of 1970, D/- 9-3-1971 (Delhi), Reversed. (Evidence Act (1872), S. 145.) (Para 54)

Cases Referred: Chronological Paras

AIR 1975 SC 1400 = 1975 Cri LJ 1009 13, 28, 52
AIR 1975 SC 1432 = 1975 Cri LJ 1224 13
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AIR 1966 Mys 248 = 1966 Cri LJ 1155 47
AIR 1965 Orissa 31 = 1965 (1) Cri LJ 315 47
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AIR 1940 Pat 289 = ILR 19 Pat 369 = 41 Cri LJ 919	47
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(1858) 1 F & F 254	40
(1859) 5 CB NS 786 = 141 ER 315	36
(1831) 18 Bing 57 = 131 ER 321	49

Mr. Frank Anthony, Sr. Advocate, (M/s. O. P. Soni and E. C. Agarwala, Advocates with him), for Appellant; M/s. V. C. Mahajan and R. N. Sachthey Advocates, for Respondent.

Judgment of the Court was delivered by

SARKARIA, J.— This appeal by special leave is directed against a judgment of the High Court of Delhi upholding the conviction and sentence of the appellant under Sec. 5 (2) read with Sec. 5 (1) (d) of the Prevention of Corruption Act and Section 161, Penal Code. The facts are these:

2. On 16-1-1970, Ramesh alias Kaka (PW 1), Mst. Maya (PW 2) and Jayna (PW 8) went to the Railway Station to receive one Mst. Mumtaz, who was expected from Bombay by 1.45 p.m. train. Finding them loitering there, a constable of the Rail-

way police took them to the appellant at the Railway Police Post where he was posted as an Assistant Sub-Inspector. The appellant gave a beating to Ramesh and demanded an explanation as to why they had come to the Railway Station. Ramesh said that they had come to receive one Mst. Mumtaz, who was expected from Bombay by train at about 1.45 P.M. The appellant questioned if Mumtaz was being brought to Delhi for prostitution. Ramesh and his companions refuted the insinuation and informed the appellant that Mumtaz was a dancing girl and not a prostitute. The appellant then demanded a bribe of Rs. 100/- from Ramesh and party, warning that in the event of non-payment, they would be implicated in some case. Ramesh paid Rs. 30/- there and then to the appellant. The latter insisted that they would not be released unless they paid the balance of Rs. 70/-. On the suggestion of the women, the appellant detained Ramesh but let off the women with the direction to send the balance of Rs. 70/-. Mst. Maya and Mst. Jayna returned to their residence on G. B. Road and informed Dal Chand (FW 7) all about the incident. Mst. Maya then handed over Rs. 70/- to Dal Chand for securing the release of Ramesh. Dal Chand, instead, went to the office of the Anti-Corruption Police where Inspector Paras Nath recorded his statement, Ex. PW 3/A. The Inspector organized a raiding party. He summoned Surinder Nath (PW 3) and Sohan Pal Singh (PW 4), two clerks from the Sales-tax Office. The recorded statement of Dal Chand was then read out to Dal Chand, and was admitted to be correct by him in the presence and hearing of the Panch witnesses. Dal Chand then produced seven currency notes of the denomination of Rs. 10/- each. The Inspector treated those notes with phenolphthalein powder. He demonstrated to the witnesses how the fingers of a person touching a note treated with such powder would turn violet when dipped in a solution of sodium carbonate. The treated notes were then returned to Dal Chand with the direction that he should hand over the same to the appellant,

on demand. The Panch witnesses were instructed to keep close to Dal Chand to witness the passing of the tainted notes. The raiding party headed by Inspector Paras Nath including Dal Chand and the panch witnesses, then reached New Delhi Railway Station at about 5.25 p.m. Dal Chand and Sohan Pal Singh were directed to go ahead, while the rest of the party took up positions nearby. Dal Chand and his companions found the appellant talking to some person just outside the Police Post. After a couple of minutes when the appellant was free from that talk, and was alone, Dal Chand approached him and said that he was the brother of Ramesh (PW 1) and had been sent by the women to pay him Rupees 70/- for getting Ramesh released. The appellant first demanded Rupees 100/- but later received Rs. 70/- from Dal Chand and put the currency notes in the left-side pocket of his pants which he was then wearing. The appellant then told Dal Chand to go away, and assured the latter that Ramesh would be released. The appellant then went into his room in the Police Post. Inspector Paras Nath and party followed the appellant into the room. Inside, they found him sitting on a cot and Ramesh, PW, squatting on the floor. The Inspector disclosed his identity and accused the appellant of having received a bribe. The appellant kept mum. The Inspector then recovered the currency notes, Exs. P1 to P7, from the pocket of the pants which the appellant was then wearing. He compared the numbers of the notes with those noted in the memorandum PW 3/P. They tallied. Pointing towards Ramesh, the Inspector asked the appellant as to who he was. The appellant replied that he (Ramesh) had been found loitering outside in suspicious circumstances and was brought for interrogation. The left-hand fingers of the appellant were then dipped in a solution of sodium carbonate which turned pink. After preparing the seizure memo and the raid report (PW 9/A), the Inspector sent the same to the Police Station for registration of the formal First Information Report.

3. After completing the investigation and securing the necessary sanction for prosecution of the appellant, he laid a charge-sheet against him in the court of the Special Judge, Delhi.

4. Examined under S. 342, Cr. P. C., the appellant denied the prosecution case, and gave this version of the occurrence:

"I left the Police Post at 4.15 p.m. in uniform for patrol duty at the New Delhi Railway Station platforms because there is a heavy rush of trains at that time. I was sent for by the Incharge Police Post through Dev Raj Constable. I came to the Police Post through an entrance towards the platform. At that time Incharge, Police Post was busy in a conversation on telephone. I was carrying a baton in my hand. I entered my room and placed the baton on the table. My room is hardly 8' x 4½'. Just at that time Inspector Paras Nath came there and secured me near the door of my room. On a few occasions I did not oblige Inspector Paras Nath for getting seats reserved at the Railway Station for his friends and relatives. He had strained relations with me. I know Dal Chand and Ramesh. They are pimps. They often used to come to the Railway Station to solicit customers who were visitors to Delhi. On a number of occasions I saw them accompanied by prostitutes of G. B. Road. I reprimanded them several times not to frequent the Railway platforms in that manner. They were out to harm me. The recovered pants was hanging on a peg in my room and it was removed from there by the Inspector. I was wearing my uniform. No proceedings of the type mentioned above took place in my room. I got confused on seeing the Anti-Corruption Staff. I was afraid that they might create trouble for my bail and therefore I did not resist or protest. I have served in the Police Department for the last 19 years and there is not a single adverse entry, major or minor in my service book. I am innocent."

5. In defence, the appellant examined five witnesses — all members of the Police force.

6. Head Constable Jabar Singh (DW 1) testified on the basis of the service record, that there was not a single adverse entry in the Character Roll of the appellant and that no less than 60 recommendation certificates some of them accompanied by cash rewards were awarded to him since his joining the Police force on 7-6-1951. Constable Sardar Singh, DW 2, proved with reference to the official records brought by him that Ramesh (DW 1) was convicted and fined on 14-1-1966 by a Delhi Magistrate under Sec. 12 of the Gambling Act. Constable Dev Raj, DW 3, of the Railway Police Post was examined to show that at the time of occurrence, the appellant was in police uniform and was not wearing the civilian clothes, including the pants from which the tainted currency notes are alleged to have been recovered. He testified that on 16-1-1970 at about 5:45 P.M., the In-charge, Police Post directed the witness to convey a message to the appellant that he was wanted on the telephone to receive a call from his sister from Kirti Nagar. Accordingly, the witness went and conveyed the message to the appellant who was then in uniform, patrolling the Railway platform. Constable Muharrar Sujjan Singh, DW 4, produced the Daily Diary of the Police Post, containing entry No. 40, showing that on 16-1-1970, the appellant had departed from the Police Post for patrol duty at 4:15 P.M. He stated that there was a Standing Order according to which, all Police Officers going on patrol were peremptorily required to go in uniform.

7. Om Prakash Sahni DW 5, is an important witness examined by the defence. He is a Sub-Inspector who, at the relevant time, was In-charge of the Police Post of New Delhi Railway Station. His room in the Police Post is on one side of the verandah and that of the accused on the other side at a distance of hardly six feet. The dimensions of the room of the accused are 7' x 6' and it has only one door which opens into the verandah. DW 5 completely discounted the prosecution version. According to him, on 16-1-1970, he was throughout present in his room from

1:30 P.M. to 5:55 P.M. During this period he did not see any stranger, or suspect in the room of the accused. The witness swore that between 5:30 P.M. and 6 P.M., the accused was on patrol duty. He further stated that at about 5:45 P.M., a telephone call was received from the sister of the accused from Kirti Nagar, whereupon he sent Constable Dev Raj to inform the accused about it. In response to the message sent by the witness, Sat Pal accused, in Police uniform came from the side of the Railway platform to the Post. At that time, the witness was attending to another telephone message; consequently, the accused went into his room. The witness then left for patrol duty, after telling the accused about the telephone message.

8. The prosecution evidence which is the mainstay of the conviction of the appellant may be catalogued under these captions:

A. Direct evidence.

(i) Demand of the bribe. Evidence in regard to this fact was given by Ramesh, PW 1, Mst. Maya, PW 2, and Mst. Jayna PW 8.

(ii) Passing of tainted currency notes, P1 to P7 to the accused. Evidence with regard to this fact was given by Dal Chand (PW 7) and Inspector Paras Nath, PW 9.

(iii) Recovery of the tainted notes from the person of the accused. Dal Chand, PW 7, and Inspector Paras Nath, PW 9, are the only witnesses who have deposed to this fact. For proof of this fact, support has also been sought from the evidence of the hostile witnesses, PWs 3 and 4.

B. Circumstantial Evidence.

(i) The circumstance that Ramesh was found detained by the appellant.

(ii) On being accused by the Inspector, that he had obtained a bribe, the appellant kept mum and did not protest or refute the accusation.

9. It may be noted at the outset, that Surinder Nath, PW 3 and Sohan Pal Singh PW 4, who were supposed to be independent Panch witnesses of the trap, turned hostile to the prosecution and were thoroughly cross-examined by the Public Prosecutor, with the leave of the court, to

impeach their credit. In cross-examination, Surinder Nath, however, said that when the Inspector accused the appellant of receiving a bribe, the latter kept mum. He further supported the prosecution to the extent, that when the fingers and the pant-pocket of the accused were dipped in a solution of sodium carbonate, they turned pink. Excepting with regard to the reticence of the accused on the query made by the Inspector, Schan Pal Singh, who was supposed to have kept close company with Dal Chand, did not support the prosecution at all.

10. The learned trial Judge found that "the complainant and party are 'men of shady and questionable character' but, according to him, that was no ground to discard their testimony. Referring to certain observations of Dua J. in *Ram Sarup Singh v. The State*, 1967 Cri LJ 744 = (AIR 1967 Delhi 26) he held that persons with such shady characteristics fall easy victims to the illegal exploits of unscrupulous and dishonest officers. The Judge was further of the opinion that the testimony of the Panch witness, Surindernath (PW 3), also cannot be discarded straightway on account of his having been cross-examined by the prosecution. He rejected the defence version propounded by DWs 3 and 5 and concluded that the evidence given by the PWs, including Dal Chand, and Inspector Paras Nath, coupled with the 'compelling' circumstantial evidence was sufficient to establish the passing of the tainted notes to the accused and the subsequent recovery of the same from him. Calling in aid the presumption under Sec. 4 of the Prevention of Corruption Act, he convicted the appellant under Sec. 5(2) read with Sec. 5(1) (d) of the Act and under S. 161, Penal Code.

11. In appeal the High Court affirmed the findings of the trial Court. In seeking support for the prosecution case from the evidence of the hostile witnesses, it went far ahead of the trial court. The High Court sought assurance from the statements of PWs 3 and 4, thus:

"After a detailed reference to the evidence adduced in this case it becomes clear that PWs 3 and 4 in

their statements under Sec. 161 (3), duly proved in terms of the proviso to Section 162 of the Code of Criminal Procedure, did support the version which was given at the trial by PWs 1, 7 and 9. If it were open to an accused person to utilise the aforementioned proviso to urge that the contradictions point in a particular direction then it is equally open to the prosecution to urge that the contradictions establish on the record that the statement made earlier to which the statement made in court was contrary, was the one which was the correct statement."

Perhaps realising that in making use of the police statements it was going too far, the High Court then switched over to the alternative argument:

"It is not only on the basis of the statements falling within the purview of the proviso to Sec. 162 that I am coming to the conclusion that the prosecution has succeeded in proving its case. Even otherwise I am satisfied that Ramesh was kept in custody by the appellant whose hands, when dipped in the sodium carbonate solution turned pink. The same was the result when the pocket of Pants Exhibit P. 11, was dipped in the sodium carbonate solution."

12. Conceding that the testimony of the trap witnesses was 'interested' testimony, the High Court held that it was not correct to say that their evidence cannot, as a matter of law, be accepted without corroboration. On this point, it referred to this Court's decision in *Dalpat Singh v. State of Rajasthan*, AIR 1969 SC 17. Even so, according to the High Court, the interested testimony of PWs 7 and 9 "received full corroboration from PW 1". The High Court summarily brushed aside the defence version without adverting to the defence evidence at all.

13. Mr. Frank Anthony, the learned Counsel for the appellant contends (a) that the courts below erred in law in using the reticence of the appellant as evidence against him. This silence amounted to a statement made to the police in the course of investigation, and as such, it was inadmissible, being hit by Sec. 162, Cr. P. C. (Reference has been made

to Narasimham v. State, AIR 1969 Andh Pra 271). In any case, this recalcitrant conduct of the appellant was not indicative of his guilt; (b) that the courts below have erred in using a part of the testimony of the hostile witnesses in support of the prosecution case. They had been fully cross-examined by the prosecution to impeach their credit, and indeed their evidence stood thoroughly discredited. (For this proposition reliance has been placed on a recent decision of this Court in Jagir Singh v. The State, AIR 1975 SC 1400); (c) that the High Court has erred in using the police statements of P. Ws. 3 and 4 for seeking assurance and corroboration of the prosecution story. Such use is not permissible under the proviso to S. 162, Cr. P. C. (d) (i) that it was clear from the record that P. Ws. 1, 2, 7 and 8 are persons of low moral character and were haunting the Railway Station in connection with their immoral trade, that the appellant was a stumbling block in the way of their immoral pursuits, and consequently, these P. Ws. had a motive to falsely implicate the appellant. (ii) P.W. 9, who was an Inspector of Anti-Corruption Police was also highly interested witness. His overzeal can be gauged from the fact that he investigated this offence under Section 161, Penal Code, although he was not duly empowered to do so. (iii) The evidence of these interested witnesses is replete with material discrepancies and, as a rule of prudence, could not, in the absence of corroboration from independent sources, be accepted, particularly when it stood sharply contradicted by the qualitatively better testimony of D.Ws. 3 and 5. (Reliance has been placed on R. P. Arora v. State of Punjab, AIR 1973 SC 498) (e) That the trial Court erred in law in invoking the presumption under Section 4 of the Prevention of Corruption Act for convicting the appellant for an offence under Section 4 (2) read with Section 4 (1) (d) of the Act. In support of this argument, reference has been made to Sita Ram v. State of Rajasthan, AIR 1975 SC 1432.

14. As against the above, Mr. V. C. Mahajan, the learned Counsel for the Respondent, submits that the evidence of the interested witnesses has

been accepted by the courts below and consequently this Court should not, in keeping with its practice, disturb these concurrent findings of fact. It is maintained that there is no rule of law, that the evidence of an interested witness cannot be acted upon without corroboration, that, in any case, the evidence of P.Ws. 1, 7 and 9 was sufficiently corroborated by the circumstantial evidence consisting of the conduct of the accused in keeping mum to the accusation made by the Inspector, and by the factum of Ramesh's detention by the appellant. The said conduct of the appellant, proceeds the argument, was relevant under Sec. 8, Evidence Act and was a definite pointer towards his guilt. Counsel has not tried to support the use of the police statements of P.Ws. 3 and 4 made by the High Court. His point is that even without such support, the evidence on record was sufficient to bring home the charges to the appellant. Counsel has further invited our attention to the copy of the judgment of the Delhi High Court in Criminal Revn. No. 505 of 1968 (Raj Kumar v. State) delivered on 7-4-1970 (produced by the appellant's side in this Court) wherein it is recited that all Inspectors of Police in the Anti-Corruption Branch of the Delhi Administration have been authorised by an order dated March 21, 1968, passed under Sec. 5A (1) of the Prevention of Corruption Act, by the Administrator of the Union Territory of Delhi, to investigate offences under Sec. 5 (1) (d) of this Act. According to Counsel the mere fact that the authority given to Inspector Paras Nath did not extend to investigation of offences under Sec. 161, Penal Code, would not vitiate either the validity of the trial or the probative value of his evidence.

15. It is true that ordinarily, as a matter of practice, this Court does not review the evidence and disturb concurrent findings of fact unless those findings are clearly unreasonable or are vitiated by an illegality or material irregularity of procedure or are otherwise contrary to the fundamental principles of natural justice and fair-play. The instant case is one which falls within the exception to this rule. As shall be presently

discussed, the courts below have adopted a basically wrong approach. They have not only used the statement of certain witnesses in a manner which is manifestly improper or impermissible under the law, but have also erred in accepting the testimony of the interested witnesses without due caution and corroboration, requisite in the peculiar circumstances of the case. It is therefore, necessary to have another look at the evidence and the salient features of the case.

16. We will begin with the evidence of the trap witnesses. They are Ramesh PW 1, Dal Chand, FW 7, and Inspector Parasnath, PW 9. It cannot be gainsaid that all the three were concerned with the success of the trap, and, as such, were interested witnesses. What the courts below appear to have failed to note is that qualitatively, the evidence of these witnesses, particularly P. Ws. 1 and 7, was far inferior than the testimony of an ordinary interested witness. While the trial court was unduly indulgent and modest in allowing these witnesses to pass under the euphemistic title of "questionable and shady" characters, the High Court overlooked their antecedents altogether.

17. Evasive denials of Ramesh and 'company' notwithstanding, sufficient material has been brought on the record from which it is clearly discernible that PWs Ramesh and Dal Chand are pimps and they were haunting the Railway Station to solicit customers for Mst. Maya and Mst. Jayna.

18. The facts which have been elicited from Ramesh and company in cross-examination are these: There is an accommodation, comprising of one Hall, and side-rooms on G. B. Road which is known as the Kotha (brothel) of Mst. Maya. Mst. Jayna, Mst. Maya and one Mst. Lachmi have been living together in these premises for the previous 8 or 9 years. The rent of these premises for all the occupants is being paid by Mst. Maya. Mst. Lachmi is the mistress of Ramesh and the latter lives on her 'professional' income. Mst. Maya is the keep of Dal Chand who maintains

her servant, Mst. Jayna, also. Ramesh also claims to be a servant of Mst. Maya. He also lives in the Kotha (vide Dal Chand PW 7). Dal Chand claimed that he was living separately at Pahar Ganj. But he admitted that he has been frequently visiting the Kotha of Maya, and on the day of occurrence, also, he was there when, according to the witness, Mst. Maya came and informed him about the demand of the bribe by the appellant. Dal Chand stated that Ramesh was only a brother by courtesy. He admitted that Ramesh, Maya and Jayna were arrested by the Police under the Suppression of Immoral Traffic Act, and the charge against him and Ramesh was that they were pimps and their women companions were carrying on the profession of prostitution. He further admitted that in 1966, Mst. Maya was convicted under the said Act by a Delhi Magistrate. Ramesh and Maya both were being jointly prosecuted (on the date of their examination) for an offence under the said Act. It is further admitted (vide, Ramesh) that one Mst. Mumtaz, a dancing girl of Bombay, is their friend and she frequently comes and stays in the kotha of Mst. Maya. Ramesh was convicted for an offence under the Gambling Act, also.

19. Viewed against this background, the suggestion made by the defence in cross-examination, to these witnesses, that they were loitering at the Railway Station to procure customers for their immoral business, could not be said to be devoid of substance. The purpose of their visit to the Railway Station at that busy hour, according to them, was to see Mst. Mumtaz who was then expected to arrive from Bombay by train. This Mumtaz was not produced by the prosecution, though she was repeatedly summoned. In the circumstances, the defence version, that these persons were roaming there to hawk their "wares" does not fall beyond the orbit of reasonable probability. The above circumstances further lend assurance to the appellant's plea that he had on several occasions, previously, reprimanded these witnesses for visiting the Railway Station for immoral trade. Even, according to the

prosecution, the appellant had rounded up Ramesh and party on the accusation that they were soliciting customers for their immoral business. Dal Chand stated that on being questioned by Inspector Parasnath, the appellant explained that since Ramesh was found loitering at the Railway Station in suspicious circumstances, he had been brought for interrogation. This explanation receives confirmation from Ramesh who stated that the accused had questioned him about the purpose of their visit to the Railway Station, and when the witness told him that they had come to receive Mumtaz, the accused, not being satisfied, asked whether she was also being brought for prostitution. The appellant had also threatened to prosecute and put them behind the bars.

20. The courts below have believed the word of these pimps and women of easy virtue, that the appellant did all this to extort a bribe. The trial court with reference to certain observations of Dua J. in Ram Sarup's case (1967 Cri LJ 744 Delhi) *ibid*, treated the "shady and questionable characteristics" of these witnesses as a point in favour of the prosecution. It argued that persons with such antecedents can be easily exploited by corrupt police officers for extorting bribes. Thus, in a way, what was a stigma, was considered a badge of honour. We are, with respect, unable to appreciate this reasoning. The observations in Ram Sarup's case, were not intended to lay down a rule of universal application. Indeed, for weighing evidence there can be no specific canon. No generalisation is possible in such matters. Each case has its own features and each witness his own peculiarities. Here was a police officer with an unblemished record, rather an outstanding record, of 19 years' service. Such an Officer would be least disposed to countenance pimping within his territorial jurisdiction. He must therefore have been an eye-sore to them. It could not therefore be said that these witnesses had no motive whatever to falsely implicate the appellant.

21. Thus the conduct of the appellant in restraining Ramesh for

interrogation, could be the innocent act of an honest and duty-conscious Police Officer.

22. Then the evidence of these witnesses was replete with discrepancies, contradictions and improbable versions. PW1 stated that they were all taken by a Constable to a room and there the appellant gave him a beating. This was in sharp conflict with the version of Mst. Jayna, that it was PW 1 alone who was first rounded up by the Constable. Again, PW 1 would have it believed that he had Rs. 30/- in all with him which he gave to the appellant. This was sharply contradicted by Mst. Jayna, according to whom, it was Mst. Maya — and not PW 1 — who had given this money to the appellant. In the context, it may be noted that apart from Rupees 70/- in tainted notes the further sum of Rs. 30/- was not recovered from the appellant or from anywhere in the Police Post. The story of the advance payment of Rs. 30/-, therefore, does not inspire confidence. Further, the conduct of the appellant in not releasing Ramesh forthwith even after the alleged receipt of Rs. 70/- as gratification, was not the natural conduct of a person whose demand for a bribe had been satisfied. Dal Chand has said that the appellant did not, on receiving the amount, allow Ramesh to go away, but said that Dal Chand could go, and that Ramesh would be sent later on. Ordinarily, such discrepancies and small improbabilities in the evidence of witnesses are not of much consequence. But when the witnesses are manifestly disreputable persons, their testimony before it can be acted upon, must pass the test of severe scrutiny and in the process and in the context of this case even minor infirmities may assume importance.

23. It is true that there is no absolute rule that the evidence of an interested witness cannot be accepted without corroboration. But where the witnesses have poor moral fibre and have to their discredit a heavy load of bad antecedents, such as those of PWs 1, 2, 7 and 8, having a possible motive to harm the accused who was an obstacle in the way of their immoral activities, it would be

hazardous to accept their testimony, in the absence of corroboration on crucial points from independent sources. If any authority is needed reference may be made to *E. P. Arora v. State of Punjab*, (AIR 1973 SC 498) wherein this Court ruled that in a proper case, the Court should look for independent corroboration before convicting the accused person on the evidence of trap witnesses.

24. Well then, was such corroboration of the testimony of the interested witnesses forthcoming in the present case? In this connection, Mr. Mahajan referred to two circumstances: (i) the detention of Ramesh and (ii) the conduct of the appellant in keeping mum to the charge that he had received a bribe. Both these circumstances were not of a determinative tendency. Both were compatible with the innocence of the appellant. We have already discussed the first, and found that instead of advancing the case for the prosecution, it lends assurance to the explanation of the appellant that Ramesh had been brought for interrogation as he was roaming there in suspicious circumstances.

25. As regards the reticence of the appellant on the query made by the Inspector, we do not think it necessary to burden this judgment with a discussion of the question whether this conduct amounts to a statement made to a Police Officer in the course of investigation and as such is hit by S. 162 of the Code of Criminal Procedure. Suffice it to say that even on the assumption that it was admissible as conduct — and not as a 'statement' — under Sec. 8, Evidence Act, its probative value in the circumstances of this case would be almost nil. The appellant explained that he did not protest and resist out of fear, that the Inspector might make matters worse for him, even for getting bail. It would not be unusual even for an honest Officer to be frightened out of wits on being suddenly accused of bribe-taking by a superior Officer.

26. Thus, these two circumstances do not lend any assurance to the testimony of the trap witnesses. Nor could such assurance be sought

from the evidence rendered by Inspector Parasnath. True, that it has not been shown that he had any hostile animus against the appellant though such an allegation was made. Nor has it been shown that he had long acquaintance or friendship with Dal Chand and party. But we cannot lose sight of the stark fact that he was an Inspector of the Anti-Corruption Staff of Police. He was the architect of the trap and the head of the raiding party. Although the power conferred on him under the order, dated 21-3-1968, by the Administrator of the Union Territory of Delhi, did not extend to the investigation of an offence under Section 161, Penal Code, yet, with zeal outrunning discretion, he went ahead with the execution of the trap and the investigation. Being deeply concerned with the success of the case, he was also an interested witness. Not being an independent witness, his evidence could not furnish the kind of corroboration requisite in the circumstances of the case.

27. This takes us to the evidence of the independent witnesses, P. Ws. 3 and 4. Both have not, in the main, supported the prosecution. With the leave of the court, the Public Prosecutor cross-examined and confronted them with their contradictory statements which they had made to Inspector Parasnath during investigation. The question is, could the court validly pick out tiny bits from their evidence and use the same to support the prosecution case?

28. Relying on *Jagir Singh v. State*, (AIR 1975 SC 1400) *ibid*, Mr. Anthony submits that when a prosecution witness, being hostile, is cross-examined by the Public Prosecutor with the leave of the Court, his entire evidence is to be discarded, as a matter of law.

29. Since this vexing question frequently arises, and the observations made by this Court in *Jagir Singh's* case (*ibid*) do not appear to have been properly understood, it will be appropriate to clarify the law on the point.

29A. The terms "hostile witness", "adverse witness", "unfavourable witness", "unwilling witness" are all terms of English Law. At

Common Law, if a witness exhibited manifest antipathy, by his demeanour, answers and attitude, to the cause of the party calling him, the party was not, as a general rule, permitted to contradict him with his previous inconsistent statements, nor allowed to impeach his credit by general evidence of bad character. This rule had its foundation on the theory that by calling the witness, a party represents him to the Court as worthy of credit, and if he afterwards attacks his general character for veracity, this is not only mala fides towards the Court, but, it "would enable the party to destroy the witness if he spoke against him, and to make him a good witness if he spoke for him with the means in his hand of destroying his credit if he spoke against him" (see Best on Evidence, p. 630, 11th Edn.). This theory or assumption gave rise to a considerable conflict of opinion as to whether it was competent for a party to show that his own witness had made statements out of Court inconsistent with the evidence given by him in court. The weight of the ancient authority was in the negative.

30. In support of the dominant view it was urged that to allow a party directly to discredit or contradict his own witness would tend to multiply issues and enable the party to get the naked statement of a witness before the jury, operating in fact as substantive evidence, that this course would open the door wide open for collusion and dishonest contrivance.

31. As against this, the exponents of the rival view, that a party should be permitted to discredit or contradict his own witness who turns unfavourable to him argued that this course is necessary as a security against the contrivance of an artful witness, who otherwise might recommend himself to a party by the promise of favourable evidence and afterwards by hostile evidence ruin his cause. It was reasoned further "that this is a question in which not only the interests of litigating parties are involved, but also the more important general interests of truth, in criminal as well as in civil proceedings, that the ends of justice are best attained by

allowing a free and ample scope for scrutinising evidence and estimating its real value, and that in the administration of criminal justice more especially, the exclusion of the proof of contrary statements might be attended with the worst consequences". Besides, it by no means follows that the object of a party in contradicting his own witness is to impeach his veracity, it may be to show the faultiness of his memory" (see Best, page 631, 11th Edn.).

32. The rigidity of the rule prohibiting a party to discredit or contradict its own witness was to an extent relaxed by evolving the terms "hostile witness" and "unfavourable witness" and by attempting to draw a distinction between the two categories. A "hostile witness" is described as one who is not desirous of telling the truth at the instance of the party calling him, and an 'unfavourable witness' is one called by a party to prove a particular fact in issue or relevant to the issue who fails to prove such fact, or proves an opposite fact (see Cross on Evidence, p. 220, 4th Edn., citing Stephen's Digest of the Law of Evidence).

33. In the case of an 'unfavourable witness', the party calling him was allowed to contradict him by producing evidence aliunde but the prohibition against cross-examination by means of leading questions or by contradicting him with his previous inconsistent statements or by asking questions with regard to his discreditable past conduct or previous conviction, continued. But in the case of a 'hostile' witness, the Judge could permit his examination-in-chief to be conducted in the manner of cross-examination to the extent to which he considered necessary in the interests of justice. With the leave of the court, leading questions could be put to a hostile witness to test his memory and perception or his knowledge of the facts to which he was deposing. Even so, the party calling him, could not question him about his bad antecedents or previous convictions, nor could he produce evidence to show that the veracity of the witness was doubtful. But the position as to whether a previous inconsistent statement could be proved

against a hostile witness, remained as murky as ever.

34. To settle the law with regard to this matter, Sec. 22 of the Common Law Procedure Act, 1854 was enacted. It was originally applicable to civil proceedings, but was since re-enacted in Sec. 3 of the Criminal Procedure Act, 1865 and extended in identical terms to proceedings in criminal courts as well.

35. Section 3 provides:

"A party producing a witness shall not be allowed to impeach his credit by general evidence of bad character, but he may, in case the witness shall, in the opinion of the Judge, prove adverse, contradict him by other evidence, or by leave of the judge, prove that he has made at other times a statement inconsistent with his present testimony but before such last-mentioned proof can be given the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made such statement." (Emphasis added)

36. The construction of these provisions, however, continued to cause difficulty, particularly in their application to 'unfavourable' witnesses. In *Greenough v. Eccles*, (1859) 5 CBNS 786 these provisions were found so confusing that Cockburn C. J. said that "there has been a great blunder in the drawing of it, and on the part of those who adopted it."

37. To steer clear of the controversy over the meaning of the terms "hostile" witness, "adverse" witness, "unfavourable" witness which had given rise to considerable difficulty and conflict of opinion in England, the authors of the Indian Evidence Act, 1872 seem to have advisedly avoided the use of any of those terms so that, in India, the grant of permission to cross-examine his own witness by a party is not conditional on the witness being declared "adverse" or "hostile". Whether it be the grant of permission under Sec. 142 to put leading questions, or the leave under Section 154

to ask questions which might be put in cross-examination by the adverse party, the Indian Evidence Act leaves the matter entirely to the discretion of the court (see the observations of Sir Lawrence Jenkins in *Baikuntha Nath v. Prasannamoyi*, AIR 1922 PC 409. The discretion conferred by Section 154 on the court is unqualified and untrammelled, and is apart from any question of "hostility". It is to be liberally exercised whenever the court from the witness's demeanour, temper, attitude, bearing, or the tenor and tendency of his answers, or from a perusal of his previous inconsistent statement, or otherwise, thinks that the grant of such permission is expedient to extract the truth and to do justice. The grant of such permission does not amount to an adjudication by the court as to the veracity of the witness. Therefore, in the order granting such permission, it is preferable to avoid the use of such expressions, such as "declared hostile", "declared unfavourable", the significance of which is still not free from the historical cobwebs which, in their wake bring a misleading legacy of confusion, and conflict that had so long vexed the English Courts.

38. It is important to note that the English statute differs materially from the law contained in the Indian Evidence Act in regard to cross-examination and contradiction of his own witness by a party. Under the English Law, a party is not permitted to impeach the credit of his own witness by general evidence of his bad character, shady antecedents or previous conviction. In India, this can be done with the consent of the court under S. 155. Under the English Act of 1865, a party calling the witness, can "cross-examine" and contradict a witness in respect of his previous inconsistent statements with the leave of the court, only when the court considers the witness to be 'adverse.' As already noticed, no such condition has been laid down in Ss. 154 and 155 of the Indian Act and the grant of such leave has been left completely to the discretion of the Court, the exercise of which is not fettered by or dependent upon the "hostility" or "adverseness" of the witness. In this respect,

the Indian Evidence Act is in advance of the English law. The Criminal Law Revision Committee of England in its 11th Report, made recently, has recommended the adoption of a modernised version of S. 3 of the Criminal Procedure Act. 1865, allowing contradiction of both unfavourable and hostile witnesses by other evidence without leave of the court. The Report is, however, still in favour of retention of the prohibition on a party's impeaching his own witness by evidence of bad character.

39. The danger of importing, without due discernment, the principles enunciated in ancient English decisions, for, interpreting and applying the Indian Evidence Act has been pointed out in several authoritative pronouncements. In *Prafulla Kumar Sarkar v. Emperor*, ILR 58 Cal 1404 = (AIR 1931 Cal 401) (FB) an eminent Chief Justice, Sir George Rankin cautioned, that "when we are invited to hark back to dicta delivered by English Judges, however, eminent, in the first half of the nineteenth century, it is necessary to be careful lest principles be introduced which the Indian Legislature did not see fit to enact". It was emphasised that these departures from English law "were taken either to be improvements in themselves or calculated to work better under Indian conditions".

40. Unmindful of this substantial difference between the English Law and the Indian Law, on the subject, the Calcutta High Court in some of its earlier decisions, interpreted and applied Sec. 154 with reference to the meaning of the term "adverse" in the English Statute as construed in some English decisions and enunciated the proposition that where a party calling a witness requests the court to declare him "hostile", and with the leave of the court cross-examines the witness, the latter's evidence should be excluded altogether in criminal cases. This view proceeds on the doctrine enunciated by Campbell C. J. in the English case, *Faulkner v. Brine*, (1858) 1 F & F 254 that the object of cross-examination of his own witness by a party is to discredit the witness in toto and to get rid of his testimony altogether. Some of these decisions

in which this view was taken are: *Luchiram Motilal v. Radha Charan*; 34 Cal LJ 107 = (AIR 1922 Cal 267); *Emperor v. Satyendra Kumar Dutt*, AIR 1923 Cal 463; *Surendra v. Ranee Dassi*, ILR 47 Cal 1043 = (AIR 1921 Cal 677); *Khijiruddin v. Emperor*, AIR 1926 Cal 139 and *Panchanan v. Emperor*, ILR 57 Cal 1266 = (AIR 1930 Cal 276).

41. The fallacy underlying this view stems from the assumption that the only purpose of cross-examination of a witness is to discredit him; it ignores the hard truth that another equally important object of cross-examination is to elicit admissions of facts which would help build the case of the cross-examiner. When a party with the leave of the court, confronts his witness with his previous inconsistent statement, he does so in the hope that the witness might revert to what he had stated previously. If the departure from the prior statement is not deliberate but is due to faulty memory or a like cause, there is every possibility of the witness veering round to his former statement. Thus, showing faultiness of the memory in the case of such a witness would be another object of cross-examining and contradicting him by a party calling the witness. In short, the rule prohibiting a party to put questions in the manner of cross-examination or in a leading form to his own witness is relaxed not because the witness has already forfeited all right to credit but because from his antipathetic attitude or otherwise, the court feels that for doing justice, his evidence will be more fully given, the truth more effectively extricated and his credit more adequately tested by questions put in a more pointed, penetrating and searching way.

42. Protesting against the old view of the Calcutta High Court, in *Sohrai Sao v. Emperor*, ILR 9 Pat 474 = (AIR 1930 Pat 247); *Courtney Terrell C. J.* pointed out that the main purpose of cross-examination is to obtain admission, and it would be ridiculous to assert that a party cross-examining a witness is therefore prevented from relying on admission and to hold that the fact that the witness is being cross-examined implies

an admission by the cross-examiner that all the witness's statements are falsehood.

43. The matter can be viewed yet from another angle. Section 154 speaks of permitting a party to put to his own witness "questions which might be put in cross-examination". It is not necessarily tantamount to "cross-examining" the witness. 'Cross-examination', strictly speaking means cross-examination by the adverse party as distinct from the party calling the witness. (Section 137, Evidence Act). That is why Section 154 uses the phrase "put any questions to him which might be put in cross-examination by the adverse party". Therefore, neither the party calling him, nor the adverse party is, in law, precluded from relying on any part of the statement of such a witness.

44. The aforesaid decisions of the Calcutta High Court were overruled by a Full Bench in Prafulla Kumar Sarkar's case (AIR 1931 Cal 101) (FB) (supra). After an exhaustive survey of case law, Rankin C. J. who delivered the main judgment, neatly summed up the law at pages 128-1430 of the Report (pp. 407-408 of AIR):

"In my opinion, the fact that a witness is dealt with under Section 154 of the Evidence Act, even when under that section he is 'cross-examined' to credit, in no way warrants a direction to the jury that they are bound in law to place no reliance on his evidence, or that the party who called and cross-examined him can take no advantage from any part of his evidence. There is moreover no rule of law that if a jury thinks that a witness has been discredited on one point they may not give credit to him on another. The rule of law is that it is for the jury to say."

45. After answering in the negative, the three questions viz., whether the evidence of a witness treated as 'hostile' must be rejected in whole or in part, whether it must be rejected so far it is in favour of the party calling the witness, whether it must be rejected so far as it is in favour of the opposite party, the learned Chief Justice proceeded:

"...the whole of the evidence so far as it affects both parties favourably or unfavourably must go to the jury for what it is worth ... If the previous statement is the deposition before the committing Magistrate and if it is put in under Section 288, Criminal Procedure Code, so as to become evidence for all purposes, the jury may in effect be directed to choose between the two statements because both statements are evidence of the facts stated therein. But in other cases the jury may not be so directed, because prima facie the previous statement of the witness is not evidence at all against the accused of the truth of the facts stated therein. The proper direction to the jury is that before relying on the evidence given by the witness at the trial the jury should take into consideration the fact that he made the previous statement, but they must not treat the previous statement as being any evidence at all against the prisoner of the facts therein alleged.

..... In a criminal case, however, the previous unsworn statement of a witness for the prosecution is not evidence against the accused of the truth of the facts stated therein save in very special circumstances, e. g., as corroboration under Section 157 of his testimony in the witness-box on the conditions therein laid down. If the case be put of the previous statement having been made in the presence and hearing of the accused, this fact might under Section 8 alter the position; but the true view even then is not that the statement is evidence of the truth of what it contains, but that if the jury think that the conduct, silence or answer of the prisoner at the time amounted to an acceptance of the statement or some part of it, the jury may consider that acceptance as an admission (The King v. Norton, Percy William Adams, (1910) 2 KB 496 and (1923) 17 Cri App Rep 77). But apart from such special cases, which attract special principles, the unsworn statement, so far as the maker in his evidence does not confirm and repeat it, cannot be used at all against the accused as proof of the truth of what it asserts."

46. We are in respectful agreement with this enunciation. It is a correct exposition of the law on the point.

47. The Bombay, Emperor v. Jehangir Cama, AIR 1927 Bom 501; Madras, Ammathayarammal v. Official Assignee, ILR 56 Mad 7 = (AIR 1933 Mad 137); Patna, Nebati v. Emperor, ILR 19 Pat 369 = (AIR 1940 Pat 289); Patna Sahdeo v. Bipti, AIR 1969 Pat 415; Rajasthan, ILR (1954) 4 Raj 822 = (AIR 1955 Raj 65), Oudh Shyam Kumar v. Emperor AIR 1941 Oudh 130; Punjab, AIR 1955 NUC (Punj) 5715; Madh Pra., AIR 1964 Madh Pra 30; Orissa, In re Kalu Singh; Rema Naik v. State, AIR 1965 Orissa 31; Mysore, AIR 1966 Mys 248; Kerala, 1951 Ker LT 471; Jammu & Kashmir, AIR 1953 J & K 41 Courts have also taken the same view.

48. In the case of an unfavourable witness, even in England the better opinion is that where a party contradicts his own witness on one part of his evidence, he does not thereby throw over all the witness's evidence, though its value may be impaired in the eyes of the court. (Halsbury, 3rd Edn. Vol. 15, Para 805).

49. In Bradley v. Ricardo, (1831) 8 Bing 57 when it was urged as an objection that this would be giving credit to the witness on one point after he has been discredited on another, Tindal C. J. brushed it aside with the observation that "difficulties of the same kind occur in every cause where a jury has to decide on conflicting testimony".

50. In Narayan Nathu Naik v. Maharashtra State, (1971) 1 SCR 133 = (AIR 1971 SC 1656) the court actually used the evidence of the prosecution witnesses who had partly resiled from their previous statements, to the extent they supported the prosecution, for corroborating the other witnesses.

51. From the above conspectus, it emerges clear that even in a criminal prosecution when a witness is cross-examined and contradicted with the leave of the court, by the party calling him, his evidence cannot, as a matter of law, be treated as washed off the record altogether. It is for the Judge of fact to consider in each case whether as a result of such cross-examination and contradic-

tion, the witness stands thoroughly discredited or can still be believed in regard to a part of his testimony. If the Judge finds that in the process, the credit of the witness has not been completely shaken, he may, after reading and considering the evidence of the witness, as a whole, with due caution and care, accept, in the light of the other evidence on the record, that part of his testimony which he finds to be creditworthy and act upon it. If in a given case, the whole of the testimony of the witness is impugned, and in the process, the witness stands squarely and totally discredited, the Judge should, as matter of prudence, discard his evidence in toto.

52. It was in the context of such a case, where, as a result of the cross-examination by the Public Prosecutor, the prosecution witness concerned stood discredited altogether, that this Court in Jagir Singh v. State, (AIR 1975 SC 1400) (supra), with the aforesaid rule of caution — which is not to be treated as a rule of law — in mind, said that the evidence of such a witness is to be rejected en bloc.

53. In the light of the above principles, it will be seen that, in law, the part of the evidence of the Panch witnesses who were thoroughly cross-examined and contradicted with their inconsistent police statements by the Public Prosecutor, could be used or availed of by the prosecution to support its case. But as a matter of prudence, on the facts of the case, it would be hazardous to allow the prosecution to do so. These witnesses contradicted substantially their previous statements and as a result of the cross-examination, their credit was substantially, if not wholly, shaken. It was therefore, not proper for the courts below to pick out a sentence or two from their evidence and use the same to support the evidence of the trap witnesses.

54. Nor was the High Court competent to use the statements of these witnesses recorded by the police during investigation, for seeking assurance for the prosecution story. Such use of the police statements is not permissible. Under the Proviso to

Section 162, Cr. P. C. such statements can be used only for the purpose of contradicting a prosecution witness in the manner indicated in Section 145, Evidence Act, and for no other purpose. They cannot be used for the purpose of seeking corroboration or assurance for the testimony of the witness in court.

55. Thus the evidence of these interested witnesses of the trap remains unconfirmed and uncorroborated by any independent evidence. In the peculiar circumstances of the case, we think that it would be highly unsafe to convict the appellant on the basis of their testimony, particularly when P. Ws. 1, 7 and 8 are persons of bad antecedents and had a possible motive to see the accused removed permanently from the way of their immoral activity.

56. It is pertinent to mention here that the evidence of defence witnesses particularly that of D. Ws. 3 and 5, was not successfully impeached in cross-examination. The High Court has not touched their evidence at all. If the defence evidence were to be believed, at the material time, the appellant was in police uniform patrolling the Railway platform and he was not wearing the pants from the pocket of which the tainted currency notes are alleged to have been recovered. According to the appellant these pants were hanging on a peg in his room. Therefore, the possibility of the tainted notes having been implanted by Dal Chand, who appears to us a person with wit more and scruples less than the ordinary, cannot be ruled out.

57. For the foregoing reasons we would allow this appeal, accord the benefit of doubt to the appellant and acquit him of the charges levelled against him.

Appeal allowed.

AIR 1976 SUPREME COURT 309

(From: AIR 1973 Bom 249)

A. ALAGIRISWAMI, P. K. GOSWAMI
AND N. L. UNTWALIA, JJ.

M/s. Paradise Industrial Corpn.,
Appellants v. M/s. Kiln Plastics Products, Respondents.

Civil Appeal No. 411 of 1973,
D/- 29-9-1975.

(A) Bombay Rents, Hotel and
Lodging House Rates Control Act
(1947), Sec. 11 (4) — Order to deposit
arrears of rent — Order directing
that in default of deposit defences
were to be struck off — Validity.
(AIR 1973 Bom 249, Reversed).

On an application under S. 11 (4) by the landlord-plaintiff, a notice was issued to the defendants and an order was made requiring the defendants to deposit arrears of rent within a stipulated period and to continue to deposit monthly rent. It was further ordered that in default of the deposit the defences of the defendants were to be struck off and the suit should be placed for ex parte orders on the date fixed.

Held, the learned Judge of the High Court was wholly in error in holding that because of the form of the order (inasmuch as it used the words "defences to be struck off"), it was illegal and without jurisdiction. Moreover, the order itself did not order the defences to be struck off, it only fixed the date for striking out the defences. So, till the expiry of the period given by that order for the deposit of money, the question of striking out the defence did not arise nor was it in fact struck out. Further, it is Sec. 11 (4) and not Section 12 (3) (b) that would apply.

(Paras 4, 5)

The phrase "defence struck off" or "defence struck out" is not unknown in the sphere of law. Indeed it finds a place in Order 11, Rule 21, C. P. C. The phrase is more advantageous to the defendant. Even when a defence is struck off the defendant is entitled to appear, cross-examine the plaintiff's witnesses and submit that even on the basis of the

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evidence on behalf of the plaintiff a decree cannot be passed against him, whereas if it is ordered in accordance with Section 11 (4) that he shall not be entitled to appear in or defend the suit except with the leave of the Court he is placed at a greater disadvantage. The use of the phrase does not in any way affect the substance of the order. What the law contemplates is not adoption or use of a formula; it looks at the substance. AIR 1973 Bom 249, Reversed.

(Para 4)

F. S. Nariman, Sr. Advocate, (Mr. B. R. Agarwala, Advocate of M/s. Gagrat & Co.), for Appellants; Mrs. Urmila Kapoor and Miss Kamlesh Bansal, Advocates, for Respondents.

Judgment of the Court was delivered by

ALAGIRISWAMI, J.:— This is an appeal against the judgment of the High Court of Bombay in an application under Article 227 of the Constitution by which it not only set aside the ex parte decrees passed by the Court of Small Causes, Bombay in a suit for eviction and rent but dismissed the suit itself. The facts are as follows:

2. The appellants-plaintiffs filed a suit against the defendants-respondents for recovery of possession of the property leased to them as also rent and mesne profits in March 1968. It was alleged that the defendants were in arrears of rent from 1st March 1966 and that the rent was Rs. 385/- a month. On 30 January 1968 a notice to quit was given to the defendants and the notice was served on 1st February 1968. On 20th February 1968 they filed an application under Sec. 11 of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 for fixation of standard rent. It was thereafter that the suit was filed in March 1968. On 23rd November 1968 the suit came up before a Judge of the Small Causes Court and after hearing the parties he made an order requiring the defendants to deposit Rs. 13,090/- as rent due up to the end of December 1968 and interim standard rent of Rs. 308/- per month to be paid beginning from February 15, 1969. It was further ordered that in default of the defendants depositing the amount the

plaintiffs were at liberty to follow the consequential remedy under Section 11 (4) of the Act. The defendants did not deposit the amount ordered by the Court and on 24th February 1969 the plaintiffs applied to the Court praying for a notice to be issued to the defendants to show cause why they should not deposit the aggregate amount of rent and further rent of Rs. 385/- per month from 1st August 1969 till the disposal of the suit. There was a further prayer that in default of the deposit of the amount the defences of the defendants may be ordered to be struck off. Upon this application a notice was issued to the defendants and on 2nd June 1969 an order was made requiring the defendants to deposit Rs. 14,607/- within one month and to continue to deposit Rs. 308/- per month in accordance with the earlier order. It was further ordered that in default of the deposit the defences of the defendants were to be struck off and that the suit should be placed for ex parte orders on 15th July 1969. The defendants failed to deposit arrears of rent and the suit came up for orders on 15th July 1969. The defendants were absent on that day and the suit was adjourned to 5th August 1969. On the 5th August the suit was again adjourned to 6th and on that day an ex parte decree for possession, recovery of arrears of rent and costs was passed. However, on the 4th August the defendants had made an application stating that on proper calculation the amount of arrears of rent would come to Rs. 7065/- and praying for extension of time for deposit of this amount. The defendants were allowed to deposit the amount without prejudice to the rights and contentions of the parties and notice was ordered to be issued to the plaintiffs. The defendants deposited the amount but did not take out and serve the notice on the plaintiffs and the notice was ultimately discharged for want of prosecution on 19th September, 1969. An appeal was filed before the Appellate Bench of the Small Causes Court against the ex parte decree and it was dismissed. On an application filed before the High Court a learned single Judge set aside the decree passed by

the Small Causes Court on 6th August 1969 as also the decree passed by the Appellate Bench and also dismissed the suit.

3. As far as we are able to see the only reason which persuaded the learned Judge to come to this extraordinary conclusion was that under Sec. 11 (4) of the Act the only order that could be passed was an order directing, after fixing the interim standard rent to be deposited within a particular time, 'that if the tenant fails to comply with any order made as aforesaid, within such time as may be allowed by it, he shall not be entitled to appear in or defend the suit except with leave of the Court, which leave may be granted subject to such terms and conditions as the Court may specify', and the section did not authorise the Court to strike off the defences straightway. The learned Judge found it difficult to understand how the Court could pass an order on June 2, 1969 as follows:

"The defendant No. 2 to deposit the balance amount of Rs. 14,607/- in Court within a month and continue to deposit Rs. 308/- per month as per order passed by scrutiny Court in default Notice absolute and defences to be struck off and suit be fixed for ex parte hearing, on 15th July 1969. Defendant No. 2 to pay Rs. 30/- to the plaintiffs."

He therefore thought the order passed by the Court on June 2, 1969 was illegal and without jurisdiction and every step that was taken by the Court subsequently must be considered to be without jurisdiction and illegal. However, considering the question as to what was the proper order to be passed in the petition, the learned Judge thought as the defendants had admittedly deposited by then all amounts as ordered by the Court previous to the order of June 2, 1969 and also deposited the monthly rent at the rate of Rs. 308/- per month the matter would fall under Section 12 (3) (b) and the suit should be dismissed.

4. We may in order to facilitate the discussion set out the provisions of S. 11 (4) of the Act:

"(4) Where at any stage of a suit for recovery of rent, whether with or

without a claim for possession of the premises, the Court is satisfied that the tenant is withholding the rent on the ground that the rent is excessive and standard rent should be fixed, the Court shall, and in any other case if it appears to the Court that it is just and proper to make such an order the Court may, make an order directing the tenant to deposit in Court forthwith such amount of the rent as the Court considers to be reasonably due to the landlord, or at the option of the tenant an order directing him to pay to the landlord such amount thereof as the Court may specify. The Court may further make an order directing the tenant to deposit in Court periodically, such amount as it considers proper as interim standard rent, or at the option of the tenant an order to pay to the landlord such amount thereof as the Court may specify, during the pendency of the suit. The Court may also direct that if the tenant fails to comply with any order made as aforesaid, within such time as may be allowed by it, he shall not be entitled to appear in or defend the suit except with leave of the Court, which leave may be granted subject to such terms and conditions as the Court may specify."

The learned Judge of the Small Causes Court used the words "defences to be struck off" and did not use the words "he shall not be entitled to appear in or defend the suit except with leave of the Court, which leave may be granted subject to such terms and conditions as the Court may specify." We are afraid the learned Judge of the High Court has missed the substance and chased the shadow. The words "striking out the defence" are very commonly used by lawyers. Indeed the application made on 24-2-1969 by the plaintiffs was for a direction to order the defences of the defendants to be struck off in default of payment of the amount ordered by the Court. The phrase "defence struck off" or "defence struck out" is not unknown in the sphere of law. Indeed it finds a place in order XI, rule 21 of Civil P. C.

"21. Where any party fails to comply with any order to answer in-

terrogatories, or for discovery of inspection of documents, he shall, if a plaintiff, be liable to have his suit dismissed for want of prosecution, and, if a defendant, to have his defence, if any, struck out, and to be placed in the same position as if he had not defended, and the party interrogating or seeking discovery or inspection may apply to the Court for an order to that effect, and an order may be made accordingly."

In effect, both mean the same thing. Nobody could have misunderstood what was meant. Indeed, one may even say that the phrase "the defence to be struck off" or "struck out" is more advantageous from the point of view of the defendants. Even when a defence is struck off the defendant is entitled to appear, cross-examine the plaintiff's witnesses and submit that even on the basis of the evidence on behalf of the plaintiff a decree cannot be passed against him, whereas if it is ordered in accordance with Section 11(4) that he shall not be entitled to appear in or defend the suit except with the leave of the Court he is placed at a greater disadvantage. The use of the words 'defence struck off' does not in any way affect the substance of the order and the learned Judge of the High Court was wholly in error in holding that because of the form of the order passed on June 2, 1969 the order was illegal and without jurisdiction. The order squarely falls within Section 11(4). What the law contemplates is not adoption or use of a formula; it looks at the substance. The order is not therefore one without jurisdiction. It is one which the Judge was competent to make. Be it noted that the learned Judge does not hold that the amount ordered to be deposited by the defendants by the order dated 2-6-1969 was wrong or that it could not have been ordered at all. That order also fixed the interim standard rent as contemplated by that section. That section itself contemplates that the Court may order the deposit of such amount of the rent as the Court considers to be reasonably due to the landlord. Therefore, the order dated June 2, 1969 could not be held to be invalid on any ground whatsoever; nor has it been held to be ille-

gal on any ground other than that the words used were not the proper ones. It is to be further noted that the order itself did not order the defences to be struck off, it only fixed the 15th of July 1969 as the date for striking out the defences and to fix the suit for ex parte hearing. So, till the expiry of a month given by that order for the deposit of money the question of striking out the defence did not arise nor was it in fact struck out. On the date fixed for striking out defences and fixing the date for ex parte hearing the defendants did not appear nor did they appear on the 5th and 6th of August when the suit was fixed for hearing. Though they were permitted to deposit Rupees 7,000/- on their application dated 4th August 1969 they did not take any further steps and so the notice was dismissed. The deposit of Rupees 7,000/- does not make any difference to the decision in this case because it was allowed to be deposited without prejudice to the rights and contentions of the parties. The defendants did not even apply for setting aside the ex parte decree giving proper reasons for their non-appearance on the 5th and 6th August. They went on appeal against the ex parte decree. The Appellate Bench of the Small Causes Court could have decided the appeal only on the basis of the material before it and the learned Judge of the High Court did not rely upon any material whatsoever except the form of the order made on the 2nd June 1969 for not merely setting aside the decrees but even dismissing the suit itself. The deposit of the money after the ex parte decree was passed was wholly irrelevant in considering whether the ex parte decree passed was a proper one and much more so whether the suit itself could be dismissed.

5. We are unable to understand how the learned Judge found it possible to bring the case within the provisions of Sec. 12(3) (b) of the Act. The tenants did not pay either on the 1st day of the hearing of the suit or on or before the date the Court fixed. Indeed on proper construction of law it is Section 11(4) that will apply. Section 12(3) (b)

does not deal with a case like the present.

6. The appeal is, therefore, allowed. The judgment of the High Court is set aside and the decree of the Court of Small Causes dated August 6, 1969 as well as the appellate decree passed by the Court of Small Causes are restored. The respondents will pay the appellants' costs.

Appeal allowed.

AIR 1976 SUPREME COURT 313

(From: Bombay)*

Y. V. CHANDRACHUD, R. S. SARKARIA AND A. C. GUPTA, JJ.

M/s. Murarilal Mahabir Prasad and others, Appellants v. Shri B. R. Vad and others, Respondents.

Civil Appeal No. 1802 of 1970, D/- 5-9-1975.

(A) Bombay Sales Tax Act (51 of 1959), Ss. 18 and 19 (3) — Bombay Sales Tax Act (3 of 1953), Ss. 26 (3) 15 (1) — Assessment of dissolved firm on its predissolution turn-over is permissible under both the Acts. (Majority view).

Majority View (Chandrachud and Sarkaria, JJ): Under the Bombay Sales Tax Acts of 1953 and 1959, a dissolved firm can be assessed or re-assessed to sales-tax in respect of its pre-dissolution turnover.

(Paras 26, 34)

The imposition of such a liability is in keeping with the general scheme of the 1953 Act, the various provisions of which show that the assessment of a dissolved firm is within the clear intendment of the statute.

(Para 26)

The Act of 1959 presents no difficulty as its provisions are clearer than those of the 1953 Act. Section 19(3) of 1959 Act not only makes clear what was necessarily implied in the 1953 Act, but it throws additional light on the true construction of the earlier law. One of the postulates of Section 19(3) is that a dissolved firm could be assessed under the 1953

*(Misc. Petn. No. 564 of 1965, D/- 8-12-1969—Bombay.)

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Act. Such a postulate accords with the principle that if the legislature provided for a charge of sales-tax, it could not have intended to render that charge ineffective by permitting the partners to dissolve the firm, an easy enough thing to do. Nothing, in fact, would be easier to evade a tax liability than to declare that the firm, admittedly liable to pay tax, has been dissolved. Case law discussed; Misc. Petn. 564 of 1965, D/- 8-12-1969 (Bom.), Affirmed.

(Paras 33, 34, 35, 36)

Per Gupta, J. (dissenting): Neither the 1953 Act nor the 1959 Act contains any provision permitting assessment or recovery proceedings being taken against a dissolved firm.

(Para 50)

The argument that under S. 15 of the 1953 Act (similar to Section 35 of the 1959 Act) it is permissible to proceed against a dissolved firm overlooks that the foundation of the Collector's jurisdiction is the notice which must be served on the dealer before the Collector proceeds against him, and 'dealer' has been defined in the Act as a person who carries on the business of selling or buying goods. In a case where the dealer was a firm dissolved before the notice was issued, there is no person carrying on the business of selling or buying goods on whom the notice can be served. The question is not how and against whom the dues of a dissolved firm can be realised, but whether the firm as such can be proceeded against after it has been dissolved.

(Para 48)

S. 19(3) of the 1959 Act makes the erstwhile partners jointly and severally liable for the tax due from a dissolved firm but does not say that assessment or recovery proceedings may be initiated or continued against a firm as such even after its dissolution.

(Para 49)

A dissolved firm may be equated with a dead person; both cease to be assessable units. The apprehension that the firm may be dissolved voluntarily in order to avoid liability should not, make any difference in principle; a man who takes his own life is in no worse position than one who dies of a natural cause, so far as the tax dues are concerned. As

for avoidance of liability, it is up to the Legislature that created the liability to prevent evasion. Section 19 (3) of the 1959 Act which makes the erstwhile partners of a dissolved firm jointly and severally liable for the tax (including any penalty) due from the firm, was obviously enacted with that purpose; but making the partners liable for the dues of a dissolved firm does not mean that the dissolved firm as such can be assessed. Case law discussed; Misc. Petn. No. 564 of 1965, D/- 8-12-1969 (Bom.), Reversed. (Para 57)

(B) Interpretation of Statutes — Fiscal statutes — Rule of strict construction — Rule applied only to a taxing provision — It was not applicable where provisions prescribe machinery for computation of tax are concerned.

Per Chandrachud and Sarkaria, JJ.:— The true implication of the principle that a taxing statute must be construed strictly (viz. the subject is not to be taxed unless the charging provision clearly imposes the obligation) is often misunderstood and the principle is unjustifiably extended beyond the legitimate field of its operation. It does not apply where the Court is concerned with a provision which prescribes the machinery for the computation of tax and not with a charging provision of the Sales tax Acts. In the latter case the rule is that that construction should be preferred which makes the machinery workable: Case law discussed.

(Paras 29, 30, 31, 32)

Cases Referred: Chronological Paras

1975 Tax LR 1509 = (1975) 35 STC 148 (Mad) (FB) 37, 50
 AIR 1973 SC 927 = (1973) 1 SCC 442 = 1973 Tax LR 595 27
 AIR 1971 SC 2463 = (1971) 2 SCC 570 = 1971 Tax LR 1756 28
 AIR 1969 SC 812 = (1969) 1 SCR 651 27
 (1968) 21 STC 263 = 1968 Jab LJ 97 (SC) 13, 53
 (1967) 19 STC 381 (SC) 13, 52
 AIR 1966 SC 1295 = (1966) 2 SCR 457 10, 12, 13, 19, 50, 51, 52, 53
 AIR 1965 SC 1358 = (1965) 1 SCR 700 27
 AIR 1963 SC 1062 = (1963) 3 SCR 893 31, 55, 56

AIR 1963 SC 1448 = (1963) 48 ITR (SC) 59 17
 (1958) 9 STC 683 (Bom) 44
 (1958) 9 STC 571 = 1958 Jab LJ 820 13
 AIR 1957 SC 657 = 1957 SCR 837 27, 54
 AIR 1957 SC 664 = 1957 SCR 1141 27, 54, 55
 AIR 1955 SC 79 = (1955) 1 SCR 810 31
 AIR 1940 PC 124 = 67 Ind App 239 31, 55
 AIR 1933 Bom 333 = (1930) 5 ITR 100 17
 (1925) 10 Tax Cas 88 = 1926 AC 37 32, 55
 (1921) 12 Tax Cas 358 = (1921) 2 KB 403 27, 29
 (1879) 4 AC 197 = 49 LJ QB 130 28

Mr. S. T. Desai, Sr. Advocate, (M/s. H. K. Shah, A. C. Moneses, Mahendra H. Gani and K. J. John, Advocates), for Appellants; Mr. M. C. Bhandare, Sr. Advocate, (M/s. Vazir Singh and M. N. Shroff, Advocates with him), for Respondents.

The Judgments of the Court were delivered by

CHANDRACHUD, J. (on behalf of himself and Sarkaria J. (majority judgment)) :— The question which arises for decision in this appeal is whether under the Bombay Sales Tax Act, 1953 and the Bombay Sales Tax Act, 1959 a dissolved firm can be assessed or re-assessed to sales-tax in respect of its pre-dissolution turnover.

2. The first appellant — M/s. Murarilal Mahabirprasad — was a partnership firm constituted under a deed of partnership dated December 3, 1953. It was doing business at 30-Commercial Chambers, Masjid Bunder Road, Bombay, as importers, commission agents, indenting agents, del credere agents and financiers and also as wholesale dealers in colours, chemicals, dyes etc. The firm consisted of 5 partners: appellants 2 to 5 and one other who died in 1965. The firm was registered as a dealer under the Acts of 1953 and 1959.

3. Under diverse orders of assessment passed prior to its dissolution, the firm was assessed to sales-tax for the period July 1953 to March 31, 1958. On November 10, 1960 the

Sales Tax Officer (VIII), Enforcement Branch, Bombay, seized certain documents from the firm's office. Notices were issued to the firm from time to time for attendance to explain these documents. Over sixty meetings took place between the firm's representatives and the authorities, at the end of which, two notices dated November 20, 1963 came to be issued to the firm. By the first of these notices, the firm was asked to explain certain discrepancies in its books of account. The second notice was issued under Section 15 of the Act of 1953, by which the firm was asked to show cause why the assessment already made for the period 1-4-1957 to 31-3-1958 should not be re-opened on the ground that certain sales were suppressed by the firm as a result of which a part of its turnover had escaped assessment. Respondent 1, the Sales Tax Officer (VIII), Enforcement Branch, Greater Bombay, fixed the hearing of the assessment proceeding on April 1, 1965 but the firm requested by its letter dated April 3, for an adjournment till May on the ground that one of the partners had died suddenly in Delhi and that the other partners would be back in Bombay by May. On May 26, 1965 respondent addressed a notice to the firm stating that the hearing would be taken up from day to day from June 14, 1965 and that the partners should remain present at the hearings.

4. There was considerable difficulty in serving the aforesaid notice, as another firm by the name of M/s. Murarilal Balkrishna had apparently started doing business at the place where the assessee firm was carrying on its business. Intimations were sent to the registered address of the firm and an Inspector of the Department went personally to effect the service. Eventually, on August 31, 1965 respondent 1 passed ex parte orders of re-assessment for the period 1-4-1957 to 31-3-1958 and ex parte orders of assessment for the period 1-4-1958 to 31-3-1961. The assessment of the firm for the period subsequent to 31-3-1958 was pending ever since, as it had to await the result of inspection of the incriminating documents seized from the firm's office in Novem-

ber, 1960. On October 22, 1965 demand notices were pasted on the office of the firm at its Masjid Bunder Road address. M/s. Murarilal Balkrishna who were doing business there are said to have informed a partner of the firm that demand notices were so pasted.

5. By the revised assessment order, respondent 1 held that for the period 1-4-1957 to 31-1-1958, the turnover of suppressed sales which had escaped assessment was Rupees 41, 47,090. He assessed on this turnover an additional tax of Rs. 1,95,582.47. Respondent 1 found that for subsequent periods also a large part of the turnover was suppressed by the firm. On that footing, he assessed the sales tax for the period 1-4-1958 to 31-3-1961, breaking up the period in four assessments. By the demand notices, the firm was called upon to pay a total tax of Rs. 6,70,969.96, inclusive of the sales tax quantified in the revised assessment. The notices apprised the firm of its liability to pay penalty if the tax was not paid within the stated period.

6. The assessment for the period 1-4-1957 to 31-12-1959 was made under the Act of 1953. The tax due for this period comes to Rupees 5,63,900 and odd. The assessment for the period 1-1-1960 to 31-3-1961 was made under the Act of 1959. The tax due for this period comes to Rupees 92,300 and odd. The firm has filed appeals against the aforesaid orders, which are pending before the Assistant Commissioner, Sales Tax, Bombay. In view of those appeals the recovery proceedings were stayed by the appellate authority.

7. During the pendency of the assessment proceedings, no formal intimation appears to have been given by or on behalf of the firm to the assessing authority that the firm was dissolved. It was on December 21, 1964 that in a letter written to respondent 1, one of the partners made a casual and fleeting reference to that fact: "you will also appreciate that the firm was dissolved 4 years back". It is however futile to pursue this line of inquiry because, on being called upon to produce the deed of dissolution, the partners did

produce deed showing that the firm was dissolved on May 20, 1962. Respondent 1 appears to have accepted the authenticity of the deed of dissolution and in fact, acting upon it, the sales-tax authorities cancelled the registration of the firm under the Sales Tax Acts with effect from June 16, 1962. We cannot now go behind the position that the firm was dissolved on May 20, 1962.

8. On November 24, 1965 the appellants filed a writ petition in the High Court of Bombay challenging the orders of re-assessment and assessment on various grounds. In view of the fact that the appeals filed by the firm before the Assistant Commissioner of Sales Tax were pending, the High Court did not decide the question whether the procedure prescribed by law was followed in the assessment proceedings and whether the orders were justified on merits. The only question which the High Court considered was whether the impugned orders were without jurisdiction as having been passed against a dissolved firm. By its judgment dated December 8, 1969 the High Court rejected the contention of the firm and held that in view of the provisions contained in the Bombay Sales Tax Acts of 1953 and 1959, it was permissible to assess a dissolved firm. The correctness of that finding is challenged by the appellants in this appeal by special leave.

9. The only question with which we are concerned in this appeal is whether the orders of re-assessment and assessment passed by respondent 1 are without jurisdiction by reason of the fact that the assessee firm was dissolved prior to the date on which those orders were passed. In fact, the very assessment and re-assessment proceedings for the relevant years were commenced after the dissolution of the firm. The notice under which those proceedings were started is dated November 20, 1963 while the firm was dissolved on May 20, 1962. We may mention that in a judgment to which we must immediately turn, this Court has taken the view that if under a statute a dissolved firm cannot be assessed to Sales Tax, it does not make any dif-

ference whether the proceeding was initiated before or after the dissolution. Thus, the true question for decision is whether a dissolved firm can be assessed or re-assessed under the Bombay Sales Tax Act, 1953 and the Bombay Sales Tax Act, 1959.

10. A similar question came up for decision before this Court in *State of Punjab v. M/s. Jullunder Vegetables Syndicate*, (1966) 2 SCR 457 = (AIR 1966 SC 1295). That was a case under the East Punjab General Sales Tax Act, 1948. The respondent firm therein was assessed to sales tax in 1953 but that order was set aside for want of jurisdiction. Fresh proceedings were then started for assessment but the firm was dissolved before the commencement of those proceedings. The firm was thereafter assessed and the order of the Sales-Tax Officer was confirmed in further proceedings with some modifications. On a reference the Punjab High Court set aside the assessment on the ground that the East Punjab General Sales-Tax Act, 1948 did not provide for a machinery for assessing a dissolved firm in respect of its pre-dissolution turnover. The judgment of the High Court was confirmed by this Court.

11. Since the learned counsel for the appellants has relied heavily on the aforesaid decision, it is necessary to analyse it closely. The Court, speaking through Subba Rao J., observed at the outset that the question as regards the validity of the assessment depended upon the relevant provisions of the particular Act. On examining the relevant provisions, namely, Sections 2(d), 4(1), 7(1), 16(b), 17 and Rule 40 the Court held that there was no provision in the statute expressly authorising the assessing authority to assess a dissolved firm. The Court then proceeded to find whether such a power could be gathered by necessary implication from the other provisions of the Act and held in the negative. Thus, by reason of the language and scheme of the Punjab Act, a dissolved firm could not be assessed. Relying on Sec. 2(d) which defined a dealer to include a firm, the Court held that though under the partnership law a

firm was not a legal entity, the firm was an independent assessable unit for the purposes of the Punjab Act. If that be so, on dissolution, the firm ceased to be a legal entity and could not be assessed in the absence of a statutory provision permitting the assessment of a dissolved firm. The Court found that there was a lacuna in the Punjab Act of 1948 which was filled up later by an amendment but that amendment was not retrospective. Finally, the Court touched upon the conflicting decisions of the High Courts on the point and observed that all of those decisions were over-burdened with the consequences of a contrary construction on the incidence of taxation and also their mixing up the question of the statutory power of assessing a dissolved firm with the liability of the partners to pay the tax so assessed on the firm before its dissolution. The reasons given by some of the High Courts in support of a contrary conclusion were rejected by this Court.

12. The Jullunder Vegetables Syndicate case (AIR 1966 SC 1295) is a clear and direct authority for the following propositions: (1) A dissolved firm cannot be assessed to sales tax unless the statute under which the assessment is made authorises the assessment either expressly or by necessary implication; (2) If, by definition, a firm is a dealer under an Act, it becomes a legal entity or an independent assessable unit for the purposes of that Act. If that be so, the firm ceases to be a legal entity on dissolution and thereafter, on principle it cannot be assessed to sales tax unless the statute so authorises expressly or by necessary implication; (3) Neither a provision requiring a dealer to inform the authorities if it discontinues its business, nor a provision imposing a joint and several liability on the dealer and its partners for the payment of tax, penalty or any other amount due under the Act or rules can be interpreted as conferring jurisdiction to assess a dissolved firm; (4) In interpreting a fiscal statute the court cannot proceed to make good the deficiencies, if any, in the statute: it shall interpret the statute as it stands and in case of doubt, it shall interpret it in a man-

ner favourable to the tax payer. The language of a taxing Act cannot be strained in order to hold a subject liable to tax.

13. The decision in the Jullunder case (AIR 1966 SC 1295) was followed by this Court, without more, in *Khushi Ram Behari Lal & Co. v. Assessing Authority, Sangrur*, (1967) 19 STC 381 (SC), and in *Additional Tahsildar, Raipur v. Gendalal*, (1968) 21 STC 263 (SC). *Khushi Ram's* case arose under the East Punjab General Sales Tax Act, 1948, the provisions of which were considered by this Court in the Jullunder case. *Gendalal's* case arose under the Central Provinces and Berar Sales Tax Act, 1947. The court did not examine the provisions of that Act separately, presumably because those provisions were considered by the M. P. High Court in *Lalji v. Asst. Commr., Sales tax, Raipur*, (1958) 9 STC 571 (Madh Pra) and the decision of the Madhya Pradesh High Court was expressly disapproved by this Court in the Jullunder case. The Madhya Pradesh High Court had relied upon Section 17 of the C. P. and Berar Sales Tax Act, corresponding to Section 16 (b) of the East Punjab Act, to sustain the continuity of the firm as a legal entity until information of dissolution was given to the prescribed authority. No other provision of the C. P. Act, apart from Section 17, appears to have been canvassed before this Court in support of the argument that it was permissible under that Act to assess a dissolved firm.

14. Applying the ratio in the Jullunder case we must examine the provisions of the two Bombay Acts in order to find whether those provisions, expressly or by necessary implication, authorise the assessment of a dissolved firm.

15. Turning first to the Act of 1953, Section 2 (6) of that Act defines a 'dealer', in so far as relevant, to mean any 'person' who carries on the business of selling or buying goods. This definition does not by itself make the firm a distinct assessable entity and the position obtaining under the general law that a firm is but compendious name for the partners who compose it remains out-

standing. But Section 3(35) of the Bombay General Clauses Act, 1904 defines 'person' as including "any company or association or body of individuals, whether incorporated or not". The provisions of the Bombay General Clauses Act apply to the interpretation of the Bombay Acts unless there is anything repugnant in the subject or context of the Act under review. There is no such repugnancy and therefore the word 'person' in Section 2(6) of the Act of 1953 must be taken to include a 'body of individuals' that a firm is. Not only is there nothing in the Act of 1953 which is repugnant to the notion that the firm could be a dealer, but Section 24 of that Act furnishes a strong indication for saying that the framers of the Act intended to recognise firms as a legal entity. That section provides that every dealer who is liable to pay the tax and who is an undivided Hindu family, an association or a club, society, firm or company, shall send to the prescribed authority a declaration stating the name of the person who shall be deemed to be the manager of such dealer's business. Section 24 would be meaningless in its reference to a 'firm', unless the fundamental assumption of the provision was that a firm as distinct from its partners is an independent assessable entity. That assumption is made good by the combined operation of Section 2(6) of the Act of 1953 and Section 3(35) of the Bombay General Clauses Act.

16. Since the Act of 1953 considers a partnership firm to be a legal entity, on the dissolution of the firm its legal personality would cease to exist. On the firm ceasing to have existence in the eye of law, there can be no assessment of the firm as such for, in the absence of an express statutory provision or a clear statutory intentment, a dead person cannot be assessed.

17. Section 2(2) of the Income-tax Act, 1922 defined an assessee as "a person by whom income-tax is payable". The Bombay High Court, in *Ellis C. Reid v. Commr. of Income-tax*, (1930) 5 ITC 100 = (AIR 1933 Bom 333) held that the definition in terms applied to living persons only, that the treasury had no

power to tax without the express permission of the legislature and therefore if an assessee failed to make a return of his income under Section 22(2), the income-tax officer had no power to make an assessment under Section 23(4) after the assessee's death. Seeing that, originally, in the Income-tax Act, 1922 there was no reference to the decease of a person on whom the tax was charged, the learned Chief Justice observed: "It must have been present to the mind of the legislature that whatever privileges the payment of income-tax may confer, the privilege of immortality is not amongst them", and that it was very difficult to assume that the omission in the Act as regards the power to tax a dead assessee was unintentional. Section 24B which was introduced in the Income-tax Act, 1922 to remove the lacuna pointed out in the Bombay judgment extends the legal personality of a deceased assessee for the duration of a previous year, so that income received by an assessee during the previous year and the income received by his heirs and legal representatives after his death but in the previous year can be brought to tax after his death. In *Commr. of Income-tax, Bombay City v. Amarchand N. Shroff*, (1963) 48 ITR (SC) 59 = (AIR 1963 SC 1448) this Court observed that the individual assessee under the Income-tax Act has ordinarily to be a living person, that there can normally be no assessment of a person after his legal personality ceases and that, apart from Section 24B, no assessment could be made on a dead person.

18. We must therefore proceed on the basis that the first appellant firm was an independent assessable entity under the Act of 1953 and that on its dissolution on May 20, 1962 its legal personality ceased to have existence. Is there then any provision in the 1953 Act which permits or contemplates the assessment of a firm after its dissolution? If not, the general rule would apply that a dead person cannot be assessed.

19. It is plausible that a distinction ought to be made between

the death of an individual and the dissolution of a firm. Human beings, as assesseees, are not generally known to court death to evade taxes. Death, normally, is not volitional and it is understandable that on the death of an individual, his liability to be assessed to tax should come to an end unless the statute provides to the contrary. With firms it is different, because a firm which incurs during its existence a liability to pay sales-tax may, with a little ingenuity, evade its liability by the voluntary act of dissolution. The dissolution of a firm could therefore be viewed differently from the death of an individual and the partners could be denied the advantage of their own wrong. But we do not want to strike this new path because the Jullunder case (AIR 1966 SC 1295) and the two cases which follow it have likened the dissolution of a firm to the death of an individual. Let us therefore proceed to examine the other provisions of the 1953 Act.

20. Section 5 of the 1953 Act provides that every dealer whose turnover exceeds the limits therein mentioned shall be liable to pay sales-tax. Sub-section (3) of Section 5 says that every dealer who has thus become liable to pay the tax "shall continue to be so liable until cancellation of his registration under sub-section (6) of Section 11, and upon such cancellation his liability to pay the tax shall cease". This provision shows that if a firm has incurred the liability to pay sales-tax, that liability continues until the cancellation of the registration. There may be a hiatus between the dissolution of the firm and the cancellation of its registration and during this interregnum the liability of the firm is expressly kept alive by the statute. Under Section 11(6), the prescribed authority has to cancel the registration with effect from the prescribed date if, inter alia, the business in respect of which a certificate has been granted under Section 11 has been discontinued or transferred. On being satisfied that the business has been discontinued or transferred, the authority concerned has undoubtedly to cancel the registration but the obligation to cancel the registration would arise not on

the statement of an assessee that the business has been discontinued or transferred but on the satisfaction of the authority that this is truly so. In other words, by virtue of Section 5(3), the mere fact of dissolution does not by itself bring to an end the firm's liability to be taxed.

21. Section 15(1) of the 1953 Act has an important bearing on the question under consideration. That section reads thus:

"15. (1) If in consequence of any information which has come into his possession the Collector is satisfied that any turnover in respect of sales or purchases of any goods chargeable to the tax has escaped assessment in any year or has been under assessed or assessed at a lower rate or any deductions have been wrongly made therefrom, the Collector may, in any case where such turnover has escaped assessment or has been under-assessed or assessed at a lower rate for the reason that the provisions of sub-section (1) of Section 2 of the Bombay Sales Tax (Validating Provisions) Act, 1957 were not then enacted, at any time, within eight years, and in any case where he has reason to believe that the dealer has concealed the particulars of such sales or purchases or has knowingly furnished incorrect returns, at any time within eight years and in any other case, at any time within five years of the end of that year, serve on the dealer liable to pay the tax in respect of such turnover a notice containing all or any of the requirements which may be included in a notice under sub-s. (3) of Sec. 14 and may proceed to assess or re-assess the amount of the tax due from such dealer and the provisions of this Act shall apply accordingly as if the notice were a notice served under that sub-section:

Provided that the amount of the tax shall be assessed after making the deductions permitted from time to time under the Bombay Sales Tax Act, 1946, the Bombay Sales Tax (No. 2) Ordinance 1952; and this Act, as the case may be, at the rates at which it would have been assessed had the turnover not escaped assessment or full assessment as the case may be:

Provided further that where in respect of such turnover or deduction, as the case may be, an order has already been passed under Section 30 or Section 31, the Collector shall make a report to the appropriate appellate or revising authority, as the case may be, which shall thereupon after giving the dealer concerned a reasonable opportunity of being heard, pass such order as it deems fit."

This provision leaves no doubt that the dissolution of a firm cannot operate as a bar to a fresh assessment of the turnover which had escaped assessment, provided that the action contemplated therein is taken within the specified period. In substance, Section 15(1) provides that if the Collector is satisfied that any turnover has escaped assessment or has been under-assessed or assessed at a lower rate or any deductions have been wrongly made therefrom, he can after serving a notice on the assessee proceed to assess or re-assess the amount of the tax due from him. It is a clear and necessary implication of Section 15(1) that even a dissolved firm can be assessed or re-assessed within the period mentioned therein. The dissolution cannot operate as a bar to the exercise by the Collector of his power to re-open an assessment and indeed it is difficult to conceive that in matters as vital to the administration of sales-tax as the assessment of suppressed turnovers, the legislature could have contemplated that the liability to re-assessment could be avoided by the erring firm by the simple expedient of winding up its affairs.

22. Section 15 (1) contains an important clause that action thereunder can be taken by the Collector after giving a notice to the assessee under Section 14(3) of the Act within the prescribed period. Once such a notice is given, the Collector gets the jurisdiction to assess or re-assess the amount of tax due from the dealer and all the provisions of the Act "shall apply accordingly as if the notice were a notice served under" Section 14(3). Section 14(3) speaks of the power of the Collector to assess the amount of tax due from the dealer after giving notice to him, if the Collector is not satisfied that the

returns furnished are correct and complete. The jurisdiction to assess or re-assess which is conferred by Section 15(1) is thus equated with the original jurisdiction to assess the dealer under Section 14. By this method, the continuity of the legal personality of the assessee is maintained in order to enable the assessment of turnover which has escaped assessment. It is no answer to a notice under Sec. 15 that the partners having dissolved the firm, the assessment cannot be re-opened. It puts a premium on one's credulity to accept that having created a special jurisdiction to assess or re-assess an escaped turnover, the legislature permitted that salutary jurisdiction to be defeated by the device of dissolution. The argument of the appellants really comes to this; suppress the turnover, evade the sales-tax, dissolve the firm and earn your freedom from taxation.

23. Importantly, the notice dated November 21, 1963 for re-opening the assessment for the period 1-4-1957 to 31-3-1958 was served on the firm under Section 15. On re-assessment, the firm was assessed to a sales-tax of Rs. 1,95,582.47 on sales suppressed during that period.

24. Section 15-A confers on the Collector analogous powers to assess or re-assess a dealer for taxes due prior to November 21, 1956 when the States were reorganised, if either no assessment was made for the prior period or if any turnover had escaped assessment. This provision, like the one contained in Section 15, is of general application and makes no exception in favour of dissolved firms. Therefore, if a firm was not assessed prior to the re-organisation of States or if any part of its turnover had escaped assessment, it is competent to the Collector to assess or re-assess the firm notwithstanding its subsequent dissolution. This is the necessary implication of Section 15A. It must follow as a corollary that the power to rectify a mistake apparent from the record can be exercised by the Collector under Section 35 of the Act of 1953 even after the dissolution of an assessed firm, though on conditions specified in the section. The section contains a compelling implica-

tion that evident errors can be corrected no matter whether the firm is in existence or is dissolved. Dissolution is not a panacea for liability to pay sales-tax.

25. A difficulty was raised on behalf of the appellants that on the dissolution of the firm the principle of agency would cease to apply as amongst the partners and therefore no partner would have the right to represent either the firm or any of the other partners in the proceeding under Section 15, commenced or continued after the dissolution of the firm. This question does not bear on the liability of a dissolved firm to be assessed or the power of the Collector to assess a dissolved firm under Section 15. It may perhaps be that in the assessment of a dissolved firm, each of the erstwhile partners may have a right to be heard because each of them would be interested in warding off a liability which may fall on them jointly and severally. But that is more a matter of procedure which the assessing authority must adopt in the assessment proceedings in order to give efficacy to the order which may eventually be passed in the proceedings. Who, in the assessment proceedings against a dissolved firm, has the right to be heard will not determine whether a dissolved firm can be assessed under the Act of 1953.

26. Sub-sections 3 (i) and 3 (ii) of Section 26 provide that when a firm liable to pay the tax is dissolved, it shall be liable to pay the tax on the goods allotted to any partner "as if" the goods had been sold to such partner, unless he holds a certificate of registration or obtains it within the prescribed period. This provision in terms envisages the assessment of a dissolved firm, though only to the limited extent and for the limited purpose that the goods allotted to a partner at the time of dissolution shall be deemed to have been sold to that partner. By the use of the words "as if", Section 26 (3) (ii) creates a fiction that the allotment of goods to a partner on dissolution of the firm shall be deemed to be a sale made by the dissolved firm to that partner. The fiction cannot be extended further than the sub-section

warrants but there is no fiction in regard to the liability of the dissolved firm to be assessed to sales-tax in respect of the goods thus deemed to be sold. The imposition of such a liability is in keeping with the general scheme of the Act, the various provisions of which show that the assessment of a dissolved firm is within the clear intendment of the statute.

27. The construction which we have placed on these provisions of the 1953 Act does no violence to the familiar principle which in *Cape Brandy Syndicate v. Commr. of Inland Revenue*, (1921) 12 Tax Cas 358 was expressed thus by Rowlatt J.:

"In a taxing statute one has to look at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used."

This principle was approved and adopted by this Court in several decisions: *A. V. Fernandez v. State of Kerala*, 1957 SCR 837 = (AIR 1957 SC 657), *Commr. of Income-tax, Bombay v. Provident Investment Co. Ltd.*, 1957 SCR 1141 = (AIR 1957 SC 664), *Commr. of Income-tax, Madras v. Ajax Products Ltd.*, (1965) 1 SCR 700 = (AIR 1965 SC 1358), *Commr. of Income-tax, Gujarat v. M/s. B. M. Kharwar*, (1969) 1 SCR 651 = (AIR 1969 SC 812), *Commr. of Income-tax, West Bengal v. Vegetable Products Ltd.*, (1973) 1 SCC 442 = (AIR 1973 SC 927). The principle is variously expressed by saying that in fiscal statutes one must have regard to the letter of the law and not to the spirit of the law, that the subject cannot be taxed by inference or analogy, that in a taxing Act there is no governing principle to look at and one has simply to go on the Act itself to see whether the tax claimed is that which the statute imposes, that while construing taxing Acts it is not the function of the court to give to the words used a strained and unnatural meaning and that the subject can be taxed only if the revenue satisfies the court that the case falls strictly within the provisions of the law.

28. The principle thus stated has hardly ever been doubted but it is necessary in the application of that principle to remember that though the benefit of an ambiguity in a taxing provision must go to the subject and the taxing provision must receive a strict construction, "that is not the same thing as saying that a taxing provision should not receive a reasonable construction." *Commr. of Wealth Tax v. Kripashankar*, (1971) 2 SCC 570 = (AIR 1971 SC 2463). If the statute contains a lacuna or a loophole, it is not the function of the court to plug it by a strained construction in reference to the supposed intention of the legislature. The legislature must then step in to resolve the ambiguity and so long as it does not do so, the tax-payer will get the benefit of that ambiguity. But, equally, courts ought not to be astute to hunt out ambiguities by an unnatural construction of a taxing section. Whether the statute, even a taxing statute, contains an ambiguity has to be determined by applying normal rules of construction for interpretation of statutes. As observed by Lord Cairns in *Pryce v. Mommmonthshire Canal and Rly. Cos.*, (1879) 4 AC 197 cases which have decided that Taxing Acts are to be construed with strictness, and that no payment is to be exacted from the subject which is not clearly and unequivocally required by Act of Parliament to be made, probably meant little more than this, that, inasmuch as there was not any a priori liability in a subject to pay any particular tax, nor any antecedent relationship between the tax payer and the taxing authority, no reasoning founded upon any supposed relationship of the tax-payer and the taxing authority could be brought to bear upon the construction of the Act and therefore, the tax-payer had a right to stand upon a literal construction of the words used, whatever might be the consequences.

29. The true implication of the principle that a taxing statute must be construed strictly is often misunderstood and the principle is unjustifiably extended beyond the legitimate field of its operation. Indeed, the more well expressed the principle as in the *Cape Brandy case* ((1921) 12

Tax Cas 358) greater the reluctance to see its limitations. In that famous passage marked by a happy turn of phrase, Rowlatt J. said, "there is no equity about a tax. There is no presumption as to a tax." There is no equity about a tax in the sense that a provision by which a tax is imposed has to be construed strictly, regardless of the hardship that such a construction may cause either to the treasury or to the tax-payer. If the subject falls squarely within the letter of law he must be taxed, howsoever inequitable the consequences may appear to the judicial mind. If the Revenue seeking to tax cannot bring the subject within the letter of law, the subject is free no matter that such a construction may cause serious prejudice to the Revenue. In other words, though what is called equitable construction may be admissible in relation to other statutes or other provisions of a taxing statute, such a construction is not admissible in the interpretation of a charging or taxing provision of a taxing statute. Speaking for the Court in *C. I. T. Madras v. Ajax Products Ltd.*, (1965) 1 SCR 700 at page 706 = (AIR 1965 SC 1358 at page 1362) Subba Rao J., after citing the passage from the judgment of Rowlatt J. in the *Cape Brandy case* said: "To put it in other words, the subject is not to be taxed unless the charging provision clearly imposes the obligation".

30. We are concerned in this case to determine not whether a particular turnover can be brought to sales-tax but whether if the turnover was liable to be charged to sales-tax, the firm can be assessed to tax after its dissolution. In other words, we are concerned with a provision which prescribes the machinery for the computation of tax and not with a charging provision of the Sales Tax Acts.

31. In *C. I. T. Bengal v. Mahaliram Ramjeedas*, 67 Ind App 239 at p. 247 = (AIR 1940 PC 124 at pp. 126-127) it was held by the Privy Council that Section 34 of the Income-tax Act, 1922, although a part of a taxing Act, imposed no charge on the subject but dealt merely with the machinery of assessment. Lord Nor-

mand who delivered the judgment of the Judicial Committee observed: "In interpreting provisions of this kind the rule is that that construction should be preferred which makes the machinery workable, *ut res valeat potius quam pereat*." In *India United Mills v. Commr. of Excess Profits Tax*, (1955) 1 SCR 810 at p. 816 = (AIR 1955 SC 79 at p. 82) this Court held that Section 15 of the Excess Profits Tax Act was not a charging section but a machinery section, "And a machinery section should be so construed as to effectuate the charging sections". Section 15 was intended to vest in the Excess Profits Tax Officer a power to amend the assessment, when it was found that the relief granted was in excess of what the law allowed. One of the sections under which relief could be granted was Section 26 (3). This Court held that Section 15 must be so interpreted as to confer a power on the Excess Profits Tax Officer to revise the assessment when relief had been erroneously granted under Section 26 (3). In *Gursahai Saigal v. C. I. T. Punjab* (1963) 3 SCR 893 = (AIR 1963 SC 1062) an assessee was called upon to pay interest under Section 18-A (8) of the Income-tax Act, 1922 for failure to make an estimate of his income and pay tax according to that estimate under Section 18A (3). The assessee relied on the rule of construction formulated by Rowlatt J. in the *Cape Brandy* case and contended that he could not be charged with interest as it was not possible to calculate interest in accordance with sub-section (6) by reason of his not having paid tax at all. This Court approved the ratio of the Privy Council in *Mahaliram Ramjee-das's case* and held that it was well-recognised that the rule of construction on which the assessee relied applied only to a taxing provision and had no application to all provisions in a taxing statute. The Court observed that the rule did not apply to a provision not creating the charge for the tax but laying down the machinery for its calculation or procedure for its collection. Sarkar J., speaking for the Court, said: "The provisions in a taxing statute dealing with machinery for assessment have to be

construed by the ordinary rules of construction, that is to say, in accordance with the clear intention of the legislature which is to make a charge levied effective." (p. 899). Sub-section (6) was accordingly read by the court in a manner which made it workable, thereby preventing the clear intention of sub-section (8) being defeated.

32. It is indisputable that the first appellant firm was liable to be charged to sales-tax on its business turnover. The charging provisions are contained in Chapter III of the Act of 1953 and Chap. II of the Act of 1959. In this appeal, we have to construe the machinery provisions of those Acts. In accordance with the view taken in the cases cited above, the machinery sections ought to be construed so as to effectuate the charging sections. The construction which we have placed on the machinery provisions of the 1953 Act will give meaning and content to the charging sections, in the sense that our construction will effectuate the provision contained in the charging sections. The resourcefulness and ingenuity which go into well-timed dissolution of firms ought not to be allowed to be used as convenient instruments of tax evasion. As observed by Lord Dunedin in *Whitney v. Commrs. of Inland Revenue*, (1925) 10 Tax Cas 88 "A statute is designed to be workable, and the interpretation thereof by a court should be to secure that object, unless crucial omission or clear direction makes that end unattainable." Far from there being any crucial omission or a clear direction in the present case which would make the end unattainable, the various provisions to which we have drawn attention leave it in no doubt that a dissolved firm can be assessed on its pre-dissolution turnover.

33. The Bombay Sales Tax Act, 1959 presents no difficulty as its provisions are even clearer than those of the 1953 Act. Section 2 (11) of the 1959 Act defines a dealer to mean any "person who carries on the business of buying or selling goods..." Under Section 2 (19), "person" includes, inter alia, a firm. There is therefore no doubt that a firm is a

distinct assessable entity under the 1959 Act also.

34. Section 19 (3) of the 1959 Act puts the matter under inquiry beyond all doubt by providing:

"Where a dealer, liable to pay tax under this Act, is a firm, and the firm is dissolved, then every person who was a partner shall be jointly and severally liable to pay to the extent to which he is liable under Section 18, the tax (including any penalty) due from the firm under this Act or under any earlier law, up to the time of dissolution, whether such tax (including any penalty) has been assessed before such dissolution but has remained unpaid, or is assessed after dissolution."

This provision in terms envisages the assessment of a dissolved firm by providing that erstwhile partners of a dissolved firm shall be liable jointly and severally to pay the tax and penalty due from the firm whether the tax, including any penalty, has been assessed before or after the dissolution. The assessment which the subsection speaks of is assessment of the firm as such because where the assessment is made on the partners themselves, it was unnecessary to provide that they shall be liable jointly and severally to pay the tax assessed on them. The joint and several liability of the partners in respect of taxes which the firm is liable to pay is provided by Section 18. The purpose of Section 19 (3) is to make the partners jointly and severally liable even if the firm is assessed to sales-tax after its dissolution. Sec. 19 (3) would otherwise be otiose. Thus, S. 19 (3) of the 1959 Act makes explicit what was implicit in the Act of 1953.

35. It is relevant, though we did not refer to this aspect while dealing with the provisions of the 1953 Act, that Section 19 (3) of the 1959 Act contains a clear indication that the legislature intended that a dissolved firm could be assessed under the 1953 Act also. Section 19 (3) speaks of the liability of partners for the tax due from a dissolved firm and provides that they shall be jointly and severally liable to pay the tax due from the firm under the Act of 1959 or "under any earlier law",

whether such tax has been assessed before or after dissolution. Section 2 (12) of the 1959 Act defines "earlier law" to mean, inter alia, the Bombay Sales Tax Act, 1953. Thus, one of the postulates of Section 19 (3) at any rate is that a dissolved firm could be assessed under the 1953 Act. Such a postulate accords with the principle that if the legislature provided for a charge of sales-tax, it could not have intended to render that charge ineffective by permitting the partners to dissolve the firm, an easy enough thing to do. Nothing, in fact, would be easier to evade a tax liability than to declare that the firm, admittedly liable to pay tax, has been dissolved. Section 19 (3) of the 1959 Act not only makes clear what was necessarily implied in the 1953 Act, but it throws additional light on the true construction of the earlier law. But we thought it advisable to keep Section 19 (3) of the 1959 Act apart while construing the 1953 Act because it is the courts, not the legislature, who have to construe the laws of the land authoritatively. As said in *Craies on Statute Law*, "Except as a parliamentary exposition, subsequent Acts are not to be relied on as an aid to the construction of prior unambiguous Acts." (6th Ed., p. 146). The limited use which may be made of the language of Section 19 (3) of the 1959 Act, though such a course is unnecessary, is for saying that it serves to throw some light on the Act of 1953, in case the argument is that the Act of 1953 is ambiguous.

36. Section 19 (3) being quite clear and explicit, it is unnecessary to dwell on the other provisions of the Act of 1959 in order to show that a dissolved firm can be assessed under it. We may only point out that the Act of 1959 contains provisions similar to those in Sections 15, 15A and 35 of the Act of 1953 on which we have dwelt at some length. Those provisions can be found in Secs. 35, 35A and 62 of the Act.

37. The view taken by a Full Bench of the Madras High Court in *The Sales Tax Officer (XIX), Enforcement Branch, Bombay v. K. M. S. Mari Chettiar*, (1975) 35 STC 148 = (1975 Tax LR 1509 (Mad) FB) that a

dissolved firm can be assessed under the Act of 1959 is, in our opinion, correct though it was wholly unnecessary to say that the words "is assessed after dissolution" occurring in Section 19 (3) should be read as "is assessed after dissolution as if the firm exists". Such an addition is superfluous and serves to make the meaning of the sub-section no clearer than it is.

38. For these reasons, we uphold the judgment of the Bombay High Court and dismiss the appeal with costs.

GUPTA, J. (minority view):—

39. I regret my inability to agree.

40. This appeal by special leave is directed against an order of the Bombay High Court dismissing the writ petition filed by the appellants before us for quashing certain assessment orders and demand notices issued under the Bombay Sales Tax Acts of 1953 and 1959. Of the five appellants, appellants 2 to 5 are the partners of a dissolved firm, and the name of the dissolved firm appears as the first appellant. The firm had another partner who died before the writ petition was filed. The firm, M/s. Murarilal Mahabir Prasad, constituted on December 3, 1953, used to carry on business at Bombay as importers and commission agents and also as wholesale dealers in chemicals, dyes and various other goods. The firm was registered as a dealer both under the Bombay Sales Tax Act, 1953 and the Bombay Sales Tax Act, 1959 (hereinafter referred to as the 1953 Act and the 1959 Act) and had been assessed by the Sales Tax authorities for the period from July 1953 to March 31, 1958 on the basis of the returns filed by it. On November 10, 1960 the Sales Tax Officer seized a number of documents from the office of the firm. According to the appellants the firm discontinued its business from the month of May, 1961. On May 20, 1962 the firm was dissolved. On June 26, 1962 the Sales Tax Officer cancelled the firm's registration certificate under the Central Sales Tax Act as well as the registration certificate, authorisation and licence under the Bombay Sales Tax Act which the partners of the

firm had surrendered. On November 20, 1963 the Sales Tax Officer issued two notices to the firm, one asking for elucidation of certain items in the books of accounts seized, and the other under Sec. 15 of the 1953 Act calling upon the firm to show cause why the assessment already made for the period April 1, 1957 to March 31, 1958 should not be reopened. It is not relevant to the question arising for decision in this case and therefore not necessary to recount all that happened before August 31, 1965 on which date the Sales Tax Officer passed five orders, all against the dissolved firm: the first was a reassessment order for the year April, 1957 to March 31, 1958 on the ground that certain sales and purchases during that period had been concealed, and the other four were assessment orders for subsequent years covering the period from April 1, 1958 to March 31, 1961. On these five orders a total sum of Rs. 6,56,365/47p. was found due from the firm. On October 22, 1965 the demand notices issued upon these assessment orders, all in the name of the dissolved firm, were affixed to the premises in which the firm had its office before it was dissolved. The partners of the defunct firm filed a writ petition in the Bombay High Court challenging as invalid the assessment orders and the demand notices issued in the name of the dissolved firm which was dismissed. In this appeal the appellants question the correctness of the order of the High Court dismissing the writ petition.

41. The point that was urged before the High Court and also canvassed in this appeal is that there is no provision either in the 1953 Act or in the 1959 Act which permits the Sales Tax authorities to assess or reassess a dissolved firm. The dates mentioned above disclose that the impugned orders of the Sales Tax Officer were all made after the firm was dissolved. The respondents' contention is that 'firm' in the context of the 1953 Act or the 1959 Act mean only the partners of the firm, and that the firm, if at all an assessable unit, continues to be so even after its dissolution in respect of its pre-dissolution turnovers. The first

question therefore is whether a firm is a distinct assessable unit under either of the two Acts and, if it is so, the next question that arises is, whether it remains so even after its dissolution. This leads to an examination of the provisions of the two Acts.

42. Taking the 1953 Act first, Sec. 2 (6) of the Act defines a dealer. The relevant part of the definition is as follows:

"Dealer means any person who carries on the business of selling or buying goods..... and includes.....any society, club or association which sells goods to or buys goods from its members."

This definition of dealer does not specifically include a firm. Under the general law a firm is not a distinct legal entity but a compendious name for all its partners. The definition includes an association, but it is limited to such associations only which sell goods to or buy goods from its members. A Firm carrying on the business of selling or buying goods would be a dealer according to this definition only if it could be called a 'person.' The Bombay General Clauses Act, 1904 defines 'person' in Sec. 3 (35) as including "any company or association or body of individuals, whether incorporated or not." This definition of 'person' will include a firm which is a body of individuals "unless there is anything repugnant in the subject or context" as the opening words of Sec. 3 of the Bombay General Clauses Act indicate. It is thus necessary to find out if there is any provision in the 1953 Act which repels the notion of a firm being a 'person'.

43. In this case, as stated earlier, the firm was registered as a dealer both under 1953 and 1959 Acts, but the question remains whether the registration certificate was legally for the benefit of the partners and not the firm as such. Sec. 5 of the 1953 Act provides, inter alia, that every dealer whose turnover exceeds the amount specified in the section is liable to pay tax under this Act on his turnover. Sec. 11 requires that a dealer carrying on business and liable to pay tax under the Act must apply for registration and get a certificate of

registration from the prescribed authority. Sec. 13 (6) provides that the prescribed authority shall cancel the registration of a dealer on the application of the dealer if he has discontinued or transferred his business, or if during any year his turnover does not exceed the limits specified in Sec. 5 (1). Section 13 requires every registered dealer to furnish return of his turnover. Sec. 14 provides, inter alia, that the amount of the tax due from a registered dealer shall be assessed separately for each year. S. 15 empowers the Collector to serve on the dealer within the period specified in the section a notice in case his turnover had escaped assessment and to assess or reassess the amount of tax due from such dealer. Section 16 contains provisions for the payment and recovery of tax. None of these sections appears to be repugnant to the firm being a dealer as defined in S. 2 (6).

44. It was however argued on behalf of the respondents that the definition of 'dealer' in Sec. 2 (6) which includes an association that sells goods to or buys goods from its members, by implication excludes an association of persons, that a firm is, which does not sell goods to or buy goods from its members, and admittedly the firm concerned in this case did not. This contention is similar to that raised on behalf of the revenue before the Bombay High Court in *State v. R. M. Shah & Co.*, (1958) 9 STC 683 (Bom) and in repelling this contention the Bombay High Court observed:

"The reference to any society, club or association, which sells goods to or buys goods from its members in the definition of the word dealer has a special purpose of its own and that is to include within the definition of the word 'sales' made as mentioned therein which otherwise may not amount to sales and could not have been intended to exclude the operation of the definition as given in the General Clauses Act. That also appears to be abundantly clear from the fact that dealings between the members of the club, society or association, which normally may not amount to sales are intended to be included in the definition of 'sale'."

I think that the lines quoted above effectively answer the respondents' contention.

45. Apart from the provisions we have referred to so far, there are other sections in the 1953 Act which indicate positively that a firm could be a dealer under the Act. Section 24 of the 1953 Act reads as follows:

"24. Dealer to declare the name of manager of his business.— Every dealer who is liable to pay the tax and who is an undivided Hindu family, an association or a club, society, firm or company or who carries on business as the guardian or trustee or otherwise on behalf of another person, shall within the prescribed period send to the prescribed authority a declaration in the prescribed manner stating the name of the person who shall be deemed to be the manager of such dealer's business for the purposes of this Act. Such declaration may be revised from time to time."

This section requires every dealer who is liable to pay the tax and who is an undivided Hindu family, an association or a club, a society, a firm or a company to declare in the prescribed manner the name of the manager of such dealer's business. Section 24 thus makes it clear that a firm can be a dealer, and does not seem to be limited in its application to such firms that buy goods from or sell goods to their partners. Section 26(3) which is also relevant in this context provides that when "a firm liable to pay the tax is dissolved" or when an undivided Hindu family liable to pay the tax is partitioned, "such firm or family, as the case may be, shall be liable to pay the tax on the goods allotted to any partner or member thereof as if the goods had been sold to such partner or member unless he holds a certificate of registration or obtains it within the prescribed period". This section clearly indicates that a firm as such may be a dealer under the Act.

46. Sec. 36A appears to put the issue beyond doubt. It is in Chapter VIII which deals with offences and penalties. The section provides that where an offence under this Act has been committed by a company, every person who at the

time the offence was committed was in charge of, and was responsible to the company, as well as the company shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly. The section includes an explanation which states that for the purpose of this section,— (a) "company" means a body corporate, and includes a firm or other association of individuals; and (b) "director" in relation to a firm means a partner in the firm. This section making the persons in-charge of the business of the firm when the offence was committed and the firm as such, both guilty of the offence, is clearest indication that a firm as distinct from its partners could be a dealer under the 1953 Act.

47. Turning now to the 1959 Act which came into operation from January 1, 1960, "dealer" as defined in Section 2 (11) of this Act is a little differently worded from the definition in the 1953 Act, but in substance there is no difference between the two. Here also the 'dealer' is a person who carries on the business of buying and selling goods and it includes, among others, any society, club or other association of persons which buys goods from or sells goods to its members. Here again, the definition does not specifically mention a firm. But the 1959 Act itself defines 'person' in Section 2 (19), and it is not necessary to refer to the Bombay General Clauses Act. 'Person' as defined in Section 2 (19) includes "any company or association or body of individuals whether incorporated or not, and also Hindu undivided family, a firm and a local authority". Section 18 of the 1959 Act provides:

"Notwithstanding any contract to the contrary, where any firm is liable to pay tax under this Act, the firm and each of the partners of the firm shall be jointly and severally liable for such payment:

Provided that, where any such partner retires from the firm, he shall be liable to pay the tax and the penalty (if any) remaining unpaid at the time of his retirement, and any tax due up to the date of retirement though unassessed at that date." In plain terms this section recognizes the liability of a firm to pay tax as

distinct from the liability of its partners. Clearly, therefore, a firm can be a dealer also under the 1959 Act.

48. The question that now remains to be answered is whether a firm as such continues to be liable to pay tax under these Acts even after its dissolution on its pre-dissolution turnovers. S. 15 of the 1953 Act provides, inter alia, that in the case of escaped assessment or under-assessment or assessment at a lower rate or where any deductions have been wrongly made from the turnover, the Collector may within the period specified in the section proceed to assess or re-assess the amount of the tax due after serving a notice on the dealer concerned. This is a provision, it was argued, which shows that it is permissible to proceed against a dissolved firm because under the section the Collector can proceed to assess or re-assess the amount of tax due within the prescribed period, and no exception has been made for firms which may have been dissolved before the expiry of that time. This argument overlooks that the foundation of the Collector's jurisdiction is the notice which must be served on the dealer before the Collector proceeds against him, and 'dealer' has been defined in the Act as a person who carries on the business of selling or buying goods. In a case, as the one before us, where the dealer was a firm dissolved before the notice was issued, there is no person carrying on the business of selling or buying goods on whom the notice can be served. If the section admits of a construction as suggested on behalf of the respondents, then a notice under the section in the name of a dead man who used to be a dealer when alive, would also be effective if issued within the specified period. I do not think that position can be maintained. The question here is not how and against whom the dues of a dissolved firm can be realised, but whether the firm as such can be proceeded against after it has been dissolved. Section 35 of the 1959 Act is in terms similar to Section 15 of the 1953 Act.

49. Section 18 of the 1959 Act makes the firm as well as each of its partners jointly and severally liable

for the tax payable by the firm. Sub-sec. (3) of Sec. 19 of the 1959 Act reads:

"Where a dealer, liable to pay tax under this Act, is a firm, and the firm is dissolved, then every person whom was a partner shall be jointly and severally liable to pay to the extent to which he is liable under Section 18, the tax (including any penalty) due from the firm under this Act or under any earlier law, up to the time of dissolution, whether such tax (including any penalty) has been assessed before such dissolution but has remained unpaid, or is assessed after dissolution."

Section 19 (3) thus provides that on the dissolution of a firm, every person who was a partner shall be jointly and severally liable to pay the tax including any penalty due from the firm under the 1959 Act or under any earlier law upto the time of dissolution, whether such tax including penalty has been assessed before the dissolution of the firm and has remained unpaid, or is assessed after dissolution. "Earlier law" as defined in Section 2 (12) of the 1959 Act includes, inter alia, the 1953 Act. Sec. 19 (3) of the 1959 Act makes the erstwhile partners jointly and severally liable for the tax due from a dissolved firm but does not say that assessment or recovery proceedings may be initiated or continued against a firm as such even after its dissolution.

50. A Full Bench of the Madras High Court in *Sales Tax Officer v. K. M. S. Mari Chettiar*, (1975) 35 STC 148 = (1975 Tax LR 1509 Mad (FB)) held that Section 19 (3) of the Bombay Sales Tax Act, 1959 provides a procedure for assessing a defunct firm by deeming it as continuing to exist for purposes of assessment. This is what the Full Bench observed:

"It seems to us that the expression "whether such tax has been assessed before such dissolution but has remained unpaid or is assessed after dissolution" is clearly indicative of the fact that the legislature addressed its mind to assessment and collection of tax not only from an existing firm but also from a defunct

firm in respect of its transactions when the firm existed. There can be no doubt that charge, assessment and collection, though they are all related, have got to be separately provided for. But such provision may be express or implied. The implication must be clear and the circumstances should warrant it to be necessary. The words "is assessed after dissolution", to our minds, are not ambiguous and are capable of being understood as "is assessed after dissolution as if the firm exists". No other construction appears to us to be reasonable. The object of the legislature being clear, namely, that where the joint and several liability of the partners of a firm has been declared, it is followed by a provision to quantify it by laying down the procedure therefor and the provision so laid down provides both for assessment and collection of tax from a defunct firm."

I do not think Sec. 19 (3) can bear such a construction. It allows the dues of a firm to be assessed or collected even after its dissolution but in my opinion it is not permissible to read in this provision the additional words "as if the firm exists." To provide that the tax due from a firm may be assessed or collected after its dissolution is not the same thing as allowing the assessment or recovery proceeding to be started or continued against the dissolved firm. As Subba Rao J. pointed out in *State of Punjab v. M/s. Jullundur Vegetables Syndicate*, (1966) 2 SCR 457 = (AIR 1966 SC 1295) to which I shall presently refer in more detail — "the question of the statutory power of assessing a dissolved firm" is not to be 'mixed up' with the liability of the partners. A firm under the two Acts we are concerned with is a distinct assessable entity; on the dissolution of the firm that entity ceases to exist, unless the statute by a fiction of law keeps it alive for any specified purpose. For instance, Section 189 (1) of the Income-tax Act, 1961 states:

"Where any business or profession carried on by a firm has been discontinued or where a firm is dissolved, the Income-tax Officer shall make an assessment of the total income of the firm as if no such discontinuance or

dissolution had taken place, and all the provisions of this Act, including the provisions relating to the levy of a penalty or any other sum chargeable under any provision of this Act, shall apply, so far as may be, to such assessment."

There is no such provision either in the 1953 or in the 1959 Act. In this context it may be relevant to refer to Sec. 34 of the 1959 Act which provides:

"Where in respect of any tax (including any penalty) due from a dealer under this Act or under any earlier law, any other person is liable for the payment thereof under Section 19, all the relevant provisions of this Act or, as the case may be, of the earlier law, shall in respect of such liability apply to such person also, as if he were the dealer himself."

Therefore all the provisions relating to the assessment or recovery of tax including provisions requiring service of notice on the assessee would, in the case of a dissolved firm, apply to the erstwhile partners and all proceedings intended against the firm must be taken against them. Neither the 1953 Act nor the 1959 Act contains any provision permitting assessment or recovery proceedings being taken against a dissolved firm.

51. The cases cited at the bar on this question may now be examined. The appellants' case rests on the decision of this Court in *State of Punjab v. M/s. Jullundur Vegetables Syndicate*, (AIR 1966 SC 1295). In this case the respondent firm liable to pay sales tax under the East Punjab General Sales Tax Act, 1948 was dissolved before assessment was made. The Sales Tax Officer however proceeded to complete the assessment against the dissolved firm. The question therefore arose as to the statutory rights of a taxing authority to assess a dissolved firm in respect of its predissolution turnover. In the aforesaid Act, 'dealer' was defined as "any person, firm or Hindu Joint Family, engaged in the business of selling or supplying goods in East Punjab.....". Rule 40 of the East Punjab General Sales Tax Rules, 1949 provided that "a dealer and his part-

ner or partners shall be jointly and severally responsible for payment of the tax, penalty, or any amount due under the Act or these Rules." It was held that though under the partnership law a firm was not a legal entity but consisted of individual partners for the time being, under the East Punjab General Sales Tax Act, 1948 it was a legal entity and, that being so, on dissolution the firm ceased to exist. It was observed that unless there was a statutory provision permitting the assessment of a dissolved firm there was no scope for assessing the firm which ceased to have a legal existence. Referring to R. 40 of the East Punjab General Sales Tax Rules, 1949, it was held that this only imposed a joint and several liability on the dealer and its partners for the payment of tax, penalty or any amount due under the Act or the Rules and that it did not "provide for a case of the dissolution of the firm and the assessment of the dissolved firm". This Court held further that unless there was a provision expressly empowering the assessing authority to assess a dissolved firm in respect of its turnover before its dissolution or unless such a power could be gathered by necessary implication from the other provisions of the Act, the assessment proceeding against the dissolved firm was not maintainable.

52. The decision in Jullunder Vegetables case (AIR 1966 SC 1295) was followed by this Court in Khushi Ram Bihari Lal & Co. v. Assessing Authority, Sangrur, (1967) 19 STC 381 (SC). This also was a case under the East Punjab General Sales Tax Act, 1948. It was held that an assessment of a dissolved firm, whether the proceeding was initiated before or after the dissolution of the firm, was unsustainable.

53. In Additional Tahsildar, Raipur v. Gendalal, (1968-21 STC 263) (SC) this Court in an appeal from the High Court of Madhya Pradesh, again following the Jullunder Vegetables case (AIR 1966 SC 1295), affirmed the decision of the High Court quashing the orders of assessment against a dissolved firm. In this case, the firm before its dissolution was registered

as a dealer under the Central Provinces and Berar Sales Tax Act, 1947.

54. It was contended before us on behalf of the respondents that though the 1953 Act and the 1959 Act contained no express provision permitting a dissolved firm to be taxed, it should be held that the Acts authorised such a course by necessary implication. In answer the appellants relied on A. V. Fernandez v. State of Kerela, (1957) SCR 837 = (AIR 1957 SC 657) in which it was held that if the revenue satisfies the court that the case falls strictly within the provisions of the law, then only the subject can be taxed and that no tax can be imposed by inference or by analogy or by trying to probe into the intentions of the legislature and by considering what was the substance of the matter. This decision was followed by this Court in Commr. of Income-tax v. Provident Investment Co. Ltd., (1957) 32 ITR 190 = (AIR 1957 SC 664) where it was held that in construing fiscal statutes and in determining the liability of the subject to tax, one must have regard to the strict letter of the law and the true legal position arising out of the transaction in question.

55. Counsel for the respondents pointed out that this Court in Gursahai Saigal v. Commr. of Income-tax, Punjab, (1963) 48 ITR (SC) 1 = (AIR 1963 SC 1062) observed referring to A. V. Fernandez v. State of Kerala, 1957 SCR 857 = (AIR 1957 SC 657) and Commr. of Income-tax v. Provident Investment Co. Ltd., (1957) 32 ITR 190 = (AIR 1957 SC 664) that the rule of construction stated in these two cases "applies only to a taxing provision and has no application to all provisions in a taxing statute. It does not, for example, apply to a provision not creating a charge for the tax but laying down the machinery for its calculation or procedure for its calculation. The provisions in a taxing statute dealing with the machinery for assessment have to be construed by the ordinary rules of construction, that is to say, in accordance with clear intention of the legislature which is to make a charge levied effective." Gursahai's case refers to the judgment of the Privy Council in Commr. of Income-

tax v. Mahali Ram Ramji Das, (1940) 8 ITR 442 = (AIR 1940 PC 124) where a similar principle has been stated, and the following observation of Lord Dunedin in *Whitney v. Commissioner of Inland Revenue*, (1925) 10 Tax Cas 88 at p. 110:

"A statute is designed to be workable, and the interpretation thereof by a court should be to secure that object, unless crucial omissions or clear direction makes that end unattainable. Now, there are three stages in the imposition of a tax; there is the declaration of liability, that is the part of the statute which determines what persons in respect of what property are liable. Next, there is the assessment. Liability does not depend on assessment. That, ex hypothesi, has already been fixed. But assessment particularises the exact sum which a person liable has to pay. Lastly come the methods of recovery, if the person taxed does not voluntarily pay."

56. On the authority of *Gursahi's case* (AIR 1963 SC 1062) (supra) it was submitted that though under the Acts of 1953 and 1959 a firm might be a separate legal entity and a distinct assessable unit, if its liability to pay tax arose before it was dissolved, we should interpret the provisions of the Acts in a manner to effectuate the charging provision, and that we ought to prefer a construction which would make the machinery of assessment workable. This only means that we should permit a dissolved firm to be proceeded against because the liability had arisen before the dissolution. I have already said that it is open to the legislature by a legal fiction to keep alive a dissolved firm for some definite purpose. I have also referred to the relevant provisions of the Acts, including those making the erstwhile partners liable for the dues of the dissolved firm; I have found no provision like Section 189(1) of the Indian Income-tax Act, 1961 in these Acts, and nothing that expressly or by implication permits action against the dissolved firm itself.

57. A dissolved firm may be equated with a dead person; both cease to be assessable units. The apprehension that the firm may be dis-

solved voluntarily in order to avoid liability should not, in my opinion, make any difference in principle; a man who takes his own life is in no worse position than one who dies of a natural cause, so far as the tax dues are concerned. As for avoidance of liability, it is up to the Legislature that created the liability to prevent evasion. Section 19(3) of the 1959 Act which makes the erstwhile partners of a dissolved firm jointly and severally liable for the tax (including any penalty) due from the firm, was obviously enacted with that purpose; but making the partners liable for the dues of a dissolved firm does not mean that the dissolved firm as such can be assessed. Therefore the assessment orders made and the demand notices issued in the name of the dissolved firm in the instant case must be held to be invalid.

58. The appeal is accordingly allowed with costs.

ORDER

59. In view of the decision of the majority, the appeal is dismissed with costs.

Appeal dismissed.

AIR 1976 SUPREME COURT 331

(From (1) AIR 1972 All 200 (FB);

(2) Allahabad)*

A. N. RAY, C. J., K. K. MATHEW, V. R. KRISHNA IYER AND S. MURTAZA FAZL ALI, JJ.

(1) In Civil Appeals Nos. 1940-41 of 1972: *Nasiruddin, Appellant v. State Transport Appellate Tribunal, Respondent*, and

(2) In Criminal Appeal No. 254 of 1974: *Ramai, Appellant v. State of Uttar Pradesh, Respondent*.

Civil Appeals Nos. 1940-41 of 1972 and Criminal Appeal No. 254 of 1974, D/- 29-8-1975.

(A) United Provinces High Courts (Amalgamation) Order, 1948, Para 14 — Expression "new High Court and

*(Cri. Revn. No. 270 of 1973, D/- 28-3-1973—All.)

JS/KS/D435/75/GGM

the.....shall sit at Allahabad or at..." — Meaning — Word 'or' cannot be read as 'and' — AIR 1972 All 200 (FB), Reversed.

The United Provinces High Courts (Amalgamation) Order states that the new High Court and the Judges and the Division Bench thereof shall sit at Allahabad or at such other places in the United Provinces as the Chief Justice may, with the approval of the Governor of the United Provinces appoint. The word "or" cannot be read as "and". It cannot therefore be concluded that the permanent seat of the High Court is at Allahabad. AIR 1972 All 200 (FB), Reversed. (Para 26).

(B) Interpretation of Statutes — Plain and unambiguous words in Statute — Construction — Unjust result does not entitle Court to refuse to give it effect.

If the precise words used are plain and unambiguous, they are bound to be construed in their ordinary sense. The mere fact that the result of a statute may be unjust does not entitle a court to refuse to give it effect. If there are two different interpretations of the words in an Act, the court will adopt that which is just, reasonable and sensible rather than that which is none of those things. If the inconvenience is an absurd inconvenience, by reading an enactment in its ordinary sense, whereas if it is read in a manner in which it is capable, though not in an ordinary sense, there would not be any inconvenience at all; there would be reason why one should not read it according to its ordinary grammatical meaning. Where the words are plain the court would not make any alteration. (Para 26).

(C) United Provinces High Courts (Amalgamation) Order, 1948, Para 14, Proviso — Areas in Oudh cannot be increased or decreased by the Chief Justice from time to time. AIR 1972 All 200 (FB), Reversed.

The areas in Oudh cannot be increased or decreased by the Chief Justice from time to time. It is only if Lucknow will ever cease to be a seat of the High Court when the Governor of the Uttar Pradesh with the

concurrence of the Chief Justice so directs that the first proviso to paragraph 14 of the Order both with regard to sitting of Judges at Lucknow and exercising jurisdiction in respect of cases arising in areas in Oudh will cease to have any significance in relation to Lucknow. AIR 1972 All 200 (FB), Reversed. (Para 34)

(D) United Provinces High Courts (Amalgamation) Order, 1948, Para 14, 1st Proviso — Expression "in respect of cases arising in such areas in Oudh" in relation to petitions under Art. 226 of the Constitution — Meaning — Lucknow Bench will have jurisdiction if the cause of action arises in Areas in Oudh whether in regard to appellate order or order in revision — Jurisdiction does not depend on the cause of action arising out of original order. AIR 1972 All 200 (FB), Reversed. (Para 36).

(E) United Provinces High Courts (Amalgamation) Order, 1948, Paras 7 and 14 — Construction.

On a construction of the United Provinces High Courts (Amalgamation) Order 1948, the following position emerges:

(1) There is no permanent seat of the High Court at Allahabad. The seats at Allahabad and at Lucknow may be changed in accordance with the provisions of the Order.

(2) The Chief Justice of the High Court has no power to increase or decrease the areas in Oudh from time to time. The areas in Oudh have been determined once by the Chief Justice and, therefore, there is no scope for changing the areas.

(3) The Chief Justice has power under the second proviso to para 14 of the Order to direct in his discretion that any case or class of cases arising in Oudh areas shall be heard at Allahabad. Any case or class of cases are those which are instituted at Lucknow. It cannot be said that the word "heard" confers powers on the Chief Justice to order that any case or class of cases arising in Oudh areas shall be instituted or filed at Allahabad, instead of Lucknow. The word "heard" means that cases which have already been instituted or filed at Lucknow may in the discretion of

the Chief Justice under the second proviso to paragraph 14 of the Order be directed to be heard at Allahabad.

(4) The expression "cause of action" with regard to a civil matter means that it should be left to the litigant to institute cases at Lucknow Bench or at Allahabad Bench according to the cause of action arising wholly or in part within either of the areas. If the cause of action arises wholly within Oudh areas then the Lucknow Bench will have jurisdiction. Similarly, if the cause of action arises wholly outside the specified areas in Oudh then Allahabad will have jurisdiction. If the cause of action in part arises in the specified Oudh areas and part of the cause of action arises outside the specified areas, it will be open to the litigant to frame the case appropriately to attract the jurisdiction either at Lucknow or at Allahabad.

(5) A criminal case arises where the offence has been committed or otherwise as provided in the Criminal Procedure Code. That will attract the jurisdiction of the Court at Allahabad or Lucknow. In some cases depending on the facts and the provision regarding jurisdiction, it may arise in either place.

(6) Applications under Art. 226 will similarly lie either at Lucknow or at Allahabad as the applicant will allege that the whole of cause of action or part of the cause of action arose at Lucknow within the specified areas of Oudh or part of the cause of action arose at a place outside the specified Oudh areas. (Paras 37 and 38).

The Judgment of the Court was delivered by:

RAY, C. J. Two of these appeals are by special leave and one by certificate from the judgment dated 17 December, 1971 of the Full Bench of the High Court at Allahabad.

2. Civil Appeal No. 1940 of 1972 arises out of the Writ Petition No. 3294 of 1970. Writ Petition No. 3294 of 1970 was filed before the Lucknow Bench of the High Court by respondents Nos. 3 to 9 for quashing the order dated 12 May, 1970 passed by the State Transport Appellate Tribunal at Lucknow. The respondents also claimed the direction that

the judgment of the High Court sitting at Lucknow dated 15 September, 1966 in Writ Petition No. 750 of 1964 is a nullity.

3. The facts in Writ Petition No. 3294 of 1970 are these. The Regional Transport Authority, Bareilly fixed the strength of Chandausi-Rajghat route at 5 stage carriage permits. The appellant and the respondent No. 3 applied for the grant of permits. The Regional Transport Authority, Bareilly, by order dated 2 October, 1961 instead of granting five permits, increased the strength of the route to 15 permits and granted one permit each to the appellant, the respondent No. 3 and 13 others. The permit granted to the appellant was valid from 9 June, 1961 to 8 June, 1964.

4. The unsuccessful appellants filed appeals against the order. By an order dated 28 March, 1963, the State Transport Appellate Tribunal at Lucknow allowed all the nine appeals and remanded the matter to the Regional Transport Authority, Bareilly, for reconsideration. The Regional Transport Authority, Bareilly, by an order dated 28 April, 1964 granted five permits, one of which was granted to the respondent No. 1. The appellant was not granted a permit.

5. The Regional Transport Authority, Bareilly had, in the meanwhile, on 20 February, 1963, increased the strength of the routes from 5 to 15 and invited applications. Respondents Nos. 4, 5 and 7 applied for the grant of permits.

6. The appellant filed Writ Petition No. 750 of 1964 before the Judges of the High Court sitting at Lucknow, challenging the order of the Appellate Tribunal, Lucknow, dated 28 March, 1963 as well as the order of the Regional Transport Authority, Bareilly dated 28 April, 1964. On 9 June, 1966 the appellant succeeded in his Writ Petition No. 750 of 1964. The orders of the Appellate Tribunal, Lucknow, dated 28 March, 1963 and the Regional Transport Authority, Bareilly, dated 28 April, 1964 were quashed and the Appellate Tribunal was directed to re-hear the appeals on merits.

7. On 1 November, 1965, the Regional Transport Authority, Bareilly, rejected the application of the appellant for the renewal of his permit on the ground that the permit granted to him originally was set aside by the Appellate Tribunal by an order dated 28 March, 1963. The appellant preferred an appeal to the Appellate Tribunal and succeeded on 8 January, 1968. On 17 June, 1968, the Appellate Tribunal, in pursuance of the orders of the High Court in Writ Petition No. 750 of 1964, issued notice to the 15 persons, who had been granted permits originally and the 9 persons, who had preferred appeals, regarding re-hearing of the appeals. Against the said order, the respondent No. 3 filed Writ Petition No. 4213 of 1968 in the High Court at Allahabad. The writ petition was admitted and a stay order was granted. However, on 25 April, 1968, the stay order was vacated.

8. The Appellate Tribunal at Lucknow, pursuant to the orders in Writ Petition No. 750 of 1964, heard the appeals and directed the Regional Transport Authority, Bareilly to grant one permanent stage carriage permit to each of the respondents Nos. 10 to 12. Inasmuch as the appellant was granted a permit in pursuance of the order in Writ Petition No. 750 of 1964, the Appellate Tribunal did not think it necessary to pass any order in his case.

9. Respondent No. 1 and respondent No. 3 filed Writ Petition No. 3294 of 1970 in the High Court at Allahabad. One of the grounds in the writ petition was that the Lucknow Bench of the Allahabad High Court had no jurisdiction to entertain and decide the Writ Petition No. 750 of 1964, because the dispute arose at Bareilly in Rohilkhand Division, which was within the exclusive jurisdiction of the Allahabad High Court, sitting at Allahabad, and it had nothing to do with the Oudh territory. The matter was referred to the Full Bench.

10. In Civil Appeal No. 1941 of 1972 the appellants filed Writ Petition No. 470 of 1971 in the High Court at Lucknow for a writ of certiorari for quashing order dated 11 December, 1970 passed by the Deputy Director of

Consolidation, Shahjahanpur, with headquarters at Lucknow. The appellants filed objections under Section 9 of the Consolidation of Holdings Act, 1954. Their objections were allowed by the Consolidation Officer. On appeal the order was upheld by the Settlement Officer, Consolidation, Shahjahanpur. The respondent No. 1 went up in revision and the Deputy Director, Consolidation, on 11 December, 1970, set aside the order. It is this order which forms subject-matter of writ petition No. 470 of 1971. On 26 July, 1971 the writ petition was listed for orders before a Division Bench consisting of the Chief Justice of the High Court and another learned Judge sitting at Lucknow. The Registry of the High Court at Lucknow reported that the petition related to the District of Shahjahanpur and question was raised as to the competency of the writ petition being presented before the Bench sitting at Lucknow. The matter eventually came before the Full Bench.

11. Criminal Appeal No. 254 of 1974 arises out of the Criminal Revision No. 270 of 1973 filed in the High Court at Allahabad. The revision relates to the sentence under Section 25 of the Arms Act passed by the Temporary Civil and Sessions Judge, Rae Bareilly. Question arose as to whether the revision should have been filed before the Lucknow Bench. Eventually the matter came before the Full Bench.

12. It is in this context that the following five questions were referred for decision to the Full Bench:

"(1) Can a case falling within the jurisdiction of the Lucknow Bench of this Court be presented at Allahabad?

(2) Can the Judges sitting at Allahabad summarily dismiss a case presented at Allahabad pertaining to the jurisdiction of the Lucknow Bench?

(3) Can a case pertaining to the jurisdiction of Lucknow Bench, presented and entertained at Allahabad, be decided finally by the Judges sitting at Allahabad, without there being an order as contemplated by the second proviso to Article 14 of the

U. P. High Court (Amalgamation) Order, 1948?

(4) What is the meaning of the expression "in respect of cases arising in such areas in Oudh" used in first proviso to Article 14 of the High Court (Amalgamation) Order, 1948? Has this expression reference to the place where the case originated or to the place of the sitting of the last Court or authority whose decree or order is being challenged in the proceedings before the High Court?

(5) Whether this writ petition can be entertained, heard and decided by the Judges sitting at Lucknow?"

13. The majority view of the Full Bench gave the following answers:—

"(1) A case falling within the jurisdiction of Judges at Lucknow should be presented at Lucknow and not at Allahabad.

(2) However, if such a case is presented at Allahabad, the Judges at Allahabad cannot summarily dismiss it only for that reason. The case should be returned for filing before the Judges at Lucknow and where the case has been mistakenly or inadvertently entertained at Allahabad, a direction should be made to the High Court Office to transmit the papers of the case to Lucknow.

(3) A case pertaining to the jurisdiction of the Judges at Lucknow and presented before the Judges at Allahabad cannot be decided by the Judges at Allahabad in the absence of an order contemplated by the second proviso to Article 14 of the Amalgamation Order, 1948.

(4) The expression "in respect of cases arising in such areas in Oudh" used in the first proviso to Article 14 of the High Court (Amalgamation) Order, 1948, refers to legal proceedings, including civil cases, criminal cases, petitions under Articles 226, 227 and 228 of the Constitution and petitions under Articles 132, 133 and 134 of the Constitution instituted before the Judges sitting at Lucknow and having their origin, in the sense explained in the majority judgment in such areas in Oudh as the Chief Justice may direct. The expression "arising in such areas in Oudh" refers to the place where the case originated

in the sense explained in the majority judgment and not to the place sitting of the last court or authority whose decree or order is being challenged in the proceeding before the High Court.

(5) The Lucknow Bench have no jurisdiction to hear writ petition No. 750 of 1964 which gave rise to writ petition No. 3294 of 1970.

14. The United Provinces High Courts (Amalgamation) Order, 1948, hereinafter referred to as the Order, was promulgated under Section 229 of the Government of India Act, 1935. The order came into effect on the appointed day, namely, 26 July, 1948. "Existing High Courts" in the Order means the High Court referred to in Section 219 of the Government of India Act as the High Court in Allahabad and the Chief Court in Oudh. As from the appointed day, the High Court at Allahabad and the Chief Court in Oudh shall constitute one High Court by the name of the High Court of Judicature at Allahabad referred to as "the new High Court" (Paragraph 3).

15. The two crucial provisions are Paragraphs 7 and 14 in the Order. The High Court referred to the provisions of the Order as Articles but we have referred to the same as Paragraphs. Paragraph 7 is as follows:

"7. (1) The new High Court shall have, in respect of the whole of the United Provinces, all such original, appellate and other jurisdiction as, under the law in force immediately before the appointed day, is exercisable in respect of any part of that Province by either of the existing High Courts.

(2) The new High Court shall also have in respect of any area outside the United Provinces all such original, appellate and other jurisdiction as under the law in force immediately before the appointed day is exercisable in respect of that area by the High Court in Allahabad."

Paragraph 14 is as follows:

"14. The new High Court, and the judges and division courts thereof, shall sit at Allahabad or at such other places in the United Provinces as the Chief Justice may, with the

approval of the Governor of the United Provinces, appoint:

"Provided that unless the Governor of the United Provinces with the concurrence of the Chief Justice, otherwise directs, such judges of the new High Court, not less than two in number, as the Chief Justice, may, from time to time nominate, shall sit at Lucknow in order to exercise in respect of cases arising in such areas in Oudh, as the Chief Justice may direct, the jurisdiction and power for the time being vested in the new High Court:

Provided further that the Chief Justice may in his discretion order that any case or class of cases arising in the said areas shall be heard at Allahabad."

16. The High Court considered paragraphs 7 and 14 of the order to mean that the new High Court has its seat at Allahabad which is the permanent seat. The reasons given by the High Court are three. First, paragraph 3 of the order which states that there will be one High Court by the name of the High Court of Judicature at Allahabad indicates that the permanent seat is at Allahabad. Second, the second proviso to paragraph 14 of the Order which confers power on the Chief Justice in his discretion to order that any case or class of cases arising in Oudh areas shall be heard at Allahabad, shows that there is one identifiable permanent seat and that is the principal seat of the High Court at Allahabad. Third, the words "the new High Court and the Judges and division courts thereof, shall sit at Allahabad or at such other places in the United Provinces as the Chief Justice may, with the approval of the Governor of the United Provinces, appoint" occurring in the main provision of paragraph 14 of the Order mean that the word "or" occurring between the words "Allahabad" and "at such other places" is to be read as "and".

17. The second matter decided by the High Court is that the Judges at Lucknow Bench will hear cases arising in specified Oudh areas as the Chief Justice directs. The High Court held as follows. It is open to the Chief Justice to reduce the areas in Oudh referred to in the first proviso

to paragraph 14 of the Order and further that the Bench at Lucknow may be abolished altogether by the Governor with the concurrence of the Chief Justice. The first proviso to paragraph 14 of the Order which speaks of such areas in Oudh followed by the words "as the Chief Justice may direct", shows that areas in Oudh will be such as will be specified by the Chief Justice. Under the first proviso to paragraph 14 of the Order all cases arising in areas in Oudh as directed by the Chief Justice will be heard at Lucknow.

18. The High Court further held as follows. The first proviso to paragraph 14 of the Order consists of two parts. The first part requires that at least two Judges will sit at Lucknow. The insistence on Lucknow as a place of sitting under the first proviso overrides the discretion of the Chief Justice to appoint any other place with the approval of the Governor because until the Governor otherwise directs with the concurrence of the Chief Justice, Lucknow will remain a place of sitting. The second part of the first proviso to paragraph 14 of the Order, namely, that Judges sitting at Lucknow shall exercise jurisdiction in respect of cases arising in such Oudh areas, specifies the work which the Judges at Lucknow will do, which can be described as amounting in substance to a statutory allocation of the category of cases mentioned there to the Judges at Lucknow. Such allocation necessarily implies that other Judges will not do that class of work, unless it is also expressly allocated to them.

19. The third matter decided by the High Court is the interpretation of the second proviso to paragraph 14 of the Order, which confers power on the Chief Justice in his discretion to order that any case or class of cases arising in the said areas shall be heard at Allahabad. The High Court expressed these views. This proviso shows that Judges at Lucknow Bench are alone competent to hear cases arising in the specified Oudh areas and that the order of the Chief Justice under the second proviso alone enables such cases being heard at Allahabad. The second

proviso to paragraph 14 of the Order is held by the High Court to mean that the Chief Justice has power not only to make an order in respect of cases which have been filed at and are pending at Lucknow but also cases which have not yet been filed or which may be filed in future at Lucknow.

20. The meaning of the word "heard" in the second proviso to paragraph 14 of the Order is not confined to the actual hearing of cases but will include the preceding stages of the institution of a case and of its being entertained by the High Court. If cases arising in Oudh areas can be transferred by the Chief Justice for being heard at Allahabad, it obviously means that cases arising in Oudh areas are cases which are instituted because they arise in Oudh areas. The second proviso means that cases covered by the direction of the Chief Justice cannot be instituted at Lucknow but only at Allahabad for being heard there.

21. The second proviso to paragraph 14 of the Order qualifies the second part of the first proviso. The second proviso deals with cases arising in the specified Oudh areas, and provides an exception to the rule stated in the second part of the first proviso. The effect of reading the two provisos together is that the Judges at Lucknow are alone competent to hear cases arising in the specified Oudh areas except where the Chief Justice orders that any such case or class of cases shall be heard at Allahabad. On this reasoning the High Court has held that paragraph 14 of the Order first provides for the place of sitting of the Judges and secondly specifies the category of cases which will be heard by them.

22. The High Court also said as follows. The jurisdiction defined by paragraph 7 of the Order vests in the entire body of Judges. It is the jurisdiction enjoyed by every Judge of the High Court and extends to all cases throughout the territories of that State. Where that jurisdiction will be exercised is a matter to be determined under paragraph 14 of the Order. It may be exercised at Allahabad or it may be exercised at Lucknow or at any other place ap-

pointed by the Chief Justice under paragraph 14. The Judges at Lucknow hear cases arising in such areas in Oudh as the Chief Justice directs. It is open to the Chief Justice to reduce the areas from time to time. Cases arising in the areas so removed can no longer be heard at Lucknow. They will be heard at Allahabad or at any other place appointed under the main provision of paragraph 14. A stage may be reached in the process of reduction where only one area of Oudh alone may remain with the Judges sitting at Lucknow. There is also power in the Chief Justice, by virtue of second proviso, to increase by order that classes of cases arising in Oudh areas shall be heard at Allahabad. Finally, the arrangement that some Judges must sit at Lucknow may be abolished by the Governor with the concurrence of the Chief Justice.

23. The fourth question on which the High Court expressed its opinion is on the meaning of "cases arising in such areas in Oudh". The High Court expressed the following views. A distinction arises between civil and criminal cases on the one hand and writ petitions under Article 226 on the other. The contention based on Article 225 that Lucknow Bench will not have jurisdiction under Article 226 is wrong because the jurisdiction of the High Court is not only the jurisdiction exercisable before the Constitution came into force but also the jurisdiction which could be conferred on the High Court in future. The Lucknow Bench, therefore, exercises jurisdiction under Article 226.

24. Though the Lucknow Bench can exercise jurisdiction under Articles 226, 227 and 228, there is limitation on such jurisdiction as far as the Lucknow Bench is concerned. The Lucknow Bench will have jurisdiction under Article 226 only in cases where the right of the petitioner arose first within the Oudh areas. Where an original order passed outside the Oudh areas has been reversed or modified or confirmed at a place within the Oudh areas it is not the place where the ultimate or the appellate order is passed that will attract jurisdiction of the Lucknow

Bench. In most cases where an appeal or revision will lie to the State Government, the order will be made at Lucknow. In all such cases, if it be held that the place where a case can be said to arise is where the ultimate or appellate order is passed by the authority, the Judges at Lucknow would then have jurisdiction even though the controversy originally arose and the original order was made by an authority outside the specified Oudh areas. In all cases a writ petition filed in the High Court would be a case arising at Lucknow. It is on this reasoning that the High Court strictly confined the jurisdiction of the Lucknow Bench under Article 226 to the right which the petitioner pursues throughout the original proceedings, the appellate proceedings and thereafter in the High Court. The right of the petitioner is the right which first arose and if the place where the right first arose will be within the Oudh areas then the Lucknow Bench will have jurisdiction.

25. With regard to the civil and criminal cases, the High Court said that the Lucknow Bench would have jurisdiction in a civil case where the cause of action wholly or in part arose. In a criminal case the Lucknow Bench would have jurisdiction where the offence has been committed.

26. The conclusion as well as the reasoning of the High Court that the permanent seat of the High Court is at Allahabad is not quite sound. The order states that the High Court shall sit as the new High Court and the Judges and Division Bench thereof shall sit at Allahabad or at such other places in the United Provinces as the Chief Justice may, with the approval of the Governor of the United Provinces, appoint. The word "or" cannot be read as "and". If the precise words used are plain and unambiguous, they are bound to be construed in their ordinary sense. The mere fact that the results of a statute may be unjust does not entitle a court to refuse to give it effect. If there are two different interpretations of the words in an Act, the Court will adopt that which is just, reasonable and sensible rather than that which is none of those things.

If the inconvenience is an absurd inconvenience, by reading an enactment in its ordinary sense, whereas if it is read in a manner in which it is capable, though not in an ordinary sense, there would not be any inconvenience at all; there would be reason why one should not read it according to its ordinary grammatical meaning. Where the words are plain the Court would not make any alteration.

27. The arguments which were presented at the Bar on behalf of the Bar Association at Allahabad as well as the Bar Association at Lucknow suggested that those views can be described to be protagonists of Allahabad or of Lucknow on the one hand and antagonists to Allahabad or Lucknow on the other. The construction is to be dispassionate without any leaning either in favour or against either of the places mentioned in the Order.

28. The Order describes the High Court as the new High Court. The two High Courts have amalgamated in the new High Court. The seat is at Allahabad or at such other places as may be determined. There is no permanence attached to Allahabad. If that were the intention of the Order, the word "and" instead of the word "or" would have been used. Other places may be determined by the Chief Justice in consultation with the Governor. It is left to prudence of the authorities mentioned as to what other places should be determined. In the normal understanding of the matters, it is left to the discretion of the authorities as to whether the seats at Allahabad as well as at Lucknow will be changed. Both places may continue. Both places may be changed. Lucknow is the seat of the Government. Allahabad has also the history that the High Court was there before the Order. Lucknow has been the principal place of Oudh. The Order aimed at giving status to the Oudh Chief Commissioner's Court as that of the High Court. It is difficult to foresee the future whether the authorities will change the location to other places but no idea of permanent seat can be read into the Order. One can only say that it is the wish and hope that

both Allahabad and Lucknow will be the two important seats so that history is not wiped out and policy is not changed.

29. The conclusion of the High Court that the first proviso to paragraph 14 of the Order means that the areas in Oudh may be decreased is not the correct construction. The first proviso deals with nomination by the Chief Justice from time to time of not less than two Judges sitting at Lucknow. An argument was advanced on behalf of the Bar Association at Allahabad that the words "not less than two in number" indicate that the Order did not contemplate the existence of a Division Bench. The words "from time to time" and "not less than two in number" indicate the minimum as two and that more than two Judges may be there. The words "from time to time" suggest not only that Judges may come from Allahabad to Lucknow or vice versa but also that the number may be increased or decreased according to exigencies. The only limitation on the number is that it shall not be less than two.

30. The High Court held that the Chief Justice might reduce the areas in Oudh because the words "as the Chief Justice may direct" occur immediately after the words "in such areas in Oudh". This reason is fallacious. First, the words "from time to time" apply only to the nomination of Judges by the Chief Justice to sit at Lucknow and not to the words "such areas in Oudh as the Chief Justice may direct". The important words in the first proviso to paragraph 14 of the Order are "such Judges of the new High Court, not less than two in number, as the Chief Justice, may, from time to time nominate, shall sit at Lucknow". These words indicate that the power of the Chief Justice to nominate Judges, who shall sit at Lucknow, is to be exercised from time to time meaning thereby that the power can be exercised as often as may be necessary. Second, the words "in respect of cases arising in such areas in Oudh, as the Chief Justice may direct" occur in the collocation of words "that the Judges nominated shall sit at Lucknow

in order to exercise in respect of cases arising in such areas in Oudh, as the Chief Justice may direct, the jurisdiction and power for the time being vested in the new High Court". The words "as the Chief Justice may direct" mean that the Chief Justice exercises the power to direct what the areas in Oudh are for exercise of jurisdiction by Judges "at Lucknow Bench. Once that power is exercised, it is exhausted. The reason is that the areas once determined should hold good on account of certainty and to dispel problems being created from time to time by increase or decrease of areas.

31. The sum and substance as well as the spirit of the Order is that under the first proviso to paragraph 14 Lucknow becomes the seat in respect of cases arising in areas in Oudh. There is no other provision except paragraph 14 in the Order as to what the areas in Oudh are or will be. Historically, the territories with 12 Districts of Lucknow, Faizabad, Sultanpur, Rai Bareilly, Pratapgarh, Barabanki, Gonda, Baharaich, Sitapur, Kheri, Hardoi and Unnao, were brought under the then British Crown within the jurisdiction of the Court of the Judicial Commissioner of Oudh at Lucknow. This was under the Government of India order dated 4 February, 1856. (See: Laws of non-Regulations Provinces 1863 by Lord G. Campbell, Judicial Commissioner, Oudh). In 1925 Oudh Courts Act was passed by the Uttar Pradesh Legislature. The Chief Court of Oudh with one Chief Justice and four Puisne Judges was established replacing the Judicial Commissioner's Court. In 1937 by the Government of India (Adaptation of Indian Laws) Order 1937 it was provided that the Chief Court of Oudh shall consist of Chief Justice and such other Judges as may be appointed under the Government of India Act, 1935. Later, two more additional Judges were appointed. In this background the Order of 1948 came into existence and the new High Court was established with its seats at Allahabad and Lucknow. It, therefore, follows that when the Order came into existence, it was for the Chief Justice to direct the areas in Oudh, which would be

within the jurisdiction of the Lucknow Bench.

32. Under paragraph 7 of the Order, the new High Court has jurisdiction in respect of whole of the United Provinces exercisable in respect of any part of that province by either of the existing High Court. Paragraph 14 of the Order deals with the seats of the High Court at Allahabad and Lucknow. It is only the first proviso to paragraph 14 of the Order which states that unless the Governor of the United Provinces with the concurrence of the Chief Justice, otherwise directs, not less than two Judges shall sit at Lucknow in order to exercise in respect of cases arising in such areas in Oudh the jurisdiction and power vested in the new High Court. The first proviso to Para. 14 of the Order specifies the instrumentality through which the jurisdiction vested in the new High Court will be exercised in respect of cases arising in Oudh. The direction which the Chief Justice has given once with regard to the areas in Oudh remains unaltered.

33. Section 14 of the General Clauses Act states that where by any Act any power is conferred then unless a different intention appears, the power may be exercised from time to time as occasion requires. In the present case Section 14 of General Clauses Act cannot have any application because a different intention appears in paragraph 14 of the order. The words "from time to time" occur in the first part of the first proviso to para. 14 of the Order, in relation to the power of the Chief Justice to nominate Judges of the Lucknow Bench from time to time. The second part of the first proviso to para. 14 of the Order which speaks of cases arising in such areas in Oudh as the Chief Justice may direct do not attract the application of the words "from time to time." The second part of the first proviso to paragraph 14 shows that such areas in Oudh as the Chief Justice may direct are areas in respect of which once such direction is given, there is no intention in the Order to exercise such power of direction from time to time.

34. The conclusion of the High Court that the areas in Oudh could

be increased or decreased by the Chief Justice from time to time is set aside. It is only if Lucknow will ever cease to be a seat of the High Court when the Governor of the Uttar Pradesh with the concurrence of the Chief Justice so directs that the first proviso to paragraph 14 of the Order both with regard to sitting of Judges at Lucknow and exercising jurisdiction in respect of cases arising in areas in Oudh will cease to have any significance in relation to Lucknow.

35. The meaning of the expression "in respect of cases arising in such areas in Oudh" in the first proviso to paragraph 14 of the Order was answered by the High Court that with regard to applications under Article 226 the same will be "a case arising within the areas in Oudh" only if the right of the petitioner in such an application arose first at a place within an area in Oudh. The implication according to the High Court is that if the right of the petitioner arose first at any place outside any area in Oudh and if the subsequent orders either in the revisional or appellate stage were passed by an authority within an area in Oudh then in such cases the Lucknow Bench would not have any jurisdiction. The factor which weighed heavily with the High Court is that in most cases where an appeal or revision would lie to the State Government, the impugned order would be made at Lucknow and on that view practically all writ petitions would arise at Lucknow.

36. The conclusion as well as the reasoning of the High Court is incorrect. It is unsound because the expression "cause of action" in an application under Article 226 would be as the expression is understood and if the cause of action arose because of the appellate order or the revisional order which came to be passed at Lucknow then Lucknow would have jurisdiction though the original order was passed at a place outside the areas in Oudh. It may be that the original order was in favour of the person applying for a writ. In such case an adverse appellate order might be the cause of action. The expression "cause of action" is well-

known. If the cause of action arises wholly or in part at a place within the specified Oudh areas, the Lucknow Bench will have jurisdiction. If the cause of action arises wholly within the specified Oudh areas, it is indisputable that the Lucknow Bench would have exclusive jurisdiction in such a matter. If the cause of action arises in part within the specified areas in Oudh it would be open to the litigant who is the dominus litis to have his forum conveniens. The litigant has the right to go to a Court where part of his cause of action arises. In such cases, it is incorrect to say that the litigant chooses any particular Court. The choice is by reason of the jurisdiction of the Court being attracted by part of cause of action arising within the jurisdiction of the Court. Similarly, if the cause of action can be said to have arisen partly within specified areas in Oudh and partly outside the specified Oudh areas, the litigant will have the choice to institute proceedings either at Allahabad or Lucknow. The Court will find out in each case whether the jurisdiction of the Court is rightly attracted by the alleged cause of action.

37. To sum up, our conclusions are as follows. First, there is no permanent seat of the High Court at Allahabad. The seats at Allahabad and at Lucknow may be changed in accordance with the provisions of the Order. Second, the Chief Justice of the High Court has no power to increase or decrease the areas in Oudh from time to time. The areas in Oudh have been determined once by the Chief Justice and, therefore, there is no scope for changing the areas. Third, the Chief Justice has power under the second proviso to paragraph 14 of the Order to direct in his discretion that any case or class of cases arising in Oudh areas shall be heard at Allahabad. Any case or class of cases are those which are instituted at Lucknow. The interpretation given by the High Court that the word "heard" confers powers on the Chief Justice to order that any case or class of cases arising in Oudh areas shall be instituted or filed at Allahabad instead of Lucknow is wrong. The word

"heard" means that cases which have already been instituted or filed at Lucknow may in the discretion of the Chief Justice under the second proviso to paragraph 14 of the Order be directed to be heard at Allahabad. Fourth, the expression "cause of action" with regard to a civil matter means that it should be left to the litigant to institute cases at Lucknow Bench or at Allahabad Bench according to the cause of action arising wholly or in part within either of the areas. If the cause of action arises wholly within Oudh areas then the Lucknow Bench will have jurisdiction. Similarly, if the cause of action arises wholly outside the specified areas in Oudh then Allahabad will have jurisdiction. If the cause of action in part arises in the specified Oudh areas and part of the cause of action arises outside the specified areas, it will be open to the litigant to frame the case appropriately to attract the jurisdiction either at Lucknow or at Allahabad. Fifth, a criminal case arises where the offence has been committed or otherwise as provided in the Criminal Procedure Code. That will attract the jurisdiction of the Court at Allahabad or Lucknow. In some cases depending on the facts and the provision regarding jurisdiction, it may arise in either place.

38. Applications under Article 226 will similarly lie either at Lucknow or at Allahabad as the applicant will allege that the whole of cause of action or part of the cause of action arose at Lucknow within the specified areas of Oudh or part of the cause of action arose at a place outside the specified Oudh areas.

39. The answers given by the High Court to the first three questions are correct save as modified by our conclusions aforesaid.

40. The answer given by the High Court to the fourth question is set aside. The meaning of cases arising in Oudh areas will be found out by appropriate courts in the light of this judgment.

41. The answer to the fifth question is discharged. The matters are sent back to the High Court for disposal in accordance with this judgment.

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42. Parties will pay and bear their own costs.

Order accordingly.

AIR 1976 SUPREME COURT 342

From: (1965) 2 ITJ 498 (Bom))

V. R. KRISHNA IYER AND A. C. GUPTA, JJ.

M/s. Chidambaram Mulraj and Co. Pvt. Ltd., Appellant v. Commissioner of Income Tax, Bombay City-I, Respondent.

Civil Appeal No. 360 of 1971, D/- 21-11-1975.

(A) Income-tax Act (1922), Ss. 10 (5A) and 2 (ii) (a) — Assessment year 1955-56 — Managing agency agreement — Compensation received by assessee for its termination in accounting year ending on 30-6-1954 — Not a new source of income — Previous year relevant to such receipt would be the previous year for the managing agency business itself — It is income assessable in year 1955-56 by virtue of Section 10. (5A).

By a legal fiction introduced by sub-s. (5A) in Sec. 10 by the Finance Act of 1955, any amount received by a managing agent as compensation for the termination of his managing agency agreement which would otherwise have been a capital receipt is to be deemed as profits and gains of a business carried on by the managing agent. The fiction introduced by sub-s. (5A) regards the capital receipt as income and does not extend to treating the termination of managing agency itself as a business. Though the amount was not earned in carrying on the business of managing agency, the source of the receipt was undoubtedly the managing agency business itself. It cannot therefore be said that the receipt was income from a new and independent source. In enacting sub-s. (5A) the legislature was concerned only with providing a head under which the receipt which has been deemed to be income could be brought to tax and was not concerned with creating a new source for that deemed income. Hence, the compensation paid for the termina-

tion of a managing agency business is a payment in relation to the said business, and, therefore, the previous year relevant to that receipt would be the same as the previous year for the managing agency business itself. (1965) 2 ITJ 498 (Bom), Affirmed. (1963) 48 ITR 661 (Mad) and (1967) 65 ITR 50 (Bom), Approved. (Paras 5, 6)

Cases Referred: Chronological Paras
(1967) 65 ITR 50 = (1967) 2 ITJ 329 (Bom) 6
(1963) 48 ITR 661 (Mad) 6

Mr. S. C. Manchanda, Sr. Advocate, Mr. K. J. John, (Advocate of M/s. J. B. Dadachanji & Co. with him), for Appellant; Mr. S. T. Desai Sr. Advocate, (Mr. Girish Chandra and Mr. M. N. Shroff, Advocates with him), for Respondent.

The Judgment of the Court was delivered by

GUPTA, J.:— The appellant is a private limited company. The assessment year is 1955-56 for which the relevant previous year ended on June 30, 1954. The shareholders of the appellant company are Mulraj Kersondas, members of his family, allied concerns and nominees only. In 1944 the appellant purchased the managing agency of the Elphinston Spinning and Weaving Mills Ltd. for Rupees six lakhs and thereafter entered into a separate managing agency agreement with the managed company for a period of seventeen years. The appellant's only source of income was this managing agency in the relevant year. Mulraj and his group also held among themselves 25,000 ordinary and 10,000 preference shares of the Elphinston Spinning and Weaving Mills Ltd. Mulraj entered into an agreement for sale of these shares with K. D. Jalan of Calcutta for a consideration of Rupees forty-five lakhs; one of the terms of the agreement was that Mulraj would have the managing agency of the appellant company terminated. In implementation of this agreement Mulraj wrote to the appellant company on October 21, 1953 asking the company to give up the managing agency on receipt of a sum of Rupees ten lakhs as compensation which he promised to pay. On the same day the appellant com-

pany passed a resolution accepting Mulraj's offer and wrote to the managed company, Elphinston Spinning and Weaving Mills Ltd, tendering resignation of its office as managing agents. The resignation was in due course accepted. The assessee received from Mulraj a sum of Rupees 9,95,000/- as compensation for premature termination of the managing agency, Rs. 5,000/- having been paid by Mulraj as brokerage to one Dhirajlal Maganlal. The amount received was credited to the Capital Reserve Account in the appellant's books for the year ending on June 30, 1954 described as "compensation for loss of office."

2. In the assessment year 1955-56 for which the appellant's previous year ended on June 30, 1954, the Income-tax Officer assessed the entire amount of Rupees ten lakhs in the hands of the appellant company under Section 10 (5-A) of the Income-Tax Act, 1922. Section 10 (1) of the Income-Tax Act, 1922 states that the "tax shall be payable by an assessee under the head "Profits and gains of business, profession or vocation" in respect of the profit or gains of any business, profession or vocation carried on by him." Sub-section (5-A) was inserted in Section 10 by the Finance Act, 1955 with effect from April 1, 1955, the relevant part of which is in these terms:

"(5-A) Any compensation or other payment due to or received by,

(a) a managing agent of an Indian company at or in connection with the termination or modification of his managing agency agreement with the company;

(b) a manager of an Indian company at or in connection with the termination of his office or modification of the terms and conditions relating thereto;

(c) any person, by whatever name called, managing the whole or substantially the whole affairs of any other company in the taxable territories, at or in connection with the termination of his office or the modification of the terms and conditions relating thereto;

(d) any person, by whatever name called, holding an agency in the

taxable territories for any part of the activities relating to the business of any other person, at or in connection with the termination of his agency or the modification of the terms and conditions relating thereto;

shall be deemed to be profits and gains of a business carried on by the managing agent, manager or other person, as the case may be, and shall be liable to tax accordingly;"

3. The company preferred an appeal to the Appellate Assistant Commissioner against the order of the Income-tax Officer. The Appellate Assistant Commissioner allowed the appeal holding that Section 10 (5A) created a new source of income for which the previous year was not the previous year for the managing agency business which ended on June 30, 1954, that the compensation of Rupees ten lakhs which the appellant received in October, 1953 fell in the financial year 1953-54 which would be the previous year for this income for which the assessment year was 1954-55 which was before sub-section (5A) of Section 10 was enacted, and the fact that the appellant had entered the amount in its books for the year that ended on June 30, 1954 could not be taken as an exercise of option by the assessee accepting the said year as the previous year in respect of the receipt. The Appellate Assistant Commissioner further held that if at all the amount was taxable in the assessment year 1955-56, the assessee was entitled to a deduction of Rupees six lakhs paid for acquiring the managing agency. The Department took an appeal to the Tribunal against the order of the Appellate Assistant Commissioner. The Tribunal was of opinion that Section 10 (5A) only regards the compensation received by the managing agent as profits and gains of a business and does not create a fresh source therefor, and as the amount in question in this case was received in the accounting year relevant to the assessment year 1955-56, it was taxable in the assessment year 1955-56. The Tribunal however agreed with the Appellate Assistant Commissioner that the assessee was entitled to a deduction of Rupees six lakhs

which the assessee had paid for acquiring the managing agency, and allowed the appeal partly holding that the assessee was liable to pay tax on the sum of Rs. 3,95,000/-. At the instance of the parties the Tribunal referred the following two questions to the High Court under Section 66(1):

"(i) Whether the sum of Rs. 10 lakhs is income assessable in the year 1955-56 by virtue of Section 10 (5A)?

(ii) If the answer is in the affirmative, whether the initial cost of acquisition of the Managing Agency of Rs. 6 lakhs and Rs. 5000/- paid as brokerage on sale are deductible?" The first question was referred at the instance of the assessee and the second at the instance of the Department. The High Court overruled the contention of the assessee that the amount in question was income from a new source for which the previous year was 1953-54, and answered the first question in the affirmative and in favour of the revenue. As regards the second question, the High Court answered it in favour of the assessee and upheld the order of the Tribunal. In the present appeal brought on a certificate under Section 66A (2), the assessee challenges the correctness of the answer given by the High Court to the first question.

4. "Previous year" is defined in Section 2 (11) of the Income-tax Act, 1922 and the relevant part of the definition is as follows:—

"(11) 'Previous year' means in respect of any separate source of income, profits and gains—

(a) the twelve months ending on the 31st day of March next preceding the year for which the assessment is to be made, or, if the accounts of the assessee have been made up to a date within the said twelve months in respect of a year ending on any date other than the said 31st day of March, then at the option of the assessee the year ending on the day to which his accounts have so been made up;"

5. As stated already, sub-section (5A) of Section 10 came into force on April 1, 1955. Therefore, the amount in question, if received by

the assessee during the previous year for the assessment year 1955-56, would be taxable under that sub-section. By a legal fiction introduced by sub-section (5A) any amount received by a managing agent as compensation for the termination of his managing agency agreement which would otherwise have been a capital receipt is to be deemed as profits and gains of a business carried on by the managing agent. The appellant contends that sub-section (5A) indicates that this deemed income is to be treated as receipt from a new source and, that being so, the relevant previous year for this income would not necessarily be the year ending on June 30, 1954 which was the previous year for the managing agency business, and the assessee should have been given an opportunity to choose the previous year in respect of the receipt in question; if the financial year 1953-54 is taken as the previous year for this income from a new source, the argument proceeds, then the amount would not be taxable in the assessment year 1955-56. It is further argued that the amount received as compensation could not be the profits and gains of the managing agency business because the business itself was being terminated. The words of the sub-section, according to learned counsel for the appellant, indicate that the receipt is to be treated as income from a new and independent source. Sub-section (5A) states, inter alia, that any compensation or other payment received by a managing agent in connection with the termination of his managing agency agreement shall be deemed to be profits and gains of 'a business' carried on by the managing agent. The use of the indefinite article before the word 'business', it is submitted, makes it plain that the income is not relatable to the managing agency business but to a new and separate source.

6. We are unable to accept the contention. The fiction introduced by sub-section (5A) regards the capital receipt as income and does not extend to treating the termination of managing agency itself as a business. The amount received by the appellant was a payment for the ter-

mination of the managing agency business and, as such, the receipt is obviously related to that business. It is of course true that the amount was not earned in carrying on the business of managing agency, but it is clear that the source of the receipt was the managing agency business itself. It cannot therefore be said that the receipt was income from a new and independent source. In our opinion the High Court was right in holding that in enacting sub-section (5A) the legislature was concerned only with providing a head under which the receipt which has been deemed to be income could be brought to tax and was not concerned with creating a new source for that deemed income. Two decisions cited on behalf of the respondent, one of the Bombay High Court, Commr. of Income-tax, Bombay v. Sir Chunilal V. Mehta & Sons P. Ltd., (1967) 65 ITF 50 (Bom) and the other of the Madras High Court, R. V. Lakshmiah Naidu and Co. v. Commr. of Income-tax, Kerala and Coimbatore, (1963) 48 ITR 661 (Mad) have both held that the compensation paid for the termination of a managing agency business is a payment in relation to the said business, and, therefore, the previous year relevant to that receipt would be the same as the previous year for the managing agency business itself. In our view these two decisions state the law on the point correctly.

7. The appeal fails and is dismissed with costs.

Appeal dismissed.

AIR 1976 SUPREME COURT 345

(From: Bombay)*

M. H. BEG AND P. K. GOSWAMI
JJ.

Ramesh Ramdas Teli, Appellant
v. The State of Maharashtra, Respondent.

Criminal Appeal No. 60 of 1975,
D/- 19-11-1975.

(A) Penal Code (1860), S. 300 —
Murder — Evidence — Sufficiency of.

*(Criminal Appeal No. 454 of 1974,
D/- 2-9-1974—Bom.)

LS/LS/E287/75/VSS

Held that the identifying witnesses had ample time to mark the visage of appellant, that there was ample corroborative evidence by way of extrajudicial confession and recovery of blood stained knife and blood stained bush shirt at the pointing out of the appellant, which lends assurance to the identity of the appellant and that it was proved beyond reasonable doubt that appellant was the murderer. Cri. App. No. 454 of 1974, D/- 2-9-1974 (Bom), Affirmed. (Paras 4, 5)

(B) Penal Code (1860), S. 302 —
Death sentence — Propriety: Where the deceased has done no harm to appellant who is apparently a desperate character who would not stop at killing rather than be caught in attempt to steal after breaking into a house, Held that death sentence is proper. Cri. App. No. 454 of 1974, D/- 2-9-1974 (Bom), Affirmed. (Para 6)

Mr. V. Maya Krishan, Advocate, A. C., for Appellant; Mr. H. R. Khanna and Mr. M. N. Shroff, Advocates, for Respondent.

The Judgment of the Court was delivered by

BEG, J:— The appellant Ramesh Ramdas Teli was convicted under Section 302 Indian Penal Code and sentenced to death for committing the murder of one Nandlal Chandnani by stabbing him on the night between 28th and 29th June, 1973, in Shyam Sadan, Marine Drive, Bombay, in an attempt to escape from the flat of the deceased which he had entered for committing theft. The appellant was also convicted under Section 458 I.P.C. and sentenced to six years rigorous imprisonment. The conviction of the appellant rests on the evidence of identification by Bipinchandra Modi, P. W. 8, and Abdul Rehman, PW 11, and Venkatesh Narsappa, PW 13, corroborated by circumstantial evidence.

2. The murdered man Nandlal Chandnani was living with his wife and parents in flat No. 8, of a building known as Shyam Sadan situated on 'F' Road, Marine Drive, Bombay. The flat had 3 bed rooms, a kitchen and a hall. The bed room in which Nandlal Chandnani and his wife Smt. Lajja Chandnani were asleep is on the western side with a

balcony overlooking the compound adjoining a passage to Shri Niketan Garden. The door of the bed room leading to the balcony was kept open probably because it was the month of June. Smt. Lajja, PW 2, was awakened by the voice of her husband at 3.15 a.m. She got up from her bed and heard him shouting "Chor! Chor!" She opened the main door of the room leading to the rest of the house. She saw that her husband was struggling with a stranger trying to get away from the balcony. She put on the light and went to the assistance of her husband and caught hold of the leg of the stranger who pushed her with his leg and also struck her with his knife on her left cheek and forehead and then escaped. Her shouts brought her mother-in-law and other relations. She noticed that her husband was bleeding profusely and soon collapsed on the bed. Her father-in-law and brother-in-law also came into the room. Servants were called. A Doctor was sent for. Shri Nandlal Chandnani was removed to the G. T. Hospital and he expired soon after reaching there. A First Information Report was lodged at Azad Maidan Police Station at 3.55 a.m. on 29-6-1973 by Raghunath Rai, PW 4, a resident of flat No. 4, in Shyam Sadan who was one of the persons who assembled in the flat after the dastardly attack.

3. The assailant had been seen running away by several persons including Padam Singh, PW 7, and Bipinchandra Modi, PW 8, who had seen a man crossing the road from Bharat Mahal on 'F' Road across Netaji Subbhash Road and jumping over the pavement wall on to what is known as "Tetrapods" on the beach. Raghunath Rai, P. W. 4, had also seen a person jumping over the compound wall of Bharat Mahal which adjoins Shyam Sadan. He had also seen some persons chasing the man. At first, he thought that it was a case of petty theft, but he soon learnt, from neighbours, that it was a case of serious stabbing. Bipinchandra Modi, PW 8, used to sleep in the compound of Seksaria building which lies across the 'F' Road in front of Bharat Mahal. He had chased the assailant who jumped over the boun-

dary of the pavement on to 'Tetrapods' on the beach. The man who had escaped towards the sea emerged a little later at a place nearly 1100 ft. to the south of 'F' Road on Netaji Subbhash Road. At that time, Abdul Rehman, PW 11, and Venkatesh Narsappa, PW 13, and Mohan Velayudan saw him. Abdul Rehman had earlier heard the shouts of "Chor! Chor!" He had seen a man who was being chased jumping over the pavement wall on to the Tetrapods. As he saw a man coming from the Tetrapods back to the Netaji Subbhash Road, Abdul Rehman, PW 11, told his friends, Narsappa, PW 13, and Mohan Velayudan, who used to sleep at the bus stop in his company, that the man who had come out was the man who had escaped towards the sea. This was probably guess work. But, when Narsappa and Mohan Velayudan ran after that man so as to be able to catch him, the man turned round, faced them, and threatened to use his knife on them. This frightened Venkatesh Narsappa and Mohan Velayudan who retreated. The man then escaped towards the building called Zaver Mahal.

4. It appears that soon after the man who had eluded arrest either at the flat or by those, including Bipinchandra Modi, PW 8, who had chased him when he jumped over the pavement wall and ran towards the sea, or, subsequently, when Abdul Rehman, PW 11, and his two friends, Venkatesh Narsappa, PW 13, and Mohan Velayudan, tried to catch him, the appellant was seen with a friend called Chinappaya at an Irani Hotel, near the Church, opposite Marine Lines Railway Station. There, he found another friend, Abdul Karim Yusuf alias Takalya, PW 10, having tea. The two men sat near Takalya who was struck by the frightened look of the accused-appellant, and asked him what the matter was. It appears that the appellant, unable to keep the secret within himself, told Takalya what had happened in a flat at 'F' Road and warned him not to go that side. This kind of behaviour is not peculiar for desperate people with little control over their speech or actions. Apparently, they were birds of the same feather. Hence, Takalya

did not tell anyone immediately. But, on the next day, when the murder was being discussed, he told his friend, Ganesh Swami, PW 9, that the appellant had confessed to him. It appears that the appellant had no home and used to usually sleep in the Shri Niketan Gardens which adjoin Shyam Sadan buildings. What the appellant had revealed to Takalya was conveyed to Ganesh Swami, PW 9. Apparently, Takalya was appellant's friend and had known him for over a year. The appellant was arrested and put up for identification at a test parade held on 2-7-1973 at which Bipinchandra Modi, PW 8, Abdul Rehman, PW 11, Venkatesh Narsappa, PW 13, and Mohan Velayudan identified him, but Padam Singh, PW 7, and Smt. Lajja Chandnani, PW 2, failed to identify him. This shows that the identification proceedings conducted by a Magistrate were above board. The identifying witnesses were thoroughly cross-examined. Their evidence showed that they had sufficient opportunity to mark the features of the appellant well. They also identified the Appellant in Court. Furthermore, their identifications are corroborated not only by the evidence of Takalya to whom the appellant had made an extra-judicial confession, but also by the evidence of the recovery of a blood stained knife and a blood stained "bush shirt" at the pointing out of the appellant. The appellant had also some injuries on his person which had resulted from the scuffle. Their duration coincided with the time of the occurrence. He had also some blood stains on his clothes which he could not explain. The blood stains on the objects mentioned were of the same group as either that of the deceased or of his wife. The accused's blood grouping is different. After examining the whole evidence, there is not a shadow of doubt left in our minds that the appellant had committed the dastardly attack which resulted in the following injuries on the body of the deceased:

"(A) Abrasions, linear and incised, on

(1) Front lower part of neck, 2.8 cm., not tailing. (2) Chest to the left

of lower end of breast bone, 3.4 cm., tailing up. (3) Chest near right armpit, 2.1 cm., tailing down.

(B) Bruises blue red on chest above injury No. A-3, below middle of right collar bone, 4.8 x 3.0 cm., area.

(C) Incised stab wound on front upper part of left arm at level of armpit, 2.8 x 1.0 x 5.5 cm., deep under muscle near outer side of bone, tailing 0.5 cm., inwards, outer and square.

(D) Incised stab wound on chest below outer half of left collar bone, 2.0 x 0.5 x 6.2 cm., deep under muscle, direction of the blow from above vertically down under the skin and muscle, outer and square.

(E) Incised stab wound on chest below inner half of left collar bone, outer and square, 2.4 x 0.4 cm. He noted the following ante-mortem internal injuries corresponding to external injury E:—

(1) Second left intercostal space perforated in front below costal cartilage, 2.0 cm., cut.

(2) Pericardium cut in front 1.5 cm.

(3) Ascending aorta cut in front 1.5 cm. and 2.5 cm., cut behind internally (outer covering remaining intact)".

5. The most that could be said in defence of the appellant was that it was not certain, from the evidence, from which place he actually jumped over the pavement wall on to the Tetrapods. It is, however, clear that he emerged a little later near the bus stop where Abdul Rehman and his friends used to sleep. It appears that Abdul Rehman had gone a little bit ahead towards the north to urinate when he heard the shouts of "chor chor" and saw the appellant escaping towards the sea by jumping over the pavement wall on to the Tetrapods. It may be a matter of inference, when the appellant emerged a little later near the bus stop further south in order to take the passage by the side of the Zaver Mahal, that he was the same person. The inference was justified by the appellant's conduct. There were lamp posts on the road in the light of which the appellant's features

could be made out. He had turned round to face the two men who chased him. Abdul Rehman, PW 11, had seen him not merely jumping over the pavement wall from a distance but also emerging again over the pavement wall near the bus stop. The identifying witnesses had ample time to mark his visage. Moreover, as we have seen, there is ample corroborative evidence which lends assurance to the evidence of the identity of the escaped assailant. The total effect is to convince us beyond reasonable doubt that the appellant is the murderer.

6. We find no extenuating circumstance to reduce the sentence. The deceased had done no harm to the appellant. The appellant is apparently a desperate character who would not stop at killing rather than be caught in an attempt to steal after breaking into a house. We do not think that anything less than a death sentence is deserved by him.

7. Consequently, we affirm the conviction and sentence of the appellant and dismiss this appeal.

Appeal dismissed.

AIR 1976 SUPREME COURT 348

(From Calcutta: (i) (1971) 81 ITR 147; from Kerala (ii) 1972 Tax LR 990)

V. R. KRISHNA IYER, A. C. GUPTA AND S. MURTAZA FAZL ALI JJ.

(1) Civil Appeal No. 2129 of 1970, Indian Chamber of Commerce, Appellant v. C. I. T., West Bengal II, Calcutta, Respondent.

(1) Federation of Indian Chambers of Commerce and Industry, New Delhi:

(2) Bengal Chamber of Commerce and Industry Calcutta.

(3) The Cochin Chamber of Commerce and Industry, Cochin. Interveners.

(2) Civil Appeals Nos. 2455-2457 of 1972 C. I. T., Kerala, Ernakulam, Appellant v. Cochin Chamber of Commerce & Industry, Cochin, Respondent.

Civil Appeal Nos. 2129 of 1970 and 2455-2457 of 1972, D/- 17-9-1975.

KS/LS/D768/75/KSB

(A) Income-tax Act (1961), Ss. 2 (15) and 11 (1) — Charitable purpose — Advancement of an object of general public utility involving the carrying on of activity for profit will not come within its ambit — Chamber of Commerce — Although it is an institution advancing objects of general public utility its income from three heads of fees involve an activity for profit and therefore is not entitled to exemption under S. 11 (1) (a). 1972 Tax LR 990 (Ker), Reversed. 1973 Tax LR 1393 (Ker), Overruled.

The Chamber of Commerce is a trade association which renders specific services to its members and therefore Section 28 will ordinarily apply to its income, unless Sec. 11 read with Sec. 2(15) excludes it from taxability. The income drawn from non-members by the Chamber will clearly be taxable unless S. 2(15) comes to its rescue. (Para 6)

An institution which carries out charitable purposes out of income derived from property held under trust wholly for charitable purposes may still forfeit the claim to exemption in respect of such takings or incomes as may come to it from pursuing any activity for profits.

(Para 12)

S. 2(15) excludes from exemption the carrying on of activities for profit even if they are linked with the objectives of general public utility, because the statute interdicts, for purposes of tax relief, the advancement of such objects by involvement in the carrying on of activities for profit. (Para 16)

The true test is to ask for answers to the following questions: (a) Is the object of the assessee one of general public utility? (b) Does the advancement of the object involve activities bringing in moneys? (c) If so, are such activities undertaken (i) for profit or (ii) without profit? Even if (a) and (b) are answered affirmatively, if (c) (i) is answered affirmatively, the claim for exemption collapses. The solution to the problem of an activity being one for or irrespective of profit is gathered on a footing of facts. (Para 21)

Although the normal objects of Indian Chamber of Commerce may

be held to be objects of general public utility, the income derived from its activities in the form of (i) arbitration fees (ii) fees for issuing certificates of origin, and (iii) fees for weighment and measurement for the benefit of traders in general are the result of activities carried on for profit within the meaning of Sec. 2 (15) and the incomes from such activities are not exempt from tax under Section 11 of the Act. (1971) 81 ITR 147 (Cal), Affirmed. 1972 Tax LR 990 (Ker), Reversed. AIR 1976 SC 10 Rel. on. 1973 Tax LR 1393 (Ker), Overruled. (Paras 4, 26)

Cases Referred: Chronological Paras

AIR 1976 SC 10 = 101 ITR 234
2, 5, 7, 11, 17
(1975) 100 Tax LR 392 (Andh Pra) 4
1973 Tax LR 1393 = 94 ITR 113
(Ker) 20
AIR 1965 SC 1281 = (1965) 55 ITR
722 4, 8
AIR 1944 PC 88 = (1944) 12 ITR 482
18

In Civil Appeal No. 2129 of 1970.

Mr. A. K. Sen, Sr. Advocate, (Mrs. Leila Seth, Advocate and M/s. O. P. Khaitan and B. P. Maheshwari, Advocates with him), for Appellant; Mr. G. C. Sharma, Sr. Advocate, (M/s. B. B. Ahuja and S. P. Nayar, Advocates with him), for Respondent. M/s. J. Ramamurthi and D. N. Gupta, Advocates (for No. 1); Mr. A. K. Sen, Sr. Advocate, (Mr. Gupta, Advocate with him, (for No. 2); M/s. J. Ramamurthi and D. N. Gupta, Advocates, (for No. 3), for Interveners. In Civil Appeals Nos. 2455-2457 of 1972.

Mr. G. C. Sharma, Sr. Advocate and (M/s. B. B. Ahuja and S. P. Nayar Advocates with him), for Appellant; Mr. A. K. Sen, Sr. Advocate, (Mr. D. N. Gupta, Advocate with him), for Respondent.

The Judgment of the Court was delivered by

KRISHNA IYER, J.:— These four appeals raise but one question, turning on the meaning of 'charitable purpose', as defined in Section 2(15) of the Income Tax Act, 1961 (Act No. XLIII of 1961) (for short, the Act). They may be disposed of by one common judgment, although the two High Courts (Calcutta and Kerala)

from where the appeals have come have taken contrary views on the single point in issue.

2. What are the bounds set for earning exemption by a combined application of Sec. 11 (1) read with Section 2 (15) of the Act? What is the parameter of the legal concept of charitable purpose? Are the triune activities, which have yielded income and have been assessed to tax, eligible for exemption as falling within the scope of Section 2 (15) as it now stands? These points of law, in the conspectus of facts presented in the case, have been argued in the light of conflicting decisions of the High Courts and illumined in part by a very recent pronouncement of this Court in *Loka Shikshana Trust v. C. I. T.*, Mysore Civil Appeals Nos. 2130 and 2131 of 1970, decided on 28-8-1975 = (reported in AIR 1976 SC 10)

3. The assesseees are the Indian Chamber of Commerce and the Cochin Chambers of Commerce. Their memoranda and articles of association are substantially similar and so the facts in the first case alone need be stated and the question of law discussed with reference to that case only. Hardly any distinction on facts or law which desiderates a separate consideration exists.

4. The Indian Chamber of Commerce is a company registered under Section 26 of the Indian Companies Act, 1913. Its memorandum and articles of association spell out the broad objects and there is no doubt that they fall within the sweep of the expression 'the advancement of any.....object of general public utility' as set down in Section 2 (15) of the Act. Briefly put, they are primarily promotional and protective of Indian trade interests and other allied service operations. A general concluding clause authorizes it 'to do all other things as may be conducive to the development of trade, commerce and industries or incidental to attainment of above objects or any of them'. It is clear from Cls. 4 and 8 of the Memorandum of Association that the Members of the Chamber do not and cannot stand to gain personally since no portion of 'income and property of the association' shall be paid directly or indirectly, by way of

dividend or bonus or otherwise howsoever by way of profit to the persons who at any time are Members of the Association.....'. Even on the dissolution of the Association the Members cannot claim any share in the assets. These highlight the fundamental fact that the Chamber, by and large, strives to advance the general trade interests of India and Indian without seeking to make profits for its Members. In the light of this Court's decision in *C. I. T. v. Andhra Chamber of Commerce*, (1965) 55 ITR 722 = (AIR 1965 SC 1281) one may readily state that the Chambers advance objects of general public utility and, prima facie move into the exclusionary area of charitable purpose. However, the bone of contention in this case is as to whether the three sources of income, viz., (a) arbitration fees levied by the Chamber; (b) fees collected for the certificates of origin; and (c) share of profit in *M/s. Calcutta Licensed Measurers* for issue of certificates of weighment and measurement, fall within the exclusion. It may be mentioned that all these three services were extended to Members and non-Members or, rather, to the trade generally. Had the law bearing on 'charitable purpose' been what it was prior to 1961, the Chamber would have won, hands down may be. But then there is a significant change in the definition of 'charitable purpose' by the addition of nine new words which cut back on the amplitude of the expression in the prior Act. The straight question to be answered here is whether, in plain English, the three activities which have yielded profits to the Chamber involve the carrying on of any activity for profit, uncomplicated by casuistic niceties, semantic nuances and case-law conflicts. Unfortunately, legislative simplicity has not been accomplished by the draftsman in the amended definition and, consequently, interpretative complexity persists. The Judges of the Andhra Pradesh High Court in *A. P. State Road Transport Corporation v. C. I. T.*, (1975) 100 ITR 392 at p. 397 observed, while considering the import of S. 2(15) of the 1961 Act:

"It is one of the fundamental principles in legislation and the drafting of statutes that the provisions con-

tained therein should be clear and cogent and, more so, with regard to the fiscal statutes which impose a burden on the public. But, in this case, what we find is that the amendment, instead of being clear and cogent, is complicated and courts have taken different views in interpreting the same."

We dare say that achieving greater simplicity and clarity in statute law will be taken up by the draftsmen of the legislative bills to avoid playing linguistic games in Court and promotion of interpretative litigation. Lawyers and legislators must stop confusing each other and start talking to their real audience — the people — so that communication problems may not lead to prolific forensic battles. We must confess to having been hard put to it to get at the controlling distinction between activities which fall on one side or the other of 'charitable purpose'. The assessee, the Indian Chamber of Commerce, was assessed for the accounting year 1963-64 on the income which arose from the three heads of arbitration fees, fees for certificates of origin and the share of profits in the firm *M/s. Calcutta Licensed Measurers* which issued weighment and measurement certificates charging a fee therefor. The return for the assessment year showed a profit of Rs. 1,58,690/- made up of a small amount from arbitration fees, and a similar sum from fees for issue of certificates of origin but a substantial sum by way of share of income from the fees charged for weighment and measurement. Although the Income-tax Officer repelled the claim of 'charitable purpose' on the view that these activities were for profit, the Appellate Tribunal took a contrary view reversing the concurrent findings of the Income-tax Officer and the Appellate Assistant Commissioner. The conclusion of the Tribunal was that Sec. 2 (15) applied but the High Court on a reference under Section 255 (1) of the Act, answered the question in favour of the Revenue.

5. We have indicated earlier that the various High Courts have taken contrary views. Kerala has consistently held on facts substantial-

ly identical that Section 2 (15) is attracted. Andhra Pradesh has concurred, while Calcutta and Mysore have ranged themselves on the opposite side. A recent decision of this Court earlier mentioned (AIR 1976 SC 10) has given some telling guidelines although the precise facet pressed before us may not be said to have been wholly covered by it.

6. The scheme of the Act may be briefly indicated to the extent it is relevant, before entering on the discussion. 'Income' is taxable, but certain incomes shall not be included in the total income of the previous year of the person in receipt of the income. Section 11 excludes from the computation income derived from property held under trust wholly for charitable purpose. The Chamber of Commerce is a trade association which renders specific services to its members and therefore Section 28 will ordinarily apply to its income, unless Section 11 read with Section 2 (15) excludes it from taxability. The income drawn from non-members by the Chamber will clearly be taxable unless S. 2(15) comes to its rescue. Thus the pivotal issue is as to whether the three channels of income may be treated as charitable purposes and therefore eschewed by Section 11 from the charging provision.

7. At this stage we may read Section 2 (15):

"2 (15) In this Act, unless the context otherwise requires,—

'charitable purpose' includes relief of the poor, education, medical relief, and the advancement of any other object of general public utility not involving the carrying on of any activity for profit."

The obvious change as between the old and the new definitions is the exclusionary provision introduced in the last few words. The history which compelled this definitional modification was the abuse to which the charitable disposition of the statute to charitable purposes was subjected by exploiting businessman. You create a charity, earn exemption from the taxing provision and run big industries virtually enjoying the profits with a seeming veneer of charity — a situation which

exsuscitated Parliament and constrained it to engraft a clause deprivatory of the exemption if the institution fulfilling charitable purposes undertook activities for profit and thus sought to hoodwink the statute. The Finance Minister's speech in the House explicates the reason for the restrictive condition. He stated in the House*:

"The definition of 'charitable purpose' in that clause is at present so widely worded that it can be taken advantage of even by commercial concerns which, while ostensibly serving a public purpose, get fully paid for the benefits provided by them, namely, the newspaper industry which while running its concern on commercial lines can claim that by circulating newspapers it was improving the general knowledge of the public. In order to prevent the misuse of this definition in such cases, the Select Committees felt that the words 'not involving the carrying on of any activity for profit' should be added to the definition."

Beg J., in *Loka Shikshana Trust*, (AIR 1976 SC 10) has adverted to this statement as throwing light on the new provision. The evil sought to be abolished is thus clear. The interpretation of the provision must naturally fall in line with the advancement of the object. Of course, there are borderline cases where it becomes difficult to decide at first sight whether the undertaking which yields profit is a deceptive device or a bona fide adventure which results in nominal surplus although substantially intended only to advance the charitable object.

8. Chambers of Commerce dot this country and, by and large, they have the same complex of objects. They exist to promote the trading interests of the commercial community and, after the *Andhra Chamber of Commerce* case, (AIR 1965 SC 1281) have been regarded as pursuing charitable purposes. This expression, defined in Section 2 (15), is a term of art and embraces objects of general public utility. But, under cover of charitable purposes, a crop of camouflaged organisations sprung up. The

*Lok Sabha Debates, Vol. LVI, 1961, p. 3073 (Aug. 18, 1961)

mask was charitable, but the heart was hunger for tax-free profit. When Parliament found this dubious growth of charitable chameleons, the definition in Section 2 (15) was altered to suppress the mischief by qualifying the broad object of 'general public utility' with the additive 'not involving the carrying on of any activity for profit'. The core of the dispute before us is whether this intentional addition of a 'cut back' clause expels the Chamber from the tax exemption zone in respect of the triune profit-fetching sub-enterprises undertaken by way of service or facility for the trading community.

9. The rival constructions put forward by counsel at the bar may now be noticed. Shri A. K. Sen's argument for the Chamber is that the controlling distinction between what is 'charitable purpose' and what is not lies in discovering the dominant intent as distinguished from the subsidiary consequence, the principal object, not the incidental inflow, the profit motive of the operation as against the service-oriented activity which may or may not en passant yield an income. His stress à la the Kerala cases, is on whether the activity is wrapped up, entangled and intertwined with the public utility object. If it is, the resultant surplus is not an exigible income. Such, certainly, are the passwords and touchstones used in several Kerala decisions. If this be the parameter, he argues, the three activities are saved because they render service, promote trade and facilitate the wheels of business to move. They do not form activities for making profit; they are in fulfilment of the objects of the Chamber.

10. Shri Sharma for the Revenue reads into the amended definition a total exclusion from the charmed circle of charitable purposes all activities which are prone to produce profits. The telling test, according to this view, is to see that the means, like the ends, are charitable, untainted by gainful stimulus and purged of the potential for profit in reality. By this canon the Chambers' desire to serve businessmen by offering arbitral or certificates facilities in return for a price is prima

facie an 'activity' for profit' unless the circumstances, express or necessarily implicit, eloquently proclaim a 'no profit' foundation for the undertaking. The linkage is not between object of public utility and the challenged activity but between the methodology adopted for the advancement of such objects and proneness for profit flowing from such method or activity. If this standpoint be sound, the three services which have yielded profits, although wrapped in, entangled or intertwined with the object of promoting trade interests, are still liable to tax, there being no visible limitation on the revenues that may arise from them and these precise activities could be carried on by private individuals for profit.

11. The legal break-through lies along a realistic line of reasoning, taking care to avoid the extreme position of Shri Sharma which will render the last limbs of Section 2 (15) illusory or ineffectual and as serviceable for tax exemption of charities as the appendix to the human physiology. In our view the key to the problem is furnished not merely by a careful look at the history of the evil and the Parliamentary debate — at least the Finance Minister's speech on the new change — but the language of Section 2 (15) itself, read in the light of the guidelines in *Loka Shikshana Trust*, (AIR 1976 SC 10).

12. Taking a close-up of Section 2 (15) with special emphasis on the last concluding words, we have to interpret 'charitable purpose' in such manner that we do not burke any word, treat any expression as redundant or miss the accent of the amendatory phrase. So viewed, an institution which carries out charitable purposes out of income 'derived from property held under trust wholly for charitable purposes' may still forfeit the claim to exemption in respect of such takings or incomes as may come to it from pursuing any activity for profit. Notwithstanding the possibility of obscurity and of dual meanings when the emphasis is shifted from 'advancement' to 'object' used in Sec. 2 (15), we are clear in our minds that by the new definition the benefit of exclusion from total income is taken away where in accomplishing

a charitable purpose the institution engages itself in activities for profit. The Calcutta decisions are right in linking activities for profit with advancement of the object. If you want immunity from taxation, your means of fulfilling charitable purposes must be unsullied by profit-making ventures. The advancement of the object of general public utility must not involve the carrying on of any activity for profit. If it does, you forfeit. The Kerala decisions fall into the fallacy of emphasising the linkage between the objects of public utility and the activity carried on. According to that view, whatever the activity, if it is intertwined with, wrapped in or entangled with the object of charitable purpose even if profit results therefrom, the immunity from taxation is still available. This will result in absurd conclusions. Let us take this very case of a Chamber of Commerce which strives to promote the general interests of the trading community. If it runs certain special types of services for the benefit of manufacturers and charges remuneration from them, it is undoubtedly an activity which, if carried on by private agencies, would be taxable. Why should the Chamber be granted exemption for making income by methods which in the hands of other people would have been exigible to tax? This would end up in the conclusion that a Chamber of Commerce may run a printing press, advertisement business, market exploration activity or even export promotion business and levy huge sums from its customers whether they are members of the organisation or not and still claim a blanket exemption from tax on the score that the objects of general public utility which it has set for itself implied these activities, even though profits or surpluses may arise therefrom. Therefore, the emphasis is not on the object of public utility and the carrying on of related activity for profit. On the other hand, if in the advancement of these objects the Chamber resorts to carrying on of activities for profit, then necessarily Sec. 2 (15) cannot confer cover. The advancement of charitable objects must not involve profit making activities.

That is the mandate of the new amendment.

13. The opposite position in its extreme form is equally untenable. While Shri Sharma is right that merely because service is rendered to traders escapement from tax liability does not follow, every type of service-oriented activity, where some charge is levied from the beneficiary and at the end of the year some surplus is left behind, does not lose the benefit of Sec. 2 (15). For, then, one cannot conceive of any object of general public utility which can be advanced by the Chamber of Commerce. For every such activity some fee will have to be levied if the Chamber is not to turn bankrupt and merely because a fee is levied one cannot castigate the activity as one for profit. Therefore it is a false dilemma to talk of activity for profit as against activity rendered free. The true demarcating line lies in between.

14. In our view, the ingredients essential to earn freedom from tax are discernible from the definition, if insightfully read against the brooding presence of the evil to be suppressed and the beneficial object to be served. The policy of the statute is to give tax relief for charitable purpose, but what falls outside the pale of charitable purpose? The institution must confine itself to the carrying on of activities which are not for profit. It is not enough if the object be one of general public utility. The attainment of that object shall not involve activities for profit. What then is an activity for profit? An undertaking by a business organisation is ordinarily assumed to be for profit unless expressly or by necessary implication or by eloquent surrounding circumstances the making of profit stands loudly negatived. We will illustrate to illumine. If there is a restrictive provision in the bye-laws of the charitable organisation which insists that the charges levied for services of public utility rendered are to be on a 'no profit' basis, it clearly earns the benefit of Section 2(15). For instance, a funeral home, an S. P. C. A. or a co-operative may render services to the public but write a condition into its constitution

that it shall not charge more than is actually needed for the rendering of the services — may be it may not be an exact equivalent, such mathematical precision being impossible in the case of variables — may be a little surplus is left over at the end of the year — the broad inhibition against making profit is a good guarantee that the carrying on of the activity is not for profit. As an antithesis, take a funeral home or an animal welfare organisation or a super bazaar run for general public utility by an institution which charges large sums and makes huge profits. Indubitably they render services of general public utility. Their objects are charitable but their activities are for profit. Take the case of a blood bank which collects blood on payment and supplies blood for a higher price thereby making profit. Undoubtedly, the blood bank may be said to be a general public utility but if it advances its public utility by sale of blood as an activity for (making) profit, it is difficult to call its purpose charitable. It is just blood business.

15. In the United States, for instance, there are many funeral homes which make considerable profits. There are super bazaars and animal welfare institutions in many countries which may be run on a profit motive. Inevitably these activities are caught in the meshes of the tax law. Ready-made nostrums like 'dominant intent', 'incidental profits', 'real object' as against 'ostensible purpose', 'entangled', 'wrapped in', 'inter-twined' and the like fail as criteria in critical cases, although they have been liberally used in judicial vocabulary. In this branch of law verbal labels are convenient but not infallible. We have to be careful not to be victimised by adjectives and appellations which mislead, if passed too far, although they may loosely serve in the ordinary run of cases.

16. To sum up, Section 2 (15) excludes from exemption the carrying on of activities for profit even if they are linked with the objectives of general public utility, because the statute interdicts, for purposes of tax relief, the advancement of such objects by involvement in the carrying

on of activities for profit. We appreciate the involved language we use, but when legislative draftsmanship declines to be simple, interpretative complexity becomes a judicial necessity.

17. Loka Shikshana Trust, (AIR 1976 SC 10) is the latest — perhaps the only case of this Court — dealing directly with Section 2 (15) of the Act. Khanna J., speaking on behalf of himself and Gupta J., observed:

"As a result of the addition of the words 'not involving the carrying on of any activity for profit', at the end of the definition in Section 2 (15) of the Act even if the purpose of the trust is 'advancement of any other object of general public utility', it would not be considered to be 'charitable purpose' unless it is shown that the above purpose does not involve the carrying on of any activity for profit. The result thus of the change in the definition is that in order to bring a case within the fourth category of charitable purpose, it would be necessary to show that (1) the purpose of the trust is the advancement of any other object of general public utility, and (2) the above purpose does not involve the carrying on of any activity for profit. Both the above conditions must be fulfilled before the purpose of the trust can be held to be charitable purpose."

x x x x x x
"It is true that there are some business activities like mutual insurance and co-operative stores of which profit making is not an essential ingredient, but that is so because of a self-imposed and innate restriction on making profit in the carrying on of that particular type of business. Ordinarily profit motive is a normal incidence of business activity and if the activity of a trust consists of carrying on of a business and there are no restrictions on its making profit, the court would be well justified in assuming in the absence of some indication to the contrary that the object of the trust involves the carrying on of an activity for profit."

(emphasis, ours)

x x x x x x
 "By the use of the expression 'profit motive' it is not intended that profit must in fact be earned. Nor does the expression cover a mere desire to make some monetary gain out of a transaction or even a series of transactions. It predicates a motive which pervades the whole series of transactions effected by the person in the course of his activity."

x x x x x x
 "We are not impressed by the submission of the learned counsel for the appellant that profit under S 2 (15) of the Act means private profit. The word used in the definition given in the above provision is profit and not private profit and it would not be permissible to read in the above definition the word 'private' as qualifying profit even though such word is not there."

Beg J. spoke on the subject with different accent but drew pointed attention to one aspect:

"The deed puts no condition upon the conduct of the newspaper and publishing business from which we could infer that it was to be on 'no profit and no loss' basis. I mention this as learned counsel for the appellant repeatedly asserted that this was the really basic purpose and principle for the conduct of the business of the trust before us. This assertion seems to be based on nothing more substantial than that the trust deed itself does not expressly make profit making the object of the trust. But, as I have already indicated, the absence of such a condition from the trust deed could not determine its true character. That character is determined far more certainly and convincingly by the absence of terms which could eliminate or prevent profit making from becoming the real or dominant purpose of the trust. It is what the provisions of the trust make possible or permit coupled with what had been actually done without any illegality in the way of profit making, in the case before us, under the cover of the provisions of the deed, which enable us to decipher the

meaning and determine the predominantly profit making character of the trust." (Emphasis, ours)

We do not think it necessary to discuss the various decisions of the High Courts cited before us nor need we seek light from the English Cases either. After all, Indian law must bear Indian impress derived from Indian life.

18. In All India Spinners' Association v. Commr. of Income-tax, Bombay, (1944) 12 ITR 482 at page 486 = (AIR 1944 PC 88 at page 91), Lord Wright, speaking for the Judicial Committee, and considering the subject of 'charitable purposes' as justifying exemption from Income-tax, observed:

"It is now recognised that the Indian Act must be construed on its actual words and is not to be governed by English decisions on the topic."

x x x x x x
 "The Indian Act gives a clear and succinct definition which must be construed according to its actual language and meaning. English decisions have no binding authority on its construction and though they may sometimes afford help or guidance, cannot relieve the Indian Courts from their responsibility of applying the language of the Act to the particular circumstances that emerge under conditions of Indian life."

Crypto-colonial inclinations have sometimes induced Indian draftsmen and jurists draw inspiration from English law but, for reasons felicitously expressed by Lord Wright, we are adopting interpretation of Section 2(15) according to the language used there and against the background of Indian life.

19. Coming to the facts of the present case, the criteria we have evolved have to be applied.

20. Among the Kerala Cases which went on the wrong test we wish to mention one, C. I. T. v. Dharmodayam Co. — (1974) 94 ITR 113 = (1973 Tax LR 1393 Ker). The assessee company was conducting a profitable business of running chit funds and its memorandum of association had as one of its objects 'to do the

needful for the promotion of charity, education and industry. The court found it possible on these facts to grant the benefit of Section 2 (15) by a recondite reasoning. If this ratio were to hold good businessmen have a highroad to tax avoidance. Dhar-modayam shows how dangerous the consequence can be if the provision were misconstrued.

21. The true test is to ask for answers to the following questions: (a) Is the object of the assessee one of general public utility? (b) Does the advancement of the object involve activities bringing in moneys? (c) If so, are such activities undertaken (i) for profit or (ii) without profit? Even if (a) and (b) are answered affirmatively, if (c) (i) is answered affirmatively, the claim for exemption collapses. The solution to the problem of an activity being one for or irrespective of profit is gathered on a footing of facts. What is the real nature of the activity? One which is ordinarily carried on by ordinary people for gain? Is there a built-in prescription in the constitution against making a profit? Has there been in practice, profit from this venture? Although this last is a weak test. The mere fact that a service is rendered is no answer to chargeability because all income is often derived by rendering some service or other.

22. Further, what is an activity for profit depends on the correct connotation of the preposition. 'For' used with the active participle of a verb means 'for the purpose of' (See judgment of Westbury C., 1127). 'For' has many shades of meaning. It connotes the end with reference to which anything is done. It also bears the sense of 'appropriate' or 'adapted to'; 'suitable to purpose' — vide Black's Legal Dictionary. An activity which yields a profit or gain in the ordinary course must be presumed to have been done for profit or gain. Of course, an extreme case could be imagined where without intent or purpose an activity may yield profit. Even so, it may legitimately be said that the activity is, 'appropriate or adopted to such profit.'

23. We may wind up with a brief rounding off and indication on

the approach. A pragmatic condition, written or unwritten, proved by a prescription of profits or by long years of invariable practice or spelt from strong surrounding circumstances indicative of anti-profit motivation — such a condition will qualify for 'charitable purpose' and legitimately get round the fiscal hook. Short of it, the tax tackle holds you fast. A word about the burden of proof is necessary here. Income, ordinarily chargeable can be free from exigibility only if the assessee discharges the onus of bringing himself within Section 2 (15). In so doing, he has to attract and repel — attract the condition that his objects are of 'general public utility' and repel the charge that he is advancing these objects by involvement in activities for profit. Once this broad dual basis is made out, the Revenue will not go into meticulous mathematics and charge every chance excess or random surplus. If the activity is prone to yielding income and in fact results in profits, the Revenue will examine the reality or pretence of the condition, that the activity is not for profit. Here, one may well say, 'Suit the action to the word, the word to the action'.

24. If such be the legal criteria for fixing charitable purpose, how does the Indian Chamber fare? The substantial item of income comes from the share of profits in the firm called M/s. Calcutta Licensed Measurers. True, the issuance of weighment and measurement certificate is a great facility for traders and under the Commercial Documents Evidence Act only recognised institutions are permitted to issue such certificates. Recognition bespeaks to the status, integrity and efficiency of the institution but does not transmute a service for profit into non-profitable activity. It is irrelevant whether this service is in implementation of or interwoven with trade promotion. What is pertinent is whether the advancement of trade promotion by issuing such certificates is done for a nominal fee conditioned by the cost of the operation and profit-making by this means is tabooed. For, there is nothing in the memorandum or articles of association which sets any limit on mak-

ing a large profit this way. And, after all, any institution or individual may set up a weighment and measurement business as a source of income and if it is of sufficient probity and competence recognition may well be accorded under the Commercial Documents Evidence Act. We cannot mix up or confuse the two concepts. The activity of charging fees and issuing certificates of origin, valuable as a service though it be, is in no different position. Both these activities are amenable to tax as being carried on for profit, there being nothing to show that the Chamber was undertaking this job on a 'no profit' basis. The presumption, if at all, is that a businessmen's association does a business of it, more so when the facility is available to members and non-members. Not infrequently one comes across weighment stations where loaded trucks are weighed for payment as a business. So also approved valuers value property as business and charge for that service. Merely because it is carried on by a Chamber of Commerce no difference in incidents arises and tax incidence can be repelled only if the work is done explicitly on a 'no profit' basis. Such is not shown to be the case here.

25. The objects of the Chamber include settlement of disputes among traders by arbitration. This is undoubtedly a service of general public utility — preventing protracted commercial litigation. If the fee charged for doing so is more or less commensurate with the expense the Chamber has to incur, a minor surplus will not attract tax. But no such restriction is written into the rules governing the Chamber. It may charge a heavy sum and spend much less for hiring experts to decide the dispute. There is no magna carta binding the Indian or Cochin or Bengal Chamber of Commerce not to sell arbitral justice. Suppose a specialist in mercantile law and practice of reputable integrity offers himself regularly for arbitration of commercial disputes for a high fee, is he not making an income? The difference between the two is as between Tweedledum and Tweedledee. Surely, if an

innate, articulated, restraint on the levy for these undoubted services to Trade existed as a fact, so as to remove the slur of activity for profit, then the umbrella of charitable purpose would protect small surpluses.

26. We hold that the incomes of the Chambers sought to be taxed are taxable. Civil Appeal No. 2129 of 1970 is dismissed and Civil Appeals Nos. 2455 to 2457 of 1972 are allowed. Parties will bear their respective costs.

27. Before parting with the case we may as well make it clear that our conclusion would have been the same even without reference to or reliance on the speech of the Finance Minister we have excerpted earlier.

Order accordingly.

AIR 1976 SUPREME COURT 357

(From Mysore: (1970) 25 STC 520)
P. K. GOSWAMI AND N. L. UNTHIAIA, JJ.

Bagal Kot Cement Co., Appellant
v. State of Mysore, Respondent.

Civil Appeal No. 98 of 1971, D/- 27-11-1975.

(A) Central Sales Tax Act (1956), Sec. 2 (b), 2 (dd) — Dealer — Does not include all kinds of agents but includes del credere agent or a mercantile agent doing business of buying, and selling goods as a principal vis-a-vis its customers. (Para 9)

The assessee Cement Company was appointed by the State Trading Corporation as its selling agent under an agreement with the Corporation for the sale of cement at the controlled price, to different customers because under the Cement Control Order the assessee was bound to sell its entire stock of cement to the Corporation. Pursuant to the agreement the assessee Company made inter-State sales and realised sales tax from the Customers under the Central Sales Tax Act. The Company had possession of the goods and was authorised to transfer the property in the goods to the purchasers and had

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actually issued invoices in favour of the customers as principal.

Held that from the course of conduct of the assessee's business and the terms of agreement it was clear that the Company was not a mere commission agent or broker selling the goods on behalf of its principal — the Corporation. There was no privity of contract between the various customers of cement and the Corporation. The assessee company which effected the sales as an agent of the Corporation was a dealer within Section 2(b) and therefore was liable to sales tax. The definition of place of business in Sec. 2(dd) had no relevance as the Corporation itself was not a dealer. AIR 1952 Mad 718 (FB), Approved. (1970) 25 STC 520 (Mys), Affirmed. (Paras 8, 12)

Cases Referred: Chronological Paras
AIR 1952 Mad 718 = (1952) 1 Mad LJ 494 (FB) 11

Mr. D. V. Patel, Sr. Advocate, (M/s. Vineet Kumar and B. P. Singh, Advocates with him), for Appellant; Mr. V. P. Raman Addl. Sol. General, (M/s. N. Nettar and R. C. Kaushik, Advocates with him), for Respondent.

UNTWALIA, J.:— In this appeal by special leave the question for determination is whether the appellant company is a dealer within the meaning of Sec. 2(b) of the Central Sales Tax Act, 1956 — hereinafter referred to as the Central Act, liable to pay sales tax thereunder.

2. The appellant, Bagal Kot Cement Co. Ltd., is a manufacturer of cement. For the period 1st April, 1961 to 31st March, 1962 it filed a Return before the Assessing Authority showing a total turn-over of Rupees 1,11,02,243/-. The entire sum was shown as taxable turn-over on which an amount of Rs. 2,25,317.55 had been collected and paid as tax. No claim was made on behalf of the appellant before the Assessing Authority that it was not liable to pay any sales tax. The Authority accepted the Return and assessed the tax as per the appellant's figure. It appears the appellant was advised thereafter to file an appeal before the Deputy Commissioner of Commercial Taxes and take the stand that in respect of the transactions in question it was not a dealer

and was not liable to pay any tax. The Deputy Commissioner dismissed the appeal. A second appeal filed by the appellant before the Mysore Sales Tax Appellate Tribunal also failed. The company took up the matter in revision to the High Court under Section 23 of the Mysore Sales Tax Act, 1957 — hereinafter called the State Act, read with Section 9(2) of the Central Act. The High Court dismissed the revision. Hence this appeal.

3. Under the Cement Control Orders, 1958 and 1961 the appellant was bound to sell the entire quantity of cement to the State Trading Corporation of India Ltd. By an agreement executed between the parties the Corporation appointed the Company as its selling agent for sale of cement to different customers on its behalf at the controlled price and in accordance with the instructions which may be given from time to time by the Corporation. Pursuant to the agreement the company made the inter-State sales and realized sales tax from the customers under the Central Act. Its contention is that being an agent of the State Trading Corporation and having effected all the sales under its direction it was not a dealer as defined in Section 2(b) of the Central Act and hence was not liable to pay any sales tax thereunder. The liability was of the Corporation.

4. In our opinion there is no substance in the appellant's argument. After having realized the sales tax from the various customers and voluntarily and excontracts paid it as per the Return submitted it was ill-advised to take an unsustainable stand of its not being liable to pay sales tax under the Central Act.

5. There cannot be any doubt that the sales of cement made during the period in question in the course of inter-State trade were exigible to sales tax under the Central Act. The question for consideration is who was liable to pay it? The liability was of the dealer as defined in Section 2(b). If the appellant company was the dealer which had made the sales as defined in Section 2(g), then the liability to pay the tax under the charging Section 6 was its. If it was

not a dealer then obviously it was not liable to pay any tax.

6. To determine the point at issue as mentioned above it is necessary to advert to the primary facts and the course of conduct of the business of the appellant as per the terms of the agreement entered into with the State Trading Corporation. The High Court has pointed out that the Deputy Commissioner found:

(1) The Company was appointed by the State Trading Corporation as its selling agent;

(2) It had sold cement at the price specified in the Cement Control Order to the customers who held permits from the governmental authorities;

(3) The customers purchased the cement from the company directly and they were not aware of the identity of the principal namely the State Trading Corporation.

The High Court also refers to the fact that the appellant did not place the relevant papers pertaining to the transactions before the authorities below. But its learned counsel conceded that the invoices were issued by the company, that the company had possession and the custody in the goods and it was authorised to transfer the property of the goods to the purchasers. These facts were not disputed before us. Rather in the special leave petition it is admitted that the invoices were issued by the appellant company in its own name.

7. We may now refer to some relevant clauses of the agreement between the parties. They are as follows:

"1. The Corporation hereby appoints the agents to take on its behalf delivery of the entire cement produced at the works of Bagalkot Cement Co. Ltd. and to arrange for the distribution of such cement in accordance with such directions as may be issued by the Corporation from time to time.

2. The Agents may enter into contracts for sale of cement on behalf of the Corporation and shall, inter alia, arrange for the despatch of cement to the consignees, submit bills for the sales, receive payments in connection therewith and do all acts

and things that may be necessary to handle effectively, on behalf of the Corporation, all contracts of sale of cement entered into as aforesaid.

7 (a) The Agents shall sell cement at such prices as may be indicated by the Corporation from time to time.

(b) The Agents shall collect State or inter-State sales tax and other local and State Government taxes as may be leviable, and pay the same in accordance with the law. They shall also discharge all liabilities devolving upon them as dealers under the various Sales Tax Acts and Rules;

13. The Agents shall credit to the Corporation at the end of every month the sale proceeds of the cement sold by them at a price referred to in clause 7 above, as reduced by:

(a) the amount paid to producers according to the provisions of Clause 9 above;

.....

(e) the Agents remuneration referred to Clause 8 above."

8. It would thus be seen from the course of conduct of the appellant's business and the terms of agreement that the Company was not a mere commission agent or broker selling the goods on behalf of its principal — the Corporation. There was no privity of contract between the various customers of cement and the Corporation. No property in the goods sold was passed by the Corporation to them. After taking the symbolical delivery of the entire cement produced at the works of the company as per clause (1) of the agreement the company was in possession and custody of the goods. It was entering into contracts for sale of cement and selling it. The property in the goods was passed on to the buyers by the company. Under clause (7) it was authorised to collect sales tax both on intra-State and inter-State sales, and to discharge its liability devolving upon it as dealer under the various Sales Tax Acts and Rules. As per Clause 13 of the agreement only the difference of price after deducting the company's remuneration was to be credited to the Corporation's account.

9. Section 2 (b) of the Central Act reads as follows:

"'dealer' means any person who carries on the business of buying or selling goods, and includes a Government which carries on such business;" "sale" within the meaning of Clause (g) means any transfer of property in goods by one person to another for cash or for deferred payment or for any other valuable consideration. "Sale price" under clause (h) means the amount payable to a dealer as consideration for the sale of any goods. On the facts stated above it is abundantly clear that sale was made by the appellant company as it effected transfer of property in the goods to the customers and realized sale price from them by issuing invoices in its own name. The restricted definition of the term 'dealer' in the Central Act is not wide enough to cover all kinds of agents such as brokers or a commission agent simpliciter as many of the State Acts include them within their definitions. As for example the term 'dealer' defined in Section 2 (k) of the Mysore State Act includes "a commission agent, a broker or del credere agent or an auctioneer or any other mercantile agent by whatever name called, who carries on the business of buying, selling, supplying or distributing goods on behalf of any principal;" The term 'dealer' as defined in the Central Act would, however, include a del credere agent or a mercantile agent who carries on the business of buying or selling goods not as an agent simpliciter on behalf of the disclosed principal but as a principal vis-a-vis its customers.

10. In Halsbury's Laws of England, Fourth Edition, Volume 1, Para. 712 it is stated:

"A mercantile agent is one having, in the customary course of his business as such agent, authority either to sell goods, or to consign goods for the purpose of sale, or to buy goods, or to raise money on the security of goods. An agent may be a mercantile agent although he has no general occupation as an agent, or has only one customer, or although his general occupation is that of an independent dealer in the commodity

entrusted to him, provided that he acts in the transaction in his capacity as mercantile agent; but he must not be a mere servant or shopman."

In Para. 713 is stated:

"A del credere agent is one who, usually for extra remuneration, undertakes to indemnify his employer against loss arising from the failure of persons with whom he contracts to carry out their contracts."

11. In the judgment under appeal the High Court repelled the stand of the appellant relying upon the decision of a Full Bench of the Madras High Court in Radhakrishna Rao v. Province of Madras, AIR 1952 Mad 718 (FB). Referring to the identical definition of the 'dealer' in the Madras Act Rajamannar, C. J. delivering the judgment on behalf of the Bench has stated at page 723 column 2:

"In the case of a commission agent, the accepted mercantile practice is that he has control over or possession of the goods and he has the authority from the owner of the goods to pass the property in and title to the goods. If this is so, undoubtedly when a commission agent sells goods belonging to his principal with his authority and consent and without disclosing to the buyer the name of the owner, there is certainly a transfer of property in the goods from the commission agent to the buyer. A business which consists in such transactions can properly be described as a business of selling goods. A similar position would arise even in the case of a commission agent buying for an undisclosed principal. A commission agent doing this kind of business would in my opinion, fall within the definition of dealer in the Sales Tax Act. Neither the definition of dealer nor of sale contemplates as a necessary condition, that the goods sold should belong to the person selling or buying. There can be a sale or purchase on behalf of another."

We agree with the above view of the learned Chief Justice.

12. Mr. D. V. Patel, learned counsel for the appellant heavily relied on the definition of the expression "place of business" given in Clause (dd) of Section 2 of the Cen-

tral Act which includes "(i) in any case where a dealer carries on business through an agent (by whatever name called), the place of business of such agent;" Counsel submitted that the above inclusive definition would show that it was the Corporation which was carrying on the business through the appellant company as its agent and for the purpose of the Central Act the place where the business was carried on by the company as the Corporation's agent would be the place of the business of the Corporation. On the other hand, learned Additional Solicitor General II pointed out that if the appellant was the dealer within the meaning of Section 2 (b) then it was not the Corporation which was carrying on the business through it as an agent to attract the definition given in Clause (dd). In our judgment it was the appellant company which carried on the business of selling cement although it was acting as selling agents of the Corporation. The Corporation was not the dealer which effected the sales but it was the company which did so.

13. For the reasons stated above, we find no substance in this appeal. It is accordingly dismissed with costs.

Appeal dismissed.

AIR 1976 SUPREME COURT 361

(From: AIR 1969 Andh Pra 158)

A. N. RAY C. J., M. H. BEG, R. S. SARKARIA AND P. N. SINGHAL JJ.

Mohd. Faisuddin Khan, Appellant v Govt. of India and others, Respondents.

Civil Appeal No. 2409 of 1968, D/- 25-11-1975.

(A) Displaced Persons (Compensation and Rehabilitation) Act (1954), Ss. 12, 13 — Notification under Section 12 (1) — Publication — Effect — Vesting of evacuee property under Sec. 12 (2), if dependent on payment of compensation — Art. 31 of Constitution if violated.

On publication of the notification under Sec. 12 (1) of the Act, the

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right, title and interest of the evacuee was extinguished in the evacuee property and it vested absolutely in the Central Government free from all encumbrances. That, was unconditional, and was not made to depend upon the fixation or payment of compensation under Section 13, notwithstanding the fact that the principles for payment of compensation had not been agreed upon between the Governments of India and Pakistan and had not therefore been fixed. The words "or otherwise" in Art. 31 (5) (b) (iii) of the Constitution are sufficiently wide and the protection of the article extends to the relevant provisions of the Act so that there could be no successful challenge on the basis of Art. 31 (2). There is nothing wrong with the view that compensation under Section 13 would have been payable to the evacuee whose property has vested in the Central Government under Sec. 12 (2), in accordance with such principles and in such manner as might have been agreed upon between the Governments of India and Pakistan, but not otherwise. The evacuee is therefore not entitled to claim such compensation in the absence of the agreement. AIR 1969 Andh Pra 158, Affirmed. (Paras 3, 4)

Mr. K. Rajendra Chowdhary and Mrs. Surendra Krishnan, Advocates, for Appellant; Mr. I. N. Sinha, Sol. General. (Mr. Girish Chandra, Advocate with him), for Respondents.

Judgment of the Court was delivered by

P. N. SINGHAL, J.:— This appeal by certificate is directed against the judgment of the High Court of Andhra Pradesh dated July 19, 1968. It is not in dispute that appellant Mohd. Fiasuddin Khan is a citizen of India, and was declared an evacuee by an order of the Deputy Custodian of Evacuee Property, Hyderabad, dated September 18, 1951. His property, consisting of a building and 350 acres of land, was declared to be evacuee property. The Custodian of Evacuee Property issued a notice to the appellant on April 5, 1961 calling upon him to surrender possession of the property. That was followed by a notification dated January 20, 1962,

of the Central Government, under Section 12 of the Displaced Persons (Compensation and Rehabilitation) Act, 1954, hereinafter referred to as the Act, by which that Government acquired all properties which had been declared to be evacuee properties, for a purpose connected with the relief and rehabilitation of displaced persons, including payment of compensation. The appellant, challenged the aforesaid notification as unconstitutional and applied for a writ of certiorari on a proper construction of Sections 12 and 15 of the Act. In its impugned judgment, the High Court has taken the view that on publication of the notification under Section 13 (1) of the Act, the right, title and interest of the evacuee was extinguished in the evacuee property and it vested absolutely in the Central Government free from all encumbrances. That, in the view of the High Court, was unconditional, and was not made to depend upon the fixation or payment of compensation under Section 13, notwithstanding the fact that the principles for payment of compensation had not been agreed upon between the Governments of India and Pakistan and had not therefore been fixed. It has also been held that the words "or otherwise" in Article 31(5) (b) (iii) of the Constitution are sufficiently wide and the protection of the article extends to the relevant provisions of the Act so that there could be no successful challenge on the basis of Article 31 (2). The evacuee feels aggrieved and has filed the present appeal.

2. It has been argued by counsel for the appellant that the view taken by the High Court is not correct, and that acquisition of the appellant's property under Section 12 of the Act was not immune from challenge under Article 31(5) (b) (iii) of the Constitution because no compensation had been paid or was proposed to be paid for the acquired property.

3. It will be recalled that a notification was issued by the Central Government under Section 12 of the Act to acquire the property of the appellant for rehabilitation of displaced persons. That notification was

published in the gazette and, by virtue of sub-section (2) of that section, the right, title and interest of the appellant in that property (which was admittedly evacuee property) was extinguished and the property vested "absolutely in the Central Government free from all encumbrances." "Section 13 of the Act provides for the payment of compensation for such acquisition in accordance with such principles and in such manner as may be agreed upon between the Governments of India and Pakistan." Section 14 of the Act goes further and provides for the constitution of a compensation pool. The appellant has, however, been deprived of the benefit of these provisions because it is the admitted case of the parties that the agreement envisaged by Section 12 has not been arrived at so far between the two Governments. Even so, that would not, in our opinion, justify the argument of counsel for the appellant that clause (2) of article 31 of the Constitution would become applicable, for clause 5 (b) (iii) of that article expressly provides as follows:

"(5) Nothing in clause (2) shall affect
(b) the provisions of any law which the State may hereafter make

.....
(iii) in pursuance of any agreement entered into between the Government of the Dominion of India or the Government of India and the Government of any other country, or otherwise, with respect to property declared by law to be evacuee property." (Emphasis added)

It would thus appear that Clause (2) of Article 31 will not avail the appellant because there is an express provision in Clause (5) that it shall not affect the provisions of any law which the State Government may make, either in pursuance of an agreement with the Government of any other country "or otherwise". So even in the absence of an agreement with the Government of Pakistan, it was permissible for the State to make the Act, and its provisions would not be affected by anything contained in Clause (2) of Article 31 of the Constitution. It would follow that there is nothing wrong with the view

that compensation would have been payable to the appellant under Section 13 of the Act, in accordance with such principles and in such manner as might have been agreed upon between the Governments of India and Pakistan, but not otherwise. The appellant is therefore not entitled to claim such compensation in the absence of the agreement, and there is nothing wrong with the conclusion arrived at by the High Court in the impugned judgment.

4. The counsel for the appellant tried to argue that the evacuee property in question could not have vested in the Central Government until compensation for its acquisition had been determined and paid. The argument is however quite futile in face of the clear provision of sub-section (2) of Section 12 of the Act that on the publication of the notification under sub-section (1), the right, title and interest of the evacuee shall be extinguished in the evacuee property and it "shall vest absolutely in the Central Government free from all encumbrances."

5. There is thus no force in this appeal and it is dismissed but, in the circumstances of the case, without any order as to the costs.

Appeal dismissed.

AIR 1976 SUPREME COURT 363

A. N. RAY C. J. AND M. H. BEG,
R. S. SARKARIA AND P. N. SINGHAL, JJ.

S. K. Bhate and others, Petitioners v. Union of India and others, Respondents.

Writ Petition No. 469 of 1971,
D/- 20-11-1975.

(A) Indian Ordnance Factories (Recruitment and Conditions of Service of Class III Personnel) Rules 1956 (as amended in 1961), R. 8 — Seniority list — Promotion of Class III employees to Class II — Wrong order of promotion — Effect. (Constitution of India, Article 16).

Promotions are only made under Rule 8 of the Indian Ordnance Factories (Recruitment and Conditions of Service of Class III Personnel) Rules,

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1956, as amended in 1961 to Charge-men Grade II, on the basis of a selection list prepared by the appropriate Departmental Promotion Committee. In the minutes of the Departmental Promotions' Committee held in the month of April, 1963, prior to the appointment of petitioners as Charge-men Grade II, the Committee had prescribed a normal minimum qualification of three years' service in the post of Grade 'A' for promotion barring exceptional cases of ex-apprentices.

Held that as the petitioners had not satisfied this condition, they could not be considered for promotion to the posts of Charge-men Grade II. The condition precedent to promotion not having been satisfied they could only be considered as direct recruits and get the appointments reserved for the class of direct recruits as and when their turns arrived in this quota. The petitioners could not take advantage of erroneous orders made by the Manager of their Ordnance Factory even if the error had been repeated by the Director General Ordnance Factories. The petitioners could not complain of violation of any fundamental rights under Art. 16 of the Constitution. It was for them to show that they were not given the required grades though they satisfied all the required conditions. AIR 1975 SC 538, Rel. on. (Paras 8, 9, 10)

Cases Referred: Chronological Paras
AIR 1975 SC 538 = 1975 Lab IC 363
13

V. M. Tarkunde Sr. Advocate, (M/s. V. N. Ganpule and P. C. Kapoor, Advocate with him), for Petitioners; Mr. G. L. Sanghi Sr. Advocate, (Mr. S. P. Nayar, Advocate with him), for Respondents Nos. 1-4.

Judgment of the Court was delivered by

BEG, J.:— Twenty two petitioners, under Article 32 of the Constitution, have come to this Court with the following assertions: (1) They are employed as civilian non-gazetted Officers holding posts of Charge-men Grade II (Chemists) in High Explosives' Factory, Kirkee, which is one of the 28 Ordnance Factories, located all over India, controlled by opposite party No. 2, the Direc-

for General of Ordnance Factories, with his Head Office at Calcutta.

2. The Factory has four cadres of officers: (i) Gazetted officers; (ii) Non-Gazetted officers; (iii) Non-Industrial employees; (iv) Industrial employees. The petitioners belong to the second cadre which has four grades: (a) Foremen; (b) Assistant Foremen; (c) Chargemen Gr. I; (d) Chargemen Grade II. The 3rd cadre of non-industrial employees has two grades: (i) Supervisor 'A' Grade; and (ii) Supervisor 'B' grade. The employees of the 3rd cadre are classified as Class III employees in the general scheme of classification of Govt. servants who are governed by Indian Ordnance Factories (Recruitment and Conditions of Service of Class III Personnel) Rules.

3. The seniority rules of Gazetted and Non-Gazetted officers of the Ordnance Factories are laid down in office Memorandum dated 4th January, 1956, amended in 1961 (Annexure 'B').

4. The Director General of Ordnance Factories, Respondent No. 2, issued an advertisement, D/- 14-11-1962, for direct recruitment to the grade of Foremen, Assistant Foremen, Chargemen Grade I and Chargemen Grade II. At the time of this advertisement, all the petitioners, except petitioner No. 12, were already serving as officiating Supervisors of 'A' Grade of Class III employees. In answer to the advertisement for appointment to temporary posts with prospects of being "considered for permanent appointment in due course," the petitioners, who possessed the minimum qualifications prescribed, applied for direct recruitment which was open to them also. The petitioners were called for interview by a letter issued by the General Manager, High Explosives Factory, Kirkee, on 7th February, 1963, but, after the interviews, no letters of appointment were received by the petitioners other than petitioner No. 12.

5. They were promoted between April, 1963, and November, 1963, from their substantive grade of Supervisor 'A' to Chargemen Grade II by the General Manager of their factory, on short term basis, by virtue of powers delegated to him. Petitioner No. 12, who was not in service

at all before, was appointed a temporary chargeman, Grade, II, in April, 1963, as a result of his selection after interview. Respondents 5 to 16, however, entered the grade of Chargemen Grade II between 1st December, 1963, and 4th February, 1965, and were also shown as temporary Chargemen Grade II, but, they were not holding any post in the grade of Supervisors. The respondents were apprentices before entering into the Grade II of Chargemen.

6. The promotions of the petitioners were given retrospective effect, by an order dated 11th June, 1965, passed by the Director General Ordnance Factories. In December, 1967, however, the petitioners were superseded by others who were alleged to be their juniors. The petitioners made representations and sent reminders which were not replied to. Respondents 5 to 16 were promoted from Chargemen Grade II to the grade of Assistant Foremen by an order of the respondent No. 2 Director General Ordnance Factories dated 17th September, 1971. This order according to the petitioners amounted to another supersession of the petitioners who were shown as holding permanent posts only as Supervisors of 'A' Grade in 1971. The petitioners, therefore, came to this Court on 14th December, 1971 against the orders dated 17th September, 1971, which amounted to their supersession.

7. The petitioners also allege that, as no orders were communicated to them showing that they were considered direct recruits by the Ordnance Depot by the Ministry of Defence Production in the Govt. of India or anyone on its behalf, they came to know, for the first time, as a result of the replies filed by the respondents to the Writ Petition that they were being treated as direct recruits so that they could only be confirmed when their turn came in the 20% quota of direct recruits and not in the 80% quota of the promotees. The petitioners, therefore, applied for the amendment of the petition and were permitted by this Court, under an order dated 16th November, 1973, to do so. They alleged, by means of this amendment, that their classifica-

tion as direct recruits instead of as promotees was "entirely fanciful, arbitrary, and even capricious." They also alleged that the seniority list filed in reply to their petition had been kept concealed from them and that it was prepared in utter disregard to statutory Rules 10 (1) to 10 (4) contained in S. R. O. 4. These rules are:

10 (1) The Director General will prepare a seniority list of all the officers in their own categories according to the following procedure:—

(i) As between two officers holding a particular class of appointment, in a substantive capacity, seniority in that class of appointment as well as in the officiating appointments held by them in the same rank or different ranks shall be determined with reference to the date of the substantive appointment.

(ii) Subject to the provisions of Clause (iii), an officer holding an appointment in a particular class in a substantive capacity will be normally senior to an officer holding an appointment in the same class in a non-substantive capacity.

(iii) Seniority of persons holding temporary appointments which are made on agreement or on probationary basis and which are expected to be continued after the expiry of the initial period, will be reckoned vis-à-vis others holding permanent appointments in the same grade in the Ordnance Factories from the date from which the officer concerned have been holding appointments of the same grade continuously. The seniority so assigned to such persons shall not be disturbed on their confirmation at a later stage.

Note: This clause applies only to persons recruited through the Union Public Service Commission and to those recruited directly, otherwise than through the Union Public Service Commission prior to 1st April 1947.

(iv) Temporary seniority in a given grade will be reckoned from the date from which the officer concerned has been occupying it continuously, irrespective of whether he has a substantive appointment in some lower grade."

8. The reply of the respondents is that the so-called promotion

orders, of which the petitioners want to take advantage, were really the result of a mistake or misunderstanding in not realising the actual legal position of the petitioners as direct recruits. It was pointed out that, in the letters issued calling them for interviews as direct recruits, it was made clear to them that their appointments did not carry with them any decision about their fitness for the post applied for and that they could be considered for any lower post to which they might be so entitled. In other words, this clearly meant that they were on trial. It was also pointed out that promotions are only made under Rule 8 of the Indian Ordnance Factories (Recruitment and Conditions of Service of Class III Personnel) Rules, 1956, as amended in 1961 to Chargemen Grade II, on the basis of "a selection list prepared by the appropriate Departmental Promotion Committee." It was asserted that, in the minutes of the Departmental Promotions' Committee held in the month of April, 1963, prior to the appointment of petitioners as Chargemen Grade II, the Committee had prescribed a normal minimum qualification of three years' service in the post of Grade 'A' for promotion barring exceptional cases of ex-apprentices. It was asserted that, as the petitioners had not satisfied this condition, they could not be considered for promotion to the posts of Chargemen Grade II. They did not belong to the class which had any exceptional qualifications. Hence, their names did not appear in the list of persons to be promoted prepared by the Departmental Promotions' Committee for the post of Chargemen Grade II.

9. It was asserted that they were being treated as direct recruits and not promotees despite their wrong description and even wrong orders conveying the impression that they were promotees. The condition precedent to promotion not having been satisfied they could only be considered as direct recruits and get the appointments reserved for the class of direct recruits as and when their turns arrived in this quota. It was conceded on behalf of the respondents that much larger

number of appointments had been made in the class of direct recruits than the vacancies available. It was, however, explained that this was due to the sudden and exceptional demands for these appointments as a result of the pressure on our Ordnance Factories due to the war with China and other defence requirements. It was urged that the petitioners could not take advantage of erroneous orders made by the Manager of their Ordnance Factory even if the error had been repeated by the Director General Ordnance Factories. If the petitioners had not satisfied the condition precedent to promotion, they could not get the appointments reserved for the 80% quota of promotees whose work was watched by the Promotions' Committee so that they could be declared fit for promotion. The promotions were on the basis of a selection on merit, the tests of which had not been satisfied by the petitioners. In fact, the petitioners were considered, with others, and were not selected. It was not necessary to give them opportunities of being heard on comparative merits, as they claimed, just as candidates at an examination are not entitled to any such opportunities as these are not disciplinary proceedings.

10. Counsel for the petitioners was, in our opinion, not able to meet the objections put forward to petitioners' claims as promotees. He could not show that they satisfied the conditions precedent to promotions. Hence, the so-called orders of promotion could not cure the defect. It was immaterial that the petitioners were wrongly shown as promotees in their service records or that they had not received intimations of their appointments as direct recruits. There was a justifiable ground for a distinction between them and the class to which the respondents belonged. There was no challenge to the fairness of the 20% quota reserved for direct recruits as against that of promotees. Hence, we do not think that the petitioners can complain of violation of any fundamental rights under Article 16 of the Constitution.

11. Petitioners cannot also claim any benefit resulting from being treated as persons belonging to

the same class as respondents 5 to 16 whose places on the seniority list are questioned by them as amounting to illegal supersessions of the petitioners. We may mention here that Mr. Sanghi, counsel appearing for the Union of India, Respondent No. 1, and the Director General Ordnance Factory, Respondent No. 2, and other officials, has fairly, conceded that so far as the case of Petitioner No. 11 is concerned, it stands on a special footing, and that his clients are considering it on that footing. Counsel for the petitioners has also conceded that so far as 3 of the petitioners are concerned, they have been rightly treated as direct recruits. We find no error in treating the others also as direct recruits.

12. It may also be mentioned here that Mr. Sanghi, Counsel for the Union of India and its officials, has stated to the Court that none of the petitioners will be reverted to his substantive post merely on the ground that he was treated as a direct recruit. The question of inter se seniority is a different matter. The petitioners have been unable to establish that they have been denied their seniority in violation of any right under Article 16 of the Constitution.

13. It may be mentioned here that, in *Amrit Lal Berry v. Collector of Central Excise Central Revenue*, AIR 1975 SC 538 this Court laid down (at p. 546):

"It was for the petitioner to satisfy the Court that he was not given the senior grade although he satisfied all the required conditions of it and that others, who were promoted into it, were given unjustifiable preference over him".

14. As we are not satisfied that the seniority list has been prepared in violation of any rule or principle of justice, we are unable to accept the petition before us.

15. We therefore, dismiss this petition. The parties will bear their own costs.

Petition dismissed.

AIR 1976 SUPREME COURT 367
(From: AIR 1971 Punj and Har 297
FB)

H. R. KHANNA, P. N. BHAGWATT
AND S. MURTAZA FAZL ALI, JJ.

T. R. Sharma, Appellant v. Prithvi Singh and another, Respondents.

Civil Appeals Nos. 354 and 355 of 1971, D/- 17-11-1975.

(A) Punjab Civil Services Rules, Vol. I Part I Rr. 3.12, 3.14 (a) (2) and 3.15 — Scope — Acquisition and suspension of lien of a Government servant. AIR 1971 Punj & Har 297 (FB), Reversed.

Under R. 3.12 normally a Government servant on substantive appointment to any permanent post acquires a lien on that post and ceases to hold any lien previously acquired on any other post. Rule 3.14 (a) (2) carves out an exception to the general rule contained in Rule 3.12. Under R. 3.14 (a) (2) a duty is cast upon the competent authority to suspend the lien of a Government servant on a permanent post which he holds substantively if he is appointed in a substantive capacity to a permanent post outside the cadre on which he is borne. The imperative nature of the rule is also clear from the use of the word "shall" in Clause (a) as against the use of the word 'may' in Clause (b) of that rule. The concerned Government servant cannot be penalised because of the omission of the competent authority to act in accordance with the mandatory provisions of Rule 3.14 (a) (2). Clause (b) of Rule 3.15 also makes it clear that in a case covered by sub-clause (2) of Clause (a) of Rule 3.14, the suspended lien of the Government servant concerned may not, except on the written request of that Government servant, be terminated while he remains in Government service. The note to Rule 3.15 shows a way out in case any difficulty is experienced on account of the operation of Rule 3.14 (a) (2). (Para 6)

Held that in the present case as the Governor has deconfirmed the appellant from the post of Block Development and Panchayat Officer, the suspended lien of the appellant on

the post of Agricultural Inspector would stand revived with effect from February 26, 1969. The promotion of the appellant in the parent Agricultural Department from the post of Agricultural Inspector to that of District Agricultural Officer by the impugned order cannot in the circumstances be held to suffer from any legal infirmity. AIR 1971 Punj and Har 297 (FB), Reversed. (Para 7)

Cases Referred: Chronological Paras 1968 Serv LR 319 (Punj) 2

Mr. M. N. Phadke, Sr. Advocate, (M/s. P. C. Bhartari and K. K. John, Advocates with him), for Appellant (in both the Appeals); M/s. S. K. Mehta, K. R. Nagaraja, M. Qamaruddin, and P. N. Puri, Advocates, (for No. 1) In Civil Appeal No. 354 of 1971 and (for Nos. 1 and 2) In Civil Appeal No. 355 of 1971, for Respondents.

Judgment of the Court was delivered by

KHANNA, J.:— This judgment would dispose of two Civil Appeals Nos. 354 and 355 of 1971 which have been filed on certificate by Tuhi Ram Sharma appellant against the Full Bench judgment of the Punjab and Haryana High Court.

2. The appellant joined service as Agricultural Inspector in the Agricultural Department of Punjab Government in 1945. Teja Singh, Bhale Ram and Prithvi Singh joined as Agricultural Inspectors in the said Agricultural Department on different dates between 1950 and 1958. The appellant was confirmed as Agricultural Inspector in 1959. On May 20, 1961 the appellant was appointed against a temporary post of Block Development and Panchayat Officer in the Development Department of the State. By order dated October 28, 1966 the appellant was made substantive permanent Block Development and Panchayat Officer with effect from April 1, 1964. As a result of partition of Punjab the appellant as well as Teja Singh, Bhale Ram and Prithvi Singh were allocated to the State of Haryana. On February 26, 1969 the Governor of Haryana passed an order deconfirming the appellant on his request from the post of Block development and Panchayat Of-

ficer with effect from that date. On March 20, 1969 the Governor of Haryana passed the impugned order which reads as under:

"The Governor of Haryana is pleased to promote temporarily Shri Tuhi Ram Sharma, Agricultural Inspector, now working as Block Development and Panchayat Officer as District Agricultural Officer in H. A. S. Class II subject to the approval of the Haryana Public Service Commission and to post him at Roh-tak in place of Shri Narain Singh who is transferred to Narnaul as District Agricultural Officer, Shri Prithvi Singh who is working against the post of District Agricultural Officer, Narnaul is reverted to the post of Agricultural Inspector being the junior-most.

The character roll file of Shri Tuhi Ram in two parts is sent herewith. Its receipt may please be acknowledged."

Two writ petitions were filed praying the quashing of the above order. One petition was filed by Prithvi Singh respondent and the other was filed by Bhale Ram and Teja Singh respondents. Learned Single Judge (Tuli J.) as per judgment dated January 30, 1970 allowed both the writ petitions and quashed the impugned order on the following two grounds:

"(i) the impugned promotion had been made in violation of the mandatory requirements of Rule 7 of the Haryana Agricultural Service Class II Rules, 1947 (hereinafter called the 1947 rules) which required appointment being made to the service by promotion by selection on the advice of Haryana Public Service Commission inasmuch as Sharma had been promoted without obtaining the advice of the Commission which had to be taken before the selection for promotion was made and not after having promoted Sharma; and

(ii) in view of the binding earlier Division Bench judgment of this Court in Labhu Ram v. State of Punjab, 1968 SLR 319 (Punjab) it was held that Sharma had on his confirmation as Block Development and Panchayat Officer on October 28, 1966 (with effect from April 1, 1964, vide Annexure A) in the Development Depart-

ment of the Haryana State, ceased to be a member of the Haryana Agricultural Service from which post alone he could have been promoted to the post in question, and his lien on the post of Agricultural Inspector automatically stood terminated under Rule 3.12 of the Punjab Civil Services Rules Volume I, Part I."

It was also observed by learned single Judge that but for the earlier Division Bench judgment in the case of Labhu Ram v. State of Punjab, he would have been inclined to hold in favour of Sharma appellant on the second point mentioned above. Four Letters Patent appeals were filed against the judgment of the single Judge. Two of those appeals were by Sharma appellant, while the other two were filed by the State of Haryana. When the appeals came up for hearing before the Division Bench, the learned Judges referred the matter to the Full Bench. In the meantime, on March 5, 1970 the Governor of Haryana in consultation with the Haryana Public Service Commission promoted Sharma appellant as District Agricultural Officer in Class II on regular basis and posted him as such with effect from April 1, 1969. All the learned Judges constituting the Full Bench held that the first ground on which the impugned order had been quashed, namely, non-procuring of the advance advice of the Haryana Public Service Commission was not well-founded. It was also observed that the earlier case of Labhu Ram was clearly distinguishable and had no bearing. By a majority of two to one the Full Bench upheld the judgment of the single Judge on the second ground, namely, that the lien of the appellant on the post of Agricultural Inspector had automatically been terminated.

3. It is the above conclusion of the majority which has been assailed in these two appeals before us.

4. Mr. Phadke on behalf of the appellants has invited our attention to the relevant rules on the subject and has contended that the conclusion of the majority of the learned Judges of the Full Bench that the lien of the appellant on the post of Agricultural Inspector had stood terminated is not well-founded. As

against that, Mr. Nagaraja has canvassed for the correctness of the above view of the learned Judges of the High Court. After hearing the learned counsel for the parties, we are of the opinion that there is considerable merit in the contention of Mr. Phadke.

5. We may at the outset reproduce the relevant rules of the Punjab Civil Services Rules, Volume I, Part I as applicable to the State of Haryana:

"3.12. Unless in any case it be otherwise provided in these Rules, a Government servant on substantive appointment to any permanent post acquires a lien on that post and ceases to hold any lien previously acquired on any other post.

3.14. (a) A competent authority shall suspend the lien of a Government servant on a permanent post which he holds substantively; if he is appointed in a substantive capacity

(1)

(2) to a permanent post outside the cadre on which he is borne, or

(3)

..... .
..... .

3.15. (a) Except as provided in Clause (c) of this rule and in note under Rule 3.13, a Government servant's lien on a post may, in no circumstances, be terminated, even with his consent, if the result will be to leave him without a lien or a suspended lien upon a permanent post.

(b) In a case covered by sub-clause (2) of Clause (a) of Rule 3.14 the suspended lien may not, except on the written request of the Government servant concerned, be terminated while the Government servant remains in Government service.

(c) Notwithstanding the provisions of Rule 3.14 (a), the lien of a Government servant holding substantively a permanent post shall be terminated while on refused leave granted after the date of compulsory retirement under Rule 8.21, or on his appointment substantively to the post of Chief Engineer of the Public Works Department.

Note.— In a case covered by Rule 3.14 (a) (2), where a Government

servant is appointed in a substantive capacity to a permanent post outside the cadre on which he is borne, Rule 3.15 (b) precludes permanently the termination of his suspended lien unless and until a written request to this effect is received from him. The result is that it is possible for such a Government servant to stop his suspended lien being removed from the parent cadre indefinitely and, thus cause inconvenience to the parent office. Such a situation may be met by appropriate executive action being taken by the controlling officer who may refuse his consent to such a Government servant being confirmed or retained in a permanent post outside his cadre unless he agrees to his lien on a permanent post in his parent office being terminated."

6. The learned Judges constituting the majority of the Full Bench in holding that the appellant's lien on the post of Agricultural Inspector had stood terminated relied upon Rule 3.12. Perusal of the above rule shows that normally a Government servant on substantive appointment to any permanent post acquires a lien on that post and ceases to hold any lien previously acquired on any other post. The opening words of the above rule, however, show that it would apply unless it be otherwise provided in the rules. Rule 3.14 (a) (2) carves out an exception to the general rule contained in Rule 3.12. According to Rule 3.14 (a) (2), a competent authority shall suspend the lien of a Government servant on a permanent post which he holds substantively if he is appointed in a substantive capacity to a permanent post outside the cadre on which he is borne. When the appellant was appointed as Block Development and Panchayat Officer in a substantive permanent capacity, his case squarely fell within the ambit of Rule 3.14 (a) (2) as the post of Block Development and Panchayat Officer was outside the cadre of Agricultural Inspectors to which the appellant belonged. In the circumstances, it was imperative for the competent authority to suspend the lien of the appellant on the permanent post of Agricultural Inspector which he had held substantively.

The competent authority, however, failed to suspend the lien of the appellant on the post of Agricultural Inspector. The appellant plainly cannot suffer because of such inaction or omission on the part of the competent authority. A reading of the rule leaves no doubt that a duty is cast upon the competent authority to suspend the lien of a Government servant on a permanent post which he holds substantively if he is appointed in a substantive capacity to a permanent post outside the cadre in which he is borne. The imperative nature of the rule is also clear from the use of the word "shall" in clause (a) as against the use of the word "may" in clause (b) of that rule. The appellant, in our opinion, cannot be penalised because of the omission of the competent authority to act in accordance with the mandatory provisions of rule 3.14(a) (2). Clause (b) of rule 3.15 also makes it clear that in a case covered by sub-clause (2) of clause (a) of rule 3.14, the suspended lien of the Government servant concerned may not, except on the written request of that Government servant, be terminated while he remains in Government service. The note to rule 3.15 shows a way out in case any difficulty is experienced on account of the operation of rule 3.14 (a) (2). It is nobody's case that any written request was made by the appellant for terminating his suspended lien on the post of Agricultural Inspector. As such, we find it difficult to uphold the finding of the majority of the learned Judges that the lien of the appellant on the post of Agricultural Inspector had stood terminated. In our opinion, the third Judge who was in the minority took a correct view of the matter when he observed that the Government servant is not to be penalised and cannot be deprived of the safeguards provided by Rule 3.14 because of the fact that the competent authority had not taken the necessary steps.

7. As the Governor has de-confirmed the appellant from the post of Block Development and Panchayat Officer, the suspended lien of the appellant on the post of Agricultural Inspector would stand revived with effect from February 26, 1969. The promotion of the appellant in the

parent Agricultural Department from the post of Agricultural Inspector to that of District Agricultural Officer by the impugned order cannot in the circumstances be held to suffer from any legal infirmity.

8. We accordingly accept the two appeals, set aside the judgments of the learned single Judge and the Full Bench and dismiss the writ petitions filed by Prithvi Singh, Bhale Ram and Teja Singh respondents. The parties in the circumstances shall bear their own costs throughout.

Appeals allowed.

AIR 1976 SUPREME COURT 370

(From: Allahabad)*

Y. V. CHANDRACHUD, V. R.

KRISHNA IYER AND A. C.

GUPTA JJ.

Bansi Lal, Appellant v. Chandan Lal and another, Respondents.

Criminal Appeal No. 272 of 1975, D/- 5-12-1975.

(A) Criminal P. C. (1974), S. 321 — Withdrawal from prosecution — Permission when can be granted — Principles — Grant of permission by Sessions Judge in absence of material on record justifying it — Revision against dismissed in limine by High Court — Order granting permission set aside. Cr. R. No. 91 of 1975 D/- 24-1-1975 (All), Reversed. (Constitution of India, Art. 136).

Permission to withdraw from the prosecution should not be granted for the mere asking but the Court must be satisfied on the materials placed before it that the grant of permission would serve the administration of justice. AIR 1972 SC 496, Rel. on. Cr. R. No. 91 of 1975, D/- 24-1-1975 (All), Reversed. (Para 4)

Where the prosecution has reached the stage of framing charges in the Sessions Court and no occasion for the defence to make out a case has arisen and there is no material before the Court justifying withdrawal of the case against some accused,

*(Cri. Revn. No. 91 of 1975, D/- 24-1-1975—All.)

LS/LS/E511/75/KSB

the order granting permission is wrong in law. Consenting to the withdrawal of the case on the view that the attitude displayed by the prosecution made it "futile" to refuse permission does not certainly serve the administration of justice.

(Paras 5, 6)

Cases Referred: Chronological Paras
AIR 1972 SC 496 = (1972) 2 SCR 599
= 1972 Cri LJ 301 4

M/s. H. R. Khanna, S. K. Mehta, K. R. Nagaraja, P. N. Puri, Advocates, for Appellant; M/s. M. L. Srivastava, S. K. Sinha and S. K. Verma, Advocates, (for Nos. 1-2) and Mr. O. P. Rana, Advocate (for No. 3), for Respondents.

Judgment of the Court was delivered by

GUPTA, J.:— By his order dated November 19, 1974 the First Additional Sessions Judge, Etawah, allowed the application of the Public Prosecutor, Etawah, to withdraw the prosecution against respondents Chandan Lal and Baldeo Prasad. A revisional application directed against the order was dismissed in limine by the Allahabad High Court. In this appeal by special leave the propriety of the order allowing withdrawal of the prosecution is in question.

2. The facts of the case, relevant for the present purpose, are as follows. On the morning of May 27, 1970 two reports concerning the same incident were lodged in quick succession by two persons; the first report was made by one Ram Narayan at 6.15 A.M. and the next at 6.30 A.M. by the appellant Bansi Lal at Etawah police station. The reports said that respondent Chandan Lal and several others had forcibly caught hold of Bansi Lal's sister's husband Mewa Ram and dragged him inside Chandan Lal's house and when attracted by his screams several persons attempted to rescue Mewa Ram, the other respondent Baldeo Prasad and one Sukh Lal closed the door from inside. Bansi Lal's report added that one of the inmates of the house standing on the roof was threatening the crowd outside with a gun. On receipt of this information, Sub-Inspector K. K. Sharma accompanied by some constables hastened to

Chandan Lal's house which they found closed from inside and surrounded by a crowd. Someone from the roof of the house started firing at the crowd and the police party. This man who was later identified as one Rameshwar was killed when the police returned fire. Entering Chandan Lal's house the police party found Mewa Ram lying seriously injured in a room where Chandan Lal, Baldeo Prasad and Sukh Lal were present. Chandan Lal, Baldeo Prasad and three other persons found inside the house, Sukh Lal, Gaya Prasad Damodar and Sitaram were all arrested and Mewa Ram was sent to the District Hospital for treatment. Mewa Ram died the same evening without gaining consciousness.

3. On the report of Sub-Inspector K. K. Sharma, a case under Sections 147, 148, 302, 342 and 149 of the Indian Penal Code was registered against the said five persons. Deputy Superintendent of Police, R. B. Malik who was deputed to investigate the case submitted charge-sheet against the accused in the court of Additional District Magistrate (Judicial) on July 7, 1970. On May 22, 1974 the Additional District Magistrate (Judicial) committed the case to the Court of Session. On July 7, 1974 the Additional Sessions Judge, Etawah, on the application of the Public Prosecutor, allowed the case against Sukh Lal to be withdrawn. On the next day, July 8, charges were framed against the remaining accused persons including the respondents under Sections 147, 342 and 302/149 of the Indian Penal Code. On November 18, 1974 the Public Prosecutor made an application before the Additional Sessions Judge, Etawah, praying for permission to withdraw the case against respondents Chandan Lal and Baldeo Prasad. The material part of the application reads:

"The prosecution does not want to produce evidence and continue the criminal matter against these accused (Chandan Lal and Baldeo Prasad)." On the next day, November 19, the Additional Sessions Judge allowed this application and acquitted Chandan Lal and Baldeo Prasad of the charges framed against them. Referring to certain facts which he des-

cribed as the 'defence case', the Additional Sessions Judge held that the case against Chandan Lal and Baldeo Prasad should be allowed to be withdrawn "because the prosecution is reluctant to prove its case against the said two accused persons" and it appeared "futile to refuse permission to the State to withdraw the prosecution". The correctness of this order is the only question for determination in this appeal.

4. Section 321 of the Code of Criminal Procedure, 1973 which corresponds to Section 494 of the earlier Code of 1898 and is in identical terms empowers the Public Prosecutor to withdraw with the consent of the Court from the prosecution of any person either generally or in respect of any one or more of the offences for which he is being tried. Section 494 of the Code of 1898 has been construed by the different High Courts in a number of cases. This Court in *M. N. Sankaranarayanan Nair v. P. V. Balakrishnan*, (1972) 2 SCR 599 = (AIR 1972 SC 496) explaining the well-established legal position as to the scope and ambit of the powers granted by Section 494 has observed that though the section "does not circumscribe the powers of the Public Prosecutor to seek permission to withdraw from the prosecution, the essential consideration which is implicit in the grant of the power is that it should be in the interest of administration of justice...". Though it is not possible to catalogue all the circumstances in which this power can be exercised, by way of illustration *M. N. S. Nair's* case (*supra*) mentions a few instances where the Public Prosecutor would be apparently justified in seeking such permission, as in a case where the prosecution "will not be able to produce sufficient evidence to sustain the charge or that subsequent information before prosecuting agency would falsify the prosecution evidence or any other similar circumstances". It is added that the request to grant permission under Section 494 should not be accepted "as a necessary formality", "for the mere asking", but the court must be satisfied "on the materials placed before it" that the grant of permission would serve the

administration of justice and that "permission was not being sought covertly with an ulterior purpose unconnected with the vindication of the law which the executive organs are in duty bound to further and maintain."

5. In the case before us the prosecution has only reached the stage of framing charges against the accused and no occasion for the defence to make out a case has yet arisen. It is not clear where the Additional Sessions Judge found the case made which he calls the defence case. It is not to be found in the material that was before him. Counsel for the respondent, State of U. P., drew our attention to an order dated October 18, 1973 passed by the Allahabad High Court on a revision petition filed by the State seeking to stay further proceedings of this case when it was pending before the Additional District Magistrate (Judicial), Etawah. It appears from this judgment that an application for stay of the proceedings was made before the Additional District Magistrate (Judicial) on the ground that the case required to be investigated further. The Additional District Magistrate rejected the application and the Sessions Judge, Etawah, confirmed that order. The High Court on October 18, 1973 dismissed the revision petition made against the order refusing the prayer for stay and directed the Additional District Magistrate to dispose of the proceedings before him expeditiously and in accordance with law. As stated already, the case was committed to the Court of Session on May 22, 1974. Therefore when the Additional Sessions Judge made the impugned order, there was no material before him to warrant the conclusion that sufficient evidence would not be forthcoming to sustain the charges or that there was any reliable subsequent information falsifying the prosecution case or any other circumstance justifying withdrawal of the case against the respondents. Consenting to the withdrawal of the case on the view that the attitude displayed by the Prosecution made it "futile" to refuse permission does not certainly serve the administration of justice. If the material before the Additional Ses-

sions Judge was considered sufficient to enable him to frame the charges against the respondents, it is not possible to say that there was no evidence in support of the Prosecution case. The application for stay of the proceeding made before the committing Magistrate cannot also be said to falsify the prosecution case. If the prosecuting agency brings before the court sufficient material to indicate that the prosecution was based on false evidence, the court would be justified in consenting to the withdrawal of the prosecution, but on the record of the case, as it is, we do not find any such justification. In our opinion the High Court was in error in dismissing in limine the revisional application made against the order of the Additional Sessions Judge.

6. The appeal is accordingly allowed and the order of the Additional Sessions Judge permitting the withdrawal of the case against the respondents is set aside. The Additional Sessions Judge will proceed with the trial in accordance with law.

Appeal allowed.

AIR 1976 SUPREME COURT 373

(From: Disciplinary Committee of the Bar Council of India)*

A. N. RAY, C. J., M. H. BEG, R. S. SARKARIA AND P. N. SHINGHAL, JJ.

L. D. Jai Shinghani, Appellant v. Naraindas M. Punjabi, Respondent

Civil Appeal No. 881 of 1975, D/- 27-11-1975.

(A) Advocates Act (1961), S. 35—Professional misconduct — Cases involving possible disbarring of advocate concerned — The evidence should be of a character which should leave no reasonable doubt about guilt — Appellant advocate, held, entitled to benefit of doubt on facts and circumstances — Order disbarring him set aside. Decision of Disciplinary Committee of Bar Council of India in

*(B. C. T. R. No. 60 of 1974, D/- 3-5-1975—D. C., B. C. of India.)

LS/LS/E529/75/CWM

B. C. T. R. No. 60 of 1974, D/- 3-5-1975, Reversed. (Paras 5 to 11)

Mr. Sharad Manohar Advocate, M/s. V. N. Ganpule and R. N. Nath, Advocates, for Appellant.

Judgment of the Court was delivered by

BEG, J.:— The appellant is an Advocate against whom a complaint was made on 25th May, 1971 before the Bar Council of Maharashtra by the Respondent Naraindas M. Punjabi. As the complaint was not disposed of within six months of its receipt by the State Bar Council it was transferred to the Disciplinary Committee of the Bar Council of India under Section 36-B of the Advocates Act, 1961 for disposal.

2. The complainant alleged as follows:

He was the co-owner with two others of certain premises of which one of the tenants was M/s. Hindustan Electric and Radio Corporation. He, together with the other co-owners, had filed suits Nos. 840 of 1961 and 1040 of 1964 in the Bombay City Civil Court against the Corporation. These suits were off-shoots of a prior proceeding No. 4174 of 1960 in the Small Cause Court for the ejectment of the Corporation, which was dismissed on 10th March, 1961. S. C. Suit No. 840 of 1961 was, thereafter, filed, but, it was withdrawn on 19th September, 1963, with liberty to file a fresh suit. On or about 10th February, 1964, the Advocate concerned, L. D. Jaisinghani, took Rs. 350/- from the complainant for filing the fresh suit in the Bombay City Civil Court and gave the complainant a copy of the plaint in which No. 1040 of 1964 was given as the number of the new suit. The complainant, after waiting for a few years made casual enquiries from the Advocate as to when Suit No. 1040 of 1964 would come up for hearing. The Advocate used to tell him that it would come up any day during 1969 to 1970. In all this period, neither the defendant Corporation was remitting any rents nor depositing anything in Court. During 1969 to 1970, the complainant requested the Advocate to move the Court for payment of rents by the Corporation. But, the Advocate kept putting this

off by pleading that the suit may come up any day for hearing in the ordinary course. The two co-owners sold their shares in the building to the complainant, on 24th November, 1970 and 4th January, 1971, respectively, so that he became the sole landlord and owner of the property. After this, the complainant had an additional reason to request L. D. Jaisinghani, the Advocate, to file a petition for the amendment of the plaint so that he may figure as the sole plaintiff and also apply to the Court for payment of rents. The Advocate agreed to do this. Nevertheless, he went on procrastinating until, by a letter dated 8th January, 1971, the complainant pressed him to do something very definitely. After this, the Advocate got a Notice of Motion sworn by the complainant before Mr. Tiwari, Superintendent of Bombay City Civil Court. The Advocate then informed the complainant that Notice of Motion had been lodged in Court and served on the Corporation's Advocate, Mr. Bhagat, through a Clerk, named Adwani, of a late Advocate Mr. Wadhwa, and that it would come up for hearing soon. As nothing seemed to come up for hearing, the complainant, at last addressed a letter to the Registrar of the Bombay City Civil Court on 9/16th March, 1971, informing him of the lodging of the Notice of Motion and enquiring what had happened to it. The Advocate, L. D. Jaisinghani, then told the complainant that the matter would be heard on 20th April, 1971, at 12 noon, before the Judge Mr. Kattal. On 20th April, 1971, on enquiry from the office of the Court, the complainant learnt that no Notice of Motion is there and that No. 1040 of 1964 was a fictitious reference given by the Advocate of a suit which was never filed by him. It turned out to be another suit filed by another person through another Advocate. When Tendolkar, the Head Clerk enquired about the Notice of Motion from the Advocate L. D. Jaisinghani, he said that he had given away all the papers to Mr. Adwani, the ex-clerk of Mr. Wadhwa and that he would enquire further after his return from Bhopal. The complainant alleged that the Advocate had thus demonstrated that he

had committed a breach of trust and faith and cheated the complainant by fraudulent means and was guilty of serious professional misconduct.

3. In reply, the Advocate, while denying the truthfulness of the allegations set out above, admitted that he had filed suit No. 840 of 1961, but he stated that he could not remember the facts fully as it was an old matter. The Advocate also denied having filed or having been asked to file any suit No. 1040 of 1964. The Advocate, however, admitted receiving the sum of Rs. 350/-, but, according to him, this was part payment of his fee towards a proposed suit of which a draft was handed over to the complainant. The Advocate's case was that as the complainant was neither serious nor willing to incur the expenses of litigation and had not supplied the necessary details or expenses, the suit could not be filed. He denied the truth of other allegations so far as he himself was concerned. He asserted that the letter to the Registrar must have been written by the complainant and enquiries made with a view to creating evidence. His case also was that, apart from the draft copy of the plaint which had a number of blanks in it, including a blank space for the number of the suit, the other documents produced by the complainant were fabricated with some ulterior motive. The Advocate did not set up what could be the reason for the complainant's displeasure with him or attempt to involve him falsely. In his evidence he alleged that this was due to the fact that the Advocate had refused to give evidence in a case in which the complainant had been proceeded against for malicious prosecution.

4. The All India Bar Council, after examining the documents and the evidence in the case, observed that, although, the matter was old and receipt of a sum so small as Rs. 350/- could not, ordinarily, serve as sufficient proof to discredit the evidence of an Advocate against that of a litigant, who alleged dishonesty against an Advocate, yet, the supporting documents and the conduct of the Advocate, particularly the untruthful

statements he had made about his past transactions which also indicated similar misappropriations of monies belonging to clients, the complainant's version must be accepted. The finding recorded by the Committee was:

"Having regard to the oral and documentary evidence on record and all the facts and circumstances of the present case, we are unable to come to any other conclusion except that the Respondent has been guilty of gross professional misconduct. This is not merely a case of an Advocate not filing a suit on behalf of his client after taking monies for the same, but going to the length of committing and perpetuating a gross deception on his client by giving a false and fictitious number of a suit which has not been filed and leading on his client to believe that a suit has been filed. A person who can stoop to such practices has no place in the legal profession. This sort of behaviour is nothing short of rank dishonesty and cheating. Practices such as these expose the profession of law to contempt and ridicule of other members of the Society".

We find, after going through the judgment of the Committee that, although, its indignation over the conduct of the appellant, particularly in view of an unenviable record of similar complaints against him in the past by Dr. Nagdev, and another by Mrs. Butler, and the third by one Tarachand, which had led to disciplinary proceedings being finally dropped after the Advocate or somebody else on his behalf had made payments to the complainant litigants, and the prevaricating replies of the Advocate, attempting to conceal or deny these proceedings, may have been justified, yet, these very features of the case were also likely to create a prejudice against the accused Advocate who may, in the particular instance now before us, not have been really so blameworthy as one may, with his background, be inclined to believe. After having been taken through the evidence, we are not convinced that the complainant was really so truthful and reliable as the Members of the Disciplinary Committee considered him to be. There are several features in his evidence which make his ver-

sion difficult to rely upon implicitly. We mention these below:

5. Firstly, the complainant's evidence shows that he was not the kind of person who could swallow so easily detectable a fraud of which he claimed to be the victim for so long a period of time. He admits that the Advocate had appeared in about six or seven suits on his behalf. There had been proceedings against him for malicious prosecution. He had denied that he wanted the appellant to give evidence, but, when confronted by documentary evidence, he was forced to admit that this was true.

6. Secondly, although the complainant stated that Rs. 350/- included the Court fee in respect of the suit, yet, he stated, after that, that the Advocate had told him that the deficit Court fee would be realised from him afterwards. If, as we find from evidence, the Court fee alone came to about Rs. 400/-, it was difficult to believe that any suit could have been agreed to be filed without realising the deficit Court fee. The statement of the complainant, that the appellant used to file suits for him and then realise the Court fee, if true, indicated that the appellant would be expected to make a demand for further payment after alleging that he had filed the suit. But, the complainant not merely does not speak of any such further demand but says that no charge was made even for taking out the notice of motion on the alleged copy of which the number of the suit given is 840, which does not tally with No. 1040 given by the complainant. Suit No. 840 had been withdrawn long before.

7. Thirdly, the copy of the plaint which was sought to be used by the complainant as proof of what, according to him, the Advocate alleged was the plaint of the suit already filed, had significant blanks in it. Even the number 1040 and the amount claimed had been admitted by the complainant to have been subsequently filled in, in his own hand. But, in his complaint, it was stated that No. 1040 was already on the plaint which had been filed. This shows that the complainant had not come with an entirely

truthful version. He had made interpolations in the documents to fit in with his version.

8. Fourthly, the complainant was, apparently, sufficiently acquainted with the requirements of litigation to know that no plaint could be filed on his behalf and on behalf of his co-owners without the signatures of his co-owners. When asked whether the co-owners had signed the plaint, he pretended to be ignorant. There are other defects also in his evidence which we need not deal with.

9. It is true that the Advocate had not fared well under cross-examination. He had tried to conceal similar complaints against him in the past. It is, however, equally true that the complainant was no green-horn. At any rate, he was not so gullible as he tried to make himself out to be. After going through the relevant evidence, we doubt whether both sides have come out with full and true facts. It is more likely that there was some dispute over the payment of Rs. 350/- which the Advocate appellant claimed as his fee for work done, but, the complainant seems to have considered himself entitled to demand the payment back. It is possible that there may have been other reasons too for friction between the two so as to lead to a disruption between the complainant and the Counsel whom he had been frequently engaging in addition to others. In any case, we are left in doubt whether the complainant's version, with which he had come forward with considerable delay, was really truthful. We think that, in a case of this nature, involving possible disbarring of the Advocate concerned, the evidence should be of a character which should leave no reasonable doubt about guilt. The Disciplinary Committee had not only found the appellant guilty but had disbarred him permanently.

10. The complainant has no doubt produced Tendolkar and D. D. Nalvade to show what enquiries were made relating to suit No. 1040 of 1964 by the respondent complainant. It is, however, not disputed that the respondent did make those enquiries. The case of the appellant was that

these enquiries were made in an attempt to bolster up a weak case. These enquiries merely prove a much too belated conduct of the complainant. They could be the result of an attempt to give a semblance of truth to a coloured and exaggerated version. It is also true that the appellant had been most unwise in not sending a Registered letter in reply to the registered notice received by him on 8th January, 1971 by the complainant. His version that he spoke to the complainant on the telephone and sent a letter in reply on 15th January, 1971, of which a copy was Ex. R1, had been rejected by the Committee on the ground that the Advocate's conduct did not appear to be above-board. We cannot help thinking that the Committee had been unduly swayed by the unsavoury background of the appellant so that it could not see its way to giving the appellant even the benefit of doubt in the instant case.

11. In the circumstances of this case, we think that the appellant is entitled to the benefit of doubt. We, therefore, allow this appeal and set aside the order disbarring the appellant who, we hope, has learnt now to conduct himself in a more satisfactory manner in his dealings with his clients. We make no order as to costs.

Appeal allowed.

AIR 1976 SUPREME COURT 376

(From: Punjab and Haryana)*

H. R. KHANNA, P. N. BHAGWATI
AND S. MURTAZA FAZL ALI,
JJ.

Shri Krishan, Appellant v. The
Kurukshetra University, Kurukshetra,
Respondent.

Civil Appeal No. 947 of 1975, D/-
17-11-1975.

(A) Kurukshetra University Cal-
endar Vol. I, Ordinance X, Clause 2
(b) — Candidate allowed to appear in
examination — His candidature, if

*(Civil Writ No. 1039 of 1974, D/-
2-4-1974—Punj. & Har.)

LS/LS/E294/75/SSG

can be withdrawn for any reason — C. W. No. 1039 of 1974, D/- 2-4-1974 (Punj & Har), Reversed.

Once the candidate is allowed to take the examination, rightly or wrongly, then the statute which empowers the University to withdraw the candidature of the applicant has worked itself out and the candidate cannot be refused admission subsequently for any infirmity which should have been looked into before giving the candidate permission to appear. (Para 6)

Before issuing the admission card to a student to appear at Part I Law Examination in April 1972 it was the duty of the University authorities to scrutinise the admission form filled by the student in order to find out whether it was in order. Equally it was the duty of the Head of the Department of Law before submitting the form to the University to see that the form complied with all the requirements. If neither the Head of the Department nor the University authorities took care to scrutinise the admission form, then in not disclosing the shortage of percentage in attendance the question of the candidate committing a fraud did not arise. Similarly, when the candidate was allowed to appear at the Part II Law Examination in May 1973, the University authorities had no jurisdiction to cancel his candidature for that examination. If the University authorities acquiesced in the infirmities which the admission form contained and allowed the candidate to appear in the Examination, then by force of the University Statute the University had no power to withdraw the candidature of the candidate. AIR 1967 Madh Pra 194, Approved. C. W. No. 1039 of 1974, D/- 2-4-1974 (Punj & Har), Reversed.

(Para 7)

(B) Evidence Act (1872), S. 3 — Fraud — Proof. (Contract Act (1872), Section 17).

Where a person on whom fraud is committed is in a position to discover the truth by due diligence, fraud is not proved. It is neither a case of suggestio falsi, or suppressio veri. (Para 7)

(C) Evidence Act (1872), Ss. 18, 115 — Admission made in ignorance of legal rights or under duress — Binding nature of — Undertaking given by candidate for University examination, if keeps him out of court.

Any admission made in ignorance of legal rights or under duress cannot bind the maker of the admission. A candidate to Part II Law Examination was given permission to appear in that examination on the basis of undertaking that if he would not be able to get requisite permission from his employer to join the law classes he would abide by any order that the University might pass. The candidate was very anxious to appear in Part II Examination and the undertaking was given in terrorem and in complete ignorance of his legal rights. It was held that the undertaking given by him did not put him out of courts if the university cancels his candidature. (Para 9)

(D) Constitution of India Articles 136 and 226 — Writ Petition challenging order of University cancelling candidate's examination — Order suffering from errors of law patent on face of record — Dismissal of Writ Petition by High Court in limine is not justified — Order set aside in appeal by special leave.

(Para 11)

Cases Referred: Chronological Paras
AIR 1967 Madh Pra 194 = 1967 Jab.
LJ 464 7

Mr. Kapil Sibal and Mr. S. K. Gambhir, Advocates, for Appellant;
Mr. S. K. Nandy, Advocate, for Respondent.

Judgment of the Court was delivered by

S. M. FAZL ALI, J.:— What appears to have been a clear case of refusal of admission to the appellant or the cancellation of his candidature at the proper time has been completely bungled and destroyed by the inherent inconsistency and seemingly contradictory stand taken by the respondent and lack of proper vigilance on the part of the Head of the Department of law. The facts of the present case lie within a very narrow compass and only two short points of law have been raised before us by Mr. Kapil

Sibbal learned counsel for the appellant.

2. The appellant was a teacher in the Government High School, Dumarkha in the District of Jind (Haryana). The University of Kurukshetra was running law classes for three-years Course and had extended the facility to persons who were in service to attend the evening classes and complete the three-years course in that manner. The appellant decided to take the benefit of the facility given by the Kurukshetra University and joined the LL.B. Part I classes some time in the year 1971. According to the University statute a student of the Faculty of Law was given the option to clear certain subjects in which he may have failed at one of the examinations before completing the three-years course. The students were to appear in six papers each year. In April 1972 the petitioner appeared in the annual examination of part I but failed in three subjects, namely, Legal Theory, Comparative Law and Constitutional Law of India. Subsequently he was promoted to Part II which he joined in the year 1972. Under the University Statute the appellant was to appear in Part II Examination in April 1973. On April 26, 1973 the appellant applied for his Roll Number to the University in order to reappear in the subjects in which he had failed and to clear them but he was refused permission and according to the appellant without any reason. The annual examination for Part II was to be held on May 19, 1973 and the appellant approached the University for granting him provisional permission to appear subject to his getting the permission from his employer to attend the Law Faculty. In between it appears that the appellant had been prosecuted for offences under Sections 376, 366 and 363, I. P. C. and was suspended during the period when the case was going on against him. The appellant was, however, acquitted and was reinstated by his employer on August 22, 1972. It would thus appear that on May 18, 1973 as also on April 25, 1973 when he had applied for his Roll Number to clear the subjects, the stigma of criminal case had been completely removed.

3. To start the thread, the appellant as mentioned already approached the University on May 18, 1973 and wrote a letter to the University authorities giving an undertaking that if he was not able to get the requisite permission from his employer to join the Law Classes, he would abide by any order that the University may pass. It appears that on the basis of this undertaking he was allowed to appear at the Part II Examination on May 19, 1973. On June 20, 1973 the appellant wrote to the University authorities that the condition on which he was to get the permission was not at all necessary and that his results may now be announced. On June 26, 1973 the respondent informed the appellant that since his percentage was short in Part I his candidature stood cancelled. Thereafter there were series of correspondence between the appellant and the University authorities but the appellant was refused admission to LL. B. Part III Class. The appellant then filed an appeal to the Vice Chancellor of the University on September 26, 1973 which was also rejected on November 3, 1973. Thereafter the appellant approached the High Court of Punjab and Haryana for a writ of certiorari to quash the order of the respondent cancelling the candidature of the appellant but the High Court after issuing notice to the other side and perusing the application form rejected the petition in limine. Hence this appeal by the appellant by special leave to this Court.

4. The sheet-anchor of the case of the respondent was that the appellant had been involved in a criminal case and therefore the Head of Institution could not give the certificate in the prescribed form that the appellant bore a good moral character. Subsequently it was said that as the appellant was short of the requisite percentage in LL. B. Part I he could not insist on his being admitted to the Part II Examination; and lastly the stand taken by the respondent was that the Evening Law Classes were held to benefit the members of the Services and it was incumbent on the appellant to have obtained permission of his superior officers and as he did not do so, the Univer-

sity was well within its rights in refusing him permission to appear at the Part II Examination or in admitting him to Part III Law course.

5. A long counter-affidavit has been filed by the respondent of which some paragraphs are extracted below:

"4. Para. 4 of the writ petition is rebutted. The petitioner was involved in a case under Sections 363 and 366 of the Indian Penal Code. As a result, he was suspended. He remained under suspension till August 23, 1972, when he was reinstated. Consequently, he attended the lectures in Part I. So far as Part II is concerned, the petitioner didn't attend the requisite number of lectures. According to the notice displayed on the notice board of the Department of Laws on January 24, 1973, the petitioner was falling short of attendance by 48 lectures upto December, 1972. Thereafter, another notice was displayed on the notice Board on April 16, 1973, according to which the petitioner was falling short of attendance by 46 lectures. As such, the averment in the writ petition that he attended his lectures according to the rules is absolutely false.

Vide letter dated November 17, 1972, the Headmaster, Government High School, Dumarkha (District Jind) made an inquiry from the University regarding the petitioner's result in the LL. B. Part I Examination. The intimation was sent by the University vide their letter dated November 17, 1972. Thereafter, a letter dated January 1, 1973, was received in the University from the District Education Officer stating inter alia that "it may also be pointed out that Shri Siri Krishan, Teacher was reinstated on 23-3-1972 and thereafter he is attending his duties in School. I am amazed to learn that he is declared by your Law Department to be attending classes in LL.B. Part II simultaneously."

"A copy of this letter is appended as Annexure 'R.1' to this affidavit. A perusal of this letter would show that the petitioner had not been granted permission by his employer to attend the law classes at the University. Furthermore, the

approximate distance between his station of posting and the University is more than fifty miles. Keeping in view the fact that he was posted in the interior of District Jind, it is impossible that the petitioner could have attended the requisite number of lectures. Evidently, the petitioner was himself aware of the fact that he had not attended the requisite number of lectures. It is also incorrect to suggest that the petitioner's name could be sent for the examination only if he had completed and required minimum attendance of lectures. The examination forms are always sent in December. Rule (Clause?) 2 (b) of Ordinance 10 of the Kurukshetra University Calendar, Volume I, provides as under inter alia:—

"B.— that he has attended regular course of study for the prescribed number of academic years. Certificate (b) will be provisional and can be withdrawn at any time before the examination if the applicant fails to attend the prescribed course of lectures before the end of his term."

The petitioner's examination form was, as such, sent provisionally and could be withdrawn at any time in case of his failure to attend the requisite percentage of lectures."

23 (i). In reply to sub-para (i) of the writ petition, it is submitted that the cancellation of the candidature of the petitioner for LL. B. Part II was not based on any extraneous considerations. Under the rules of the University every student is required to attend the prescribed course of lectures delivered to the class in each of the subjects offered. Mr. Shri Krishan was short of attendance which was duly notified on the notice board of the Department of Law twice; once on January 24, 1973 and again on April 16, 1973. The admission of the petitioner to the Law course in the University was under dispute as a result of a complaint from the District Education Officer, Jind. The petitioner came to the Magistrate (Registrar?) on 18-5-1973, with an application that pending final decision of his case he, may be allowed to sit in the examination provisionally at his own risk and responsibility. In this application, the petitioner did not mention

that he was also falling short in lectures as notified by the Head of the Department of Law. Since the office was closed at that time and the examination was to start at 8.00 a.m. on May 19, 1973, the candidate was allowed to appear in the examination provisionally at his own risk and responsibility.

(viii) In reply to sub-para (viii) of the writ petition, it is submitted that in the admission notice printed at page 75 in the Hand Book of Information for the session 1971-72 to which the application for admission to the Department forms a part, mentions that LL. B. Classes in the evening were for employed persons only. It was, therefore, implied that the applicant while seeking admission in this class would obtain the approval of his employers. This approval became particularly necessary because of the constant complaints of serious nature from the employers (the Government) of the petitioner who insisted that he must obtain such permission. It may be recalled that the petitioner in his undertaking to the Registrar on May 18, 1973 promised to produce the required permission."

It will be seen from the above affidavit that the stand taken by the respondent is by no means consistent. It may be mentioned that at one stage the University takes the stand that it was a case of shortage of percentage and therefore the appellant was refused admission to appear at Part II Examination. Later on this stand is given up and the respondent averred that as the appellant did not get the permission of his superior officers and since the University was moved by the District Education Officer to cancel the candidature of the appellant the impugned order was passed by the University. It was also argued by Mr. S. K. Nandy counsel for the respondent that the appellant knew fully well that his percentage was short and in spite of that he fraudulently suppressed this fact from the University authorities when he was allowed to appear in the LL.B. Part I Examination in April 1972.

6. Mr. Sibbal learned counsel for the appellant submitted two points before us. In the first place it was

argued that once the appellant was allowed to appear at LL.B. Part II Examination held on May 19, 1973 his candidature could not be withdrawn for any reason whatsoever, in view of the mandatory provisions of Clause 2 (b) of the Kurukshetra University Calendar Vol. I, Ordinance X under which the candidature could be withdrawn before the candidate took the examination. Secondly it was argued that the order of University was mala fide because the real reason for cancelling the candidature of the appellant was the insistence of the District Education Officer that the appellant should not have been admitted to the Law Faculty unless he had obtained the permission of his superior officers. In order to appreciate the first contention it may be necessary to extract the relevant portions of the statute contained in Kurukshetra University Calendar Volume I, Ordinance X. Clause 2 of this Ordinance runs as follows:

"2. The following certificates, signed by the Principal of the College/Head of the Department concerned, shall be required from each applicant:—

(a) that the candidate has satisfied him by the production of the certificate of a competent authority that he has passed the examinations which qualified him for admission to the examination; and

"(b) that he has attended a regular course of study for the prescribed number of academic years.

Certificate (b) will be provisional and can be withdrawn at any time before the examination if the applicant fails to attend the prescribed course of lectures before the end of his term."

The last part of this statute clearly shows that the University could withdraw the certificate if the applicant had failed to attend the prescribed course of lectures. But this could be done only before the examination. It is, therefore, manifest that once the appellant was allowed to take the examination, rightly or wrongly, then the statute which empowers the University to withdraw the candidature of the applicant has worked itself out and the applicant cannot be refused

admission subsequently for any infirmity which should have been looked into before giving the applicant permission to appear. It was, however, submitted by Mr. Nandy learned counsel for the respondent that the names of the candidates who were short of percentage were displayed on the Notice Board of the College and the appellant was fully aware of the same and yet he did not draw the attention of the University authorities when he applied for admission to appear in LL. B. Part II Examination. Thus the appellant was guilty of committing serious fraud and was not entitled to any indulgence from this Court.

7. It appears from the averments made in the counter-affidavit that according to the procedure prevalent in the College the admission forms are forwarded by the Head of the Department in December preceding the year when the Examination is held. In the instant case the admission form of the appellant must have been forwarded in December 1971 whereas the examination was to take place in April/May 1972. It is obvious that during this period of four to five months it was the duty of the University authorities to scrutinise the form in order to find out whether it was in order. Equally it was the duty of the Head of the Department of Law before submitting the form to the University to see that the form complied with all the requirements of law. If neither the Head of the Department nor the University authorities took care to scrutinise the admission form, then the question of the appellant committing a fraud did not arise. It is well settled that where a person on whom fraud is committed is in a position to discover the truth by due diligence, fraud is not proved. It was neither a case of *suggestio falsi*, or *suppressio veri*. The appellant never wrote to the University authorities that he had attended the prescribed number of lectures. There was ample time and opportunity for the University authorities to have found out the defect. In these circumstances, therefore, if the University authorities acquiesced in the infirmities which the admission form contained and allowed the appellant to appear in Part I Examination

in April 1972, then by force of the University Statute the University had no power to withdraw the candidature of the appellant. A somewhat similar situation arose in *Premji Bhai Ganesh Bhai Kshatriya v. Vice Chancellor, Ravishankar University, Raipur*, AIR 1967 Madh Pra 194 at p. 197 where a Division Bench of the High Court of Madhya Pradesh observed as follows:

"From the provisions of Ordinances Nos. 19 and 48 it is clear that the scrutiny as to the requisite attendance of the candidates is required to be made before the admission cards are issued. Once the admission cards are issued permitting the candidates to take their examination, there is no provision in Ordinance No. 19 or Ordinance No. 48 which would enable the Vice-Chancellor to withdraw the permission. The discretion having been clearly exercised in favour of the petitioner by permitting him to appear at the examination, it was not open to the Vice-Chancellor to withdraw that permission subsequently and to withhold his result."

We find ourselves in complete agreement with the reasons given by the Madhya Pradesh High Court and the view of law taken by the learned Judges. In these circumstances, therefore, once the appellant was allowed to appear at the Examination in May, 1973, the respondent had no jurisdiction to cancel his candidature for that examination. This was not a case where on the undertaking given by a candidate for fulfilment of a specified condition a provisional admission was given by the University to appear at the examination which could be withdrawn at any moment on the non-fulfilment of the aforesaid condition. If this was the situation then the candidate himself would have contracted out of the statute which was for his benefit and the statute therefore would not have stood in the way of the University authorities in cancelling the candidature of the appellant.

8. As regards the second point that the order was passed *mala fide*, it is difficult to find any evidence of *mala fides* in this case. The order suffers from yet another infirmity. The

annexures filed by the appellant and the respondent as also the allegations made in the counter-affidavit clearly show that there were series of parleys and correspondence between the District Education Officer and the respondent in the course of which the respondent was being persuaded, to the extent of compulsion, to withdraw the candidature of the appellant because he had not obtained the permission of his superior officers. Mr. Nandy appearing for the respondent has not been able to show any provision in the statutes of the University which required that the candidates attending the evening law classes who are in service should first get the prior permission of their superior officers. We have also perused the University Statute placed before us by counsel for the appellant and we do not find any provision which could have afforded justification for the respondent to cancel the candidature of the appellant on the ground that he had not obtained the previous permission of his superior officers.

9. Mr. Nandy, counsel for the respondent placed great reliance on the letter written by the appellant to the respondent wherein he undertook to file the requisite permission or to abide by any other order that may be passed by the University authorities. This letter was obviously written because the appellant was very anxious to appear in Part II Examination and the letter was written in *terrorem* and in complete ignorance of his legal rights. The appellant did not know that there was any provision in the University Statute which required that he should obtain the permission of his superior officers. But as the respondent was bent on prohibiting him from taking the examination he had no alternative but to write a letter per force. It is well settled that any admission made in ignorance of legal rights or under duress cannot bind the maker of the admission. In these circumstances we are clearly of the opinion that the letter written by the appellant does not put him out of court. If only the University authorities would have exercised proper diligence and care by scrutinising the admission form when it was sent by the Head of the Department to the

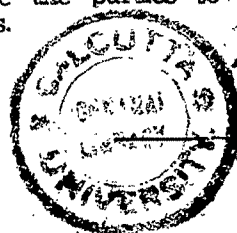
University as far back as December 1971 they could have detected the defects or infirmities from which the form suffered according to the University Statute. The Head of the Department of Law was also guilty of dereliction of duty in not scrutinising the admission form of the appellant before he forwarded the same to the University.

10. Moreover, the stand taken by the respondent that as the appellant did not get the requisite permission from his superior officers; therefore he was not allowed to appear at the examination, does not merit consideration, because the impugned order does not mention this ground at all and it was not open to the respondent to have refused admission to the appellant to LL.B. Part III or for that matter to refuse permission to appear at the examination on a ground which was not mentioned in the impugned order.

11. Having gone into the circumstances mentioned above, we are of the view that the impugned order suffers from errors of law patent on the face of the record, and in any event this was not a case which should have been dismissed by the High Court in limine.

12. The appeal is accordingly allowed and the order of the University dated June 26, 1973, is hereby quashed by a writ of certiorari. The respondent is directed to declare the result of LL. B. Part II Examination in which the appellant had appeared on May 19, 1973 and also to give him an opportunity to appear in the three subjects in which he had failed in LL.B. Part I Examination, at the next examination which may be held by the University.

13. In the peculiar circumstances of this case, however, we leave the parties to bear their own costs.



Appeal allowed.

1976 Karunakaran v. State of T. N. (Goswami J.) [Prs. 1-3] S.C. 383

AIR 1976 SUPREME COURT 383

(From Madras: 1975 Cri LJ 798)

P. K. GOSWAMI AND N. L. UN-
WALIA, JJ.

Karunakaran, Appellant v. State
of Tamil Nadu, Respondent.

Criminal Appeal No. 425 of 1974,
D/- 12-11-1975.

(A) Penal Code (1860), S. 302 —
Conviction of one of the accused out
of some — Conviction based on the
testimony of sole witness — FIR by
the witness mentioning only accused
as assailant while medical evidence,
indicating more than one assailant —
FIR mentioning that the deceased
chased the accused while running
away — Version changed in evidence
and others also implicated as assail-
ants — Absence of blood trail show-
ing deceased chasing accused — Con-
viction and passing of death sentence,
held, could not be justified. 1975 Cri
LJ 798 (Mad), Reversed.

(Paras 10 & 12)

(B) Penal Code (1860), S. 302 —
Sentence of death — Conviction bas-
ed on testimony of a sole witness —
Appreciation of evidence. 1975 Cri LJ
798 (Mad), Reversed. (Evidence Act
(1872), S. 3.) (Criminal Trial — Ap-
preciation of evidence.)

Where an accused is going to
lose his life in a serious charge of
murder, it is only necessary that the
Court should be circumspect and
closely scrutinise the evidence to
come to an unhesitating conclusion
that the eye witness on whose testi-
mony the conviction is based is ab-
solutely reliable. Where the sole wit-
ness on whose testimony the convic-
tion was based had himself given the
FIR and there were serious depar-
tures in his evidence from the version
given in FIR and the evidence was
contradicted by the medical evidence,
Held on facts that the High Court
failed to consider the intrinsic quality
of evidence of the witness. It failed
to notice certain broad facts which
would definitely weigh with the
Court while appreciating the ocular
testimony. The witness was unreliable
and his testimony instead of being
corroborated was contradicted by the

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FIR. Conviction was set aside. 1975
Cri LJ 798 (Mad), Reversed.

(Paras 11 and 12).

(C) Constitution of India, Art. 136
— Criminal trial — Re-appreciation
of evidence — Circumstances under
which Supreme Court would go into
facts.

Ordinarily in an appeal under
Art. 136 of the Constitution the Sup-
reme Court would not go into the
facts to reappreciate the evidence.
But where the conviction under Sec-
tion 302 was based and accused was
sentenced to death on the sole testi-
mony of a witness when the said
testimony was rejected with reference
to another accused who was in the
same boat as the accused, the Court
re-appreciated the evidence, and set
aside the conviction. (Para 10)

Mr. A. N. Mulla, Sr. Advocate,
(M/s. K. Jayaram and P. Chandrashe-
kar, Advocates with him), for Appel-
lant; Mr. A. V. Rangam and Miss A.
Subhasini, Advocates, for Respon-
dent.

Judgment of the Court was de-
livered by

GOSWAMI, J.:— This appeal by
special leave is directed against the
judgment and order of the High
Court of Madras convicting the ap-
pellant (hereinafter to be described as
the accused) under Sec. 302, I. P. C.
and sentencing him to death.

2. The police had submitted
charge-sheet under Section 302/34,
I. P. C. against the present accused
and accused Jabamani Nadar alias
Kanyakumari Comrade alias Ramu and
Thamizharasan alias Ramaswami, who
was shown as an absconder. On the
prayer of the prosecution the case
against the first two accused, with-
out the absconding accused, was taken
up for trial. The two accused were
charged under Section 120B read with
Sections 302 and 109, I. P. C. as well
as under Section 302/34, I. P. C. The
case was referred to the High Court
as usual and the accused also prefer-
red appeals against their conviction
and sentence.

3. The High Court acquitted
accused Jabamani Nadar alias Kanya-
kumari Comrade alias Ramu and ac-
cepted the reference in respect of the
present accused. His appeal was also

dismissed. Hence this appeal by special leave.

4. The facts are in a brief compass. The deceased, Viswanatham Pillai, was the village Munsif (Headman). On April 26, 1971, at about 10.00 P.M. he was sleeping on a bench outside his cattle-shed in the open space, which is shown in the site plan (Ex. P15) at No. 9. The younger brother of the deceased, Pandurangam (PW 4), who is a leper, was also sleeping on the eastern parapet of the sluice of the north Boothagudi channel, which is shown at No. 5 in the site plan (Ex. P15). Pandurangam woke up at about 11.15 P.M. on hearing the shout of his deceased brother crying "younger brother: Karunakaran is running after stabbing me with knife. 'Catch him'". He got up and saw the accused Karunakaran running on the eastern bank of the channel with a knife 8 inches long. The electric lights were burning in the vicinity. He also saw two persons running ahead of accused Karunakaran. He further saw his two brothers, Gnanasekaran (PW 1) and Thiru-gnanasambandam (PW 3) along with Ramasamy (PW 2) chasing them. He ran to his elder brother who came from the side of the bench where he was sleeping and who fell down on the southern side of the sluice. When he went near him he was already dead. He had bleeding injuries on several parts of his body. A crowd gathered and Pandurangam was asked to lodge information at the police station which he did. The doctor (PW 16) who held the post-mortem examination found nine injuries, two of which he described as incised and four as punctured incised, two more as punctured and the remaining one as a vertical incised wound. These were on the left upper arm, left forearm, on the left side of the epigastrium, on the left side of the anterior axillary line, on the left mid-axillary line, on the right side of the epigastrium and on the left side of the back. Injuries were very severe and according to the doctor death was due to shock and haemorrhage on account of the injuries.

5. It is clear that whosoever had inflicted these injuries definitely

had the intention to cause the death of the victim.

6. In the first information report which PW 4 lodged at the Thana, which is very close to the place of occurrence, within about 15 minutes of the occurrence, inter alia, stated thus:

"At about 11.15 P.M. I woke up on hearing a noise to the effect 'younger brother, Karanukaran is running after stabbing me with knife, 'catch him'. I stood up and saw Karunakaran, son of Orathur Ayyathurai Padayachi running eastwards from the place where I lay and my elder brother chasing him from behind. I too came running".

7. It will be seen that at the time of lodging of the first information report only the present accused was implicated. Even so, later on four eye-witnesses were produced implicating not only the present accused but also two other accused. The High Court after appreciating the entire evidence rejected the evidence of these eye-witnesses, namely, PWs 1, 2, 3 and 5 and described them as "a bunch of liars." "unashamed liars and perjurers". The High Court, therefore, acquitted the second accused, Jabamani Nadar alias Kanyakumari Comrade alias Ramu and also observed that necessarily no case would lie on this kind of testimony against even the absconding accused. It was also observed that the High Court "can place no reliance on the testimony of PW 4 in so far as he implicated the second accused and Thamizharasan in the case of murder of Viswanatham". The High Court further observed:

"Poor PW 4 was compelled to speak to a version which ought to accord and harmonise with the version given out by PWs 1, 2 and 3".

Even so the High Court thought that it was justified in convicting the present accused on the sole testimony of PW 4 "corroborated by the contents of Ex. P1 (FIE)". The High Court held that "PW 4 who was afflicted with the hell disease of leprosy..... has absolutely no motive to implicate the first accused." The High Court further held that PW 4 gave a "candid, natural and

truthful version..... at the earliest opportunity”.

8. The High Court has taken note of the fact that “there has been a history of a bitter feud spanning over nearly a decade between the first accused and his father on the one hand and the deceased Viswanatham on the other.”

9. This is, therefore, a case where conviction of the accused depends on the sole testimony of a single witness. If the witness is absolutely reliable there can be no infirmity in convicting the accused. In that case even corroboration may not be sought for.

10. Ordinarily in an appeal under Article 136 of the Constitution we would have hesitated to go into the facts to reappraise the evidence. It is, however, not possible to adopt that course in this case where the testimony of the sole witness has been rejected with reference to the second accused who was in the same boat with the appellant. The very fact that this eye-witness could be persuaded to substitute PWs 1, 2 and 3 for his deceased brother as chasing the assailants, degrades him from the status of an absolutely reliable witness. He is definitely an obliging witness and cannot at all be trustworthy. This witness may not have a qualm of conscience in implicating the accused for the mere asking by someone, if not by the inimical police Officer (PW 23) against whom criminal cases were pending at the instance of the accused's father.

11. Apart from that we find that the High Court has not considered the intrinsic quality of the evidence of PW 4. It failed to notice certain broad facts which should definitely weigh with the court while appreciating ocular testimony. From the medical evidence it is clear that there were more than one assailant and yet from the FIR it appears that there was only one assailant. This may not, in a given case, be considered as a very serious infirmity since the witness may not have seen the other assailants when he came running to the place of occurrence. But the fact that the witness has stated in the first information report that the deceased was only

mentioning the name of accused Karunakaran as his assailant, this earlier version appears to be contradicted by the medical evidence. Besides, he has deliberately changed his own stand in court when he deposed that he saw two other persons running ahead of Karunakaran being chased by his two brothers and Ramasamy.

12. Another very serious departure from his earlier version is that while PW 4 had stated in the first information report that “my elder brother” (meaning the deceased) was “chasing him from behind” in court he has completely given a go-by to this statement and stated that Karunakaran was being chased by PWs 1, 2 and 3. He did not at all refer to the deceased chasing him. If his statement in court that he saw PWs 1, 2 and 3 chasing Karunakaran while running away after the assault is true, it is difficult to appreciate that he would not mention about this fact in the first information report. He admitted in the course of cross-examination that the Sub-Inspector asked him whether he had any witnesses and that he “did not tell about them due to excitement.” It is difficult to accept this explanation of this witness. Assuming that his earlier version in the first information report is true that the deceased chased the accused as the latter was running away after the assault we would have expected some evidence of a trial of blood stains from the place where he was sleeping to the place where he fell dead. On the other hand we find that there is a mention about a pool of blood only where the dead body was found at No. 1 in the site plan. There were also no blood stains on the bench where he was said to be sleeping. We further find from the evidence of PW 4 in cross-examination that when he went near his deceased elder brother about hundred persons were there and “none of them asked him as to how it had happened.” We do not find in this case a single witness out of that crowd produced in court for the purpose of corroborating PW 4. If the statement of PW 4 is to be believed, the crowd had gathered at the place of occurrence already when he arriv-

ed. It is also conceivable that those persons, who arrived at the place of occurrence a little earlier than PW 4, did not see the assailants who might have already escaped. It also stands to reason that those persons who gathered would not ask PW 4, who arrived at the place a little later, for information with regard to the assailants. There is considerable doubt as to his testimony with regard to seeing the accused running away from the place of occurrence. When the accused is going to lose his life in such a serious charge it is only necessary that the court should be circumspect and closely scrutinise the evidence to come to an unhesitating conclusion that he is absolutely reliable. We are unable to say that the High Court in this case has made a correct approach in assessing the quality of the testimony of this solitary eyewitness. The High Court is not even right that PW 4 stands wholly corroborated by the contents of the FIR. On the other hand we have shown that his version in the FIR stands contradicted by the testimony in court on a very material point.

13. For the reasons given above we are unable to place such reliance as is requisite on the testimony of this uncorroborated solitary witness for convicting the accused facing a murder charge. The conviction and sentence of death are, therefore, set aside. The appeal is allowed and the accused shall be released from detention forthwith.

Appeal allowed.

AIR 1976 SUPREME COURT 386

(From: ILR (1969) Delhi 1055)

A. N. RAY, C. J., M. H. BEG, R. S. SARKARIA AND P. N. SHINGHAL JJ.

D. L. F. Housing Construction (P) Ltd., Petitioner v. Delhi Municipal Corpn. and others, Respondents.

Civil Appeal No. 1298 of 1970, D/- 4-12-1975.

(A) Constitution of India, Art. 226 — Relief when can be granted — Disputed facts — Complicated ques-

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tions of law and facts depending on evidence — No relief can be granted.

In a case where the basic facts are disputed and complicated questions of law and fact depending on evidence are involved the writ Court is not the proper forum for seeking relief. The right course for the High Court in proceedings under Art. 226 is to dismiss the petition on this preliminary ground without entering upon merits of the case. In the absence of firm and adequate factual foundation, it is hazardous to embark upon a determination of the points involved. (Para 18)

Cases Referred: Chronological Paras

AIR 1971 SC 1021 = (1970) 3 SCR 854 15

AIR 1968 SC 718 = (1968) 2 SCR 366 15

AIR 1962 SC 458 = (1962) 1 Supp SCR 156 14

AIR 1947 PC 88 = 1947 All LJ 365 15

AIR 1931 PC 196 = 58 Ind App 279 15

Dr. L. M. Singhvi, Sr. Advocate, (M/s. P. C. Bharghari and R. Narain, Advocates with him), for Appellant; Mr. A. D. Mathur and Mr. Rameshwar Dayal, Advocates, for Respondents, Mr. V. S. Desai, Sr. Advocate, (M/s. Hardev Singh and R. S. Sodhi, Advocates with him), for Respondent No. 4.

Judgment of the Court was delivered by

SARKARIA, J.:— This appeal by certificate arises out of a judgment of the High Court of Delhi dismissing the appellant's writ petition under Article 226 of the Constitution.

2. The appellant D. L. F. Housing Construction (P) Ltd. (hereinafter referred to as the Coloniser) carries on the business of colonisation and development of lands in Delhi. Among the colonies which were developed by it are New Delhi South Extension Part I and Part II Shivaji Park, Hauz Khas Kailash Greater Kailash I and Greater Kailash II. The Coloniser submitted applications for the development of these colonies and obtained sanctions of the lay-out plans under the extant laws. Sanctions for five of these colonies were granted by the Delhi Development

Provisional Authority in the year 1956 under the Delhi (Control of Building Operations) Act 53 of 1955 and the Regulations framed under Section 19 of the Delhi (Control of Building Operations) Ordinance No. V of 1955.

3. Under Regulation 5 (3) (ii), before a Coloniser undertakes to subdivide a plot of land into building plots, he is required to enter into an agreement with the Central Government for the internal development of the land to the satisfaction of the Authority. A Coloniser seeking permission to develop an area of land as a colony has to submit an application for the purpose together with a lay-out plan in which he has to set apart, among other things, open spaces for roads, parks etc. and open sites for other public utility services such as schools, dispensaries etc. The principles and conditions on which the sanction is accorded are indicated in the Regulations. Sanctions for development of the first five colonies mentioned above were obtained by the Coloniser in 1956 and of Greater Kailash II in 1959.

4. On January 12, 1965, the Municipal Corporation (Respondent 1) by a letter required the Coloniser to hand over, free of cost, the total land in its colonies under roads, public parks and such other public utility services, including the land set apart for schools, hospitals and similar other public institutions, as provided under Regulation 5 (3) of the Delhi (Control of Building Operations) Regulations. It also reminded the Coloniser of its obligation under sub-paragraph (iv) of Regulation 5 (3) to transfer all such land to it. It further asserted that all such plots in all the colonies developed by the Coloniser which had been set apart for public utility services, vest in Delhi Municipal Corporation in accordance with the Regulations.

5. On June 28, 1965 the Coloniser received a notice, dated June 24, 1965, from the Delhi Municipal Corporation (Respondent 1) through its Deputy Commissioner (Respondent 2) regarding vacant plots in N. D. S. E. Parts I & II that had been set apart for public utility services. The material part of this notice runs as under:—

"The services of the colony of N. D. S. E. I and II have been taken over by the Municipal Corporation Delhi long ago; and as provided under Section 313 (b) of D. M. C. Act 1957, vacant plots and other services indicated in the layout plans automatically vest in the Municipal Corporation of Delhi.

It is, therefore, understood that the possession of the plots in N.D.S.E. Parts I and II earmarked for Primary School and High School in both the above colonies now vests in the Municipal Corporation of Delhi and further action to utilize these plots will be taken in the interest of the public/residents of these colonies."

In reply to this letter the Coloniser informed Respondent 1 that it had no authority under the law to treat these sites, and similar sites in the other colonies as vesting in Respondent 1. The Coloniser asserted that it was holding these plots as owner thereof.

6. The Coloniser on July 27, 1965, filed a petition under Article 226 of the Constitution for impugning the aforesaid notices dated 12-1-65 and 24-6-65 whereby the Municipal Corporation directed the Coloniser to transfer such plots to it free of cost. The Coloniser pleaded that neither the Acts concerned, nor the Regulations framed under Ordinance V of 1955 authorise the Municipal Corporation to take over free of cost the vacant plots of land earmarked for schools and hospitals etc. The Coloniser, however, made it clear that it is holding such plots to be utilised only for the purposes for which they were earmarked, and for no other purpose. The Coloniser's case in the petition was that the principles embodied in Regulation 5 were only general guiding principles, which did not fetter the discretion of the Authority in any way whatsoever in granting or refusing permission. It was further alleged that in any event the Regulations had no force of law because Ordinance V of 1955 under which they were framed, had been repealed by Delhi Act No. 53 of 1955 without preserving the continuity of the Regulations. In the alternative, it

was pleaded that these Regulations were hit by Article 31 (1) and (2) of the Constitution and as such were ultra vires and void. It was further stated that the Coloniser had already made arrangements with various trusts and charitable organisations and leased out various such plots with the express stipulation that the same would be utilised only for the purposes for which they had been earmarked in the lay-out plans but Respondent 1 had refused to sanction the building plans submitted in respect thereof. The lessee of two such plots — one situated in N. D. S. E. Part I and the other in Greater Kailash — submitted building plans for sanction but the same were rejected by Respondent 1. According to the Coloniser, in rejecting the building plans, the Municipal Corporation had acted without jurisdiction. On the preceding facts, the petitioner prayed for the issuance of:

(a) a writ of mandamus or any other appropriate writ, direction or order, restraining the respondents, their agents, and servants, from interfering with the peaceful possession and ownership of the Petitioner Coloniser in respect of the said plots of land earmarked for schools, hospitals etc. in these six colonies developed by it;

(b) a writ of mandamus or any other appropriate writ, direction or order, directing the Respondents to treat the said plots of land earmarked for schools, hospitals etc. in the various colonies developed by the petitioner as described in prayer (a) hereinabove;

(c) a writ of mandamus or any other appropriate writ or direction restraining the respondent from rejecting the building plans submitted and being submitted in respect of the said plots of land earmarked for schools and hospitals etc;

(d) a writ of mandamus or any other appropriate writ directing the respondents to grant sanction of the building plans submitted, and being submitted, in respect of the said plots.

7. In the counter-affidavit filed on behalf of Respondents 1 and 2, the Deputy Commissioner asserted that the ownership of the open spaces and sites in question had vested

in the Municipal Corporation, and the Coloniser was no longer the owner thereof. While admitting the petitioner's allegation that the transfer of these plots was being claimed by the Municipal Corporation free of cost, the Deputy Commissioner averred that in one of the plots in dispute the Municipal Corporation had already built a Municipal School which was functioning. It was stated that "so far as the petitioner's other schemes were concerned i.e. in Model Town, Rajori Gardens and in Hauz Khas, all streets, open spaces, parks, schools, markets etc. had already been handed over by the petitioner to the respondent without any protest."

8. The South Extension (II) Plot Holders and Residents Welfare Association (Registered), New Delhi also joined (with the permission of the High Court) as Respondent No. 4 to oppose the petition. They are interested in the open spaces which in the sanctioned layout were set apart for public utility services such as parks, lawns, streets, etc. They had instituted a regular suit in the court of the Subordinate Judge, Delhi in regard to one such plot earmarked as open space in N. D. S. E. (II) to restrain the Coloniser from building a private school on it. In its affidavit the Association inter alia stated that the plot-holders (who were members of this Association) had purchased the plots on the faith of the sanctioned lay-out plans which provided for parks, roads, sites for schools, hospitals, public places and other public utility services. They filed a copy of Resolution No. 63, dated 16th April, 1956 of the Authority, together with a copy of the amended lay-out plan in respect of New Delhi South Extension Part II. They alleged that the beneficial interest in all such open spaces and vacant sites earmarked and set apart in the sanctioned layout, vest in the plot-holders of the respective colonies and that both under the law and the agreements executed by the Coloniser, the authority entitled to maintain and control these parks, sites for schools, hospitals and public places was the Municipal Corporation.

9. In the rejoinder affidavit the petitioner stated that no agree-

ments were entered into between the Coloniser and the Delhi Development Provisional Authority at the time of getting the lay-out plans sanctioned. The petitioner categorically denied that the "alleged agreements provided that the Coloniser shall transfer to the Corporation free of cost vacant land in the colonies which was under roads, public parks and such other public utility services, including the land set apart for schools, hospitals and similar public institutions."

10. The High Court held that Regulation 5 (3) (iv), taken in conjunction with the applications submitted for sanction of the lay-out plans to the Authority and the agreements, amounted to an unequivocal declaration on the part of the Coloniser of its "willingness to use lease lands for the purposes for which they were reserved in the plans." The High Court reasoned that having so agreed to the user of these lands and having obtained sanction of the Authority on that basis under the Act, certain consequences follow in law as a matter of course. Firstly, the petitioners were estopped from going back on their solemn undertaking that the plots so reserved would be used for any purposes other than those for which they were reserved in the proposed lay-out plans. Secondly, a fiduciary relationship in the nature of a trust came into existence, with the result that the beneficial use of these plots passed on to "others" and the Coloniser's ownership rights stood modified, they became trustees. The High Court, however, found it unnecessary to determine the exact kind of trust that thus came into being in respect of these plots and the person and persons in whom the beneficial interest came to vest after the creation of this trust. It observed that "this subject cannot appropriately be dealt with when the matter is being considered in the abstract without reference to the facts of any particular case." In its opinion it was sufficient to say "that the petitioners by their own conduct and operation of law ceased to be full and complete owners of the plots and held them only as trustees." and they could not deal with these plots other(wise) than

in the manner permitted by the law under which the sanctions were granted or any valid rules or regulations made thereunder. Sub-para (iv) of Regn. 5 (3) was held to be the law, according to which, the Coloniser was bound to transfer its rights in these plots free of cost to the Authority.

11. There, as here, it was contended on behalf of the Coloniser:

(1) That the Regulations, which were being relied upon by the respondents stood repealed by the Act 53 of 1955.

(2) that sub-para (iv) of Regulation 5 (3) requiring the Coloniser to transfer to the Authority free of cost the plots reserved for public utility services, was beyond the regulation-making powers conferred by the Ordinance/Act 53 of 1955 and as such, was invalid:

(3) that these Regulations; in any case, were no more than guiding principles giving the Authority a discretion to make all or any one of them, in whole or in part, a condition of the sanction and to get them incorporated in the agreement, and that in any event, sub-para (iv) of Regulation 5 (3) of its own force did not become a part of the conditions of the sanction or a term of the agreement:

(4) that sub-para (iv) of Regulation 5 (3) is hit by Article 31 of the Constitution, and is void.

12. The High Court found Section 24 read with Section 30 of the General Clauses Act in terms saves and continues the operation of the Regulations, notwithstanding the repeal of the Ordinance, that sub-para (iv) of Regulation 5 (3) simply lays down a "principle" and was therefore within the rule-making power conferred by Section 19 of the Act.

13. Regarding the contention that these Regulations were directory, the High Court said that although it could plausibly be argued that sub-para (xii) of Regulation 5 (3) gave a discretion to the Authority to waive or not to waive any of the conditions specified in the earlier "clauses", it was not possible to accept this argument in this case because "no material has been placed on the record to show that this "clause" (iv) was ever waived by the Authority in the case

of these six colonies, which formed the subject-matter of the petition." In the absence of any such material the High Court held that the principle contained in Regulation 5 (3) (iv) would be considered to be an "integral part of the conditions" subject to which the lay-out plans were sanctioned.

14. The High Court further held that the residuary interest left with the Colonisers in the plots earmarked for public utility services was only a right of management of the trust in respect of these lands, and that Article 31 of the Constitution was not attracted in such a case. For this conclusion it relied upon the dictum of this Court in *The Board of Trustees, Ayurvedic and Unani Tibia College, Delhi v. The State of Delhi*, (1962) (1) Supp SCR 156 = (AIR 1962 SC 453). In the result it dismissed the petition. Hence this appeal.

15. Apart from reiterating the arguments with regard to the vires and constitutional validity of Regulation 5 (3) (iv) and the effect of the repeal of Ordinance V of 1955 on the operation of these Regulations, Dr. Singhvi, appearing for the appellant, has advanced these contentions before us:

(1) (a) Clause (6) of the agreements executed between the Coloniser and the Authority in respect of the five colonies, in 1956, provides that open sites reserved for such public utility services (as distinguishable from open spaces earmarked for roads, parks etc.) shall be transferred to the Authority or persons or institutions approved by the Authority, at a price to be determined by the Authority on no-profit basis. This stipulation provides for a price and does not require transfer free of cost. Clause (6) of the agreements (which relates to open sites) stands out in contradistinction to Clause (5) of the agreements particularly in the matter of payment of price. The impugned action is not in conformity with this condition incorporated in the agreements, which are an integral part of the orders according the sanctions.

(b) No such stipulation for transfer of school sites was made in the

order sanctioning the layout for Greater Kailash II, under Act 66 of 1957.

(c) The sanctions granted are valid in law and it is not open to the Authority to resile from them or to read into them any other conditions.

(2) In view of the clarification in sub-para (xii) of Regulation 5 (3) the sanctioning Authority had a discretion to adopt all or any of the principles embodied in Regulation 5 and make the same a condition of the sanction. Sub-para (iv) of Regulation 5 (3) contains two alternatives, any one of which could be adopted by the sanctioning Authority in the present case. While granting the sanction the Authority did not make the grant subject to the first alternative contained in this sub-para (iv) but adopted the second alternative, according to which the plots in question were to be transferred to the Authority or its nominee or some other institution with the permission of the Authority 'on no-profit no-loss' basis. (Reliance for this contention has been placed on document which is said to be the draft agreement attached to the order of sanction).

(3) Having granted the sanctions on the terms in the agreements which did not contain any condition that the plots in question would be transferred free of cost to the Authority, the respondents, who stand in the shoes of the Authority, are estopped, in equity, from denying that these plots had to be taken over on payment of a price determined 'on no-profit no-loss' basis. (Reliance for this contention has been placed on *Union of India v. Indo-Afghan Agencies* (1968) 2 SCR 356 = (AIR 1968 SC 718) and *Century Spinning Co. v. Ulhasnagar Municipal Council*, (1970) 3 SCR 854 = (AIR 1971 SC 1021.))

(4) The obligations of the parties in this case were contractual and were governed by the agreements which were appendages to the sanctions. The sanction orders-cum-agreements did not create any fiduciary relationship between the promiser and the promisee. There was no transfer, no divesting and no vesting in the obligations created by these agreements. There was only an agreed

restriction in the matter of land use and this could not amount to the creation of a trust nor to an undertaking to transfer the land free of cost. Clause (6) of the agreements shows that there was no automatic vesting but that the transfer could be directed to be made on the payment of a price. This Clause (6) is in the nature of an agreement to sell for a particular purpose at a concessional or at no-profit price.

On the point that a contractual obligation is different from an obligation amounting to a trust, reference has been made to *Chhatra Kumari v. Mohan Bikram*, (AIR 1931 PC 196) and *Rama Rao v. Venkataratnam*, (AIR 1947 PC 88).

In any event in a trust there should be a settler, a trustee and a beneficiary. According to the High Court it could not be said as to who were the beneficiaries.

(5) The impugned notice dated June 24, 1965 requiring the appellant to hand over free of cost the plots in question in N. D. S. E. I & II is invalid on the face of it because—

(a) Section 313 (1) (b) of the Delhi Municipal Corporation Act, 1957, on the basis of which the automatic vesting of these plots, free of cost, in the Municipal Corporation is claimed, does not provide for such vesting. Section 313 (1) (b) is concerned primarily with "Streets" and has no application whatever to "open sites" reserved for public utility services such as schools, hospitals etc.;

(b) The sanction of the lay-out plans of the NDSE I & II was accorded in 1956 under Act 53 of 1955, when the Delhi Municipal Corporation Act, 1957 was not on the statute book.

16. Mr. Rameshwar Dayal appearing for the Municipal Corporation, has at the outset raised an objection that none of the documents now relied upon by the appellant was produced in the High Court. He stoutly opposes the entertainment of these documents for the first time in appeal. These documents, the admission of which is objected to by counsel, include an affidavit dated August 14, 1969 purporting to be from one R. K. Jain, Secretary to the Coloniser Company, and a copy of a letter dated

24-4-1956, purporting to be signed by one "G. L. Mittel for the Secretary of the Authority", conveying to the Coloniser the sanction of the Authority to the layout plan submitted by the appellants for New Delhi South Extension Colony on the conditions contained in the draft agreement annexed thereto. These documents, particularly the sanction letter and the agreement annexed thereto constitute the factual basis of contentions 1, 2, 3 and 4 canvassed by counsel for the appellant. The Municipal Corporation disputes the authenticity of these documents.

17. Thus in these proceedings under Article 226 the Court has been called upon to decide disputed questions of fact and law relating to the precise nature and extent of right, title and interest of the parties in the plots in question. Even the basic documentary evidence, such as the orders granting the sanctions, the conditions of the sanctions, and the agreements in which they are said to have been incorporated, were not produced before the pronouncement of judgment in the High Court. Even the questions of law relating to the validity and effect of Regulation 5 (3) could not be properly decided in the absence of proof or admission of such primary facts. The High Court also felt this difficulty in reaching the finding that a fiduciary relationship in the nature of a trust came into existence in regard to the user of these open sites. It conceded that this matter was being considered "in the abstract without reference to the facts of any case", and had to leave undetermined the exact nature of the trust that had come into being and the person or persons in whom the beneficial interest in these open sites was supposed to vest under such trust. Nevertheless, it concluded that "the petitioners had by their own conduct and operation of law ceased to be the full and complete owners of the plots and held them only as trustees." This "conduct" of the petitioners according to the High Court consisted of the acts of making applications for sanction of the lay-out plans to the Authority and the execution of the requisite agreements. But the evidence of those agreements and the

terms and conditions of the sanctions were conspicuous by their absence from the record. Again in the absence of relevant material on the record, the High Court found it difficult to record a categorical finding as to whether the provisions of Regulation 5 (3) (iv) were only optional and could be waived, or had in fact been waived by the Authority while granting sanction of the layout plans in case of any of these six colonies in question.

18. In our opinion, in a case where the basic facts are disputed, and complicated questions of law and fact depending on evidence are involved the writ court is not the proper forum for seeking relief. The right course of the High Court to follow was to dismiss the writ petition on this preliminary ground, without entering upon the merits of the case. In the absence of firm and adequate factual foundation, it was hazardous to embark upon a determination of the points involved. On this short ground while setting aside the findings of the High Court, we would dismiss both the writ petition and the appeal with costs. The appellants may if so advised, seek their remedy by a regular suit.

19. Before we part with this judgment we may note here in fairness to Respondent 4, a concession made by Dr. Singhvi on behalf of the Coloniser. The concession is that all "open spaces" set apart for roads, streets, public parks, public lawns etc. and other services, as distinguished from "open sites," earmarked for schools, hospitals and other public utility buildings, shown in the sanctioned lay-out plans in these colonies vest in the Municipal Corporation free of cost and that his client has no objection to the transfer of such open spaces free of cost to the Municipal Corpn. if such transfer has not already been made. The Colonisers however reserve their right to dispute whether a particular plot in the sanctioned lay-out was set apart as an "open space" for a public park, road etc., or as an "open site" meant for a public utility building.

Appeal dismissed.

AIR 1976 SUPREME COURT 392

(From: Madhya Pradesh)*

P. K. GOSWAMI AND N. L. UNTWALIA, JJ.

Ramashraya Chakravarti, Appellant v. State of Madhya Pradesh, Respondent.

Criminal Appeal No. 154 of 1975, D/- 13-11-1975.

(A) Criminal P. C. (1974), Ss. 28, 29 — General principles as to punishment— (Penal Code (1860), S. 53).

Sentencing involves an element of guessing but often settles down to practice obtaining in a particular court with inevitable differences arising in the context of the times and events in the light of social imperatives. It is always a matter of judicial discretion subject to any mandatory minimum prescribed by law.

(Para 1)

In judging the adequacy of a sentence the nature of the offence, the circumstances of its commission, the age and character of the offender, injury to individuals or to society, effect of the punishment on the offender, eye to correction and reformation of the offender, are some amongst many other factors which would be ordinarily taken into consideration by courts. (Sentence modified).

(Para 6)

Prosecution under Ss. 409 and 467, I. P. C. — Accused, a youngman of 30 years employed in Government service — Part played by accused in forgery, a little obscure — Accused, sure to lose his employment — Sentence of one year's rigorous imprisonment in addition to fine of Rs. 500/-, held would meet the ends of justice.

(Para 8)

Mr. Sarju Prasad, Sr. Advocate, (Mr. S. N. Prasad, Advocate, with him), for Appellant; Mr. Ram Panjwani, Deputy Advocate General, Madhya Pradesh, (M/s. H. S. Parihar and I. N. Shroff, Advocates, with him), for Respondent.

Judgment of the Court was delivered by

P. K. GOSWAMI, J.:— To adjust the duration of imprisonment to the

*(Criminal Appeal No. 789 of 1972, D/- 18-2-1975—Madh Pra.)

gravity of a particular offence is not always an easy task. Sentencing involves an element of guessing but often settles down to practice obtaining in a particular court with inevitable differences arising in the context of the times and events in the light of social imperatives. It is always a matter of judicial discretion subject to any mandatory minimum prescribed by law.

2. Hegel in his 'Philosophy of Right', pithily put the difficulty as follows:—

"Reason cannot determine, nor can the concept provide any principle whose application could decide whether justice requires for an offence (i) a corporal punishment of forty lashes or thirty-nine, or (ii) a fine of five dollars or four dollars ninety-three, four, etc., cents, or (iii) imprisonment of a year or three hundred and sixty-four, three, etc. days, or a year and one, two, or three days. And yet injustice is done at once if there is one lash too many, or one dollar or one cent, one week in prison or one day, too many or too few."

3. The present appeal by special leave being limited to sentence we are to consider about the appropriate deserts for the appellant in this case.

4. The appellant was a Circle Organiser in the Tribal Welfare Department at Lohandiguda in the State of Madhya Pradesh. He was entrusted with the distribution of stipends to Adivasi students of the Tribal Welfare Department School. He misappropriated a sum of Rs. 500/- meant for four students and also forged certain entries in the bills. He was convicted under S. 409 and S. 467, IPC by the Sessions Judge and sentenced for each head of charge to concurrent four years' rigorous imprisonment and also to a fine of Rs. 500/- in default to rigorous imprisonment for six months. The High Court on appeal maintained the conviction but reduced the sentence to two years' rigorous imprisonment maintaining the fine.

5. From a perusal of the judgment of the High Court which is the only document in the paper book in addition to the special leave petition, it is not very

clear about the offence of forgery committed by the accused. We would, however, say nothing more than that.

6. In judging the adequacy of a sentence the nature of the offence, the circumstances of its commission, the age and character of the offender, injury to individuals or to society, effect of the punishment on the offender, eye to correction and reformation of the offender, are some amongst many other factors which would be ordinarily taken into consideration by courts. Trial courts in this country already over-burdened with work have hardly any time to set apart for sentencing reflection. This aspect is missed or deliberately ignored by the accused lest a possible plea for reduction of sentence may be considered as weakening his defence. In a good system of administration of criminal justice pre-sentence investigation may be of great sociological value. Throughout the world humanitarianism is permeating into penology and the courts are expected to discharge their appropriate roles.

7. The appellant is a young man of about 30 years. He is an educated person who was employed in Government service. But for the forgery he could have been tried in the court of a first class Magistrate for the offence under Section 409, I. P. C. and in that case the maximum sentence of imprisonment would have been two years' rigorous imprisonment. On the face of the High Court's judgment, as noticed above, the part played by the appellant in the forgery is rather a little obscure. The appellant is sure to lose his employment under the Government. There is already indignity heaped upon him on account of conviction. He has no opportunity to commit such offences as a Government servant in the future. Any sentence of imprisonment imposed upon him will be a deterrent to others similarly disposed in such unlawful pursuits. The appellant was refused bail in this Court and he is said to have served about nine months in prison.

8. While we do not minimise the seriousness of the offences, having regard to the circumstances mentioned above, we are of opinion that

it will meet the ends of justice in this case if we order, which we do, that the appellant's sentence be reduced to one year's rigorous imprisonment only and in addition to a fine of Rs. 500/- only, in default rigorous imprisonment for six months. The appeal is partly allowed with modification of the sentence as ordered.

Appeal partly allowed.

AIR 1976 SUPREME COURT 394

(From Delhi: (1971) 73 Pun. LR (D) 101)

R. S. SARKARIA AND
A. C. GUPTA JJ.

Municipal Corporation of Delhi,
Appellant v. Kacheroo Mal, Respondent.

Criminal Appeal No. 174 of 1971,
D/- 29-9-1975.

(A) Prevention of Food Adulteration Act (1954), Sec. 2 (i) (f) — Expression "insect infested" includes infestation even by dead insects. (1971) 73 Punj LR (D) 101, Reversed.

An article of food which is infested with living insects and is consequently unwholesome for human consumption, does not cease to be so and become wholesome, when these insects die out. The expression 'insect-infested' is to be construed in the context of an article of food meant for human consumption. It takes its hue from the phrase 'unfit for human consumption' occurring at the end of the sub-clause. Thus construed, it means that the article so abounds in insects dead or living, that it is rendered unfit for human consumption. 1973 Cri LJ 433 (Delhi), Approved; (1971) 73 Punj LR (D) 101, Reversed. (Para 4)

(B) Prevention of Food Adulteration Act (1954), Ss. 2 (i) (f) and 13 — Mere insect infestation is not sufficient to hold the article as 'adulterated' — Further proof that the article was unfit for human consumption is a must.

The phrase "or is otherwise unfit for human consumption" in Sec. 2 (i) (f) has to be read conjunctively and not disjunctively. The adjectives

"filthy", "putrid", "disgusting", "decomposed" "rotten" "insect-infested" refer to the quality of the article and furnish the indicia for presuming the article to be unfit for human consumption. But the presumption may not be conclusive in all cases, irrespective of the character of the article, and the nature and extent of the vice afflicting it. This is particularly so, where an article is found to be 'insect-infested'.

(Para 9)

In each case it must be proved that the article was unfit for human consumption. In the case of articles for which the Rules lay down any minimum standard of purity with reference to any of the vices specified in this sub-clause; mere proof of the fact that the impurity was in excess of that countenanced by the prescribed standard, would be conclusive to show that the article was unfit for human consumption. (Para 13)

In regard to cashewnuts, there is no statutory provision prescribing any minimum standard of purity with reference to the vice of 'insect-infestation' or other adjectives used in this sub-clause. It will therefore, be for the Judge of fact to decide upon the evidence in the case, whether the insect-infestation found was of such a nature and extent as to make it unfit for human consumption.

(Para 14)

The opinion of the Public Analyst who examines and analyses the sample, as to the fitness or otherwise of the sample for human consumption, would constitute legal evidence. But this does not mean that his ipse dixit would be conclusive and binding on the court. It is for the Court to weigh his opinion and reach its own finding. 1973 Cri LJ 433 (Delhi), Approved. (Paras 10, 11)

(C) Prevention of Food Adulteration Act (1954), Sec. 2 (i) (f) — Applicability of sub-clause (f) to an article in respect of which no minimum standard of purity is prescribed. Observations in 1973 Cri LJ 433 (Delhi), Overruled.

It cannot be said that if for any article of food no standard of quality or purity has been prescribed or no limits have been prescribed for the variability of its constituents, then

sub-clause (f) of Clause (i) of Section 2 will not apply. Observations in 1973 Cri LJ 433 (Delhi), Overruled.

(Para 16)

Cases Referred: Chronological Paras

1973 Cri LJ 433 = ILR (1970) 2 Delhi

681 3, 4, 6, 12, 15

AIR 1972 SC 2044 = (1972) 1 SCC

326 = 1972 Cri LJ 1309 15, 17

Mr. S. N. Andley and Mr. P. S. Nariman, Sr. Advocate, (M/s. B. P. Maheshwari, N. K. Jain and Suresh Sethi, Advocates with him), for Appellant; Mr. D. Mukherjee Sr. Advocate, (Mr. U. P. Singh, Advocate with him), for Respondent.

Judgment of the Court was delivered by

SARKARIA J.:— This appeal by special leave is directed against a judgment of a learned single Judge of the High Court of Delhi. It arises out of these circumstances:

On Jan. 8, 1969, B. R. Kochhar, Food Inspector, purchased 600 grams of Kaju-Tukra (cashewnut pieces) as sample for analysis from the grocery shop of Kacheroo Mal, Respondent in Khari Baoli, Delhi. The sample was divided into three equal parts and sealed into three bottles. An inventory was prepared which was read over and explained to the respondent, who thereafter signed it. One of these bottles was given to the respondent, one was retained by the Inspector, while the third was handed over to the Public Analyst on the following day for examination. The Public Analyst has reported:

"Date of Analysis: 10-1-1969. Insect-infested pieces of Kajus: 21.9% and I am of the opinion that the same is adulterated due to insect infested pieces of Kajus to the extent of 21.9%."

2. On the preceding facts, the Food Inspector filed a complaint for prosecution of the respondent in respect of an offence under Section 7 read with Section 16 of the Prevention of Food Adulteration Act, 1954 (hereinafter called the Act). The trial Magistrate convicted and sentenced him for six months rigorous imprisonment with a fine of Rupees 1000/-. Kacheroomal's appeal before the Additional District and Sessions Judge, failed. Against the order of

the Additional Sessions Judge, he preferred a revision to the High Court. The revision was heard by a learned Judge who held that since no living insect was found in the sample pieces examined by the analyst, the same could not be called "insect-infested" within the contemplation of Section 2 (i) (f) of the Act. The learned Judge was of the opinion "that the presence of living insects is necessary before an article could be called 'insect-infested'". According to him, "the intention of the legislature by using this word in Section 2 (i) (f) in the sentence 'if the article is insect-infested' clearly is that at the time of analysis infestation by insects should be present". It was further observed that if only dead insects were present, the sample could be called 'insect-damaged' and not 'insect-infested'. Since the report of the Public Analyst did not show the presence of living insects in the Kaju sample pieces, it was concluded that the same could not be said to be 'adulterated'. On this reasoning, the revision-petition was allowed and the conviction of Kacheroo Mal was set aside. Hence this appeal by the Municipal Corporation of Delhi.

3. Having heard the learned Counsel on both sides, we are of opinion that the construction put by the learned Judge of the High Court is manifestly erroneous. It has been disapproved by a Division Bench of the same High Court in *Dhanraj v. Municipal Corporation of Delhi*, ILR (1970) 2 Delhi 681 = (1973) Cri LJ 433. Indeed, Mr. D. Mukherji, the learned Counsel for Kacheroo Mal has not tried to support it.

4. The Act has been enacted to curb and remedy the widespread evil of food-adulteration, and to ensure the sale of wholesome food to the people. It is well settled that wherever possible, without unreasonable stretching or straining, the language of such a statute should be construed in a manner which would suppress the mischief, advance the remedy, promote its object, prevent its subtle evasion and foil its artful circumvention. The construction adopted by the learned Judge is repugnant to the cardinal rule of interpretation. With respect it is less ra-

tional, but too literal, narrow and pedantic. It would be straining one's common sense to say that an article of food which is infested with living insects and is consequently unwholesome for human consumption, ceases to be so and becomes wholesome, when these insects die out and the 'infestation' turns into an infestation by dead insects. The expression 'insect-infested' is to be construed in the context of an article of food meant for human consumption. It takes its hue from the phrase 'unfit for human consumption' occurring at the end of the sub-clause. Thus construed, it means that the article so abounds in insects, dead or living, that it is rendered unfit for human consumption. We need not labour the point further. It has been lucidly brought out by Jagjit Singh J. who spoke for the Bench of the High Court in Dhanraj's case (*supra*) at page 688 of the report, (ILR (1970) 2 Delhi 681) = (1973 Cri LJ 433 at p. 437). We fully approve that reasoning and would extract it here:

"The expression 'insect-infested' was not defined in the Prevention of Food Adulteration Act and has, therefore, to be given its ordinary meaning. The word 'infest' appears to have been derived from the latin word 'infestate' which meant to assail or molest. According to the Oxford English Dictionary (Volume V at page 259) the word 'infest' means "To attack, assail, annoy, or trouble (a person or thing) in a persistent manner", "to visit persistently or in large number for purposes of destruction or plunder", "to swarm in or about, so as to be troublesome"; In the same Dictionary the word 'infestation' is stated to mean: "The action of infesting, assailing, harassing, or persistently molesting". It is also mentioned that the word is now used especially for "insects which attack plants, grain, etc. in large swarms." Thus an article of food would be "insect-infested", if it has been attacked by insects in swarms or numbers. It however seems to us that there is no justification for the view that insect-infestation would only continue so long as the insects continue to be alive. If an article of food is attacked by insects in large swarms or

numbers and for some reason those insects die, the mere fact that the article of food has no longer living insects but has dead insects will not change its character of being insect-infested."

4A. In view of the construction that the expression "insect-infested", includes infestation even by dead insects, the further point to be considered is, whether mere insect-infestation, without more, would be sufficient to hold the article to be "adulterated" within the meaning of sub-c. (f) of Clause (i) of S. 2 of the Act.

5. Mr. D. Mukherji, learned Counsel for the Respondent submits that mere proof of the fact that a certain number of pieces of the sample sent to the Public Analyst were found to be insect-infested, could not make the article "adulterated" in terms of the aforesaid sub-clause (f) unless it was proved further that the article was unfit for human consumption. It is stressed there is no proof of that essential fact on the record. It is pointed out that in his report, the Public Analyst has not said that the insect-infestation found by him had rendered the article unfit for human consumption. In this connection Counsel has invited our attention to an application which was made by Kacheroomal in the first appellate Court, praying that the Public Analyst be summoned and examined as a witness. He has further drawn our attention to an order, dated 17-12-70 of the High Court which shows that on the request of Mr. Bishamber Dayal, Counsel for the Municipal Corporation, the Court summoned Mr. Sudama Roy and Mr. P. P. Bhatnagar, Public Analysts, for 21-12-1970. The point sought to be made out is that in this case, the prosecution, the defence and the High Court all felt that the report of the Public Analyst was vague, inadequate and deficient, and in the absence of clear proof of the sample, being unfit for human consumption, it could not constitute a valid basis for holding the article to be "adulterated" within the meaning of Sec. 2 (i) (f).

6. As against the above, Mr. F. S. Nariman, the learned Counsel for the appellant Corporation submits

that in the case of food articles for which no minimum standard of purity is prescribed, the moment it is proved that a proportion or percentage of the article — not being a proportion or percentage as would be covered by the rule, *de minimis non curat lex* — is putrid, filthy, disgusting, decomposed or insect-infested, it would be deemed to be unfit for human consumption and, therefore, adulterated within the contemplation of Section 2 (i) (f). In any case, proceeds the argument, it is implicit in the report of the Public Analyst that the article in question was found unfit for human consumption. This implication, according to the learned Counsel, flows from the Analyst's conclusion that the article was "adulterated". Counsel has criticised the view taken by the Bench in Dhanraj's case (1973 Cri LJ 433) (Delhi) that if for an article of food, no standard of quality or purity has been prescribed or no limits have been prescribed for the variability of its constituents, then sub-cl. (f) of Cl. (i) of Sec. 2 will not apply, and that the Public Analyst is not competent to say as to what extent of insect-infestation would make the article "adulterated".

6A. The relevant part of Section 2 reads as under:

"(i) "adulterated" — an article of food shall be deemed to be adulterated—

(a) to (e)

(f) if the article consists wholly or in part of any filthy, putrid, disgusting, rotten, decomposed or diseased animal or vegetable substance or is insect infested or is otherwise unfit for human consumption".

7. The phrase "or is otherwise unfit for human consumption" can be read conjunctively as well as disjunctively. If it is read conjunctively, that is, in association with what precedes it, sub-clause (f) with slight consequent rearrangement and parenthesis would read like this: "If the article is unfit for human consumption on account of (a) its consisting wholly or in part of any filthy, putrid, disgusting, rotten, decomposed or diseased animal or vegetable substance or being insect infested, (b) or on ac-

count of any other cause." In this view of the sub-clause proof of 'unfitness of the article for human consumption', is a must for bringing the case within its purview.

8. If the phrase is to be read disjunctively, the mere proof of the whole or any part of the article being "filthy, putrid, disgusting, rotten or insect-infested" would be conclusive to bring the case within the mischief of this sub-clause, and it would not be necessary in such a case, to prove further that the article was unfit for human consumption.

9. We would prefer the first construction as it comports best with reason, common sense, realities, the tenor of this provision and the main purpose and scheme of the Act. The adjectives "filthy", "putrid", "disgusting, decomposed, rotten...or insect-infested" refer to the quality of the article and furnish the indicia for presuming the article to be unfit for human consumption. But the presumption may not be conclusive in all cases, irrespective of the character of the article, and the nature and extent of the vice afflicting it. This is particularly so, where an article is found to be 'insect-infested'. There are some articles of food in respect of which the Rules framed under the Act, lay down the minimum proportion of insect-infestation or insect damage which is not deemed to make the article unfit for human consumption. For instance, in the case of Nutmeg (Jaiphal) the proportion of extraneous matter and infestation shall not exceed 3.0 per cent by weight (Item A.05.16 of the Prevention of Food Adulteration Rules, 1955). In the case of Coriander (Dhania) the proportion of extraneous matter including dirt and insect-damaged seeds shall not exceed 8.0 per cent by weight (Item A.05.08). Similarly, in the case of food-grains the proportion of 20 milligrams of insect-damaged grain per 100 milligrams sample of the grain, and 5 per cent by weight of fungus-damaged grain is not considered enough to treat it as adulterated either under sub-clause (f), or any of the other sub-clauses of Sec. 2 (i).

10. These illustrations unmistakably show that the mere fact that any part of an article was insect-in-

festated may not be conclusive proof of its being 'adulterated' under sub-clause (f). In other words, all the adjectives used in the sub-clause are a presumptive and not an absolute test of the quality of the article being unfit for human consumption. To be more particular, in the case of an article in respect of which the Rules do not prescribe any minimum standard of purity or any minimum proportion of insect-infestation, that would exclude it from the definition of 'adulterated article'; it will be a mixed question of law and fact, whether the insect-infestation is of such a nature, degree and extent as renders the article unfit for human consumption. The opinion of the Public Analyst who examines and analyses the sample, as to the fitness or otherwise of the sample for human consumption, would constitute legal evidence. A Public Analyst is supposed to be specially skilled in the science of dietetics. As an expert in the science, he is competent to opine and testify about this fact.

11. The report of the Public Analyst, including his opinion on this point, is per se evidence by virtue of Section 13 of the Act. But this does not mean that this ipse dixit would be conclusive and binding on the court. To treat it so, would be to leave the determination of the guilt of the accused to the whims and fancies of the Public Analyst. The Act would not countenance such abdication of its judicial function by the court, leaving the case—as it were—to be tried by the Analyst. It is for the Court to weigh his opinion and reach its own finding.

12. In Dhanraj's case (1973 Cri LJ 433 Delhi) (supra), the High Court construed this sub-clause thus:

"The word 'otherwise' in sub-clause (f) of Cl. (i) of Section 2 does suggest that all the adjectives used earlier refer to the quality of the article being unfit for human consumption. To fall under that sub-clause an article of food must be unfit for human consumption because it consists wholly or in part of any filthy, putrid, disgusting, rotten, decomposed or diseased animal or vegetable substance or because it is in-

sect-infested or on account of any other cause."

13. If we may say so with respect, this is a correct exposition of the law embodied in Section 2 (i) (f). We need only add for the sake of elucidation, that these adjectives indicate presumptive but not absolute criteria as to the quality of the article. In each case it must be proved that the article was unfit for human consumption. In the case of articles for which the Rules lay down any minimum standard of purity with reference to any of the vices specified in this sub-clause; mere proof of the fact that the impurity was in excess of that countenanced by the prescribed standard, would be conclusive to show that the article was unfit for human consumption.

14. In regard to cashewnuts, there is no statutory provision prescribing any minimum standard of purity with reference to the vice of 'insect-infestation' or other adjectives used in this sub-clause. It will therefore, be for the Judge of fact to decide upon the evidence in the case, whether the insect-infestation found was of such a nature and extent as to make it unfit for human consumption. We have already pointed out that the Report of the Public Analyst is admissible in proof this fact.

15. In Dhanraj's case (1973 Cri LJ 433 Delhi) (supra), the High Court after holding that in order to bring a case within the purview of the said sub-clause (c), it must be proved that the article is unfit for human consumption, proceeded to say something — which in our opinion is not correct — as to the proof of this issue, as under:

"By referring to Appendix B to the Prevention of Food Adulteration Rules, 1955 the learned counsel for the petitioners also urged that as for purposes of sub-clause (i) of Clause (i) of Section 2 no standard of quality had been prescribed for Kaju the Public Analysts were not justified in treating the samples found insect-infested above 5% to be adulterated. There can hardly be any doubt that if for an article of food no standard of quality or purity has been prescribed or no limits have been pres-

cribed for the variability of its constituents then sub-clause (f) of Cl. (i) of Section 2 will not apply and for considering whether or not the article is adulterated it will have to be seen if any other portion of the definition of "adulterated" is applicable. Of course as no standard of quality or purity was prescribed for Kaju it was not competent for any Public Analyst to himself fix any such standard and to say that he will not treat Kaju which is insect-infested to the extent of 5% as not adulterated but will regard any higher percentage of insect-infestation to make the article adulterated. In the case of Jagdish Prasad v. State of West Bengal, (1972-1 SCC 326) = (AIR 1972 SC 2044), it was held by their Lordships of the Supreme Court that the standards of quality and limits of variability fixed by Government are not even subject to alteration or variation by Courts."

16. We are unable to agree with the proposition propounded by the High Court that if for any article of food no standard of quality or purity has been prescribed or no limits have been prescribed for the variability of its constituents, then sub-clause (f) of Clause (i) of Sec. 2 will not apply.

17. As already discussed, the governing ingredient of sub-clause (f) is the quality of the article being unfit for human consumption. If the quality of the article suffers from any of the vices, i.e. filthiness, putrefaction, insect-infestation etc. this sub-clause would be inexorably attracted and on proof of the article being unfit for human consumption, the requirements of the clause would be completely satisfied. Such proof may consist of the report of the Public Analyst. The value of his report however would depend on its being self-contained, and comprising the necessary data and reasons for his opinion. It is desirable that the Public Analyst should express his opinion on all the relevant points with reference to the particular sub-clause or sub-clauses of Section 2 (i) of the Act. This will not only enhance the value of his report but also facilitate the task of the Court. If it is merely dogmatic, that would be a circum-

stance detracting from its evidential value though it may not render it inadmissible. Ultimately the decision rests with the court which would take into account all the circumstances of the case including the character of the article, the nature and the extent of the insect-infestation and other relevant factors. If the Public Analyst says 'that since the insect-infestation in the Kaju pieces is less (sic) than 5% the sample, in his opinion, is adulterated' then all that can be said about it is that the opinion is dogmatic. He should say with particularity as to how and why the percentage of insect-infestation found by him renders the sample unfit for human consumption. The additional reasons which he might give, in addition to a certain proportion of the sample being insect-infested, would enhance the value of his report, still further. It is not possible for us to speculate the reasons which the Public Analyst as an expert in the science might advance in support of his opinion. By giving the opinion that if the insect-infestation is above 5 per cent, the sample of Kaju pieces would be unfit for human consumption, the expert would not be laying down any standard of quality or limits of variability which the Legislature in its wisdom has not prescribed. His opinion would be just a piece of evidence which has to be evaluated by the Court in the circumstances of a particular case to reach a finding as to the unfitness or otherwise of the sample for human consumption. The question of varying any standard of quality or limits of variability in the case of Kaju pieces does not arise because no such standard has been fixed either in the Act or in the rules framed thereunder. Reference to what this Court said in Jagdish Prasad Gupta's case (AIR 1972 SC 2044) (ibid), made by the High Court was thus not in point.

18. In the instant case the report of the Public Analyst is silent as to whether on account of the insect-infestation found by him in the sample of Kaju pieces, the article was unfit for human consumption. The respondent, as already noticed, had made an application to the Additional Sessions Judge, in appeal, for sum-

moning the Public Analysts. His request was however declined. When the case was in the High Court, Counsel for the Municipal Corporation, also, felt that the report was vague, incomplete and deficient, and, on his request, the High Court actually summoned the Public Analysts, M/s. Sudama Roy and P. P. Bhatnagar, as witnesses, for 21-12-1970, for evidence. Despite the adjournment granted by us, the learned Counsel for the parties have not been able to throw light as to what had happened in the High Court on 21-12-1970.

19. The Public Analysts, as is apparent from the judgment of the learned single Judge of the High Court have been expressing different opinions on different occasions as to when an article can be said to be 'insect-infested'. In the circumstances of this case therefore, it had become necessary to call the Public Analysts as witnesses to enable them to elucidate their opinion and amplify their report and to allow the parties to test it by cross-examination. For this purpose, on our first reaction, we were inclined to remit the case to the High Court for rededecision. But the learned Counsel for the Municipal Corporation has brought to our notice that the Public Analyst, Mr. Sudama Roy whose report is in question — is no longer in the service of the Corporation and is not residing at Delhi. It is obvious that it will not be possible to procure Mr. Roy's attendance in court without an amount of delay and inconvenience which will be unreasonable in the circumstances of the case and will cause undue hardship to the respondent who has had more than his normal share of the mental suffering, harassment and expense which go together with protracted criminal proceedings, extending in the present case over 81 months. No useful purpose will therefore be served by remanding the case for a fresh decision. Taking into consideration all the circumstances of the case, we do not think it proper to disturb the acquittal of the respondent.

20. Subject to the clarification of the points of law and the reversal of the view taken by the High Court

as to the meaning and scope of Section 2 (i) (f), the appeal is dismissed. Order accordingly.

AIR 1976 SUPREME COURT 400

(From Allahabad)*

P. N. BHAGWATI AND R. S. SARKARIA, JJ.

Shyam Behari, Appellant v. State of U. P., Respondent.

Criminal Appeal No. 148 of 1971, D/- 9-9-1975.

(A) Criminal P. C. (1898), S. 423

(1) (a) — Appeal from acquittal — Trial Court taking a view which no reasonable tribunal would have taken on the basis of evidence on record and acquitting the accused of the charge of murder — High Court held was right in reversing the acquittal and substituting its own evaluation of the evidence. (Para 15)

Mr. R. L. Kohli, Advocate, for Appellant; Mr. O. P. Rana, Advocate, for Respondent.

Judgment of the Court was delivered by

SARKARIA, J.:— Shyam Behari and Ram Prakash were tried by the Sessions Judge, Etawah, for the murder of Barey Lal of village Bhatpura. The prosecution story was as under:

On October, 30, 1966, at about 8 P. M. Shyam Behari the appellant, herein went to the house of Barey Lal deceased in village Bhatpura and inquired from Vijai Bahadur about the deceased. Vijai told Shyam Behari that the deceased was taking his food. In the meantime Barey Lal finished his meals and came out. The appellant after a brief talk with the deceased took the latter with him into the fields. About 20 minutes after their departure, Vijai heard outcry of the deceased. Thereupon Vijai (PW 1) his immediate neighbour, Babu Singh (PW 2), one Prem Narain (PW 3) and others of the village ran towards the spot from where the cries were emanating. Misri Lal PW who was easing himself in the vicinity was also

*(Govt. Appeal No. 2148 of 1967, D/- 6-10-1970—All.)

LS//LS/D558/75/GDR

attracted to the spot. When these witnesses were at a distance of 15 or 16 paces from the field of one Ram Sewak they saw the appellant repeatedly stabbing the deceased with a knife while another person was pinning the deceased to the ground. Prem Narain flashed his torch towards the assailants. There was also bright moonlight, the night being one immediately succeeding the night of full moon. On seeing the witnesses, the assailants ran away. After a hot pursuit, the witnesses succeeded in arresting the appellant after giving him a harsh beating from the field of Radha Krishan wherein he had attempted to hide. His companion, who was later on identified as Ram Prakash, managed to escape. The witnesses seized a blood-stained knife which the appellant was carrying. After his arrest, the appellant was brought to the scene of occurrence. Barey Lal who was then alive told the witnesses that the appellant had decoyed him from his house on the pretext of an abducted woman, and thereafter inflicted the injuries on him while he was accompanied by another person. He further stated that the appellant had done all this at the instance of Jia Lal and Raja Babu Pandey. On being questioned by the villagers, the appellant confessed his crime. Escorted by P. Ws. Vijai, Misri Lal, Prem Narain and others, Barey Lal injured and the appellant (Shyam Behari) were taken in a cart towards the Police Station Dibiapur, 4 miles away. When the cart reached near Sewar-Ki-Mathia, at about 9.30 P. M., Barey Lal succumbed to his injuries. Vijai P. W. 1 lodged the F. I. R. (Ex. Ka-2) in the Police Station same night at 10 P. M. The appellant and the blood stained knife were also made over to the custody of the Police there and then. The knife was sealed into a parcel and was sent in due course to the Chemical Examiner and Serologist. The Serologist reported that there was human blood on this knife.

2. The post-mortem examination was conducted by Dr. S. S. Anand on the following day. The Doctor found 22 injuries, out of these 21 incised wounds located on the

neck, the cheek, the abdominal region, the left thumb, the back and the thighs of the deceased.

3. The plea of the accused was one of denial of the prosecution case. The appellant stated that he had been arrested from his house at about 12 midnight and was thereafter given a severe beating in the village at the instance of the Sub-Inspector. He denied his arrest from the field of Radha Krishan in the manner alleged by the prosecution witnesses. He further denied the seizure of blood-stained knife from his possession.

4. The prosecution demanded conviction of the appellant on the basis of evidence which may be catalogued as under:

1. Ocular account of the eye-witnesses Vijai PW 1, Babu PW 2, Prem Narain PW 3 and Misri Lal PW 4.

2. The circumstances of his arrest by these PWs and others after a hot pursuit from the field of Radha Krishan and the seizure of blood-stained knife from him.

3. Oral dying declaration made by the deceased at the spot in which he denounced the appellant as his actual assailant.

4. Extra-judicial confession made by the appellant soon after his arrest.

5. The trial court rejected this evidence in toto and acquitted both the accused.

6. On appeal by the State, the High Court of Allahabad reversed the acquittal of the appellant and convicted and sentenced him to imprisonment for life for the murder of Barey Lal. It however maintained the acquittal of Ram Prakash. Hence this appeal by Shyam Behari.

7. Shri R. L. Kohli, learned Counsel for the appellant has taken us through the judgments of the courts below. His main contention is that the view of the evidence taken by the Sessions Judge was also reasonably possible. This being the

case, the High Court should have stayed its hands from reversing the acquittal and substituting its own evaluation of the evidence.

8. The contention cannot be accepted. Having heard Counsel and scrutinized the record, we are of opinion that the view taken by the learned Sessions Judge was manifestly erroneous. His very approach was odd and conceived in a fanciful setting. That was why what in reality were insignificant, neutral or self-explanatory features of the case appeared to him odd features throwing a cloud on the veracity of the prosecution. The exceedingly speculative nature of his "reasoning" is patent. We will state the same only to be rejected.

(i) The motive for the crime has not been established.

(ii) Raja Babu Pandey and Jia Lal who according to the dying declaration of the deceased were behind this crime, have not been examined.

(iii) The appellant was admittedly a notorious character; he was prosecuted for abduction of a woman. A man of such character is "not expected to act so foolishly as to create evidence against himself of being the last person in whose company the deceased was seen moving away from his house."

(iv) The circumstance that Barey Lal was directly removed from the spot towards the Police Station — and was not first brought to his house—shows that Barey Lal was already dead when he was found at the spot and placed in the cart.

(v) The conduct of the eye-witnesses in running to the scene of occurrence stealthily without raising any shouts till they were within 15 or 16 Ft. of the spot was queer and the explanation, that they wanted to catch the miscreants given by them was unconvincing.

(vi) Even if the witnesses approached the scene without raising shouts, the assailants could see the witnesses from a far off distance and must have escaped after finishing their job, before the arrival of the witnesses. This, according to the trial Judge was an odd feature which in-

dicated that the witnesses did not actually see the murder being committed or the murderers escaping.

(vii) Persons from the neighbouring villages, Kanarpur and Mandaiya, who are also, said to have joined the chase at some stage were not produced.

(viii) Abdul Ghani of village Ehatpura who was supposed to be one of the eye-witnesses has not been examined. His non-production makes the story of the arrest of the appellant after a hot pursuit, extremely doubtful.

(ix) The Investigating Officer did not care to send the clothes of the appellant for examination to the Chemical Examiner and the Serologist.

(x) The presence of 21 stab wounds on the body of the deceased shows that this was the job of a person who had plenty of venom against the victim and not of a hired assassin like the appellant who admittedly is a Pahalwan.

(xi) Two dandas were recovered from the place where the deceased's torch was found in the sugar-cane field of Raghunath Joshi; no witness has said that the appellant was carrying any danda when he called the victim from his house.

(xii) The appellant being bad character, and allegedly carrying a knife "was bound to whip out his knife before submitting tamely to the arrest."

(xiii) Semi-digested food was found in the stomach of the deceased which indicated that the fatal assault had been made on the deceased two hours and not 20 minutes after the ingestion of the food.

(xiv) After his arrest and the seizure of the knife from him, the appellant was asked as to what sort of knife it was. Such a question, according to the trial Judge was incompatible with the confession said to have been made by the appellant.

(xv) In all probability, the deceased died immediately after the assault and did not survive long enough to make a dying declaration.

(xvi) The location of the injuries found on the appellant indicated that they had been inflicted after his ar-

rest and not in the course of the pursuit.

9. The learned Judges of the High Court have considered and dispelled and in our opinion rightly those of the above 'reasons' which were less flimsy and merited some discussion to be rejected. We therefore do not propose to go over the entire field again.

10. The learned trial Judge brushed aside the evidence of Vijai PW merely for the reason that he was the real brother of the deceased. He cast aside the testimony of Babu Singh on the ground that since he had sold away his entire land in this village his presence at Bhatpura at the time of the occurrence was improbable. He dubbed Misri Lal as an "interested" witness merely for the reason that he along with Vijai had accompanied the cart in which Barey Lal was taken to the Police Station. As regards Prem Narain, the learned Judge observed that "he is a chance witness whose story about his presence on the scene does not carry conviction."

11. The learned Judges of the High Court have very cogently discounted these so-called "reasons" advanced by the Sessions Judge and found that the testimony of Vijai, Babu Singh and Misri Lal was credit-worthy. We entirely agree with that assessment of the evidence made by the High Court. The account given by PWs Vijai, Babu Singh and Misri Lal was highly probable. The field of occurrence was hardly one furlong from the habitation of village Bhatpura. The occurrence took place at about 8.30 P.M. It was quite natural for the witnesses to be awake and present at or near their houses. At that hour, in the stillness of the night, the screams of the deceased must have been heard by the villagers, including these P.Ws. Vijai had only 20 minutes earlier seen the deceased going away with the appellant. He was present in front of his house and so was Babu Singh at the adjoining house when they heard the outcry of the deceased. It was therefore, quite natural for these two witnesses to rush together towards the field from where the cries were emanating. There were as many as 22

injuries on the deceased. The latter also must have struggled hard to escape the blows. The assault therefore must have been going on for about 4 or 5 minutes at least. There was thus ample time for these P.Ws to reach near the spot when the assault was in progress. At least they must have in all probability seen the appellant and his companions running away from the scene. The truth of the version that these witnesses had actually seen the appellant assaulting the deceased and then running away is guaranteed by the circumstances that the appellant was arrested soon after the assault after a hot pursuit and the blood-stained knife was also seized from him. The appellant's plea that he had been arrested from the house of his father-in-law in another village at midnight was palpably false. By 10 P.M. the F. I. R. and the appellant had both been lodged in the Police Station which is four miles from Village Bhatpura. There was no time for the P.Ws. to stage-manage a fake arrest or to spin out a false story. The fact that Barey Lal expired on his way to the Hospital, also lends assurance to the conclusion that they must have seen the assault on the deceased. This also lends strength to their version that the deceased had made a dying declaration in which he had denounced the appellant as his assailant.

12. As rightly observed by the learned Judges of the High Court, Babu Singh still owns his house in village Bhatpura. His family lives there. By no stretch of imagination therefore his presence at his own house in Bhatpura could be called unnatural. Misri Lal could not be branded as "interested" simply because he had accompanied the deceased and his brother to the Police Station.

13. Mr. Kohli contended that both the courts below had found that Prem Narain had been falsely inducted as a witness in this case and this circumstance alone was sufficient to hold suspect the testimony of the eye-witnesses. We are afraid this contention cannot prevail. The Courts below have not positively held that Prem Narain was a false witness. We have already noticed why the trial

Judge found his evidence "unconvincing." The High Court also, did not rely on him as a matter of caution. It never held that Prem Narain was a down right liar.

14. Thus, no inference against the veracity of P. Ws 1, 2 and 3 can be drawn on that score. Nor was it necessary for the prosecution to produce all those who had at some later stage joined the chase.

15. In short, the view taken by the trial Court was such that no reasonable tribunal would have taken on the basis of the evidence on record. The acquittal of the appellant was therefore rightly reversed by the High Court.

16. For the foregoing reasons, the appeal fails and is dismissed.

Appeal dismissed.

AIR 1976 SUPREME COURT 404

(From: AIR 1970 Pat 432 FB)

A. N. RAY C. J., M. H. BEG. R. S. SARKARIA AND P. N. SHINGHAL JJ.

State of Bihar, Appellant v. Madan Mohan Prasad and others, Respondents.

Civil Appeal No. 1667 of 1970, D/- 19-12-1975.

(A) Bihar Superior Judicial Service Rules (1951), R. 16 (e) — Inter se seniority of promoted officers and direct recruits — Determination of — Competent authority.

Reading Clause (e) together with Cls. (a) and (b) of R. 16, it is clear that before fixing the seniority of direct recruits vis-a-vis promoted officers, it will be necessary as a preliminary step to prepare two separate seniority lists, one of direct recruits under Cl. (a) and the other of promoted officers under Cl. (b) of Rule 16, in the chronological order of their confirmation. (Para 20)

Since the Rules make the chronological order of confirmation an integral part of the process of fixation of the order of seniority in the Service, the inference is that both these powers were intended to be exercised by one and the same authority.

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Since Article 235 of the Constitution vests the power of confirmation in the High Court, it stands to reason that the power of determining the seniority in the Service is also with the High Court. Of course, in determining the seniority the High Court is bound to act in accordance with the Rules validly made by the Governor under the Proviso to Art. 309 of the Constitution. AIR 1975 SC 613, Rel. on. AIR 1970 SC 370, Dist; AIR 1970 Pat 432 (FB), Affirmed.

(Para 21)

(B) Bihar Superior Judicial Service Rules (1951), R. 16 (e) — "May have been allowed to officiate continuously" — Meaning of.

The words "may have been allowed to officiate continuously" in Cl. (e) of R. 16 mean actual and continuous officiation and not a fortuitous or fictional officiation. A notional construction of the clause would lead to anomalous results. AIR 1970 Pat 432 (FB), Affirmed. (Para 23)

Cases Referred: Chronological Paras
AIR 1975 SC 613 = 1975 LIC 375
21

AIR 1970 SC 370 = (1970) 2 SCR 666
15, 19

Mr. L. M. Singhvi, Sr. Advocate, (Mr. U. P. Singh, Advocate with him), for Appellant; Mr. B. P. Singh, Advocate, for Respondents.

Judgment of the Court was delivered by

SARKARIA, J.:— Respondents 1, 2 and 3 herein made an application under Article 226 of the Constitution alleging that the decision of the Bihar State Government fixing the seniority of Respondent 4 below Shri C. P. Singh (Respondent 5) and Shri E. Rehman (Respondent 6) and above the applicants, in the cadre of Bihar Superior Judicial Service was illegal and ultra vires. They prayed for a writ of mandamus, direction or order quashing the same and directing the State Government to revise the applicant's seniority vis-a-vis the opposite parties, (Respondents 4, 5 and 6 herein).

2. The applicants also challenged the upgrading of the posts of Deputy Registrar, Patna High Court and the Secretary, Bihar Legislative Assembly with effect from June 17, 1959 till the posts were held by Respondents 5 and 6, respectively.

3. A Full Bench of the High Court, partly allowed the writ application and quashed the order of the State Government placing Respondent 4 below Respondents 5 and 6 in seniority. The material facts were these:

4. Respondents 4, 5 and 6 were appointed as Munsifs on the same date under one notification. On April 25, 1959, these three officers were holding the posts of Subordinate Judges. Prior to that date four posts of Additional District and Sessions Judges fell vacant. On April 25, 1959, the High Court, after considering the service records of the Subordinate Judges due for promotion, recommended Respondents 4, 5 and 6 and Shri Sharda Prasad for promotion as Additional District and Sessions Judges in those vacancies. Respondents 5 and 6 on that date were acting as Deputy Registrar, Patna High Court and Secretary, Bihar Legislative Assembly, respectively, and since the release of Respondent 5 from that post was not in public interest, the High Court recommended temporary upgrading of that post. It further recommended that Respondent 6 should act as Additional District and Sessions Judge in the second longer vacancy and in case the State Government did not think it proper to relieve him, the post of Secretary, Bihar Legislative Assembly should be ungraded. Respondent 4 was recommended to be promoted as Additional District and Sessions Judge in the third longer vacancy. He joined in the promoted rank on June 17, 1959 and continued in it till October 1, 1959. Before the actual officiation by Respondent 4 in the promoted rank, the Government by its letter, dated August 5, 1959, had approved the creation of two posts of Additional District and Sessions Judges for a period of one year in the first instance, consequent on the amendment of Bengal, Agra and Assam Civil Court Act, 1887.

5. On May 22, 1959, the Government sanctioned the creation of two posts of Peripatetic District and Sessions Judges for a period of two years. Thus, between April 25, 1959 and June 17, 1959 four extra posts of Additional District and Sessions Judges

were created, and were available for the persons found fit and due for promotion from the cadre of Subordinate Judges. On August 17, 1959, the High Court recommended Sarvshri A. N. Sahay, R. B. P. Sinha, C. P. Singh (Respondent 5) and E. Rahman (Respondent 6) for promotion as Additional District and Sessions Judges. It, however, made it clear that since Respondents 5 and 6 could not be relieved from the posts of Deputy Registrar, High Court and Secretary, Legislative Assembly, they should continue in these posts after the same had been upgraded. The High Court further recommended that in view of the heavy arrears two more posts of Additional District and Sessions Judges be created for the period for which Respondents 5 and 6 were to continue on the posts they were then holding.

6. Ten more posts of Additional District and Sessions Judges fell vacant between November 1, 1959 and April 6, 1960. Thus, there were, in all, fourteen vacancies in the posts of Additional District and Sessions Judges, to one of which Respondent 4 could and should have been appointed, if there was no administrative or procedural delay attributable to his fault. Respondents 1, 2 and 3 were appointed as Additional District and Sessions Judges by a Government notification, dated April 21, 1960. Despite the availability of a post and suitability of Respondent 4 to be appointed as Additional District and Sessions Judge, he was promoted to that post on September 19, 1960. Respondent 4 made a representation dated April 10, 1961, to the State Government praying for fixation of his seniority just below Shri E. Rehman in the cadre of Additional District and Sessions Judges. He followed it up by supplementary representations in the same connection. These representations remained pending on the administrative side of the High Court. By a letter dated August 20, 1964, the High Court recommended the rejection of his representations. The Government, however, was of the opinion that there was substance in the representation of Respondent 4. It therefore made a back reference on August 5, 1965 to the High Court

for reconsideration of the matter. The High Court, however, informed the Government that it did not see any reasons to reconsider the matter. Thereafter the Government took a decision and allowing the representation of Respondent 4, ordered that he should be deemed to have been officiating as Additional District and Sessions Judge with effect from November 1, 1959 and for purposes of seniority, should rank immediately below Respondents 5 and 6 in the cadre of the Superior Judicial Service. The Government was of opinion that on a proper interpretation of Rule 16 (e) of the Bihar Superior Judicial Service Rules, it was authorised to fix the seniority from a date from which officiation was possible on account of availability of vacancy. On being satisfied that the delay between October 1, 1959 and September 19, 1960, in the promotion and appointment of Respondent 4 to the post of Additional District and Sessions Judge, when several posts in that cadre were vacant, was wholly an administrative and procedural delay the State Government in order to relieve undue hardship to Respondent 4 relaxed Rule 16 (e) of the Service Rules and passed the impugned order which it communicated to the High Court by a letter dated January 24, 1968, which reads as follows:

"I am directed to refer to your letter No. 501 dated 18-1-66 on the subject noted above and to say that after a careful consideration of the case of Shri Jitendra Narain at present District and Sessions Judge of Dhanbad, the State Government have been pleased to decide that Shri Narain shall rank immediately below Shri Enayetur Rehman and above Sarwashri Madan Mohan Pd., Rameshwar Pd. Sinha and Chandra Shekhar Prasad Singh, the direct recruits from the Bar in the cadre of the Superior Judicial Service, and for this limited purpose, he will be deemed to have been officiating as Additional District and Sessions Judge with effect from 1st November 1959."

7. Thus, the question before the High Court was one of fixation of the seniority of the writ-applicants, the three direct recruits, vis-a-vis Respondent 4. In this context, the

interpretation of Rule 16 (e) of the State's Superior Judicial Service Rules came up for consideration. This Rule provides:

"Seniority of direct recruit vis-vis promoted officer shall be determined with reference to the dates from which they may have been allowed to officiate continuously, in posts in the cadre of the service or in posts outside the cadre on identical time-scale of pay and of equal status and responsibility or in posts of higher scale of pay and of higher responsibility in or outside the cadre."

8. There, as here, it was contended that the meaning of the expression "may have been allowed to officiate continuously" occurring in the above quoted clause is that a notional, continuous officiation in a post in the cadre of the Service or outside it will give preference to the promoted officer in the matter of seniority over the direct recruit provided there were vacancies in one of which he could or might have been allowed to officiate continuously. The High Court rejected this contention and held that this expression means actual and continuous officiation and not a fictional or notional one. The High Court, however, went further and said that the power to determine seniority being a matter of control exclusively vests in the High Court under Article 235 of the Constitution. It further held that the Government could not fix the seniority of Respondent 4, as they had done by taking recourse to the "hardship rule" framed by them under the proviso to Article 309 of the Constitution. According to it what the Government could not do directly, could not be indirectly done by it by relaxing the requirement of Rule 16 (e).

9. Shri Madan Mohan Prasad (Respondent No. 1 in the original petition) has since been appointed to the Bench of the High Court. Consequently, he has withdrawn his appeal (Civil Appeal No. 1928 of 1970) which stands dismissed as such with no order as to costs.

10. We are told that Sarvaswari Rameshwar Prasad Sinha (Respondent 2), Jitendra Narain (Respondent 4) and Chandrika Prasad Sinha

(Respondent 5) have also been appointed to the Bench of the High Court, and that Respondents 3 and 6 have since retired from service as District and Sessions Judges. The matter has thus been rendered academic, except, as the Solicitor-General says, for the limited purpose of fixing pension and gratuity on the basis of the length of service in the cadre of Superior Judicial Service.

11. Before dealing with the contentions canvassed, it will be appropriate to notice the relevant provisions of the Bihar Superior Judicial Service Rules, 1951. Rule 6 says that of the posts in the cadre of the Service, two-thirds shall be filled by promotion and one-third by direct recruitment. Then there is a proviso which gives the State Government power to deviate from this proportion after consultation with the High Court. Rule 15 deals with confirmation. It says:

"15 (1) (a). A member of the Service appointed under Clause (a) of Rule 5 shall be on probation for a period of one year and shall not be confirmed unless he is found to be suitable in every respect for appointment to the Service:

Provided that the period of probation may be extended by the State Government, in consultation with the High Court.

(b) When such a member is confirmed in the Service the period spent on probation shall be counted towards leave, pension or increments in the relevant time-scale.

(2) Promoted officers appointed against substantive vacancies in the cadre shall forthwith be confirmed in the Service."

12. Then comes Rule 16 which regulates the inter se seniority. It provides:

"16 (a). Seniority inter se of direct recruits shall be determined in accordance with the date of their substantive appointments to the Service:

Provided that a direct recruit appointed to the post of an Additional District Judge shall be junior to a direct recruit appointed to any other post in the schedule.

(b) Seniority inter se of promoted officers shall also be determined

in accordance with the dates of their substantive appointments to the Service.

(c) When more than one direct recruit is appointed at one time, the seniority inter se will be determined in accordance with the order given in the notification making their appointments

(d) When more than one appointment is made by promotion at one time, the seniority inter se of the officers promoted shall be in accordance with their respective seniority in the Bihar Civil Service (Judicial Branch)

(e)"

13. There is a Note appended to this rule which clarifies that a period of leave or the annual vacation of the Civil Courts will not be treated as an interruption for the purposes of this sub-rule.

14. It will be seen that these rules are silent as to whether any question in regard to inter se seniority of the promoted officers and the direct recruits is to be determined by the High Court or the State Government in consultation with the High Court.

15. Mr. Lal Narain Sinha, Solicitor General contends that this question is concluded by the decision of this Court in Chandramouleshwar Prasad v. Patna High Court, (1970) 2 SCR 666 = (AIR 1970 SC 370). It is therefore proposed to notice that case in some detail.

16. There, the petitioner as well as respondents 3 to 5 belonged to the Judicial Service of Bihar. They had joined service as Munsiffs. In due course, they were promoted as Subordinate Judges. In 1962, the question of promoting them as Additional District and Sessions Judges was considered by the High Court and the Government. The High Court wanted respondents 3 and 4 to function as Additional District and Sessions Judges ahead of the petitioner and its recommendation in that behalf was accepted by the Government. Due to certain circumstance, the petitioner started acting as such earlier than respondents 3 to 5. The Bihar Civil List published in March 1968 showed the petitioner as No. 10 and respondents 3 to 5 as Nos. 12 to

14 in the cadre. Respondents made a representation to the High Court for correction of the gradation list. The High Court accepted their representation in September 1968. In the same month the District and Sessions Judge at Errah retired and respondent No. 3 who was the 3rd Additional District and Sessions Judge was asked by the High Court to officiate in the vacancy. The petitioner who was also working as 1st Additional District and Sessions Judge in the same place considered this to be a supersession and memorialised the Government. The latter took action on October 17, 1968 appointing the petitioner as officiating District and Sessions Judge. Thereupon the High Court transferred the petitioner to another District on October 25, 1968. The petitioner moved this Court under Art. 32 challenging the validity of the order of the High Court transferring him from Errah and posting him as Additional District and Sessions Judge at Singhbhum and the direction or the order of the High Court dated September 23, 1962 declaring respondents 3 to 5 as senior to him in the gradation list of Additional District and Sessions Judges maintained by the High Court. He further prayed that the High Court be directed to allow him to take over charge as officiating District and Sessions Judge at Errah in terms of the Government's notification dated October 17, 1958. The main ground on which he challenged the direction or order of September 23, 1968 relating to his position in the gradation list was that it was in contravention of Rule 16 (b) and Rule 16 (d) of the Bihar Superior Judicial Service Rules, 1951. He took his stand on the notification dated October 17, 1968 of the Government purporting to appoint him temporarily as District and Sessions Judge, Errah.

17. On the question of fixation of seniority, this Court speaking through Mitter J. said:

"The position of a person in a Civil List gives no indication of his intrinsic quality as an officer. The list merely shows the length of service of the officers according to the dates of their appointment, their posting at the time when the list is pub-

lished and their designation and scale of pay at that time. The gradation list of the High Court has no legal basis and its preparation is not sanctioned by the Bihar Superior Judicial Service Rules. The seniority inter se of the petitioner and the three respondents will have to be determined when the question of their confirmation comes up for consideration.....

We only hope that there will be no such misunderstanding between the High Court and the Secretariat in the future and if there ever be any difference of opinion attempts will be made to resolve them by mutual deliberation without one or the other making an order or giving a direction contrary to the views of the other before deliberation."

18. In the result this Court held:

"that the Government notification of October 17, 1968 was not in terms of Art. 233 of the Constitution and consequently the question of quashing the High Court's order dated October 25, 1968 does not arise. We also hold that the Gradation List of Additional District and Sessions Judges prepared by the High Court has no legal sanction and that the seniority of the petitioner and respondents 3 to 5 can only be determined in the Superior Judicial Service where they are now all holding officiating posts when the occasion arises."

19. It is to be noted that in Chandramouleshwar, (AIR 1970 SC 370) (supra), this Court was concerned only with Clauses (b) and (d) of Rule 16, while in the present case, we are concerned with fixation of inter se seniority of promoted officers vis-a-vis the direct recruits which matter is governed by Cl. (e) of the said rule. It will be seen from what has been extracted above that in Chandramouleshwar, even while construing Cls. (b) and (d), this Court did not say in express terms that the gradation list prepared by the High Court was invalid because under the concerned rules, the High Court had no power to determine inter se seniority of the promoted officers or that the determination of such seniority was a matter for the State Govern-

ment. All that was held was that the question of determining inter se seniority in terms of Cls. (b) and (d) of Rule 16, does not arise before their confirmation comes up for consideration. In other words, the question of determining inter se seniority of the promoted officers could not be determined apart from and prior to their confirmation in the Service. Since the Civil List prepared by the High Court had not been drawn up in accordance with the aforesaid rule, it had "no legal basis." Thus, Chandramouleshwar seems to lay down that the question of determining inter se seniority of promoted officers is intertwined with the question of their confirmation in the Service. According to Cl. (a) of Rule 16, inter se seniority of direct recruits is also to be determined in accordance with the dates of their confirmation in the Service. In this case, however, we are concerned with fixation of the seniority of direct recruits vis-a-vis promoted officers. The relevant clause for this purpose is Cl. (e) of Rule 16. The governing criterion, according to this clause, is "the date from which they may have been allowed to officiate continuously in posts in the cadre of the Service or in posts outside the cadre on identical time-scale of pay and of equal status and responsibility or in posts of higher scale of pay and of higher responsibility."

20. Reading clause (e) together with cls. (a) and (b) of rule 16, it is clear that before fixing the seniority of direct recruits vis-a-vis promoted officers, it will be necessary as a preliminary step to prepare two separate seniority lists, one of direct recruits under cl. (a) and the other of promoted officers under cl. (b) of r. 16, in the chronological order of their confirmation.

21. This Court has recently held in *The High Court of Punjab and Haryana v. State of Haryana*, AIR 1975 SC 613 = (1975 LIC 375) that the power of confirmation of District Judges is a part of the power of control vested in the High Court under Art. 235 of the Constitution. Since the Bihar Superior Judicial Service Rules,

make the chronological order of confirmation an integral part of the process of fixation of the order of seniority in the Service, the inference is that both these powers were intended to be exercised by one and the same authority. Since Article 235 of the Constitution vests the power of confirmation in the High Court, it stands to reason that the power of determining the seniority in the Service is also with the High Court. Of course, in determining the seniority the High Court is bound to act in accordance with the Rules validly made by the Governor under the Proviso to Art. 309 of the Constitution.

22. Be that as it may, it is not necessary to pursue the discussion further. Appointment of three of respondents to the Bench of the High Court and retirement of two others has rendered the matter largely, if not entirely, academic.

23. We further agree with the High Court that the words "may have been allowed to officiate continuously" in Cl. (e) of Rule 16 mean actual and continuous officiation and not a fortuitous or fictional officiation. A notional construction of the clause would lead to anomalous results. The State Government therefore, could not on an interpretation of Rule 16 (e) say that for the limited purpose of seniority respondent 4 would rank below respondents 2 and 3 but above the writ petitioners and will be deemed to have been officiating as Additional District and Sessions Judges with effect from November, 1, 1959. Such a deeming officiation, as rightly held by the High Court, for the purpose of determination of seniority on a construction of Cl. (e) was not permissible.

24. For the foregoing reasons, the appeal fails and is dismissed without any order as to costs.

Appeal dismissed.

AIR 1976 SUPREME COURT 410
(From: Madhya Pradesh: 1974 MPLJ 639)

H. R. KHANNA AND S. MURTAZA
- FAZL ALI, JJ.

Manganese Ore (India) Ltd., Appellant v. The Regional Assistant Commissioner of Sales Tax, Jabalpur, Respondent.

Civil Appeal No. 599 of 1975,
D/- 19-12-1975.

(A) Central Sales Tax Act (1956), Section 5 (1) — Sale whether occasioning export.

Where the sale was not directly and substantially connected with export, and where between the seller and ultimate buyers intermediaries were involved, such a sale would not occasion any export and would not fall within the purview of Section 5 (1) of the Act. AIR 1975 SC 1564, Rel. on; 1974 MPLJ 639, Affirmed.

(Para 6)

Where the sale is in fact and in law a pure inter-State sale, it cannot be treated to be a sale occasioning export.

(Para 6)

(B) Precedents — Doctrine of stare decisis.

The doctrine of stare decisis is a very valuable principle of precedent which cannot be departed from unless there are extra-ordinary or special reasons to do so.

(Para 6)

(C) Central Sales Tax Act (1956), Ss. 3 (a), 4 (2) (b) and 9 — Sale in the course of inter-State trade or commerce — Conditions to be satisfied.

The following conditions must be satisfied before a sale can be said to take place in the course of inter-State trade or commerce: (i) that there is an agreement to sell which contains a stipulation express or implied regarding the movement of the goods from one State to another; (ii) that in pursuance of the said contract the goods in fact moved from one State to another; and (iii) that ultimately a concluded sale takes place in the State where the goods are sent which must be different from the State from which the goods move. If these conditions are satisfied then by virtue of Section 9 of the Act it is

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the State from which the goods move which will be competent to levy the tax under the provisions of the Act. Civil Appeals Nos. 449-454 of 1971, D/- 9-12-1975 (SC), Rel. on.

(Para 7)

Held, on facts, that there was inter-State sale of manganese ore by the appellant. A close perusal of the various contracts of sale entered into by the appellant would, clearly disclose that it was manganese ore and manganese ore alone which was sought to be sold by the appellant to various buyers in India. The mere fact that certain specifications have been given or certain percentages have been mentioned does not change the character or the quality of the goods that are actually supplied by the appellant to its various purchasers. It was not right to say that actually one of the constituents of the manganese ore was despatched by the appellant from various mines situated in the State of Madhya Pradesh. 1974 MPLJ 639, Affirmed. S. T. Ref. Nos. 17 to 20 of 1964, D/- 7-4-1969 (Bom) and AIR 1959 SC 887, Dist. (Paras 8 & 9)

(D) Central Sales Tax Act (1956), Section 3 (a) — Scope.

So far as Section 3 (a) is concerned there is no distinction between unascertained and future goods and goods which are already in existence, if at the time when the sale takes place these goods have come into actual physical existence. C. As. Nos. 449-454 of 1971, D/- 9-12-1975 (SC), Rel. on; 1974 MPLJ 639, Affirmed.

(Para 14)

(E) Central Sales Tax Act (1956), Section 10 — Imposition of penalty for delay in filing return under the Act — Held illegal — No provision in the Act making dealer liable for penalty for filing belated returns and recourse could not be taken to the provisions of State Act on the subject. AIR 1975 SC 1549, Rel. on; 1974 MPLJ 639, Reversed on this point.

(Para 15)

Cases Referred: Chronological Paras
AIR 1975 SC 1549 = (1975) 2 SCC
22 = 1975 Tax LR 1777 15
AIR 1975 SC 1564 = (1975) 2 SCC
47 = 1975 Tax LR 1800 6
(1975) Civil Appeals Nos. 449-454 of
1971, D/- 9-12-1975 (SC) 7, 8, 14

(1969) Sales Tax Ref. Nos. 17 to 20 of 1974, D/- 7-4-1969 (Bom) 12 AIR 1959 SC 887 = 10 STC 297 13

M/s. S. V. Natu, L. K. Kambarkar and V. N. Ganpule, for Appellant; Mr. Ram Panjwani, Dy. Advocate General, M. P., (Mr. H. S. Parihar, Advocate with him), for Respondent.

Judgment of the Court was delivered by

FAZL ALI, J.:— This is an appeal by special leave against the judgment and order of the Madhya Pradesh High Court dated April 23, 1974 dismissing the writ petition filed by the appellant before the High Court for quashing the orders of the Assessing Authorities imposing tax under the Central Sales Tax Act, 1956 on the basis of a number of sales made by the appellant Company in pursuance of multifarious contracts of sale. The appellant Company was formed in pursuance of an agreement dated June 8, 1962 between the President of India and the Central Provinces Manganese Ore Co. Limited. Before this agreement the said Company which will be hereafter referred to as the 'C. P. M. O. C.' was a private company incorporated in the United Kingdom and carried on the business of extracting manganese ore from several mines in the erstwhile States of C. P. and Berar and Bombay. By virtue of the agreement referred to above a new Company was formed under which the Government of India, the Government of Maharashtra and the Government of Madhya Pradesh held shares in the ratio of 17% each whereas the original Company C. P. M. O. C. retained shares to the extent of 49 per cent. Thus the position was that in the present commercial venture the Central Government had preponderance of shares. The appellant, after the formation of the new Company, was known as Manganese Ore (India) Ltd. which will hereafter be referred to as the M.O.I.L. Fresh leases to extract the minerals from the various mines were issued by the Government in favour of the M.O.I.L. and the Company entered into contracts with buyers in India and outside for selling the manganese ore extracted from the various mines situated in

the States of Madhya Pradesh and Maharashtra.

2. A close analysis of the contracts entered into by the appellant Company and the business carried on by it would manifestly reveal that the contracts may be divided into four separate and clear categories.

3. Category-I are the contracts by which the manganese ore extracted by the appellant company is sent directly to a foreign company known as M/s. Philips Brothers on f.o.b. terms. Another such contract was entered into by the appellant with B.I.S.C. (Ore) Ltd., London for sale of oriental manganese ore f.o.b. Visakhapatnam. Copies of these contracts were filed before the High Court as Annexures Q & R. The Regional Assistant Sales Tax Commissioner accepted the contention of the appellant that so far as the sales under these contracts were concerned, they occasioned export and were clearly exempt from the Central Sales Tax Act as they fell within the purview of Section 5 (1) of the said Act. We might also mention here that the main dispute between the parties is regarding the applicability of Sections 3 (a), 4 (2) (b) and 9 of the Central Sales Tax Act, according to which the State of Madhya Pradesh was competent to levy tax on the sales made by the appellant in the course of which the manganese ore moved from the State of Madhya Pradesh to other States in India. The main contention of the appellant before the High Court as also before the Sales Tax Authorities was that all these sales were outside sales and not in the course of inter-State trade or commerce and therefore the provisions of the Central Sales Tax Act did not apply. The Assistant Sales Tax Commissioner negatived the contention of the appellant and hence a writ petition was filed before the High Court. We might also mention that the writ petition was filed by the appellant company before the High Court even before taking recourse to the normal procedure laid down under the Madhya Pradesh General Sales Tax Act, 1958. This was obviously done because the appellant chose to assail the levy of tax

on the ground that the Sales Tax Authorities did not possess any jurisdiction to impose the tax inasmuch as the sales were not at all covered by the Central Sales Tax Act. We have stressed this fact particularly because before High Court the appellant raised some questions relating to the merits of the matter which could be properly agitated before Appellate or Revisional authorities under the Madhya Pradesh General Sales Tax Act. Thus so far as the sales in Category-I are concerned, the Assistant Sales Tax Commissioner accepted the plea of the appellant and did not levy any tax on those sales. These sales, therefore, did not form the subject-matter of the present appeal before us. This position was conceded by both sides.

4. Category-II represents contracts which were entered into by the appellant company with the Minerals and Metals Trading Corporation of India Ltd.—hereinafter referred to as MMTC—under which the appellant despatched manganese ore of varying percentage to the MMTC f. o. b. Bombay. After having received the goods from the appellant the MMTC exported the goods to foreign buyers. The copies of the contracts comprising these sales are Annexures N, O and P, before the High Court.

5. Category-III relates to sales as per agreements copies of which are Annexures S, T and U by which the appellant sold to M/s. Ram Bahadur Thakur & Company, Bombay and other buyers which in turn sold the goods to the MMTC.

6. As regards these two categories, Category II and Category III, the appellant advanced two-fold contention before us. In the first place it was argued that as the goods were eventually exported by the buyers from India to foreign countries, therefore, the sales made by the appellant were not inter-State sales but sales which occasioned exports and, therefore, fell within Sec. 5 (1) of the Central Sales Tax Act. The High Court after consideration of various aspects of the matter overruled the contention of the appellant and held that as no export was involved so far as the sales made by the appellant

to the buyers in India were concerned, therefore, Section 5 (1) had no application at all. This matter need not detain us further, because it is no longer *res integra* and is now completely concluded by a Constitution Bench decision of this Court in *Md. Serajuddin v. State of Orissa*, (1975) 2 SCC 47 = (AIR 1975 SC 1564) where Ray C. J., speaking for the majority, observed as follows:

"To establish export a person exporting and a person importing are necessary elements and the course of export is between them. Introduction of a third party dealing independently with the seller on the one hand and with the importer on the other breaks the link between the two for then there are two sales one to the intermediary and the other to the importer. The first sale is not in the course of export because the export commences with intermediary. The tests are that there must be a single sale which itself causes the export or is in the progress or process of export. There is no room for two or more sales in the course of export.

x x x x x

The expression "occasions" in Section 5 of the Act means the immediate and direct cause. But for the contract between the Corporation and the foreign buyer, there was no occasion for export. Therefore, the export was occasioned by the contract of sale between the Corporation and the foreign buyer and not by the contract of sale between the Corporation and the appellant."

The Court clearly held that where the sale was not directly and substantially connected with export, and where between the seller and ultimate buyers intermediaries were involved, such a sale would not occasion any export and would not fall within the purview of Section 5 (1) of the Central Sales Tax Act. It is not disputed that all the sales covered by Category II and Category III were actually made by the appellant not to any foreign exporter but to buyers inside India whether it was MMTC or whether they were other private firms. In these circumstances, therefore, the sales mentioned above could not be said to be sales which occasioned any export. The High

Court, therefore, rightly found that these sales were completed within the territory of India when the goods passed to the buyers. The High Court further found as follows:

"For these reasons, it cannot be held that these sales occasioned the export within Section 5 (1) of the Central Sales Tax Act and were sales in the course of export."

The High Court relied on a number of authorities, but in view of the decision of this Court in *Md. Serajuddin's* case it is not necessary for us to consider those authorities at all because the matter has now been concluded by a decision of this Court. In fact this position was conceded by Mr. Natu appearing for the appellant but he tried to persuade us to refer the case to a larger Bench for reconsidering *Md. Serajuddin's* case. We are, however, unable to agree with the prayer made by the learned counsel for the appellant because this Court has given its decision recently and the doctrine of stare decisis is a very valuable principle of precedent which cannot be departed from unless there are extra-ordinary or special reasons to do so. We are unable to find any special reasons for reconsidering *Md. Serajuddin's* case, particularly when this Court has laid down the rule, namely, that where the sale is in fact and in law a pure inter-State sale, it cannot be treated to be a sale occasioning export. This, therefore, disposes of the first plank of attack made by the appellant on the judgment of the Madhya Pradesh High Court so far the sales contained in Categories II and III are concerned.

7. Category-IV is in respect of contracts of sale, copies of which are Annexures 1 to 7 before the High Court. These sales were admittedly made by the appellant in favour of the buyers within the territory of India but outside the State. It was, however, contended that as the goods purported to have been sold to the buyers did not in fact move from the State of Madhya Pradesh, therefore, there was no inter-State sale, but only an inside sale in the State where the goods were delivered, and therefore the State of Madhya Pradesh had no jurisdiction to levy tax under the Central Sales Tax Act.

The same arguments were applied to Categories II and III on the ground that if the sales comprised in Categories II and III were not sales in the course of export they also were not inter-State sales, because the goods which moved from the State of Madhya Pradesh were not actually the goods which were sought to be sold to the buyers in other States in India. The High Court has considered this matter at great length and has relied on a number of authorities. In a recent judgment of this Court in *Balabhgas Hulaschand v. State of Orissa*, Civil Appeals Nos. 449-454 of 1971, Decided on 9-12-1975 (SC) after review of all the authorities on the point, this Court held as follows:

"That the following conditions must be satisfied before a sale can be said to take place in the course of inter-State trade or commerce:

(i) that there is an agreement to sell which contains a stipulation express or implied regarding the movement of the goods from one State to another;

(ii) that in pursuance of the said contract the goods in fact moved from one State to another; and

(iii) that ultimately a concluded sale takes place in the State where the goods are sent which must be different from the State from which the goods move.

If these conditions are satisfied then by virtue of Section 9 of the Central Sales Tax Act it is the State from which the goods move which will be competent to levy the tax under the provisions of the Central Sales Tax Act."

On a careful consideration of the facts and circumstances of the present case we are satisfied that the present case is directly covered by the decision of this Court in *Balabhgas Hulaschand's* case.

8. The learned counsel for the appellant sought to distinguish *Balabhgas Hulaschand's* case Civil Appeals Nos. 449-454 of 1971, D/- 9-12-1975 (SC) on the ground that what was despatched from Madhya Pradesh was merely manganese ore of a particular percentage but that was not the property which was sought to be pur-

chased by buyers in other States. It was contended that under the contracts of sale the property which was to be sold was continental mixture which consisted of various kinds of rocks or manganese ore which were mixed together. What therefore was actually despatched, according to counsel for the appellant, was merely one of the constituents of the goods purported to be sold and not the goods which were ores purchased by the buyers. The High Court in its well reasoned judgment has fully considered this aspect of the matter and has rightly pointed out that there is no mechanical or scientific process by which the continental mixture is made. According to the appellant itself the mixture comes into existence automatically by piling up manganese ore despatched from various States one after the other. In other words, the position is that suppose 1000 tons of manganese ore is sent from Madhya Pradesh and another thousand tons from various mines from Maharashtra, when these ores are stocked at one place by being piled up one upon another they automatically produce continental mixture with various constituents, properties and percentages required.

9. Mr. B. Sen appearing for the respondent submitted that what was actually sold was manganese ore of an average percentage and it was not right to say that actually one of the constituents of the manganese ore was despatched by the appellant from various mines situated in the State of Madhya Pradesh. In fact, manganese ore like iron or coal is a special type of commodity which is not capable of undergoing any scientific process of mixing up resulting in an end product. We find ourselves in complete agreement with the argument of the learned counsel for the respondent. It seems to us that the word 'oriental mixture' which has no doubt been used in some of the agreements produced by the appellant is a misnomer, because this is merely a technical terminology or just another name for what is known in the commercial world as manganese ore of an average or standard percentage of about 49%. A careful perusal of the agreements would clearly show that

what the buyers wanted and what was actually sold to them was manganese ore and after all the goods were stocked together the required percentage under the contracts of sale automatically came into existence. For instance, the relevant provisions of one of the contracts, which has been quoted by the High Court, runs thus:

"QUALITY: The average quality of the ore to be supplied by sellers should be, without guarantee, 49.25% Manganese, 0.15% Phosphorus, 9% Silica and 7.5% Iron PROVIDED ALWAYS that as such supplies are furnished by mixtures of ores from the sellers' several mines the average quality of the samples taken from deliveries from each mine shall form the basis of settlement."

It would be seen that what was to be supplied was only manganese ore of the percentage of 49.25%. Properties like Phosphorus, Silica and Iron are inherent constituents of manganese ore and are bound to be found in every manganese ore. Similarly in another contract which appears at p. 117 of The Paper Book and which was entered into by the appellant with the MMTC the relevant passage runs thus:

"The execution of this Sale Agreement is dependent on the sellers being able to rail the ores from the mines to the port for shipment and also of the grant of any necessary export permit.

1. QUALITY: 30,000 (Thirty thousand tonnes) of 1000 kgs. each, 5% more or less at Buyers' option.

2. SPECIFICATIONS:

Mn.	basis	48%
rejection	below	46%
Fe.		10% maximum
Silica + Alumina		14% maximum
Phos.		0.18% maximum"

Here also it would appear that the agreement is only for sale of manganese ore. Although a certain percentage is mentioned but that percentage is derived automatically when the manganese ores are stocked together. In most of the other contracts which have been filed by the appellants, for instance, in another contract which has been entered into between the appellant and

the MMTC on February 22, 1968 what is sold is 'Oriental grade manganese ore'. Similarly in another contract between the appellant and M/s. Ram Bahadur Thakur & Company dated February 23, 1968 the property sold is about 25,000 Metric Tonnes of Oriental Mixture of Manganese Ore. In another contract which appears at p. 147 of the Paper Book and which is between the appellant and the Universal Ferro and Allied Chemicals Ltd., Tumsar Road, what is sold is 12,000 metric tonnes of Manganese Ore. There was another stipulation as to delivery in respect of this contract as follows:

"The sellers will load the component ores from their mines into the wagons which will be arranged for by the buyers who shall be the consignees, in the name of the sellers, who shall be the consignors, at such mines sidings and for such quantities as may be declared from time to time by the sellers' Managing Director, the destination of all the wagons being Tumsar in the State of Maharashtra and the railway freight being payable by the buyers at the destination. As aforesaid, after the loading of the component ores into wagons the buyers shall be responsible in all respects in respect of the goods so loaded into the wagons."

The stipulation in this contract that after loading the component ores into the wagons the buyers shall be responsible in respect of the goods is a clear pointer to the fact that the manganese ores that were loaded into the wagons were undoubtedly the goods which were purported to be sold under the contract of sale, otherwise the buyers would not have taken the responsibility for the ores loaded into the wagons if it was really not the ores which the appellant were to supply but merely a constituent thereof.

10. A close perusal of the various contracts of sale entered into by the appellant would, therefore, clearly disclose that it was manganese ore and manganese ore alone which was sought to be sold by the appellant to various buyers in India. The mere fact that certain specifications have been given or certain percentages

have been mentioned does not change the character or the quality of the goods that are actually supplied by the appellant to its various purchasers.

11. Another important feature of the contract of sale is that a certain amount of tonnage of manganese ore is to be supplied by the appellant which is stretched over a period of a few months which shows that the appellant was to supply the ore in instalments. In these circumstances, therefore, the theory of the ore supplied by the appellant being only one constituent and not the entire goods sold appears to be purely illusory and is not at all supported even by the contracts of sale filed by the appellant. For instance, if a firm placed an order for 1000 bales of cloth to be supplied to it by the seller in the course of five months and in pursuance of this contract if the seller supplies 200 bales every month it cannot be said that the first instalment of 200 bales is not the goods sold but only a constituent of the same. On a parity of reasoning, therefore, the manganese ores loaded by the appellant in the railway wagons in the State of Madhya Pradesh, are clearly included in the contract of sale which itself provides that the supply has to be made within a specified period of a few months.

12. Learned counsel for the appellant placed great reliance on a judgment of the Bombay High Court, a certified copy of which has been filed in this Court, in the Central Provinces Manganese Ore Co. Ltd. v. State of Maharashtra, Sales Tax Ref. Nos. 17, 18, 19 and 20 of 1964 decided on 7-4-1969 (Bom). In the first place this judgment is not at all applicable to the facts of the present case, because the Bombay High Court was not dealing with a sale under the Central Sales Tax Act. The High Court was pre-eminently concerned with the provisions of the C. P. and Berar Sales Tax Act, 1947 and there is nothing to show that the provisions of that Act were in pari materia to the provisions of the Central Sales Tax Act. More than this, we do not want to say about the judgment of the Bombay High Court.

13. Reliance was also placed by the appellant on a decision of this Court in Commr. of Sales Tax, Eastern Division, Nagpur v. Husenali Adamji and Co., 10 STC 297 = (AIR 1959 SC 887) which also does not appear to be applicable to the facts of the present case, because the Supreme Court in that case was dealing with the question as to when the title in the goods passes.

14. Lastly it was contended by counsel for the appellant that as the manganese ores despatched by the appellant were unascertained or future goods which would come into existence only after the manganese ores extracted in various mines in Madhya Pradesh and Maharashtra were stocked and piled up one after the other the provisions of Section 3 (a) of the Central Sales Tax Act would not apply. This contention is completely without substance in view of the decision of this Court in Balabhas Hulaschand's case, (Civil Appeals Nos. 449-454 of 1971, D/- 9-12-1975 (SC)) where it was pointed out that so far as Section 3 (a) of the Central Sales Tax Act is concerned there is no distinction between unascertained and future goods and goods which are already in existence, if at the time when the sale takes place these goods have come into actual physical existence. In the instant case also it was never disputed before the High Court or before us that the manganese ore was loaded into the wagons after being extracted from the mines and that the sales of these manganese ores despatched from Madhya Pradesh to various States actually took place and the goods were ultimately accepted by the buyers in other States. In these circumstances, therefore, it is quite clear in this case that the movement of the goods took place in pursuance of the contracts of sale which ultimately merged into actual sales and it was only thereafter that the tax was sought to be levied by the State of Madhya Pradesh. It was also not disputed that the tax has been levied only on such sales of the manganese ore despatched from the State of Madhya Pradesh which came from the mines situated in the State of Madhya Pradesh. Thus all the incidents of an

inter-State sale are present in the instant case and the view taken by the High Court that the sales were covered by Section 3 (a) of the Central Sales Tax Act is absolutely correct and we fully endorse the same.

15. These were the main arguments advanced before us by counsel for the appellant. Apart from these, some small points were also argued by the learned counsel for the appellant. In the first place it was submitted that the Sales Tax Authorities had no jurisdiction to impose a penalty of Rs. 1,000/- for the delay in filing the return under the Central Sales Tax Act, because there was no provision in the Central Act making a dealer liable to pay penalty for filing belated returns and recourse could not be taken to the provisions of the State Act on the subject. The High Court negatived this plea following two Division Bench judgments of the Madhya Pradesh High Court. The view taken by the High Court on this point is legally erroneous because this Court in *M/s Khemka & Co. (Agencies) Pvt. Ltd. v. State of Maharashtra* (1975) 2 SCC 22 = (AIR 1975 SC 1549) has pointed out that in the absence of any provision for penalty under the Central Sales Tax Act itself it is not open to the Sales Tax Authorities to press into service the provisions of the State Sales Tax Act. In this connection, this Court observed as follows:

"It is only tax as well as penalty payable by a dealer under the Central Act which can be assessed, re-assessed, collected and enforced in regard to payment. The words 'as if the tax or penalty payable by such a dealer under the Central Act is a tax or penalty payable under the general sales tax law of the State' have origin and root in the words 'payment of tax including any penalty payable by dealer under the Central Act.'"

x x x x x x

For the foregoing reasons we are of opinion that the provisions in the State Act imposing penalty for non-payment of income-tax within the prescribed time is not attracted to impose penalty on dealers under the

Central Act in respect of tax and penalty payable under the Central Act. x x x x =

The Central Act contains specific provisions for penalty. Those are the only provisions for penalty available against the dealers under the Central Act. Each State Sales Tax Act contains provisions for penalties. These provisions in some cases are also for failure to submit return or failure to register. It is rightly said that those provisions cannot apply to dealers under the Central Act because the Central Act makes similar provisions." In this view of the matter, therefore, this part of the order of the High Court must be set aside and the penalty imposed by the Assistant Sales Tax Commissioner must be quashed.

16. It was then submitted that a purchase tax on a turnover of Rs. 748/- has been levied under Section 7 (1) of the Madhya Pradesh General Sales Tax Act. It was, however, pointed out by the respondent that the tax was actually levied on the purchases made by the appellant from unregistered dealers and is a very petty amount. In view of this concession, learned counsel for the appellant did not press this matter. The finding of the High Court on this point is, therefore, affirmed.

17. Lastly it was submitted that the Assistant Sales Tax Commissioner was wrong in holding that the turnover in respect of inter-State sales was not supported by 'C' Forms. This is also a matter which relates to the merits of the case which could be properly agitated before the Appellate or Revisional authorities under the State Sales Tax Act.

18. The result is that the penalty of Rs. 1000/- imposed by the Assistant Sales Tax Commissioner is quashed. All other contentions raised by the appellant fail and the judgment of the High Court on those points is hereby affirmed. The appeal is accordingly dismissed with the modification indicated above, but in the circumstances without any order as to costs.

Order accordingly.

AIR 1976 SUPREME COURT 417

(From: AIR 1973 All 132)

A. N. RAY C. J., M. H. BEG, R. S. SARKARIA AND P. N. SHINGHAL, JJ.

Khadim Hussain, Appellant v. State of U. P. and others, Respondents.

Civil Appeal No. 1754 of 1974, D/- 18-12-1975.

(A) U. P. Town Improvement Act (8 of 1919), Ss. 4 and 8 — Trustees appointed in 1963 — Term of office commencing in 1966 after repeal of the Act — Framing of Scheme by the Trustees valid.

A trust duly incorporated by the terms of a statute armed with all the powers vested in it by the provisions of Sections 4, 8, 3, 6 and 100 of the U. P. Town Improvement Act, which had become operative cannot be lacking in power or competence to act at all simply because Section 8 meant to notify the commencement of the office of the first trustees only under the Act, had not been complied with simultaneously with or soon after the appointment of the first trustees. It cannot therefore be said that since a notification under Sec. 8 of the Act indicating the commencement of the term of the office of the 1st Trustees took place only on 21st February, 1966, after the Act of 1919 had been repealed, the Trustees, who had been appointed by a notification dated 21st March, 1963, under Sec. 4 of the Act, could not have framed any scheme because the Trust itself was never properly constituted.

(Para 12)

(B) Land Acquisition (Amendment and Validation) Act (1967), S. 4 (2) — Prohibition is to a declaration made beyond specified period — There is no prohibition to a notification under Sec. 4 — Land Acquisition Act (1894), Ss. 4 and 6)

A look at the amendment introduced by Section 4 (2) of the Land Acquisition (Amendment and Validation) Act, 1967, shows that it is the declaration which has to take place within two years of the expiry of the commencement of the Ordinance which came into force on 20th Janu-

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ary, 1967. In fact, Section 4 (2) of the Amendment Act of 1967, itself makes a distinction between a "declaration" under Section 6 and a "notification" under Section 4 of the principal Act. It does not say that no notification under Section 6 of the principal Act can take place beyond the time fixed. The prohibition is confined to declaration made beyond the specified period. (Para 26)

Cases Referred: Chronological Paras
AIR 1966 SC 1593 = (1966) 3 SCR 557 27

Mr. D. V. Patel, Sr. Advocate, (Mr. B. P. Singh, Advocate with him), for Appellant; Mr. J. P. Goyal and Mr. Shreepal Singh, Advocates, (for Nos. 2-3) and Mr. G. N. Dikshit, Sr. Advocate, (Mr. O. P. Rana, Advocate with him), (for Nos. 1 and 4), for Respondents.

The Judgment of the Court was delivered by

BEG, J.:— The appellant before us, by grant of special leave to appeal against the judgment of a Division Bench of the Allahabad High Court, challenges the validity of a Housing Scheme, first notified on 13th March, 1965, under Section 36 of the U. P. Town Improvement Act No. VIII of 1919 (hereinafter referred to as 'the Act'), and then finally sanctioned, under Section 32 (1) of the U. P. Avas Evam Vikas Parishad Adhiniyam U. P. Act I of 1966 (hereinafter referred to as 'the Adhiniyam') and published on 3rd May, 1969 in the U. P. Gazette.

2. Learned counsel for the petitioner has invited our attention to the five objections put forward and rejected by the Division Bench to the acquisition for purposes of the scheme. Out of these, he has abandoned two. He confines his objections to three which are as follows:

3. Firstly, as the notification under Section 8 of the Act of 1919, indicating the commencement of the term of the office of the 1st Trustees took place only on 21st February, 1966, after the Act of 1919 had been repealed, the Trustees, who had been appointed by a notification dated 21st March, 1963, under Section 4 of the Act of 1919, could not have framed any scheme because the Trust itself was never properly constituted.

4. Secondly, even if the first objection be not sustainable, the scheme, as sanctioned by the Trust, not being the same as the one which was first notified under the Act of 1919, could not be continued under the provisions of Section 97 of the Adhiniyam.

5. Thirdly, the notification made under Section 32 (1) of the Adhiniyam of 1966, with regard to the "Rustampur-Tiwaripur Vikas Yojna No. 5", which was to be equated with a notification under Section 6 of the Land Acquisition Act, 1894, was invalid, because it was not published within two years after the commencement of the Land Acquisition (Amendment and Validation) Ordinance, 1967, as required by S. 4(2) of the Land Acquisition (Amendment and Validation) Act of 1967.

6. With regard to the 1st objection the relevant provisions placed before us are Sections 4 and 8 of the Act of 1919. They are:

"4. Constitution of Trust.— (1) Trust shall consist of the following Trustees, namely

(a) a Chairman;
(b) the Chairman of the Municipal Board;

(c) repealed.
(d) seven other persons in Kanpur and five other persons in other places.

(2) The Chairman and the persons referred to in clause (d) of sub-section (1) shall be appointed by the State Government by notification.

(3) The Chairman of the Municipal Board shall be a Trustee ex-officio.

(4) and (5) Repealed.

(6) Of the persons referred to in Clause (d) of sub-section (1) not more than one shall be a person in the services of the Government."

"8. Commencement of term of office of first Trustees.—

(1) The term of office of the first Trustees shall commence on such date as shall be notified in this behalf by the State Government.

(2) A person ceasing to be a member by reason of the expiry of his term of office shall, if otherwise qualified, be eligible for renomination".
Section 1, sub-s. (3) says:

"1 (3) This section and Section 66 shall come into force at once. The

State Government may, by notification direct that the rest of the Act shall come into operation in the whole or any part of any Municipality and in any area adjacent thereto, on such date as may be specified in such notification".

It is not disputed that the relevant notifications had been issued bringing the whole Act into operation before the notification of 21st March, 1963, with which we are concerned here, was published showing that the Governor of U. P. was pleased to appoint the District Magistrate of Gorakhpur as the Chairman of the Gorakhpur Improvement Trust and others as Trustees of it.

7. Chapter II of the Act of 1919 dealing with Constitution of trusts, begins with Section 3, which reads as follows:

"3. Creation and incorporation of Trust.— The duty of carrying out the provisions of this Act in any local area shall, subject to the conditions and limitations hereinafter contained, be vested in a board to be called. "The (name of town) Improvement Trust", hereinafter called "the Trust"; and every such board shall be a body corporate and have perpetual succession and a common seal, and shall by the said name sue and be sued."

We have already set out Section 4 above. Section 5 deals with resignation of trustees.

8. Sections 6 and 7 are also relevant. They read as follows:

"6. Term of office of Chairman.— The term of office of the Chairman shall ordinarily be three years, provided that he may be removed from office by the State Government at any time."

"7. Term of office of other Trustees.— Subject to the foregoing provisions of the term of office of every Trustee appointed under Clause (c) of sub-section (1) of Section 4 shall be three years."

9. Section 9 deals with remuneration of the Chairman, Section 10 with removal of trustees, Section 11 with the disabilities of trustees removed under Section 10, and Section 12 with the filling up of casual vacancies.

10. Chapter III deals with proceedings of the Trusts and its Committees. Chapter IV deals with improvement schemes. Chap. VI deals with acquisition and disposal of land. Chapter VII deals with finance. Chapter VIII with framing of rules, and Chapter IX with procedures and penalties. Chapter X, which is the last chapter, deals with certain supplementary provisions among which is Section 100 providing as follows:

"100. Validation of acts and proceedings.— (1) No act done or proceeding taken under this Act shall be questioned on the ground merely of—

(a) the existence of any vacancy in, or any defect in the constitution of, the Trust or any Committee; or

(b) any person having ceased to be a trustee; or

(c) any trustee, or any person associated with the Trust under Section 14 or any other member of a Committee appointed under this Act having voted or taken any part in any proceeding in contravention of Section 117; or

(d) the failure to serve a notice on any person, where no substantial injustice has resulted from such failure or

(e) any omission, defect or irregularity not affecting the merits of the case.

(2) Every meeting of the Trust, the minutes of the proceedings of which have been duly signed as prescribed in Clause (g) of sub-section (1) of Section 13, shall be taken to have been duly convened and to be free from all defect and irregularity".

11. It is not denied that the Improvement Trust of Gorakhpur had been actually working under the above mentioned provisions of the Act of 1919. We think that Section 100 of the Act of 1919, in the context of the whole Act, completely refutes the argument based upon a specious distinction between appointment of members of the trust and the Constitution of the Trust, and upon an unwarranted condition sought to be imposed upon the competence of members of the Trust to act said to be embedded in Section 8 which was, we think, never intended to serve such a purpose.

12. Section 4, dealing with the Constitution of the Trust, indicates that the appointment of members of the Chairman and members completes the Constitution of the trust. A trust, duly incorporated by the terms of a statute, armed with all the powers vested in it by the provisions, mentioned above, of a statute which has become operative, cannot be lacking in power or competence to act at all simply because Section 8, meant to notify the commencement of office of the first trustees only under the Act, has not been complied with simultaneously with or soon after the appointment of the first trustees.

13. Section 8 is the last of the three sections which deal with duration of terms of offices of the Chairman and the trustees. It is confined to the commencement of the "term" by which is meant the duration of the period of office of the first trustees so that subsequent trustees may properly take over after the period of office of the first trustees terminates. The whole object seemed to be only to determine the date of commencement of their term in order to fix the date of its expiry so as to enable fresh appointments to be made in time. Assuming that the Gorakhpur Improvement Trust was first constituted in 1963, there is no provision indicating that the constitution of the trust was not complete as soon as it was declared by statute and a Chairman and trustees took charge of their offices by reason of their appointment as trustees. This had been done by the notification under Section 4 (2). Therefore, the need for a notification under Sec. 8 does not seem to have been felt until the time when the expiry of the fixed term of office of the first trustees drew near. This explains why the subsequent notification, which was really a corollary of a notification under Section 4 (2), took place so late when the three years' period of their offices was about to come to an end.

14. A notification under Section 8 was probably quite unnecessary by reason of Sections 96 and 97 of Adhiniyam of 1966 which repealed U. P. Act No. VIII of 1919 and dissolved the trust "on and from the

date on which" the Adhiniyam came into force in an area. However, even assuming that the date of the coming into force of the Adhiniyam, and, therefore, the repeal of the Act for Gorakhpur was subsequent to 21st February, 1966, the absence of a notification under Section 8 could not, in our opinion, invalidate any proceeding of the Trust. It was conceded that a notification under Section 8 could have been combined with the notification under Section 4 (2). Even if, strictly speaking, a notification under Section 8 should have followed soon after the notification under Section 4 (2) of the Act of 1919, yet, Section 100 prevents any such technical irregularity from invalidating any proceeding of the trust, including the framing and implementation of the Scheme before us.

15. Coming to the second objection, we find that the only ground upon which it is pressed is that the preliminary notification, of which no copy has been placed before us, was said to contain what is described as "a housing and accommodation scheme," falling under Section 24 (g) read with Section 31 of the Act of 1919, whereas, the finally sanctioned scheme, called 'Rustampur Tiwaripur Vikas Yojna No. 5KP', which is translated by learned counsel for the appellant as a "Land Development Scheme" is alleged to fall under Section 24 (f) read with Section 30 of the Act of 1919. This argument seems based on mere speculation about the changed character of the two supposedly separate and different schemes. The scheme had been referred to by the same name in so far as locality, to which the scheme relates, is concerned. The plots involved are admitted to be the same both in the initial and final notifications. It is immaterial that Section 24 of the Act of 1919 lists eight types of schemes. We have not been shown how any feature of the originally framed scheme, apart from an acquisition by it of a new Hindi appellation, was altered so that it could not be continued under Section 97 (3) of the Adhiniyam of 1966 which lays down:

"97 (3) Every scheme and all proceedings relating thereto under the U. P. Town Improvement Act, 1919

(U. P. Act VIII of 1919), including proceedings for the levy, assessment or recovery of betterment tax, pending on the appointed day shall stand transferred to the Board, which shall proceed further with the scheme or with the execution thereof or with the levy, assessment or recovery of betterment fee in connection therewith, from the stage at which it was transferred to it, in accordance with the corresponding provisions of this Act:

Provided that the Board may, if it thinks fit, recall any step or proceeding already gone through under the said Act and take that step or proceeding afresh under the corresponding provision of this Act".

16. The third objection appeals, at first sight, to be a little more substantial than the first two, but, on closer examination, we find it to be also untenable for reasons we now proceed to give.

17. We have already noticed that the dates of notifications under Section 36 of the Act of 1919, and under Section 32 (1) of the Adhiniyam of 1966 were 13th March, 1965, and 3rd May, 1969, respectively.

18. Section 36 of the Act of 1919 provided:

"36. Preparation, publication and transmission of notice as to improvement schemes, and supply of documents to applicants.— (1) When any improvement scheme has been framed, the Trust shall prepare a notice, stating:—

(a) the fact that the scheme has been framed.

(b) the boundaries of the area comprised in the scheme, and

(c) the place at which particulars of the scheme, a map of the area comprised in the scheme, and a statement of the land which it is proposed to acquire, may be seen at reasonable hours

(2) The Trust shall:—

(a) cause the said notice to be published weekly for three consecutive weeks in the Official Gazette and in a local newspaper or newspapers (if any) with a statement of the period within which objections will be received, and

(b) send a copy of the notice to the Chairman of the Municipal board

(3) The Chairman shall cause copies of all documents referred to in Clause (c) of sub-section (1) to be delivered to any applicant on payment of such fees as may be prescribed by rule under Section 73".

Section 56 of the Act of 1919 reads:

"56. Power to acquire land under the Land Acquisition Act, 1894.— The Trust may, with the previous sanction of the State Government, acquire land under the provisions of the Land Acquisition Act, 1894, as modified by the provisions of this Act, for carrying out any of the purposes of this Act."

19. Section 58 of the Act indicates that the modifications made by the Act subject to which the procedure of the Land Acquisition Act of 1894 is to be applied to a scheme under the Act, are given in paragraph 2 of the schedule to the Act which lays down:

"2. Notification under Section 4 and declaration under Section 6 to be replaced by notifications under Sections 36 and 42 of this Act.—

(1) The first publication of a notice of an improvement scheme under Section 36 of this Act shall be substituted for and have the same effect as publication in the Official Gazette and in the locality, of a notification under sub-section (1) of Section 4 of the said Act, except where a declaration under Section 4 or Section 6 of the said Act has previously been made and is still in force.

(2) Subject to the provisions of Sections 10 and 11 of this Schedule, the issue of a notice under sub-section (4) of Section 29 in the case of land acquired under that sub-section, and in any other case the publication of a notification under Section 42 shall be substituted for and have the same effect as a declaration by the State Government under Section 6 of the said Act, unless a declaration under the last mentioned section has previously been made and is still in force."

20. Section 97 of the Adhiniyam, already set out above, applies the corresponding provisions of the Adhiniyam of 1966 to proceedings begun under the Act of 1919.

21. It is clear, from the provisions set out above, that the Act and

the Adhiniyam apply Sections 4 and 6 of the Land Acquisition Act, 1894, to the acquisition for the scheme before us in so far as their effects are concerned. It is arguable that, if the effectiveness of the notifications under Sections 4 and 6 of the Land Acquisition Act is cut down or modified or amended in any way, subsequent to the date of the passing of the Adhiniyam, the amendments may not apply, but the effect of the notifications, when the Act and the Adhiniyam were enacted, would be all that need be considered. It is true that the notices are procedural matters, but they affect substantive rights as well. The date of notification under Section 4 affects the amount of compensation which may be determined and a notification under Section 6 operates as conclusive evidence that the land is needed for a public purpose and enables the appropriate Government to proceed to acquire the land. Nevertheless, an acquisition under Section 56 of the repealed Act as well as under Section 55 of the Adhiniyam of 1966 takes place expressly "under" the Land Acquisition Act of 1894. This may well mean that, if the machinery of acquisition is modified in some respect by an amendment, the amended machinery alone can apply. The High Court had not decided this question. We also think that it is not necessary for us to decide this question as it has not been argued on behalf of the respondent, that the amendment of the Land Acquisition Act, 1967, would not apply here. We, therefore, proceed on the assumption that the Land Acquisition Act as amended in 1967, was applicable here.

22. Section 4 (2) of the Land Acquisition (Amendment and Validation) Act 1967, lays down:

"4 (2) Notwithstanding anything contained in Cl. (b) of sub-section (1), no declaration under Section 6 of the principal Act in respect of any land which has been notified before the commencement of the Land Acquisition (Amendment and Validation) Ordinance, 1967, under sub-s. (1) of Section 4 of the Principal Act, shall be made after the expiry of two years from the commencement of the said Ordinance."

23. In the case before us, the first notification under Section 36 of the Act, having been equated with the preliminary notification under Section 4 of the Land Acquisition Act and published on 13th March, 1965, the "declaration" under Section 6 had to be made within two years of the coming into force of the Ordinance on 20th January, 1967. Neither the declaration nor the actual notification have been placed before us. Nevertheless, the contention on behalf of the appellant is that, as the notification under Section 32 (1) of the Adhiniyam took place on 3rd May, 1969, no declaration under Section 6 of the Land Acquisition Act could be made on this date, the last date for such declaration being 19th January, 1969. No doubt both sides are agreed that, as the judgment of the High Court reveals, the date of the notification under Section 32 (1) of the Adhiniyam is 3rd May, 1969. We, however, think that the appellant's contention before us ignores the very apparent distinction made in the provisions of Section 6 of the Land Acquisition Act between a declaration and its notification.

24. Section 6 of the Land Acquisition Act reads as follows:

"6 (1) Subject to the provisions of Part VII of this Act, when the appropriate Government is satisfied, after considering the report, if any, made under Section 5A, sub-section (2), that any particular land is needed for a public purpose or for a Company, a declaration shall be made to that effect under the signature of a Secretary to such Government or of some officer duly authorised to certify its orders, and different declarations may be made from time to time in respect of different parcels of any land covered by the same notification under S. 4, sub-s. (1), irrespective of whether one report or different reports has or have been made (wherever required) under S. 5A, sub-s. (2):

Provided that no declaration in respect of any particular land covered by a notification under Section 4, sub-section (1), published after the commencement of the Land Acquisition (Amendment and Validation) Ordinance, 1967, shall be made after the expiry of three years from the date of such publication:

Provided further that no such declaration shall be made unless the compensation to be awarded for such property is to be paid by a Company, or wholly or partly out of public revenues or some fund controlled or managed by a local authority.

(2) Every declaration shall be published in the Official Gazette, and shall state the district or other territorial division in which the land is situate, the purpose for which it is needed, its approximate area, and where a plan shall have been made of the land, the place where such plan may be inspected.

(3) The said declaration shall be conclusive evidence that the land is needed for a public purpose or for a Company, as the case may be; and after making such declaration, the appropriate Government may acquire the land in manner hereinafter appearing."

25. It is clear from the provisions set out above that the object of the notification under Section 6 is to ensure that the Govt. is duly satisfied, after an enquiry at which parties concerned are heard, that the land under consideration is really needed for a public purpose and that the declaration is to operate as conclusive evidence to show that this is so. The conclusiveness of this declaration cannot be questioned anywhere if the procedure dealing with its making has been observed. The notification which takes place under Section 6 (2), set out above, follows and serves only as evidence of the declaration. That the declaration mentioned in Section 6 (1), set out above, differs from its notification is shown by the fact that it has to be signed by a Secretary or other officer duly authorised. The declaration is in the form of an order. The notification is its publication and proof of its existence. It has been shown, in the case before us, that the deemed notification under Section 6 took place about three and a half months after the expiry of two years from the commencement of the Ordinance of 1967. But, it is not argued on behalf of the appellant that the declaration under Section 6 was similarly delayed. Presumably, it was within time

26. A look at the amendment introduced by Section 4 (2) of the Land Acquisition (Amendment and Validation) Act, 1967, shows that it is the declaration which has to take place within two years of the expiry of the commencement of the Ordinance which came into force on 20th January, 1967. In fact, Section 4 (2) of the Amendment Act of 1967, set out above, itself makes a distinction between a "declaration" under Section 6 and its "notification" under Section 4 of the principal Act. It does not say that no notification under Section 6 of the principal Act can take place beyond the time fixed. The prohibition is confined to declarations made beyond the specified period. If the case of the appellant could be that no declaration was made within the prescribed time, it was his duty to prove it. He has not discharged that onus.

27. As indicated by the Division Bench of the Allahabad High Court, the amendment of 1967, was the result of a decision of this Court in the State of Madhya Pradesh v. Vishnu Prasad Sharma, (AIR 1966 SC 1593) holding successive notifications, under Section 6, with excessive intervening delay between a notification under Section 4 (2) and a declaration under Section 6, keeping the owner or other person entitled to compensation in suspense all the time, to be illegal. It may be that, if an unreasonable delay between a declaration and its notification is shown to exist, it may raise a suspicion about the existence of the declaration itself or about the bona fides of acquisition proceedings. This, however, is not the position in the case before us. Neither the existence nor the bona fides of the declaration have been questioned. It has not been either asserted or shown, as already mentioned, that no declaration was made within the period of time fixed for it. We, therefore, reject the last objection also.

28. Consequently, we dismiss this appeal, but, in the circumstances of the case, we make no order as to costs.

Appeal dismissed.

AIR 1976 SUPREME COURT 424

(From: AIR 1972 Madh Pra 86)

K. K. MATHEW, P. K. GOSWAMI
AND N. L. UNTWALIA, JJ.

State Govt. of Madhya Pradesh,
Appellant v. Ramnaresh Swamy and
another, Respondents.

Civil Appeal No. 1830 of 1972,
D/- 4-12-1975.

(A) M. P. Minor Minerals Rules (1961), Rule 6 (1), Appendix Form I — Application for minor minerals — Respondent No. 2 mentioning in Column 6 of Para 3 "limestone for burning" by merely copying from 1958 notification of Govt. of India ignoring 1961 notification — Respondent No. 1 using expression "limestone used in kilns for manufacture of lime used as building material" in his application — Application of Respondent No. 2, held, could not be considered to be an application for quarrying limestone for burning as a minor mineral — The High Court, held rightly quashed the order of State Govt. granting lease to Respondent No. 2. AIR 1972 Madh Pra 86, Affirmed. AIR 1975 SC 991, Distinguished. (Para 2)

Cases Referred: Chronological Paras
AIR 1975 SC 991 = 1975 UJ (SC)

129 2
(1970) Misc. Petn. No. 3 of 1968, D/-
2-9-1970 (Madh Pra) 1, 2

Mr. Ram Panjwani, Dy. Adv. Genl. (M. P.), (Mr. H. S. Parihar, Advocate with him), for Appellant; Mr. G. L. Sanghi, Sr. Advocate, (M/s. P. V. Lele and A. G. Ratnaparkhi, Advocates with him), (for No. 1) and Mr. S. K. Bisaria, Advocate, (for No. 2 (i)).

Judgment of the Court was delivered by

UNTWALIA, J.:— The appellants in this appeal by special leave are the State Government of Madhya Pradesh and their Director of Geology and Mining. Ramnaresh Swamy and H. P. Pathak are respondents 1 and 2 respectively. Respondent No. 2 made an application to the State Government on May 13, 1966 for a quarry lease in respect of 33.63 acres of land for quarrying limestone for burning. His application was not disposed of within the time allowed by Rule 8

(2) of the Madhya Pradesh Minor Minerals Rules, 1961 — hereinafter called the Rules. In the meantime, respondent No. 1 filed an application on January, 8, 1968 for grant of a quarry lease to him in respect of Khasra No. 346, area 1.31 acres in Mouza Amehta. This land formed part of the large area in respect of which respondent No. 2 had applied for a quarry lease. His application also was not disposed of in time by the officer concerned. Respondent No. 1 filed an appeal under the Rules before the State Government on July 15, 1968. The appeal was transferred to the Board of Revenue for disposal. The Board ultimately remanded the case for reconsideration on merits. Respondent No. 2 had applied to the State Government for review against the deemed rejection of his application for a quarry lease. On the 16th of June, 1969, the State Government reviewed the order and sanctioned the grant of lease to respondent No. 2 in respect of Khasra No. 346 area 1.31 acres for a period of 10 years. On the same date, respondent No. 1 filed an application before the State Government for reconsideration and reviewing its order of the date. This application was dismissed by the State Government by their order dated the 5th September, 1970. Respondent no. 1 filed writ petition (MP. No. 570/1970) in the Madhya Pradesh High Court and prayed for the quashing of the orders of the State Government dated the 16th June, 1969 and 5-9-1970. The High Court has quashed the earlier order and held the later order to be infructuous. It has expressed the view following its decision in Misc. Petn. No. 3 of 1968 decided on 2-9-1970 (Madh. Pra.) (Gorelal Dubey v. State of Madhya Pradesh) that the application filed by respondent no. 2 and the grant of lease in his favour was not for a minor mineral. The State has filed this appeal by special leave.

2. In the appeal arising out of the aforesaid decision of the High Court in Gorelal Dubey's case following the decision of this Court in Smt. Rukmani Bai Gupta v. State Government of Madhya Pradesh, Bhopal, AIR 1975 SC 991 we have held that the application by Gorelal Du-

bey and the lease granted in his favour was for a minor mineral because in Column 6 of Paragraph 3 of the application, the applicant had stated that he wanted to extract limestone as a minor mineral. Reading the said column with his statement in paragraph 1 we held that in substance the application was for quarrying limestone for burning as a minor mineral as was the position in Rukmani Bai's case. But we are unable to hold so in this case. The application filed by respondent No. 2 mentioned in Column 6 of paragraph 3 "limestone for burning." In this application the expression "limestone for burning" was merely copied from the 1958 notification of the Government of India completely ignoring the 1961 notification. On the other hand, respondent No. 1 had used the expression "limestone used in kilns for manufacture of lime used as building material." in column 6 of paragraph 3 of the application. On the facts of this case, therefore, we do not feel persuaded to interfere with the judgment and order of the High Court. We accordingly dismiss the appeal but make no order as to costs.

Appeal dismissed.

AIR 1976 SUPREME COURT 425*

(From: Patna)*

Y. V. CHANDRACHUD, V. R.
KRISHNA IYER AND A. C.
GUPTA, JJ.

Rohtas Industries Ltd. and another, Appellants v. Rohtas Industries Staff Union and others, Respondents.

Civil Appeals Nos. 1727-1728 of 1968, D/- 18-2-1975.

(A) Constitution of India, Art. 227 — Arbitrator functioning under Sec. 10A of Industrial Disputes Act is a statutory Tribunal — Award — Apparent error of law — Award can be set aside. (Industrial Disputes Act (1947), Section 10A (as amended in 1964)).

The arbitrator under Sec. 10A of the Industrial Disputes Act, (as am-

* (M. J. C. Nos. 475 and 478 of 1959 D/- 2-5-1962—Pat.)

LS/LS/E581/75/GGM

ended in 1964) has power to bind even those who are not parties to the reference or agreement and the whole exercise under Section 10A as well as the source of the force of the award on publication derives from the statute. It is legitimate to regard such an arbitrator as part of the methodology of the sovereign's dispensation of justice, thus falling within the rainbow of statutory tribunals amenable to judicial review. An award under Section 10A is not only not invulnerable but more sensitively susceptible to the writ lancet being a quasi-statutory body's decision. Admittedly, such an award can be upset if an apparent error of law stains its face. The distinction, in this area, between a private award and one under Section 10A is fine, but real. AIR 1963 SC 874, Foll.

(Paras 11 and 12)

(B) Constitution of India, Article 226 — Power of High Court — Nature of — Writ can affect private individual — Alternative remedy not an absolute bar.

The expansive and extraordinary power of the High Courts under Article 226 is as wide as the amplitude of the language used indicates and so can affect any person — even a private individual — and be available for any (other) purpose — even one for which another remedy may exist. The amendment to Art. 226 in 1963 inserting Art. 226 (1A) reiterates the targets of the writ power as inclusive of any person by the expressive reference to 'the residence of such person'. The Supreme Court has spelt out wise and clear restraints on the use of this extraordinary remedy and High Courts will not go beyond those wholesome inhibitions except where the monstrosity of the situation or other exceptional circumstances cry for timely judicial interdict or mandate. The mentor of law is justice and a potent drug should be judiciously administered. Speaking in critical retrospect and portentous prospect, the writ power has, by and large, been the people's sentinel on the qui vive and to cut back on or liquidate that power may cast a peril to human rights.

(Para 9).

(C) Precedents — Orders of Statutory Tribunal — Judicial review — English Law — Persuasive value.

English law is not binding on the Supreme Court, but the jurisprudence of judicial review in this branch is substantially common for Indian and Anglo-American systems and so Halsbury has considerable persuasive value. The wider emergence of common canons of judicial review is a welcome trend towards a one-world public law. (Para 13)

(D) Constitution of India, Article 227 — Error of law apparent — Award by arbitrator under Section 10A of the Industrial Disputes Act — Illegal strike by workers — Loss of profit — Whether compensation is to be awarded involves question of law.

In order to determine whether an award by the arbitrator under Section 10A of the Industrial Disputes Act suffers from errors of law apparent on the face of it, what is important is a question of law arising on the face of the facts found and its resolution *ex facie* or *sub silentio*. The arbitrator may not state the law as such. Even then such cute silence confers no greater or subtler immunity on the award than plain speech. The need for a speaking order, where considerable numbers are affected in their substantial rights, may well be a facet of natural justice or fair procedure. If erroneous law is found as the necessary buckle between the facts found and the conclusions recorded, the award bears its condemnation on its bosom. A minimal judicialisation by statement, laconic or lengthy, of the essential law that guides the decision, is not only reasonable and desirable but has, over the ages, been observed by arbitrators and quasi-judicial tribunals as a norm of processual justice. AIR 1967 SC 378, (1969) 1 SCWR 66, AIR 1967 SC 361, AIR 1923 PC 66, (1857) 3 CB (NS) 189. (1944) 1 KB 566. Ref.

(Para 16)

Determination by the arbitrator as to whether illegal strike by workers causing loss of profit is a delict justifying award of damages involves a question of law. (Para 17)

(E) Industrial Disputes Act (1947), Ss. 2 (k), 10A, 24 and 26 — Illegal

strike by workmen — Award granting compensation to employer for loss of business through illegal strike — Award is illegal — Such compensation is not a dispute.

Since the Industrial Disputes Act which creates rights and remedies has to be considered as one homogeneous whole, it has to be regarded *uno flatu*, in one breath, as it were. On this doctrinal basis, the remedy for the illegal strike (a concept which is the creature not of the common law but of Sec. 24 of the Act) has to be sought exclusively in Sec. 26 of the Act. The claim for compensation and the award thereof in arbitral proceedings is invalid on its face. Such a compensation for loss of business is not a dispute or difference between employers and workmen 'which is connected with the employment or non-employment or the terms of employment or with the conditions of labour, of any person; AIR 1975 SC 2238, Foll. 1897 AC 615, AIR 1949 FC 111, Ref. (Para 29)

Cases Referred: Chronological Paras

AIR 1975 SC 2238 =	1975 Lab IC	
1651		28
(1969) 1 SCWR 66		13
AIR 1967 SC 361 =	(1967) 1 SCR	
739		13
AIR 1967 SC 378 =	(1967) 1 SCR	633
		13
AIR 1963 SC 874 =	1963 Supp (1)	
SCR 625		10
AIR 1949 FC 111 =	(1949) 1 Lab LJ	
245		30
(1944) 1 KB 566 =	113 LJ KB	567
		15
1925 AC 700 =	94 LJ Ch 347	19, 22
AIR 1923 PC 66 =	50 Ind App	324
		14
1901 AC 495		19
1898 AC 1 =	67 LJQB 14	19
1897 AC 615 =	66 LJQB 672	28
1892 AC 25 =	61 LJ QB 295	19, 20
(1857) 3 CB (NS) 189 =	140 ER 712	
		14
(1831) 1 B & Ad 347 =	109 ER 1001	
		28

Mr. A. B. N. Sinha, Sr. Advocate, (M/s. S. P. Maheshwari and Suresh Sethi, Advocates with him), for Appellants in both the Appeals; Mr. B. C. Ghose, Sr. Advocate, (M/s. S. S. Jauhar, D. N. Pandey, A. Sinha and D. P. Mukherjee, Advocates with him), (for No. 1) in Civil Appeal No.

1727 of 1968 and (for Nos. 1-3) in Civil Appeal No. 1728 of 1968; Mr. D. P. Singh Sr. Advocate, (M/s. S. C. Agarwal and V. J. Francis Advocates with him), (for Nos. 7 and 8) in Civil Appeal No. 1727 and (for No. 4) in Civil Appeal No. 1728 of 1968, for Respondents.

Judgment of the court was delivered by

KRISHNA IYER, J.:— We permit ourselves a few preliminary observations disturbingly induced by the not altogether untypical circumstances of these two appeals, before proceeding to state the facts, set out the submissions and decide the points.

2. Industrial law in India has not fully lived up to the current challenges of industrial life, both in the substantive norms or regulations binding the three parties—the State, Management and Labour—and in the processual system which has baulked, by dawdling dysfunction, early finality and prompt remedy in a sensitive area where quick solution is of the very essence of real justice. The legislative and judicial processes have promises to keep if positive industrial peace, in tune with distributive economic justice and continuity of active production, were to be accomplished. The architects of these processes will, we hopefully expect, fabricate creative changes in the system normative and adjectival.

3. The two appeals before us, passported by special leave under Art. 136, relate to an industrial dispute with its roots in 1948, meandering along truce, union rivalry and the like, into strikes and settlements, the last of which led to an arbitration award in 1959 which, in turn, prompted two writ petitions before the High Court. After a spell of a few years they ripened into a judgment. Appeals to this Court followed and, after long gestation of six years for preparation of papers and a like period for the cases to be ready for final hearing or parturition, in all 12 years after the grant of leave, they have now come up. By this cumulative lapse of time the generation of workers who struck work two decades ago have themselves all but retired, the representative Union itself

which sponsored the dispute has, the other side faintly states, ceased to command representative character, the Managements themselves have, out of many motives, disclaimed the intention to recover the huge sums awarded to them by the arbitrators and the only survival after death, as it were, is a die-hard litigation tied up to a few near-academic, but important, legal points for adjudication by the highest Bench. On this elegiac note we will enter the relevant area of facts and law since we must decide cases brought before us, however stale the lis.

4. At this stage we may mention our strong feelings that where the superior courts, after hearing full arguments, are clearly inclined to affirm the judgment under appeal for substantially similar reasons as have weighed with the lower Court, there is no need to give lengthy reasons for dismissing the appeal. Brevity, except in special cases, may well fill the bill where the fate is dismissal. On this score we are disposed to make short shrift of the appeals with stating but the necessary facts and focusing on the larger legal facets. Nevertheless, the significance and plurality of the points pressed have defeated condensation.

5. The facts:

Two connected managements of industries in the same locality, who figure as appellants before us, had a running industrial dispute with their workers, which has had a long history moving in a zigzag course and sicklied over by alleged interne-cine trade-union strife. There were two trade unions which were perhaps of competitive strength and enjoying recognition. One of them, the Rohtas Industries Mazdoor Sangh (for short, the Mazdoor Sangh) was the representative union during the relevant period while the other, the Rohtas Industries Seva Sangh (for brevity, the Seva Sangh) is not a party before this Court and so we are not concerned with it except for the purpose of noticing its presence in the settlement of the dispute which starts the story so far as the litigation is concerned. There was a strike in the Industry (for our purposes this expression embraces both the appel-

lants) which came to an end by virtue of a memorandum of agreement dated October 2, 1957, to which not merely the management but also the two registered unions afore-mentioned and the two un-registered unions which had a lesser following, were party. The terms of the said agreement provided inter alia that

"The employees' claim for wages and salaries for the period of strike and the company's claim for compensation for losses due to strike shall be submitted for arbitration of Shri J. N. Majumdar and Shri. R. C. Mitter, Ex-High Court Judges and Ex-Members of the Labour Appellate Tribunal of India as joint arbitrators and their decisions on the two questions shall be final and binding on all the parties." (Clause 7 of agreement.)

This agreement was admittedly arrived at during conciliation proceedings contemplated by the Industrial Disputes Act, 1947 (for short, the Act) and the reference to arbitration spelt out in Clause 7 directly and admittedly fell under Section 10A of the Act.

6. It is apparent that the arbitrators were seized of two questions: (a) the claim of the workers for wages for the period of strike; and (b) the claim of the management for compensation for its losses flowing from the strike. The Board of arbitrators, two retired Judges of the Calcutta High Court — held extensive hearings spread over a year and a half, made a lengthy award marshalling the evidence, adducing the reasons, discussing the law and recording its decision on the two vital issues. At the end of the detailed and reasoned record of conclusions, the award runs thus:

"Our award accordingly is:—

(1) That the workmen participating in the strike are not entitled to wages and salaries for the period of the strike.

(2) That the company do recover from the workmen participating in the strike, compensation assessed at Rs. 80,000 (rupees eighty thousand).

(3) That the workmen jointly and severally do pay to the company one eighth of the total costs of the arbi-

tration. In default of payment the company will be at liberty to recover the same in such manner as it thinks fit. Subject to this the parties do bear their respective costs."

7. The workmen were deprived of their wages during the period of the strike on the score that it was an illegal strike. Both sides seem to have accepted this finding after an unsuccessful challenge in the High Court and happily industrial peace is said to be prevailing currently. What did hurt the Mazdoor Sangh more and what the management did try to have and to hold as a bonanza was the second finding that the strikers, apart from forfeiting wages, do pay compensation in the huge sum of Rs. 6,90,000/- in one case and Rupees 80,000/- in the other, for the loss of profits suffered by the manufacturing business of the management, a pronouncement unusual even according to counsel for the appellant, although sustainable in law, according to him. For the workers this unique direction of industrial law is fraught with ominous consternation and dangerous detriment. The Mazdoor Sangh challenged the award as illegal and void by filing two writ petitions but the High Court quashed that part of the award which directed payment of compensation by the workers to the management and, as earlier pointed out, both sides have chosen to abide by the award in relation to the denial of wages during the strike period.

8. The Main Points Urged:

The short but important issue, which has projected some serious questions of law, is as to whether the impugned part of the award has been rightly voided by the High Court. We may as well formulate them but highlight the only major submission that merits close examination, dealing with the rest with terse sufficiency. In logical order, counsel for the appellant urged that (1) (a) an award under Section 10A of the Act savours of a private arbitration and is not amenable to correction under Art. 226 of the Constitution. (b) Even if there be jurisdiction, a discretionary desistance from its exercise is wise, proper and in consonance with the canons of restraint this Court has set down. (2)

The award of compensation by the arbitrators suffers from no vice which can be regarded as a recognised ground for the High Court's interference. (3) The view of law taken by the High Court on (i) the supposed flaw in the award based on 'mixed motives' for the offending strike; (ii) the exclusion of remedies other than under Section 22 of the Act; and (iii) the implied immunity from all legal proceedings against strikers allegedly arising from Section 18 of the Trade Unions Act, 1926 is wrong. A few other incidental arguments have cropped up but the core contentions are what we have itemised above.

9. (1) (a) & (b):

The expansive and extraordinary power of the High Courts under Article 226 is as wide as the amplitude of the language used indicates and so can affect any person—even a private individual — and be available for any (other) purpose, even one for which another remedy may exist. The amendment to Art. 226 in 1963 inserting Art. 226 (1-A) reiterates the targets of the writ power as inclusive of any person by the expressive reference to 'the residence of such person.' But it is one thing to affirm the jurisdiction, another to authorise its free exercise like a bull in a china shop. This Court has spelt out wise and clear restraints on the use of this extraordinary remedy and High Courts will not go beyond those wholesome inhibitions except where the monstrosity of the situation or other exceptional circumstances cry for timely judicial interdict or mandate. The mentor of law is justice and a potent drug should be judiciously administered. Speaking in critical retrospect and portentous prospect, the writ power has, by and large, been the people's sentinel on the qui vive and to cut back on or liquidate that power may cast a peril to human rights. We hold that the award here is not beyond the legal reach of Article 226, although this power must be kept in severely judicious leash.

10. Many rulings of the High Courts, pro and con, were cited before us to show that an award under Section 10A of the Act is insulated from interference under Art. 226 but

we respectfully agree with the observations of Gajendragadkar J., (as he then was) in Engineering Mazdoor Sabha, (1963) Supp 1 SCR 625 = (AIR 1963 SC 874) which nail the argument against the existence of jurisdiction. The learned Judge clarified (at p. 640 of SCR) = (at p. 881 of AIR):

"Article 226 under which a writ of certiorari can be issued in an appropriate case, is, in a sense, wider than Art. 136, because the power conferred on the High Courts to issue certain writs is not conditioned or limited by the requirement that the said writs can be issued only against the orders of Courts or Tribunals. Under Art. 226 (1), an appropriate writ can be issued to any person or authority, including in appropriate cases any Government, within the territories prescribed. Therefore even if the arbitrator appointed under Section 10A is not a Tribunal under Art. 136 in a proper case, a writ may lie against his award under Article 226." (page 640)

11. We agree that the position of an arbitrator under Section 10A of the Act (as it then stood) vis a vis Art. 227 might have been different. Today, however, such an arbitrator has power to bind even those who are not parties to the reference or agreement and the whole exercise under Section 10A as well as the source of the force of the award on publication derives from the statute. It is legitimate to regard such an arbitrator now as part of the methodology of the sovereign's dispensation of justice, thus falling within the rainbow of statutory tribunals amenable to judicial review. This observation made en passant by us is induced by the discussion at the bar and turns on the amendments to Section 10A and cognate provisions like Section 23, by Act XXXVI of 1964.

12. Should the Court invoke this high prerogative under Art. 226 in the present case? That depends. We will examine the grounds on which the High Court has, in the present case, excised a portion of the award as illegal, keeping in mind the settled rules governing judicial review of private arbitrator's awards. Suffice it to say, an award under

Section 10A is not only not invulnerable but more sensitively susceptible to the writ lancet being a quasi-statutory body's decision. Admittedly, such an award can be upset if an apparent error of law stains its face. The distinction, in this area, between a private award and one under Section 10A is fine, but real. However it makes slight practical difference in the present case, in other cases it may. The further grounds for invalidating an award need not be considered as enough unto the day is the evil thereof.

Thus, we arrive at a consideration of the appellant's second submission, perhaps the most significant in the case, that the High Court had no legitimate justification to jettison the compensation portion of the award. Even here, we may state that counsel for the appellants, right at the outset, mollified possible judicial apprehensions springing from striking workers being held liable for loss of management's profits during the strike period by the assurance that his clients were inclined to abandon realisation of the entire compensation, even if this Court upheld that part of the award in reversal of the judgment of the High Court — a generous realism. He fought a battle for principle, not pecunia. We record this welcome fact and proceed on that footing.

13. The relevant law which is beyond controversy now has been clearly stated in Halsbury's Laws of England thus:

"Error of law on the face of award: An arbitrator's award may be set aside for error of law appearing on the face of it, though the jurisdiction is not lightly to be exercised..... The jurisdiction is one that exists at common law independently of statute. In order to be a ground for setting aside the award, an error in law on the face of the award must be such that there can be found in the award, or in a document actually incorporated with it, some legal proposition which is the basis of the award and which is erroneous.

.....where the question referred for arbitration is a question of construc-

tion, which is, generally speaking, a question of law, the arbitrator's decision cannot be set aside only because the court would itself have come to a different conclusion; but if it appears on the face of the award that the arbitrator has proceeded illegally, as for instance, by deciding on evidence which was not admissible, or on principles of construction which the law does not countenance, there is error in law which may be ground for setting aside the award.

(Para 623, p. 334, Vol. 2, Fourth Edn.)

We adopt this as sound statement of the law. Not that English law binds us but that the jurisprudence of judicial review in this branch is substantially common for Indian and Anglo-American systems and so Halsbury has considerable persuasive value. The wider emergence of common canons of judicial review is a welcome trend towards a one-world public law. Indeed, this Court has relied on the leading English decisions in several cases. We may content ourselves with adverting to *Bungo Steel Furniture*, (1967) 1 SCR 633 = (AIR 1967 SC 378) and to the unreported decision *Babu Ram, C. A. No. 107 of 1966* decided on 5-12-1968 (SC) = reported in (1969) 1 SCWR 66. In simple terms, the Court has to ask itself whether the arbitrator has not tied himself down to an obviously unsound legal proposition in reaching his verdict as appears from the face of the award. *Bhargava J.*, speaking for the majority, in *Bungo Steel* stated the law:

"It is now a well-settled principle that if an arbitrator, in deciding a dispute before him, does not record his reasons and does not indicate the principles of law on which he has proceeded, the award is not on that account vitiated. It is only when the arbitrator proceeds to give his reasons or to lay down principles on which he has arrived at his decisions that the Court is competent to examine whether he has proceeded contrary to law and is entitled to interfere if such error in law is apparent on the face of the award itself."

(p. 640-641)

In *Bharat Barrel & Drum Mfg. Co.*, AIR 1967 SC 361 dealing with a pri-

vate award and the conditions necessary for exercise of writ jurisdiction to correct an error of law apparent on the record, did not lay down the law differently from what we have delineated.

14. In one of the leading English cases *Champsey Bhara & Co.*, 50 Ind App 324 = (AIR 1923 PC 66) followed in India, Lord Dunedin defined 'error of law on the face of the award' as 'where the question of law necessarily arises on the face of the award or upon some paper accompanying and forming part of the award' and said that then only the error of law therein would warrant judicial correction. The law Lord expressed himself lucently when he stated:

"An error in law on the face of the award means, in their Lordships' view, that you can find in the award some legal proposition which is the basis of the award and which you can then say is erroneous."

Williams J., in the case of *Hodgkinsons v. Feraie*, (1857) 3 CB (NS) 189 hit the nail on the head by using the telling test as firmly established, viz., 'where the question of law necessarily arises on the face of the award'. In this view the enquiry by the Court before venturing to interfere is to ascertain whether an erroneous legal proposition is the basis of the award. Nay, still less. Does a question of law (not even a proposition of law) necessarily arise on the award followed by a flawsome finding explicit or visibly implicit? Then the Court can correct.

15. Tucker J., in *James Clark*, (1944) 1 KB 566 formulates the law to mean that if the award were founded on a finding which admits of only one proposition of law as its foundation and that law is erroneous on its face, the Court has the power and, therefore, the duty to set right. While the Judge cannot explore, by chasing subterranean routes or ferret out by delving deep what lies buried in the unspoken cerebration of the arbitrator and interfere with the award on the discovery of an error of law by such adventure, it is within his purview to look closely at the face of the award to discern the law on

which the arbitrator has acted if it is transparent, even translucent but lingering between the lines or merely wearing a verbal veil. If by such an intelligent inspection of the mien of the award — which is an index of the mind of the author — an error of law forming the basis of the verdict is directly disclosed, the decision is liable to judicial demolition. In *James Clark*, the issue was posed with considerable clarity and nicety. If, at its face value, the award appears to be based on an erroneous finding of law alone, it must fail. The clincher is that the factual conclusion involving a legal question must necessarily be wrong in point of law. Even though the award contains no statement of the legal proposition, if the facts found raise 'a clear point of law which is erroneous on the face of it', the Court may rightly hold that an error of law on the face of the award exists and invalidates.

16. Let us put the proposition more expressively and explicitly. What is important is a question of law arising on the face of the facts found and its resolution *ex facie* or *sub silentio*. The arbitrator may not state the law as such. Even then such mute silence confers no greater or subtler immunity on the award than plain speech. The need for a speaking order, where considerable numbers are affected in their substantial rights, may well be a facet of natural justice or fair procedure, although, in this case, we do not have to go so far. If, as here, you find an erroneous law as the necessary buckle between the facts found and the conclusions recorded, the award bears its condemnation on its bosom. Not a reference in a narrative but a clear legal nexus between the facts and the finding. The law sets no premium on juggling with drafting the award or hiding the legal error by blanking out. The inscrutable face of the sphinx has no better title to invulnerability than a speaking face which is a candid index of the mind. We may, by way of aside, express hopefully the view that a minimal judicialisation by statement, laconic or lengthy, of the essential law that guides the decision, is not only reasonable and desirable but has, over

the ages, been observed by arbitrators and quasi-judicial tribunals as a norm of processual justice. We do not dilate on this part of the argument as we are satisfied that be the test the deeply embedded rules to issue certiorari or the traditional grounds to set aside an arbitration award 'thin partition do their bounds divide' on the facts and circumstances of the present case.

17. The decisive question now comes to the fore. Did the arbitrators commit an error of law on the face of the award in the expanded sense we have explained? The basic facts found by the arbitrators are beyond dispute and admit of a brief statement. We summarise the fact situation succinctly and fairly when we state that according to the arbitrators, the strike in question was in violation of Section 24 of the Act and therefore illegal. This illegal strike animated by inter-union power struggle, inflicted losses on the management by forced closure. The loss flowing from the strike was liable to be recompensed by award of damages. In this chain of reasoning is necessarily involved the question of law as to whether an illegal strike causing loss of profit is a delict justifying award of damages. The arbitrators held, yes. We hold this to be an unhappy error of law — loudly obtrusive on the face of the award. We may as well set out, for the sake of assurance, the simple steps in the logic of the arbitrators best expressed in their own words which we excerpt:

"(a) It is argued that strike is a legitimate weapon in the hands of workmen for redressal of their grievances and if they are made liable for loss on account of strike then the basic idea of strike as a means for having the grievances redressed will be taken away. The fallacy in this argument is that it presupposes the strike not to be illegal and unjustified. In the present case we found the strike to be otherwise. The workmen have got no right of getting their grievances redressed by resorting to illegal means which is an offence.

(b) It has been argued that the claim for compensation is not an

industrial dispute as defined in the Industrial Disputes Act. Considering the issue of compensation in a water-tight compartment the argument might appear to be attractive. But, in our opinion, in this case the claim for compensation by the company is a consequence flowing from an admitted industrial dispute, which in this case is whether the strike was illegal and/or unjustified and as against the condition of service as laid down in the certified standing order on which point our finding has been against the workmen....."

18. The award of the Tribunal, in its totality, is quite prolix, the reasons stated in arguing out its conclusions many and thus it is just to state that in the present case the arbitrators — two retired Judges of the Calcutta High Court — have made a sufficiently speaking award both on facts and on law. They have referred to the strike being illegal with specific reference to the provisions of the Act, but faulted themselves in law by upholding a case for compensation as axiomatic, necessarily based on a rule of common law i.e., English common law. The rule of common law thus necessarily arising on the face of the award is a clear question of law.

19. What is this rule of common law? Counsel for the appellants inevitably relied on the tort of 'conspiracy' and referred us to *Moghul Steamship Co.*, 1892 AC 25; *Allen v. Flood*, 1898 AC 1; *Quinn v. Leatham*, 1901 AC 495 and *Sorrel v. Smith*, 1925 AC 700. These decisions of the English Courts are a response to the societal requirements of the industrial civilisation of the 19th Century England. Trade and Industry on the *laissez faire* doctrine flourished and the law of torts was shaped to serve the economic interests of the trading and industrial community. Political philosophy and economic necessity of the dominant class animate legal theory. Naturally, the British law in this area protected business from the operations of a combination of men, including workers, in certain circumstances. Whatever the merits of the norms, violation of which constituted 'conspiracy' in English law, it is a pro-

blem for creative Indian jurisprudence to consider, detached from anglophobic inclination, how far a mere combination of men working for furthering certain objectives can be prohibited as a tort, according to the Indian value system. Our Constitution guarantees the right to form associations, not for gregarious pleasure, but to fight effectively for the redressal of grievances. Our Constitution is sensitive to workers' rights. Our story of freedom and social emancipation led by the Father of the Nation has employed, from the highest of motives, combined action to resist evil and to right wrong even if it meant loss of business profits for the liquor vendor, the trothel-keeper and the foreign-cloth dealer. Without expatiating on these seminal factors, we may observe that English history, political theory and life-style being different from Indian conditions replete with organised boycotts and mass satyagrahas, we cannot incorporate English torts without any adaptation into Indian law. A tort transplant into a social organism is as complex and careful an operation as a heart-transplant into an individual organism, law being life's instrumentality and rejection of exotics being a natural tendency. Here, judges are sociological surgeons.

20. Let us examine 'conspiracy' in the English Law of Torts to see if even there it is possible to hold that an illegal strike per se spells the wrong. We may state that till recently it could not be said with any certainty that there was any such tort as 'conspiracy.' Salmond thought that there was not (See Salmond-Law of Torts-p. 505, 15th Ed.). It is interesting that in that Edition of Salmond, *Mogul* 1892 AC 25 is linked up by the learned author with a capitalist economy. Be that as it may, the common law of England today is more or less clear, home rumblings notwithstanding.

"A combination wilfully to do an act causing damage to a man in his trade or other interests is unlawful and if damage in fact is caused is actionable as a conspiracy. To this there is an exception where the defendants' real and predominant purpose is to advance their own lawful interests in a matter in which they

honestly believe that those interests would directly suffer if the action against the plaintiff was not taken. In truth, the Crofter case has made Section 1 of the Trade Disputes Act, 1906, largely unnecessary, for there will now be few conspiracies arising out of trade disputes which are not protected at common law." (pp. 508-509, 15th Edn., Sweet & Maxwell) (emphasis, ours).

The essence of actionable conspiracy is best brought out by Salmond;

"The tort is unusual because it emphasises the purpose of the defendants rather than the results of their conduct." (P. 513, 15th Edn., Sweet & Maxwell) (emphasis, ours)

21. Even when there are mixed motives, 'liability will depend on ascertaining which is the predominant object or the true motive or the real purpose of the defendant. Mere combination or action, even if it be by illegal strike, may be far away from a 'conspiracy' in the sense of the law because in all such cases, except in conceivably exceptional instances, the object or motive is to advance the workers' interests or to steal a march over a rival union but never or rarely to destroy or damage the industry. It is difficult to fancy workers who live by working in the industry combining to kill the goose that lays the golden eggs. The inevitable by-product of combination for cessation of work may be loss to the management but the obvious intendment of such a collective bargaining strategy is to force the employer to accept the demand of the workers for betterment of their lot or redressal of injustice, not to inflict damage on the boss. In short, it is far too recondite for an employer to urge that a strike, albeit illegal, was motivated by destruction of the industry. A scorched earth policy may, in critical times of a war, be reluctantly adopted by a people, but such an imputed motive is largely imaginary in strike situations. However, we are clear in our minds that if some individuals destroy the plant or damage the machinery wilfully to cause loss to the employer, such individuals will

be liable for the injury so caused. Sabotage is no weapon in workers' legal armoury.

22. The leading case of *Sorrel v. Smith*, 1925 AC 700 emphasizes that a combination of two or more persons for the purpose of injuring a man in his trade is unlawful and, if it results in damage to him, is actionable. The real purpose of the combination is the crucial test between innocence and injury. It may well be that even where there is an offending object, it may be difficult for a court to hold that there is a tort if one may read into the facts an equal anxiety for the defendants to promote their success which produces the plaintiff's extinction. There is a penumbral region, as Lord Sumner pointed out in *Sorrel*:

"How any definite line is to be drawn between acts, whose real purpose is to advance the defendant's interests, and acts, whose real purpose is to injure the plaintiff in his trade, is a thing which I feel at present beyond my power."

23. It is absolutely plain that the tort of conspiracy necessarily involves advertence to and affirmation of the object of the combination being the infliction of damage or distraction on the plaintiff. The strike may be illegal but if the object is to bring the employer to terms with the employees or to bully the rival trade union into submission, there cannot be an actionable combination in tort. In the present case, it is unfortunate that the arbitrators simply did not investigate or pass upon the object of the strike. If the strike is illegal, the tort of conspiracy is made out, appears to be the proposition of law writ tersely into the award. On the other hand, it is freely conceded by counsel for the appellant that the object was inter-union rivalry. There is thus a clear lapse in the law on the part of the arbitrators manifest on the face of the award.

24. We have earlier referred to the need for a fresh look at conspiracy as a tort when we bodily borrow the elements of English law and apply them to Indian law. It is as well that we notice that even in England considerable criticism is

mounting on the confused state of the law of conspiracy. J. T. Cameron has argued (in 1965 Vo. 28 Modern Law Review p. 448) that

"experience has already shown that conspiracy is a hydra perfectly capable of growing two heads to replace an amputated one, and the authorities contain material which could be used to impose liability in very wide and varied circumstances. It is time, therefore, to consider what form legislation should take, and to urge that the proper answer is to remove the tort of conspiracy from the law altogether, and with it the *Rookes v. Barnard* version of intimidation, and to put in its place a different basis of liability."

(CONSPIRACY AND INTIMIDATION: An Anti-Metaphysical Approach)

The author complains that the fundamental basis is unsatisfactory and uncertain and demands that a complete re-writing of the principles on which the tort of conspiracy and intimidation is necessary.

25. We may as well suggest that, to silence possible mischief flowing from the confused state of the law and remembering how dangerous it would be if long, protracted, but technically illegal strikes were to be followed by claims by managements for compensation for loss of profits, a legislative reform and re-statement of the law were undertaken at a time when the State is anxious for industrial harmony consistent with workers' welfare. This rather longish discussion has become necessary because the problem is serious and sensitive and the law is somewhat slippery even in England. We are convinced that the award is bad because the error of law is patent.

26. The High Court has touched upon another fatal frailty in the tenability of the award of compensation for the loss of profits flowing from the illegal strike. We express our concurrence with the High Court that the sole and whole foundation of the award of compensation by the arbitrators ignoring the casual reference to an ulterior motive of inter-union rivalry, is squarely the illegality of the strike. The workers went

on strike claiming payment of bonus as crystallized by the earlier settlement (D/- 2-10-1957). There thus arose an industrial dispute within Section 2(k) of the Act. Since conciliation proceedings were pending the strike was ipso jure illegal (Sections 23 and 24). The consequence, near or remote, of this combined cessation of work caused loss to the management. Therefore the strikers were liable in damages to make good the loss. Such is the logic of the award.

27. It is common case that the demands covered by the strike and the wages during the period of the strike constitute an industrial dispute within the sense of Section 2(k), of the Act. Section 23, read with Section 24, it is agreed by both sides, make the strike in question illegal. An 'illegal strike' is a creation of the Act. As we have pointed out earlier, the compensation claimed and awarded is a direct reparation for the loss of profits of the employer caused by the illegal strike. If so, it is contended by the respondents, the remedy for the illegal strike and its fall out has to be sought within the statute and not de hors it. If this stand of the workers is right, the remedy indicated in Section 26 of the Act, viz., prosecution for starting and continuing an illegal strike, is the designated statutory remedy. No other relief outside the Act can be claimed on general principles of jurisprudence. The result is that the relief of compensation by proceedings in arbitration is contrary to law and bad.

28. The Premier Automobiles Case, Civil Appeal No. 922 of 1973 decided on 26-8-1975 = (reported in AIR 1975 SC 2238) settles the legal issue involved in the above argument. The Industrial Disputes Act is a comprehensive and self-contained Code so far as it speaks and the enforcement of rights created thereby can only be through the procedure laid down therein. Neither the civil court nor any other Tribunal or body can award relief. Untwalia J., speaking for an unanimous court, has, in Premier Automobiles observed:

"The object of the Act, as its preamble indicates, is to make provision

for the investigation and settlement of industrial disputes, which means adjudication of such disputes also. The Act envisages collective bargaining, contracts between Union representing the workmen and the management, a matter which is outside the realm of the common law or the Indian law of Contract."

After sketching the scheme of the Act, the learned Judge stated the law thus:

"..... the Civil Court will have no jurisdiction to try and adjudicate upon an industrial dispute if it concerned enforcement of certain right or liability created only under the Act."

x x x x x

"In Doe v. Bridges 1831-1 B & Ad 847 at p. 859 are the famous and oftquoted words of Lord Tenterden, C. J., saying:

"where an Act creates an obligation and enforces the performance in a specified manner, we take it to be a general rule that performance cannot be enforced in any other."

Barraclough v. Brown, 1897 AC 615 decided by the House of Lords is telling, particularly Lord Watson's statement of the law at p. 622:

"The right and the remedy are given uno flatu and one cannot be dissociated from the other."

In short, the enforcement of a right or obligation under the Act, must be by a remedy provided uno flatu in the statute. To sum up, in the language of the Premier Automobiles Ltd.:

"If the industrial dispute relates to the enforcement of a right or an obligation created under the Act, then the only remedy available to the suitor is to get an adjudication under the Act."

29. Since the Act which creates rights and remedies has to be considered as one homogenous whole, it has to be regarded uno flatu, in one breath, as it were. On this doctrinal basis, the remedy for the illegal strike (a concept which is the creature not of the common law but of Section 24 of the Act) has to be sought exclusively in Section 26 of the Act. The claim for compensation and the award thereof in arbitral proceedings is invalid on its face—'on its face' we say because this jurisdictional

point has been considered by the arbitrators and decided by committing an *ex facie* legal error.

30. It was argued, and with force in our view, that the question of compensation by workers to the management was wholly extraneous to the Act and therefore, outside the jurisdiction of a voluntary reference of industrial dispute under S. 10-A. While we are not called upon to pronounce conclusively on the contention, since we have expressed our concurrence with the High Court on other grounds, we rest content with briefly sketching the reasoning and its apparent tenability. The scheme of the Act, if we may silhouette it, is to codify the law bearing on industrial dispute. The jurisdictional essence of proceedings under the Act is the presence of an 'industrial dispute'. Strikes and lock-outs stem from such disputes. The machinery for settlement of such disputes at various stages is provided for by the Act. The statutory imprimatur is given to settlement and awards, and norms of discipline during the pendency of proceedings are set down in the Act. The proscriptions stipulated, as for example the prohibition of a strike, are followed by penalties, if breached. Summary procedures for adjudication as to whether conditions of service etc., of employees have been changed during the pendency of proceedings, special provision for recovery of money due to workers from employers and other related regulations, are also written into the Act. Against this backdrop, we have to see whether a claim by an employer from his workmen of compensation consequent on any conduct of theirs, comes within the purview of the Act. Suffice it to say that a reference to arbitration under Section 10A is restricted to existing or apprehended industrial disputes. Be it noted that we are not concerned with a private arbitration, but a statutory one governed by the Industrial Disputes Act, deriving its validity, enforceability and protective mantle during the pendency of the proceedings, from Section 10A. No industrial dispute, no valid arbitral reference. Once we grasp this truth, the rest of the logic is simple. What is the industrial dispute in the

present case? Everything that overflows such disputes spills into areas where the arbitrator deriving authority under Section 10A has no jurisdiction. The consent of the parties cannot create arbitral jurisdiction under the Act. In this perspective, the claim for compensation can be a lawful subject for arbitration only if it can be accommodated by the definition of 'industrial dispute' in Section 2 (k). Undoubtedly this expression must receive a wide connotation, calculated as it is to produce industrial peace. Indeed, the legislation substitutes for free bargaining between the parties a binding award; but what disputes or differences fall within the scope of the Act? This matter fell for the consideration of the Federal Court in *Western India Automobile Association*, (1949) 1 Lab LJ 245 = (AIR 1949 FC 111). Without launching on a long discussion, we may state that compensation for loss of business is not a dispute or difference between employers and workmen 'which is connected with the employment or non-employment or the terms of employment or with the conditions of labour, of any person'. We are unable to imagine a tort liability or compensation claim based on loss of business being regarded as an industrial dispute as defined in the Act, having regard to the language used, the setting and purpose of the statute and the industrial flavour of the dispute as one between the management and workmen.

31. In this context, we are strengthened in our conclusion by the provisions of Section 33C which provide for speedy recovery of money due to a workman from an employer under a settlement or an award, but not for the converse case of money due to an employer from workmen. There is no provision in the Act which contemplates a claim for money by an employer from the workmen. And indeed, it may be a little startling to find such a provision, having regard to workmen being the weaker section and Part IV of the Constitution being loaded in their favour. The new light shed by the benign clauses of Part IV must illu-

mine even pre-Independence statutes in the interpretative process. As yet, and hopefully, claims by employers against workmen on grounds of tortious liability have not found a place in the pharmacopoeia of Indian Industrial Law. However, as earlier stated, we do not pronounce finally as it is not necessary.

32. There was argument at the Bar that the High Court was in error in relying on Section 18 of the Trade Unions Act, 1926 to rebuff the claim for compensation. We have listened to the arguments of Shri B. C. Ghosh in support of the view of the High Court, understood on a wider basis. Nevertheless, we do not wish to rest our judgment on that ground. Counsel for the appellants cited some decisions to show that an award falling outside the orbit of the Indian Arbitration Act can be enforced by action in court. We do not think the problem so posed arises in the instant case.

33. We dismiss the appeal but, in the circumstances, there will be no order as to costs.

Appeal dismissed.

AIR 1976 SUPREME COURT 437

(From: Andhra Pradesh)*

K. K. MATHEW, P. K. GOSWAMI
AND N. L. UNTWALIA, JJ.

M/s. Ajantha Industries and others, Appellants v. Central Board of Direct Taxes, New Delhi and others, Respondents.

Civil Appeal No. 724 of 1975, D/- 5-12-1975.

(A) Income-tax Act (1961), S. 127 (1) — Transfer of case file to another area — Non-communication of reasons to an assessee is a serious infirmity — (Constitution of India, Article 226 — Natural Justice). Writ Appeal No. 626 of 1974, D/- 12-9-1974 (Andh Pra), Reversed. 1975 Tax LR 865 (Delhi), Overruled.

The requirement of recording reasons under Section 127 (1) is a mandatory direction under the law

*(Writ Appeal No. 626 of 1974, D/- 12-9-1974—Andh Pra.)

LS/LS/E540/75/GDR

and non-communication thereof is not saved by showing that the reasons exist in the file although not communicated to the assessee or that the reasons were given in the prior show cause notice issued to the assessee against the proposed transfer.

(Paras 7, 8, 11)

When law requires reasons to be recorded in a particular order affecting prejudicially the interests of any person, who can challenge the order in court, it ceases to be a mere administrative order and the vice of violation of the principles of natural justice on account of omission to communicate the reasons is not expiated. Writ Appeal No. 626 of 1974, D/- 12-9-1974 (Andh Pra), Reversed; 1975 Tax LR 865 (Delhi), Overruled; AIR 1957 SC 397 and 1967 MPLJ 868, Referred; AIR 1965 SC 1028 and AIR 1967 SC 523, Distinguished.

(Para 15)

Cases Referred: Chronological Paras

1975 Tax LR 865 = (1975) 99 ITR 391 (Delhi)	12
AIR 1967 SC 523 = (1967) 63 ITR 219	16
1967 MPLJ 868 = 1967 Jab LJ 817 (SC)	13
AIR 1965 SC 1028 = (1965) 56 ITR 14	14
AIR 1957 SC 397 = (1957) 31 ITR 565	8

Mr. A. Subba Rao, Advocate, for Appellants; Mr. G. C. Sharma, Sr. Advocate, (Mr. S. P. Nayar, Advocate with him), for Respondents.

Judgment of the Court was delivered by

GOSWAMI, J.:— The appellant No. 1 is a registered firm and appellants 2 and 3 are the only two partners of that firm. They are assessee under the Income-tax Act. Their assessments have been made for a number of years in Nellore District in the usual course. On January 23, 1973, the Central Board of Direct Taxes (briefly the Central Board) sent a notice to the appellants under Section 127 of the Income-tax Act, 1961 (briefly the Act) proposing to transfer their case files "for facility of investigation" from the respective Income-tax Officer at Nellore to the Income-tax Officer, B Ward, Special Circle II, Hyderabad. By this notice

they were also asked to submit in writing if they had any objection to the proposed transfer within 15 days of receipt of the notice. The appellants made their representation objecting to the transfer and on July 26, 1973, the Central Board passed the impugned order transferring the cases from Nellore to Hyderabad.

2. There is no provision of appeal or revision under the Act against such orders of transfer. The appellants, therefore, preferred an application under Article 226 of the Constitution before the High Court of Andhra Pradesh questioning the validity of the order chiefly on the ground of violation of the principles of natural justice inasmuch as no reasons were given nor communicated in the said order. The learned single Judge after having called for the relevant file found that certain reasons were recorded by the Central Board prior to the passing of the impugned order and held that mere failure to communicate the reasons to the appellants was not fatal to the order. The writ petition was, therefore, dismissed.

3. The appellants' Letters Patent Appeal before the Division Bench of the High Court also met with the same fate. Hence this appeal by special leave.

4. The short question that arises for consideration is whether failure to record the reasons in the order which was communicated to the appellants is violative of the principles of natural justice for which the order should be held to be invalid.

5. Section 5 (7A) was the corresponding section in the Income-tax Act, 1922 (briefly the Old Act). The section may be set out:

"The Commissioner of Income-tax may transfer any case from one Income-tax Officer subordinate to him to another, and the Central Board of Revenue may transfer any case from any one Income-tax Officer to another. Such transfer may be made at any stage of the proceedings, and shall not render necessary the re-issue of any notice already issued by the Income-tax Officer from whom the case is transferred"

The successor section under the Income-tax Act, 1961 is Section 127 and the same may be set out:

"Transfer of cases from one Income-tax Officer to another:—

(1) The Commissioner may, after giving the assessee a reasonable opportunity of being heard in the matter, wherever it is possible to do so, and after recording his reasons for doing so, transfer any case from one Income-tax Officer subordinate to him to another also subordinate to him, and the Board may similarly transfer any case from one Income-tax Officer to another.

Provided that nothing in this sub-section shall be deemed to require any such opportunity to be given where the transfer is from one Income-tax Officer to another whose offices are situated in the same city, locality or place.

(2) The transfer of a case under sub-s. (1) may be made at any stage of the proceedings, and shall not render necessary the re-issue of any notice already issued by the Income-tax Officer from whom the case is transferred.

Explanation:— In this section and in Sections 121 and 125, the word 'case' in relation to any person whose name is specified in any order or direction issued thereunder, means all proceedings under this Act in respect of any year which may be pending on the date of such order or direction or which may have been completed on or before such date, and includes also all proceedings under this Act which may be commenced after the date of such order or direction in respect of any year."

The section was amended by Section 27 of Finance (No. 2) Act, 1967, and Section 127 since then stands as under:—

(1) "The Commissioner may, after giving the assessee a reasonable opportunity of being heard in the matter, wherever it is possible to do so, and after recording his reasons for doing so, transfer any case from any Income-tax Officer or Officers subordinate to him to any other Income-tax Officer or Income-tax Officers also subordinate to him and the Board

may similarly transfer any case from any Income-tax Officer or Income-tax Officers to any other Income-tax Officer or Income-tax Officers.

Provided that nothing in this sub-section shall be deemed to require any such opportunity to be given where the transfer is from any Income-tax Officer or Income-tax Officers to any other Income-tax Officer or Income-tax Officers and the offices of all such Income-tax Officers are situated in the same city, locality or place:

Provided further that where any case has been transferred from any Income-tax Officer or Income-tax Officers to two or more Income-tax Officers, the Income-tax Officers to whom the case is so transferred shall have concurrent jurisdiction over the case and shall perform such functions in relation to the said case as the Board or the Commissioner (or any Inspecting Assistant Commissioner authorised by the Commissioner in this behalf) may, by general or special order in writing, specify for the distribution and allocation of the work to be performed.

(2) The transfer of a case under sub-section (1) may be made at any stage of the proceedings, and shall not render necessary the re-issue of any notice already issued by the Income-tax Officer or Income-tax Officers from whom the case is transferred.

Explanation:— In this section and in Sections 121, 123, 124 and 125, the word 'case' in relation to any person whose name is specified in any order or direction issued thereunder, means all proceedings under this Act in respect of any year which may be pending on the date of such order or direction or which may have been completed on or before such date, and includes also all proceedings under this Act which may be commenced after the date of such order or direction in respect of any year."

6. Unlike Section 5 (7A) Section 127 (1) requires reasons to be recorded prior to the passing of an order of transfer. The impugned order does not state any reasons whatsoever for making the order of transfer.

7. It is submitted on behalf of the Revenue by Mr. Sharma that reasons were communicated to the assessee in the notice calling for objection against the proposed transfer. It is, therefore, manifest that the reasons given in that show cause notice, namely, "facility of investigation" can be read as a part of the impugned order although there is no mention of any reasons therein as such.

8. We are unable to accede to this submission. It appears Section 5 (7A) of the Old Act came for consideration in *Pannalal Binjraj v. Union of India*, (1957) 31 ITR 565 = (AIR 1957 SC 397), and this Court observed at page 589 (of ITR) = (at p. 410 of AIR SC) as follows:—

".....it would be prudent if the principles of natural justice are followed, where circumstances permit, before any order of transfer under Section 5 (7A) of the Act is made by the Commissioner of Income-tax or the Central Board of Revenue, as the case may be, and notice is given to the party affected and he is afforded a reasonable opportunity of representing his views on the question and the reasons of the order are reduced however briefly to writing..... There is no presumption against the bona fide or the honesty of an assessee and normally the Income-tax authorities would not be justified in refusing to an assessee a reasonable opportunity of representing his views when any order to the prejudice of the normal procedure laid down in Section 64 (1) and (2) of the Act is sought to be made against him, be it a transfer from one Income-tax Officer to another within the State or from an Income-tax Officer within the State to an Income-tax Officer without it, except of course where the very object of the transfer would be frustrated if notice was given to the party affected. If the reasons for making the order are reduced however briefly to writing it will also help the assessee in appreciating the circumstances which make it necessary or desirable for the commissioner of Income-tax or the Central Board of Revenue, as the case may be, to transfer his case under Section 5 (7A) of the Act and it will also help the court in determining the bona fides of

the order as passed if and when the same is challenged in court as mala fide or discriminatory. It is to be hoped that the Income-tax authorities will observe the above procedure wherever feasible."

9. This judgment was rendered by this Court on December 21, 1956, and we find that in the 1961 Act Section 127 replaced Section 5 (7A) where the legislature has introduced, inter alia the requirement of recording reasons in making the order of transfer. It is manifest that once an order is passed transferring the case file of an assessee to another area the order has to be communicated. Communication of the order is an absolutely essential requirement since the assessee is then immediately made aware of the reasons which impelled the authorities to pass the order of transfer. It is apparent that if a case file is transferred from the usual place of residence or office where ordinarily assessments are made to a distant area, a great deal of inconvenience and even monetary loss is involved. That is the reason why before making an order of transfer the legislature has ordinarily imposed the requirement of a show-cause notice and also recording of reasons. The question then arises whether the reasons are at all required to be communicated to the assessee. It is submitted, on behalf of the Revenue, that the very fact that reasons are recorded in the file, although these are not communicated to the assessee, fully meets the requirement of Section 127 (1). We are unable to accept this submission.

10. The reason for recording of reasons in the order and making these reasons known to the assessee is to enable an opportunity to the assessee to approach the High Court under its writ jurisdiction under Article 226 of the Constitution or even this Court under Article 136 of the Constitution in an appropriate case for challenging the order, inter alia, either on the ground that it is mala fide or arbitrary or that it is based on irrelevant and extraneous considerations. Whether such a writ or special leave application ultimately fails is not relevant for a decision of the question.

11. We are clearly of opinion that the requirement of recording reasons under Section 127 (1) is a mandatory direction under the law and non-communication thereof is not saved by showing that the reasons exist in the file although not communicated to the assessee.

12. Mr. Sharma drew our attention to a decision of the Delhi High Court in *Sunanda Rani Jain v. Union of India*, (1975) 99 ITR 391 = (1975 Tax LR 865 Delhi) where the learned single Judge has taken a contrary view. For the reasons, which we have given above, we have to hold that the said decision is not correct.

13. The appellant drew our attention to a decision of this Court in *Pragdas Umar Vaishya v. Union of India*, 1967 MPLJ 868 (SC) where Rule 55 of the Mineral Concession Rules, 1960, providing for exercise of revisional power by the Central Govt. was noticed. It was held that under R. 55 the Central Government in disposing of the revision application must record its reasons and communicate these reasons to the parties affected thereby. It was further held that the reasons could not be gathered from the notings in the files of the Central Government. Recording of reasons and disclosure thereof is not a mere formality.

14. Mr. Sharma drew our attention to a decision of this Court in *Kashiram v. Union of India*, (1965) 56 ITR 14 = (AIR 1965 SC 1028). It is submitted that this Court took the view that orders under Section 127 (1) are held in that decision to be "purely administrative in nature" passed for consideration of convenience and no possible prejudice could be involved in the transfer. It was also held therein that under the proviso to Section 127 (1) it was not necessary to give the appellant an opportunity to be heard and there was consequently no need to record reasons for the transfer. This decision is not of any assistance to the Revenue in the present case since that was a transfer from one Income-tax Officer to another Income-tax Officer in the same city, or, as stated in the judgment itself, "in the same locality" and the proviso to Section 127 (1), therefore, applied.

15. When law requires reasons to be recorded in a particular order affecting prejudicially the interests of any person, who can challenge the order in court, it ceases to be a mere administrative order and the vice of violation of the principles of natural justice on account of omission to communicate the reasons is not expiated.

16. Mr. Sharma also drew our attention to a decision of this Court in *S. Narayanappa v. Commr. of Income-tax, Bangalore*, (1967) 63 ITR 219 = (AIR 1967 SC 523) where this Court was dealing with Section 34 of the Old Act. It is clear that there is no requirement in any of the provisions of the Act or any section laying down as a condition for the initiation of the proceedings that the reasons which induced the Commissioner to accord sanction to proceed under Section 34 must also be communicated to the assessee. The Income-tax Officer need not communicate to the assessee the reasons which led him to initiate the proceedings under Section 34. The case under Section 34 is clearly distinguishable from that of a transfer order under Section 127 (1) of the Act. When an order under Section 34 is made the aggrieved assessee can agitate the matter in appeal against the assessment order, but an assessee against whom an order of transfer is made has no such remedy under the Act to question the order of transfer. Besides, the aggrieved assessee on receipt of the notice under Section 34 may even satisfy the Income-tax Officer that there were no reasons for reopening the assessment. Such an opportunity is not available to an assessee under Section 127 (1) of the Act. The above decision is, therefore, clearly distinguishable.

17. We are, therefore, clearly of opinion that non-communication of the reasons in the order passed under Section 127 (1) is a serious infirmity in the order for which the same is invalid. The judgment of the High Court is set aside. The appeal is allowed and the orders of transfer are quashed. No costs.

Appeal allowed.

AIR 1976 SUPREME COURT 441

(From: Award of Industrial Tribunal-Cum-Labour Court — Jabalpur)*

Y. V. CHANDRACHUD, V. R.

KRISHNA IYER AND A. C.

GUPTA, JJ.

Workmen of the Rajasthan Atomic Power Project, Appellants v. Management of Rajasthan Atomic Power Project, Respondents.

Civil Appeal No. 705 of 1975, D/- 18-12-1975.

(A) Industrial Disputes Act (1947), Section 19 — Settlement — Termination on ground of mistaken belief — Permissibility.

Prior to 1-8-1971 the motor vehicle drivers employed in certain project, were being paid overtime allowance in accordance with the Staff Car Rules. The Union, claimed that the overtime allowance paid to the drivers should be fixed at the rates at which the other employees of the project were being paid. This claim gave rise to a dispute which was settled after protracted discussions on certain terms on 17-11-1971. Under this settlement the motor vehicle drivers were to be paid overtime in accordance with the provision of the Motor Transport Workers Act, 1961 and the rules framed thereunder, by the Government with effect from 1-8-1971. On 12-12-1972 the Management of the Project gave notice to the General Secretary of the Union under Section 19 (2) conveying their intention to terminate the said settlement in so far as the staff car drivers were concerned. Another notice of the Management under Section 9-A stated that with effect from 12-4-1973 the Staff car drivers would be entitled to overtime allowance as admissible to them under the Staff Car Rules and not under the Motor Transport Workers Act, 1961. This gave rise to the dispute which, was referred for adjudication to the Tribunal. The termination of the settlement in so far as it concerned the staff car drivers was found by the Tribunal to be justified.

*(Case No. I. T./L. C. (R) (5) of 1973, D/- 30-11-1974—Ind. Tri. Cum Labour Court — Jabalpur.)

On appeal by the Union by special leave.

Held that the parties were aware that the Act by its own force did not apply to the motor vehicle drivers. And it could not be said that the management of the Project entered into the settlement on a mistaken belief. Award of Tribunal was set aside. (Para 3)

Mr. M. K. Ramamurthi Sr. Advocate, (Mr. J. Ramamurthi, Advocate with him), for Appellants; Mr. G. L. Sanghi Sr. Advocate, (Mr. Girish Chandra, Advocate with him), for Respondents.

Judgment of the Court was delivered by

A. C. GUPTA, J.:— The following dispute was referred under Section 10 (2) of the Industrial Disputes Act, 1947 for adjudication to the Central Government Industrial Tribunal-Cum-Labour Court, Jabalpur:

"Whether the action of the Management of Rajasthan Atomic Power Project Post Office Anushakti, via Kota in giving a notice of change dated 20th March, 1973 under Section 9A of the Industrial Disputes Act, 1947, in so far as payment of overtime allowance to Staff Car Drivers is concerned, is justified? If not, to what relief are they entitled?"

The dispute arose in the following manner. Prior to August 1, 1971 the motor vehicle drivers employed in the Rajasthan Atomic Power Project, hereinafter called the Project, were being paid overtime allowance in accordance with the Staff Car Rules. The Rajasthan Anushakti Prayojna Karamchari Sangh, which was the recognised union of the employees of the project, referred to hereinafter as the Union, claimed that the overtime allowance paid to the drivers should be fixed at the rates at which the other employees of the Project were being paid. This claim gave rise to a dispute which was settled after protracted discussions on certain terms and a memorandum of settlement was signed by the representatives of the parties concerned before the Assistant Labour Commissioner (Central), Kota, on November 17, 1971. The memorandum of settlement reads as follows:

"TERMS OF SETTLEMENT"

It is agreed that:

1. The Motor Vehicle Drivers and Bus Helpers shall be paid overtime in accordance with the provision of the Motor Transport Workers Act, 1961 and the rules framed thereunder, by the Government of Rajasthan with effect from 1-8-1971.

2. The arrears accruing in regard to Clause (1) above shall be paid to all the entitled workers by 31st December, 1971.

3. The parties shall furnish their implementation report to the Assistant Labour Commissioner (C), Kota, on or before 15-1-1972."

2. On December 12, 1972 the Management of the Project gave notice to the General Secretary of the Union under Section 19 (2) of the Industrial Disputes Act conveying their intention to terminate the settlement dated November 17, 1971 in so far as the staff car drivers were concerned. On the expiry of two months from the service of this notice, the management served on the Union a notice under Section 9A of the Industrial Disputes Act proposing to effect a change in the conditions of service of the staff car drivers as indicated in the notice under Section 19 (2). The notice under Section 9A stated that with effect from April 12, 1973 the staff car drivers would be entitled to overtime allowance as admissible to them under the Staff Car Rules and not under the Motor Transport Workers Act, 1961. This gave rise to the dispute which, as stated earlier, was referred for adjudication to the Central Government Industrial Tribunal-Cum-Labour Court, Jabalpur. Before the Tribunal it was contended on behalf of the Management that they had entered into the settlement dated November 17, 1971 under a mistaken belief that the staff car drivers were covered by the provisions of the Motor Transport Workers Act, 1961 but they found later that the definition of "motor transport worker" in Section 2 (h) of the Motor Transport Workers Act, 1961 did not include the staff car drivers of the Project. The Tribunal agreed that the staff car drivers were not motor transport workers within the meaning of Section 2 (h) and held that there was

force in the contention of the Management that they were wrongly included in the settlement and that the termination of the settlement in so far as it concerned the staff car drivers was therefore justified. The Tribunal found that the staff car drivers were not entitled to any relief and made his award accordingly. The workmen of the Project represented by their Union have preferred this appeal by special leave challenging the validity of the award.

3. It seems to us that the question whether the staff car drivers of the Project were motor transport workers as defined in the Motor Transport Workers Act, 1961 was not relevant to the issue before the Tribunal. The workmen were not seeking to enforce their right to overtime allowance under the Motor Transport Workers Act. The settlement dated November 17, 1971 resolved the existing dispute as to the rate of overtime allowance payable to the motor vehicle drivers by providing in one of the terms that they should be paid overtime in accordance with the provisions of the Motor Transport Workers Act, 1961. The agreement making the provisions as to overtime in the Motor Transport Workers Act, 1961 applicable to the motor vehicle drivers employed in the Project itself suggests that the parties were aware that the Act by its own force did not apply to the motor vehicle drivers. If these motor vehicle drivers were governed by the provisions of the Motor Transport Workers Act, then no question of applying that Act for a settlement between the parties could possibly arise. It is not disputed that motor vehicle drivers include staff car drivers. The right asserted by the staff car drivers arises on the settlement and does not flow out of the Motor Transport Workers Act, 1961, and it appears from the memorandum of settlement that it was arrived at "after protracted discussions". In these circumstances we do not think that it could be said that the management of the Project entered into the settlement on a mistaken belief. As the award proceeds on the management's case of 'mistaken belief' which we do not consider acceptable, we allow the ap-

peal and set aside the award. The appellants will be entitled to the costs of this appeal.

Appeal allowed.

AIR 1976 SUPREME COURT 443*

(From: Allahabad)*

A. N. RAY C. J., M. H. BEG, R. S. SARKARIA AND P. N. SHINGHAL, JJ.

Malkhan Singh and others, Appellants v. The State of Uttar Pradesh and others, Respondents.

Civil Appeal No. 1824 of 1969, D/- 10-12-1975.

(A) U. P. Imposition of Ceiling on Land Holdings (Amendment) Act, 1972 (18 of 1973), S. 19 (1) and Proviso — Import of Section 19 (1) — Proviso is in the nature of a procedural provision.

The proviso to sub-section (1) of Section 19 of the Amendment Act does not detract from the requirement of determining over again the surplus land/ceiling area of a landholder in accordance with the provisions of the principal Act. The Proviso is in the nature of a procedural provision. It, in terms, prescribed the manner in which determination of ceiling area is to be made. Clauses (a) and (b) of the Proviso fix the stages and sequence for such determination. Clause (a) read with the main body of the sub-section which, in terms, refers to S. 9, shows that at the first stage, the ceiling area is to be determined de novo in accordance with the provisions of the principal Act as it stood immediately before the coming into force of the Amendment Act, 1973. It is only after this has been done, that the stage for going over to clause (b) is reached.

(Paras 17, 18)

Cases Referred: Chronological Paras
AIR 1968 SC 714 = (1968) 2 SCR 95
8, 9

Mr. G. S. Pathak Sr. Advocate, (Mr. E. C. Agrawala, Advocate with him), for Appellants; Mr. G. N. Dik-

*(Special Appeal No. 17 of 1968, D/- 14-5-1968—All.)

LS/LS/E552/75/CWM

shit Sr. Advocate, (Mr. O. P. Rana, Advocate with him), for Respondents.

Judgment of the Court was delivered by

SARKARIA, J.:— This appeal by special leave is directed against a judgment of an Appellate Bench of the High Court of Allahabad dismissing in limine Special Appeal No. 17 of 1968 against an order of a learned Single Judge.

2. Malkhan Singh, tenure-holder, held 66.11 acres of agricultural land in the revenue estate of Siauri, District Jhansi, U. P. He failed to submit a correct statement in respect of his holdings under the U. P. Imposition of Ceiling and Land Holdings Act, 1960 (for short, the Act), within the time mentioned in the notice published under Section 9 of the Act. Consequently, the Prescribed Authority issued a notice under Section 10 (2) of the Act and sent along with it a Statement of the area proposed to be declared surplus. In response to this notice, the tenure-holder filed objections. One of his pleas was that there were 14 members in his family including his sons, grand-sons and grand-daughters and all of them were joint in home, hearth and estate, and that consequently, there was no surplus area with him. On this point the Authority framed this issue:

"Are there 14 members in land-holder's family, if so its effects?"

3. The Authority found that the four sons of Malkhan Singh, namely, Murari Lal, Lakhan Lal, Kishan Lal and Ganeshi Lal, were tenure-holders in their own separate rights, and consequently, in view of the Explanation to Section 3 (c) of the Act, they could not be deemed as members of Malkhan's family. The Authority further held that "their wives and issues would also naturally be considered to be in the family of their husbands and fathers and would therefore be excluded from objector's family". After excluding the sons and their wives and sons' sons, the Authority held that there were only two members of the family of Malkhan Singh who were alive on January 3, 1961. Accordingly he negatived his objection and declared an area of 25.70 acres as surplus land with him.

4. Against this order, dated June 29, 1963 of the Authority the tenure-holder preferred an appeal to the District Judge under Section 13 of the Act. On this issue, the District Judge also held that the four sons of Malkhan Singh were tenure-holders in their own separate rights, and in view of the definition of the term 'family' in the Act, this circumstance was conclusive proof of their separation from the family "even though under Hindu Law such separation may not be recognised in face of this legal position". Referring to the argument advanced on behalf of the appellant, he said:

"that the evidence to the effect of proving jointness is of unimpeachable character, has no significance. The said oral or documentary evidence cannot mitigate the effect of the objector's sons having separate holdings in their own rights."

5. Inter alia in these premises, he affirmed the findings of the Authority and dismissed Malkhan Singh's appeal with a slight reduction in the area declared surplus.

6. To impugn the orders of the Prescribed Authority and the District Judge, Malkhan Singh and his three sons filed a petition under Article 226 of the Constitution. They attacked the constitutional validity of the provisions of the Act and the orders on the ground that they were violative of their fundamental rights under Arts. 14, 19 (1) (f) (g) and 31 (2) of the Constitution. It was further alleged that the impugned decision was based on surmises and presumptions which could not arise. It was prayed that a writ of certiorari quashing the impugned orders be issued.

7. The writ petition was dismissed by a learned Single Judge and that decision was affirmed by the appellate Bench of the High Court on May 14, 1968. Hence this appeal.

8. Mr. Dixit, counsel for the Respondents has raised a preliminary objection that this appeal has become infructuous, if not abated, in view of Section 19 (1) of the U. P. (Amendment) Act No. 18 of 1973, which came into force during the pendency of this appeal. Mr. Dixit's argument is that the words "any

court or authority" in S. 19(1) of the Amendment Act would include this Court also, and similarly the "proceedings" which in terms of this section abate, would cover proceedings under Article 226 of the Constitution, also. In any event, it is submitted that this appeal has become infructuous because under the Amendment Act, the surplus land will have to be first determined afresh under the Principal Act. In this connection he has cited *Ram Adhar Singh v. Ram-roop Singh*, (1968) 2 SCR 95 = (AIR 1968 SC 714).

9. Mr. Pathak's reply to this preliminary objection is that the proceedings under Article 226 are not proceedings for determination of the surplus area under the Act, but independent proceedings under the Constitution. In these premises, it is urged that the words "any court" or "authority" in Section 19(1) do not take in proceedings in appeal under Article 136 before this Court. Counsel has tried to distinguish *Ram Adhar Singh's case*, (1968) 2 SCR 95 = (AIR 1968 SC 714) (supra) on the ground that there, the appeal has arisen out of a suit and not a Writ petition under Article 226. In the alternative, it is urged that if the surplus land is first to be determined de novo by the Prescribed Authority, it should be clarified that the appellants would be entitled to urge and have all the arguments, pleas and objections reconsidered by the Authority, which the counsel is raising now before us.

10. Mr. Pathak's contention is that the Prescribed Authority and the District Judge, have both proceeded on an erroneous construction of the definition of "Family" given in Section 3(c) of the Act, inasmuch as they have excluded even the grandsons and other relations from the 'Family' of Malkhan Singh, notwithstanding the fact that they were not "tenure-holders in their own separate right" within the definition. In this connection, Counsel has drawn our attention to the observation of the District Judge that the "unimpeachable evidence" about the jointness of the family in the concept of Hindu Law, was of no significance.

Section 3(c) defines "family" as under:—

"Family" means as consisting of the holder of a holding and any or all of his following relations not being tenure-holders in their own separate right:—

(i) wife or husband, as the case may be;

(ii) dependent father and dependent mother;

(iii) son and son's son, as long as they are unseparated from the holder;

(iv) wife or widow of the persons mentioned in sub-section (iii)

(v) daughter and unseparated son's daughter, as long as they are unmarried.

Provided that where a relation falls under the above clause in more than one family, he shall nevertheless be a member of only one family in accordance with his choice, or if he is under any disability, in accordance with the choice of the person legally authorised to do so on his behalf.

Explanation: For the purpose of this clause, a son or son's son shall be deemed to be separate where land is recorded separately in his name or where his separate share has been declared under a family settlement either registered or acted upon prior to the twentieth day of August, 1959, or by a decree of Court passed prior to or in a suit pending on the twentieth day of August, 1959, or where separate land has been assigned to him under Section 12-B of the U. P. Consolidation of Holdings Act, 1953 or the separation of his share has been accepted under the U. P. Large Land Holdings Tax Act, 1957."

11. The point pressed into argument is, that only those relations enumerated in the definition would go out of the "family" of the landholder who are "tenure holders in their own separate right" and not other members of the Joint Family who were not such tenure-holders. Since the grandsons of Malkhan Singh who by "unimpeachable evidence" had been shown to be members of the joint Hindu Family of the landholder, admittedly were not tenure-holders in their "own separate rights", they could not on a proper construction of the definition of the term 'family' in Section 3(c), be excluded from the family of the grandfather.

In treating the grandsons as members of the families of their fathers, that is, the sons of Malkhan Singh, who were tenure-holders in their own separate right, the Authority and the District Judge have offended the fundamental canon of interpretation according to which a legal fiction has to be strictly limited to the purposes indicated by the context and cannot be given a larger effect.

12. Section 19 (1) of the Amendment Act of 1972 reads as follows:

"(1) All proceedings for the determination of surplus land under Section 9, Section 10, Section 11, Section 12, Section 13 or Section 30 of the Principal Act, pending before any Court or authority at the time of the commencement of this Act, shall abate and the prescribed authority shall start the proceedings for determination of the ceiling area under that Act afresh by issue of a notice under sub-section (2) of Section 9 of that Act as inserted by this Act:

Provided that the ceiling area in such cases shall be determined in the following manner—

(a) firstly, the ceiling area shall be determined in accordance with the principal Act, as it stood before its amendment by this Act;

(b) thereafter, the ceiling area shall be re-determined in accordance with the provisions of the principal Act as amended by this Act."

13. In this connection Section 5 of the amendment Act may also be seen.

"(1) On and from the commencement of the Uttar Pradesh Imposition of Ceiling on Land Holdings (Amendment) Act, 1972, no tenure-holder shall be entitled to hold in the aggregate, throughout Uttar Pradesh, any land in excess of the ceiling area applicable to him.

(2) x x x x x

(3) Subject to the provisions of sub-sections (4), (5) and (6), the ceiling area for purposes of sub-section (1) shall be—

(a) x x x x

(b) In case of tenure-holder having a family of more than five members, 7-30 hectares of irrigated land (including land held by other mem-

bers of the family) besides, each of the members exceeding five and for each of his adult sons who are not themselves tenure-holders or who hold less than two hectares of irrigated land, two additional hectares of irrigated land or such additional land which together with the land held by such adult son aggregates to two hectares, subject to a maximum of six hectares of such additional land.

Explanation: The expression 'adult son' in Clauses (a) and (b), includes an adult son who is dead and has left surviving behind him minor sons or minor daughters (other than married daughters) who are not themselves tenure-holders or who hold land less than two hectares of irrigated land.

x x x x x

14. Section 4 of the Amendment Act 1972 provides:

"Section 9 of the principal Act, shall be renumbered as sub-section (1), thereof, and after sub-section (1) as so re-numbered the following sub-sections shall be inserted, namely:

(2) As soon as may be after the enforcement of the Uttar Pradesh Imposition of Ceiling on Land Holdings (Amendment) Act, 1972, the prescribed authority shall by like general notice, call upon every tenure-holder holding land in excess of the ceiling area applicable to him on the enforcement of the said Act, to submit to him within 30 days of publication of such notice, a statement referred to in sub-section (1)."

x x x x x

15. The first part of sub-section (1) of Section 19 of the Amendment Act is susceptible of two interpretations. First, that all proceedings, whatever, relating to the determination of surplus land under the Principal Act, pending before any court or authority, including the High Court and this Court at the time of commencement of this Act, shall abate. Second, that proceedings for determination of surplus land under the principal Act pending before the District Judge or the Prescribed Authority, only, at the time of commencement of this Act shall abate. In this view, the words "any Court" occurring in the first part of sub-sec-

tion (1) of Section 19 will not include the High Court or this Court exercising jurisdiction under Article 226 of the Constitution.

16. It is not necessary for us to express any final opinion as to which of these two constructions is correct because the scheme and other provisions of the Amendment Act have, in effect, rendered the earlier proceedings infructuous.

17. The latter part of sub-section (1) of Section 19 gives a mandate to the Prescribed Authority to start proceedings for determination of the ceiling area under the principal Act, afresh, by the issue of a notice under Section 9 (1). Sub-section (2) Section 9 of the principal Act, as modified and inserted by Section 4 of the Amendment Act (extracted above), requires the Prescribed Authority to call upon every tenure-holder holding land in excess of the ceiling area to submit to him within 30 days of the publication of notice a statement referred to in its sub-section (1).

18. The proviso to sub-sec. (1) of Section 19 of the Amendment Act does not detract from the requirement of determining over again the surplus land/ceiling area of a land-holder in accordance with the provisions of the principal Act. The Proviso is in the nature of a procedural provision. It in terms, prescribed the manner in which determination of ceiling area is to be made. Clauses (a) and (b) of the Proviso fix the stages and sequence for such determination. Cl. (a) read with the main body of the sub-section which, in terms, refers to Section 9, shows that at the first stage, the ceiling area is to be determined de novo in accordance with the provisions of the principal Act as it stood immediately before the coming into force of the Amendment Act, 1973. It is only after this has been done, that the stage for going over to Clause (b) is reached.

19. If this be the correct import of Section 19 (1) — as it appears to be — the proceedings for determinations of the surplus land/ceiling area of Malkhan Singh will have to be taken afresh, under the principal Act from the very start after a notice under Section 9 of that Act. This

means that all the earlier proceedings for determination of his surplus land before the Prescribed Authority and the District Judge have become infructuous, rendering, in consequences, the appeal before us, also futile.

20. In view of the position explained above, we do not think it necessary to decide the question raised by Mr. Pathak. We leave the same open, and dismiss this appeal as infructuous. The parties shall pay and bear their own costs.

Appeal dismissed.

AIR 1976 SUPREME COURT 447

(From: Punjab and Haryana)*

K. K. MATHEW AND S. MURTAZA
FAZL ALI, JJ.

Gurdial Singh and others, Appellants v. Biru and others, Respondents.

Civil Appeal No. 982 of 1968, D/-9-12-1975.

(A) Punjab Occupancy Tenants (Vesting of Proprietary Rights) Act 8 of 1953), S. 9 — Occupancy tenants — Concurrent finding as to — No interference by Supreme Court — (Constitution of India, Art. 136).

Where the courts below including the High Court have found that the respondents were in actual possession of the land till Rabi 1958, that they were the occupancy tenants; that the appellants forcibly took possession of the land in Rabi 1958 and that since the suit was filed in May, 1958, the suit was not barred by limitation.

Held that there was no reason to differ from concurrent findings of the courts below and the contention that since the appellants were tenants within the meaning of the Punjab Security of Land Tenures Act, 1953 and that as none of the grounds of eviction mentioned in S. 9 of that Act had been pleaded or made out the appellants were not liable to be evicted, had no merits. (Para 6)

*(First Appeal No. 884 of 1961, D/-10-11-1967—Punjab and Har.)

LS/LS/E591/75/HGP

Mr. Bishan Narain, Sr. Advocate, (Mr. I. S. Sawhney, Advocate with him), for Appellants; M/s. N. D. Bali and D. D. Sharma, Advocates, for Respondents.

Judgment of the Court was delivered by

MATHEW, J.:— This is an appeal by special leave against the decree of the High Court of Punjab and Haryana confirming the decrees passed by the courts below decreeing a suit filed by the respondents against the appellants. The suit was for recovery of possession of a piece of land measuring 29 Kanals from the appellants. The allegations in the plaint were that the land originally belonged to one Atta Mohammed and others, that the respondents were occupancy tenants of the land; that by virtue of the provisions of the Punjab Occupancy Tenants (Vesting of Proprietary Rights) Act the respondents became the owners of the land and that since the appellants had taken forcible possession of the land in 1958 they were entitled to evict the appellants.

2. The appellants contended that they were the tenants of the land and that the civil court had no jurisdiction to try the suit.

3. The trial court accepted the contention of the appellants and directed the return of the plaint to the respondents for presentation to the Revenue Court. Against this judgment, the respondents appealed to the learned Subordinate Judge, Ludhiana who remanded the case to the trial court for decision of the case on merits. The appellants filed a second appeal and the same was disposed of by a learned Single Judge of the High Court. By his judgment he directed the trial court to find whether the appellants were trespassers or tenants and in case they were found to be trespassers, the trial court will have jurisdiction to pass a decree against them, but in case they were found to be tenants, the suit will have to be dismissed. Thereafter the appellants applied before the trial court for amendment of the written statement on the basis that they had become the occupancy tenants of the land by adverse possession against the original proprie-

tors and had become owners of it under the Punjab Occupancy Tenants (Vesting of Proprietary Rights) Act and that the suit was barred by limitation. The trial court allowed the amendment and framed issues on the basis of the contentions in the amended written statement. The trial court found that the respondents were the occupancy tenants of the land and that the appellants had not become the owners of the land by adverse possession and that the suit was not barred by limitation. The court, therefore, decreed the suit.

4. An appeal was filed by the appellants before the lower appellate court. That was dismissed. The appellants filed a second appeal against the decree before the High Court. The High Court also dismissed the appeal.

5. The appellants contended before us that they were tenants of the land and that they had become occupancy tenants by virtue of adverse possession against the original proprietors and that they were the owners of the land. On the other hand, the respondents submitted that they were in possession of the land, that they had acquired the occupancy right and that it was only in Rabi 1958 that they were forcibly dispossessed by the appellants. The question whether the appellants were in possession of the land as tenants on the date of the suit was considered by the trial court as well as by the first appellate court and they held that there was no evidence that in 1958 the appellants were tenants of the land. Apart from it in the amended written statement the appellants' case was that they became owners of the land firstly by reason of their adverse possession of the land for the requisite period and secondly by reason of the fact that they were occupancy tenants within the meaning of the Punjab Occupancy Tenants (Vesting of Proprietary Rights) Act. After the amendment of the written statement the appellants had no case that they were tenants of the land and that the civil court had, therefore, no jurisdiction to try the suit. In fact their counsel expressly stated in the trial court that the plea with regard to lack of jurisdiction

had been abandoned. Now the courts below including the High Court have found that the respondents were in actual possession of the land till Rabi 1958, that they were the occupancy tenants; that the appellants forcibly took possession of the land in Rabi 1958 and that since the suit was filed in May, 1958, the suit was not barred by limitation.

6. Counsel for the appellants argued that Khasra Girdawaris showed that from 1931 to Rabi 1956 and then from Rabi 1957 onwards he appellants were in possession, that it was only in Kharif 1957 that the entry had been changed in favour of the respondents and that the charge in the entry was recorded by the Patwari without observing the relevant instructions on this point. The High Court had overruled this plea. It held that no reason had been shown for holding that the entry was incorrect. The appellants made no effort for correction of the entry in Khasra Girdawari Kharif 1957 at any time. In these circumstances, we see no reason to differ from concurrent finding of the courts on this point. Counsel for the appellants submitted that since the appellants were tenants within the meaning of the Punjab Security Land Tenures Act, 1953 and that as none of the grounds of eviction mentioned in Section 9 of that Act had been pleaded or made out, the appellants were not liable to be evicted. We see no merits in this contention. This plea was not raised before any of the courts below and is not even mentioned in the statement of case or grounds of appeal before this Court.

7. We dismiss the appeal, but make no order as to costs.

Appeal dismissed.

AIR 1976 SUPREME COURT 449

(from: Delhi)*

P. K. GOSWAMI AND P. N. SHINGHAL, JJ.

Maha Singh, Appellant v. State (Delhi Administration), Respondent.
Criminal Appeal No. 209 of 1971,
D/- 8-1-1976.

(A) Criminal P. C. (1898), Section 367 — Contents of judgment — Verdict of guilty — Duty of Court — (Criminal P. C. (1974), S. 354).

When witnesses swear home through a two inch board and sometimes quantitatively the defence musters up a number of witnesses, the court has to be extremely cautious and careful to enter a verdict of guilty only if the complainant's version is supported by some clinching circumstance of such character and quality as may reasonably assure the judicial mind about the truth of the real position against the accused.

(Para 27)

Where in prosecution of an accused (Head constable of a police station) for offence under Section 161, I. P. C. and Section 5 (2) read with Sec. 5 (1) (d) of Prevention of Corruption Act there was a clinching circumstance that a currency note of Rs. 10/- was recovered from the left side front pocket of the shirt of the accused and there was nothing to show that the currency note was recovered from his pocket being wrapped inside a particular purchase, the arrival of Inspector being immediately after the putting of money inside pocket of accused, the defence story of complainant giving ten rupee note wrapped inside the "purchase" was absolutely false. When there was a conclusive proof with regard to recovery of currency note from pocket of accused, deficiency of evidence of corroboration with regard to the negotiation of the accused with the complainant paled into insignificance, more so when no material prejudice resulted to the accused. A defence plea of planting of any incriminating object in answer to a charge, to be successful must be or, at any rate,

*(Criminal Appeal No. 71 of 1970,
D/- 19-1-1971—Delhi.)

AT/AT/A69/76/SSG

should reasonably appear to have been, made without the knowledge or acquiescence of the accused. AIR 1973 SC 498, Distinguished. Cr. A. No. 71 of 1970 D/- 19-1-1971 (Delhi), Affirmed. (Paras 25, 29)

(B) Evidence Act (1872), S. 3 — Trap witness — Value of.

There is no rule of law that even if a witness is otherwise reliable and independent, his association in a prearranged raid about which he had become acquainted, makes him an accomplice or a partisan witness. In absence of anything to warrant a contrary conclusion, conviction is not untenable merely because it is based on the testimony of such a witness. Every witness of a raiding party cannot be dubbed as an accomplice per se or even as an interested witness in total absence of materials justifying such an inference. (Paras 33, 34)

(C) Criminal P. C. (1898), Ss. 4 (1), 161, 162 — Complaint to Inspector, Anti Corruption Department — Steps taken by Inspector, if "investigation" within S. 4 (1) — Statement by accused to Inspector — Admissibility of — (Criminal P. C. (1974), Sections 2 (h), 161, 162.)

On a complaint made to the Inspector of Anti Corruption Department, he recorded the same and arranged the raid by noting each step taken thereafter in a regular manner. Indeed the Inspector himself examined the witnesses under S. 161, Cr. P. C. and completed the investigation. What was done by the Inspector in order to detect the accused while taking the bribe came within the term 'investigation' under S. 4(1) of the Code of Criminal Procedure, 1898. The fact that he had also later on forwarded the complaint for formal registration of the case at Police Station did not do away with the character of the investigation already commenced by the Inspector on recording the complainant's statement disclosing a cognisable offence. Therefore, any statement made by the accused in answer to question put by the Inspector was inadmissible under S. 162, Cr. P. C. and neither the prosecution nor the accused could take advantage of these answers.

(Paras 37, 38)

(D) Evidence Act (1872), S. 8 — Conduct of accused — Relevancy.

In prosecution for offence of bribery the conduct of the accused will be relevant under S. 8 of the Evidence Act if his immediate reactions to the illegal overture of the complainant or his action in inserting unwanted something in his pocket were revealed in the form of acts accompanied then and there or immediately thereafter by words or gestures reliably established. (In the present case there was no evidence to support an innocent piece of conduct of accused.) (Para 39)

Cases Referred: Chronological Paras
AIR 1973 SC 498 = (1972) 3 SCC 652 = 1972 Cri LJ 1293 30

Mr. Frank Anthony, Sr. Advocate, (M/s. K. R. Rohtagi and V. K. Jain, Advocates with him), for Appellant; Mr. S. N. Anand and Mr. R. N. Sachthey, Advocates, for Respondent.

Judgment of the Court was delivered by

P. K. GOSWAMI, J.:— The complainant, Shiv Darshan Nath, (PW 1) was an unlicensed hawker selling oranges and fruits in what is described as a 'chabba' around Novelty Cinema area in Delhi. The locality is within the jurisdiction of the Lahori Gate Police Station.

2. The accused Maha Singh was enrolled as a Constable in the Delhi Police in July 1957 and was promoted as Head Constable (Havaldar) in August 1963. He was posted to the Lahori Gate Police Station on November 21, 1967 and had since been serving there in that capacity until his suspension in connection with the present case.

3. During April 1969 the accused was deputed for prosecuting unauthorised squatters and persons indulging in petty offences within the area of the said Police Station. The accused in performance of these duties was required to and did maintain a Petty Offences Register and he had "to do pervi of these cases challaned by him in the court."

4. The complainant approached the Anti-Corruption Inspector Delhi, Bal Krishan (PW 7) on April 7, 1969, at about 11.00 A.M. and made

a complaint to him. This complaint was recorded by the Inspector (PW 1/A). The material allegations disclosed therein were—

".....Now, for some days a new Havaladar of P. S. Lahori Gate, has been coming there for challaning under Section 33, Bombay Police Act, and he has been harassing people unlawfully. He has chalaned me also a number of times. He drew up one chalan (against me) on 3-4-69, which stands fixed for hearing on 8-4-69, in the court of Shri O. P. Yadav, SDM. This Havaladar says that he will not put up this chalan in case I pay him Rs. 10/-, and that in case I give him Rs. 50/- p.m., I will not be chalaxed in future. I am poor man and unable to meet his said desire. On 5-4-69, the Havaladar aforesaid came to me, and said that he would come again on 7-4-69 about 3.00 P.M. and that in case rupees ten were not paid, the chalan would be put in Court. Since the Havaladar of Lahori Gate Police Station has demanded Rs. 10/- from me as bribe, I have come for report. Suitable action may be taken.....".

5. The words "against me" in parentheses in the above extract are not to be found in the original statement recorded in the Urdu language. This has to be mentioned as Mr. Frank Anthony appearing on behalf of the accused strenuously submitted that since there had been no chalan against the complainant the entire edifice of the case was destroyed. We felt some doubt about the translation in the paper-book and, therefore, looked into the original document and we are satisfied that the words "against me" are not to be found therein.

6. Now following the sequence, the Inspector decided to arrange a raid and summoned two witnesses from the Deputy Commissioner's office (PWs 3 and 4) and recorded in a raid memo the number of the only ten rupee note (P-1) which the complainant had with him. The Inspector proceeded to state that—

"the said G. C. note was later returned to the complainant with a direction to pass it on to the accused

within the sight of the panch witnesses having such talk with the accused as to indicate the said G. C. note had been passed on to the accused by way of bribe. Both the panch witnesses were also instructed to remain close to the complainant and the accused, hear their talk, see the passing of the bribe money and on ascertaining that the same had been passed to the accused by way of bribe, Ved Prakash was further instructed to give the agreed signal."

7. The Inspector and the party with the complainant were in the area of the Novelty Cinema from about 2.10 P.M., the accused was not to be seen in the area till 5.45 P.M. when, however, he was located in plain clothes in a three-wheeler scooter sitting in the rear seat with Babu Ram (PW 6) a constable of the Lahori Gate Police Station on duty, in uniform.

8. In addition to the complainant, Sohan Singh (PW 3) stated that "..... somebody came and called the complainant. He took him along with him". This has to be particularly noted as the High Court put great reliance upon this piece of evidence of PW 3 as will be noticed later.

9. The complainant approaching the accused sat in the driver's seat inside the scooter. According to the complainant—

"The accused then asked me that if I had to get the chalan cancelled, I should pay Rs. 10/- and that if further challans were not desired, a sum of Rs. 50/- on my behalf and on behalf of my brother should be paid to him. I handed over Rs. 10/- G. C. Note P-1 and the chalan P-2 to the accused. The accused put these in his front pocket of the shirt."

As arranged the signal was given to the Inspector by PW 4 (Ved Prakash) and the Inspector and the party, who were at an eye-shot, reached the place immediately. The Inspector recovered the G. C. Note P-1 from the pocket of the accused's shirt and comparing the number of the G. C. note found it to tally with the one already recorded by him. On further search of the person of the accused a sum of Rs. 51/- along with carbon copies of two chalans were also recovered. According to the

inspector when challenged by him the accused "replied that he had taken a ten rupee G. C. note which he had put in the front pocket of his shirt. On his search one G. C. Note of Rs. 10/- was recovered from the front pocket of his shirt and after comparing its number with the raid report which was found to tally and it was taken into possession vide memo PW 1/C. Besides, two chalans P-2 and P-3 and a sum of Rs. 51/- were also recovered and were taken into possession vide memo PW 1/D".

10. Although PWs 3 and 4 were requisitioned for help in the arranged raid, as stated above, they did not come upto full expectations. According to PW 3 "I heard no talk between the complainant and the accused, nor could I see the passing of the money." He stated that he was standing at quite a distance whereas Ved Parkash was nearer to the scooter". He also stated that on the accused being challenged by the Inspector "if he had taken the bribe money", the accused replied "that he had taken one chalan 'purchee' P-2 and one G. C. note P-1 of Rs. 10/-" and "on being searched G. C. note Ex. P-1 was recovered from the front pocket of the shirt of the accused which he was wearing". He further stated that "from the personal search of the accused 51 currency notes and two chalan purchees P-2 and P-3 were also recovered and the same were taken into possession vide memo PW 1/D".

11. PW 4, on the other hand, stated that "the complainant handed over a ten rupee G. C. note major portion of which was wrapped in a white paper to the accused Maha Singh present in court and told the accused that my chalan may be got corrected (mera chalan theek kara dena). The accused took the G. C. note with the white paper and put the same in his front shirt pocket. I gave the signal. Inspector Bal Krishan reached the spot. He disclosed his identity and secured the accused. I told the Inspector that the G. C. note has been put by the accused in his shirt pocket. The same was recovered by Inspector Bal Krishan vide memo PW 1/C. Two chalans P-2 and P-3 were also recovered besides

Rs. 51/- from the accused vide memo PW 1/D."

PW 4, however, stated that "the accused denied having taken any bribe when challenged by Inspector Bal Krishan".

12. It may be mentioned here that P-2 is the chalan relating to the complainant's brother, Charan Dass. It appears from P-2 that the case against Charan Dass was fixed in the court of Shri O. P. Yadav, Sub-Divisional Magistrate, on April 8, 1969. P-3 related to Mangal Sain (DW 5) showing that he was to attend his case in the same court on the same date, April 8, 1969. Both the cases were under Section 33/13/131 Bombay Police Act (obstruction of public passage) and P-2 and P-3 are personal recognizance bonds.

13. The case was investigated by the Anti-Corruption Department and the charge-sheet was submitted after obtaining sanction from the Superintendent of Police, North District, Delhi (PW 5).

14. The accused stands charged under Section 161, I. P. C. and Sec. 5 (2) read with Section 5 (1) (d) of the Prevention of Corruption Act (briefly the Act). His defence is that the case was concocted against him by the complainant and the money was planted in his pocket as he "had casually told him also not to obstruct the public way once earlier." He further stated in his examination under Section 342, Code of Criminal Procedure "In fact the complainant hastened to put something in the chalan in my pocket against my wishes and I was trying to know what it was about when I was surrounded by the Inspector. I told the Inspector also that I had not done anything and I might not be harassed unnecessarily."

15. From the above, the version of the prosecution and that of the accused are clear. While according to the prosecution the accused had earlier negotiated for a bribe and later on accepted the same from the complainant, according to the accused he made no negotiation with the complainant nor did he voluntarily accept any money from the complainant. On the other hand, the

complainant planted the currency note of Rs. 10/- into his pocket against his wishes when he was all of a sudden surrounded by the Inspector and the raiding party.

16. The trial court accepted the prosecution case and convicted the accused under both the sections and sentenced him to rigorous imprisonment for one year on both the counts running concurrently and to a fine of Rs. 100/- in addition, in default one month's imprisonment. The High Court affirmed the conviction and the sentence. Hence this appeal by special leave.

17. Mr. Frank Anthony submitted that since the prosecution failed to establish that there was any case instituted by the accused against the complainant which might furnish an occasion for offering a bribe the entire story of the complainant should stand discredited. He also submitted that the complainant's brother, Charan Dass, was not even examined by the police nor in court. Mangal Sain was not examined by the prosecution but had been examined by the accused. He further emphasised that the story of the complainant with regard to the negotiation for the bribe stood on his solitary uncorroborated testimony and he was not such an absolutely independent witness whose testimony was worthy of credit for the purpose of basing a conviction. Counsel further emphasised that while the prosecution sought to prove that the accused voluntarily accepted the bribe and himself put the currency note in his pocket, this story did not find corroboration from any independent source.

18. PW 3, of course, does not state about the passing of the money nor about any conversation. PW 4, however, supported the complainant in his examination-in-chief although he added that "the accused denied having taken any bribe when challenged by Inspector Bal Krishan". In the course of his cross-examination, however, he stated that he "could not hear the talk between the complainant and the accused." Constable Babu Ram (PW 6), who was sitting with the accused in the scooter, deposed that his attention was more towards the road than towards the

complainant and the accused. He completely threw overboard the complainant's version and stated "I saw the complainant Shiv Darshan Nath putting a purchase with a note in the pocket of the accused". He further stated that "I did not hear the accused telling the Inspector that he had taken no bribe and should not be harassed."

19. The High Court accepted the version of the complainant and found that the prosecution case stood established beyond any doubt. The learned Judge observed:

"To me it appears on admission that the appellant allowed PW 1 to put something in his pocket. If that was against his wishes he should have thrown it out."

The High Court also accepted the testimony of PW 3 corroborating the complainant in that a person had called PW 1 to the scooter where the accused was sitting. From this the High Court concluded—

"Why at all was PW 1 sent for if there were no prior negotiations and if the accused was not sure that in fulfilment thereof he will be receiving the money from PW 1".

20. Nothing has been elicited against PW 3 as to why he should be disbelieved. He has not gone to the entire length of supporting every detail of the prosecution case. It is, therefore, not possible to hold that the High Court was absolutely wrong in accepting his statement that the complainant had been sent for by the accused to the scooter through some person who could not be later identified for the purpose of examination in Court. It was not possible in such a situation to recognise and locate the messenger.

21. The trial court does not seem to have relied upon the evidence of PW 4. From the evidence of the defence witnesses (DWs 1, 2, 3, 4 and 7) it is clear that the witness is not an independent person, nor a very reliable one. There was a case against him under Section 161, I. P. C. and Section 5 (2) of the Act. His services were terminated for missing of certain records although he was later on re-employed in July 1968. He was a raid witness for the police in several anti-corruption cases.

The High Court also has not relied upon his evidence.

22. In view of the defence of the accused which is supported by PW 4, PW 6, DW 5 and DW 6 with regard to the fact of the complainant putting the currency note wrapped inside 'purchee' P-2 into the pocket of the accused, the recovery of the note by the Inspector from the accused's pocket is absolutely inconsequential, says Mr. Frank Anthony.

23. There are, however, more things than meet the eye. There were two persons, DW 5, Mangal Sain and Charan Dass (Complainant's brother), who had been sent up by the accused on April 3, 1969, under the Bombay Police Act for prosecution in court. It is understandable that while performing these duties a policeman may clash with the shopkeepers. There is also equal possibility of patching up with certain offenders. In this situation it is extremely important for the court to find by unerring and cogent evidence whether the accused had committed the offence.

24. In our view there is a clinching factor. If the accused's version is true, the recovery of the note would have been inside 'purchee' P-2 since the accused and his four supporting witnesses had deposed to that effect. If this version is even prima facie reliable, the accused will be entitled to the benefit of doubt. We are, however, unable to hold so. The seizure memo PW 1/C about which there has been no cross-examination shows that a currency note of Rs. 10/- bearing number C-67-090721 was recovered from the left side front pocket of the shirt worn by the accused. There is nothing to show that this currency note was recovered from his pocket being wrapped inside the particular 'purchee' or for the matter of that inside "another white paper". This fact of recovery is proved by the Police Inspector as well as by PW 3 and the complainant who had signed the memo. Even Ved Parkash (PW 4) had signed this memo. Similarly, we have the seizure memo PW 1/D which is prepared by the Inspector and signed by the complainant and PWs 3 and 4. This seizure memo shows that

the currency notes of Rs. 51/-, a carbon copy of chalan of Charan Dass (P-2) and another carbon copy of chalan of Mangal Sain (P-3) admittedly received by the accused a short while ago were recovered from the left side front pocket of the shirt.

25. From the above it is clear that the defence story of the complainant giving a ten rupee note wrapped inside the "purchee" relating to Charan Dass is absolutely false. If, as stated by the accused, the Inspector arrived immediately after the money was put inside his pocket, namely, wrapped inside a "purchee", the seizure memo (PW 1/C) would have shown the recovery in that state. We do not find it to be so. The evidence of the complainant is corroborated by the Inspector and PW 3 and also corroborated by the documentary evidence, PW 1/C, coupled with the manner of the recovery of the note. When we find such a conclusive proof with regard to this part of the case, deficiency of evidence of corroboration with regard to the negotiation of the accused with the complainant pales into insignificance.

26. Further, one of the witnesses, who deposed with regard to the recovery of the note as per PW 1/C was cross-examined to the effect that the note was recovered wrapped in the "purchee" (P-2). Even the evidence of PW 4, PW 6, DW 5 and DW 6 called in aid to support the accused's plea of planting the currency note, is belied by the lone recovery of the marked currency note of Rs. 10/- by itself detached from the "purchee" in which it was said to be more or less concealed from external view.

27. When witnesses swear home through a two inch board and sometimes quantitatively the defence musters up a number of witnesses, the court has to be extremely cautious and careful to enter a verdict of guilty only if the complainant's version is supported by some clinching circumstance of such character and quality as may reasonably assure the judicial mind about the truth of the real position against the accused. This we have been able to find in this case as noted above.

28. It was also argued at one stage that the charge being with reference to favour shown to the complainant in person; with regard to his own case, the accused was entitled to an acquittal as the case in court was that it related to his brother Charan Dass. We do not think that a particular mention of the chalan against the complainant instead of against Charan Dass, in the charge, has resulted in any material prejudice to the accused in the present trial. Evidence was clearly let regarding the chalan against Charan Dass and it was his 'purchee' which had been handed over to the accused by the complainant along with the currency note. The accused was fully aware of the charge he had to meet and made no mistake in taking a definite defence although, unfortunately, the same could not be established. Even the grievance of non-examination of Charan Dass as a prosecution witness in presence of admitted 'purchee' is not of any consequence.

29. A defence plea of planting of any incriminating object in answer to a charge, to be successful must be or, at any rate, should reasonably appear to have been made without the knowledge or acquiescence of the accused. The case in hand is not such a case. The learned counsel strenuously relied upon *Ram Prakash Arora v. State of Punjab*, (1972) 3 SCC 652 = (AIR 1973 SC 498 = 1972 Cri LJ 1293) where notwithstanding recovery of the two marked ten rupee currency notes the accused was acquitted in a bribery charge. But in that case recovery of the currency notes, which was denied by the accused, assumed great importance and the fact that the same could not be established by reliable and independent search witness was considered by this court as one of the serious infirmities.

30. The class from which the complainant comes is one of poor hawkers who somehow eke out their living. Nothing is known whether they just deliberately avoid payment of licence fees for hawking, which may not even be exorbitant, or they avoid being tucked to a particular place being subject to a licence in absence of

which they may squat at any place of their choice and convenience. It is, however, manifest that such encroachment of public place will be a continuing offence and, if repeated, will be committed every day afresh. In that view a demand of Rs. 10/- for clearing one single day's offence and Rs. 50/- for purchasing immunity for the whole month may drive such a person to desperation prompting recourse to public authorities against such illegal proposals. In this view of the matter, an unwilling or forced bribe-giver, as in the case at hand, may not even be stigmatised as an accomplice in the strict sense of the term of *particeps criminis*.

31. Even so we will adopt a cautious line in following the dictate of prudence to seek for some material corroboration even in this case to assure the judicial mind about the truthfulness of the crux of the matter in respect of the offence charged and of the nexus of the crime with the criminal.

32. The matter will be different when a person himself abets the offences of bribery under Section 161 and Section 165, I. P. C. which is an independent offence under Section 165A equivalent earlier to Section 161 read with Section 109 or Section 116, I. P. C.

33. This also leads to the question whether all witnesses, who are called upon to assist detection of a bribery case by laying a trap, should be considered unreliable as accomplices or at any rate partisan witnesses. There is no rule of law that even if a witness is otherwise reliable and independent, his association in a pre-arranged raid about which he had become acquainted, makes him an accomplice or a partisan witness. In absence of anything to warrant a contrary conclusion, conviction is not untenable merely because it is based on the testimony of such a witness.

34. We are also not prepared to dub every witness of a raiding party to be an accomplice per se or even as an interested witness in total absence of materials justifying such an inference. While PW 4 will be a highly partisan witness in this case in his own interest to oblige the po-

lice, nothing was shown against PW 3. PW 7, the Inspector, cannot be considered as an absolutely partisan witness because he is a Police Officer who took immediate action on the complaint. Nothing unusual is suggested against him. We have no hesitation in accepting the testimony of PWs 3 and 7 on their own. They do corroborate the complainant.

35. As demonstrated above, it is not a case where conviction of the accused by the High Court is based only on the uncorroborated testimony of the bribe-giver.

36. Even three or four days' time taken by the complainant after the accused's demand of the bribe for the purpose of reporting the matter to the Anti-Corruption Department is not such as to efface the offence when it was actually committed on the very day of the report which was faithfully recorded by the Inspector then and there without loss of time.

37. A question arose whether the statement of the accused before the Inspector admitting to have received the bribe was admissible in evidence. It is apparent from the evidence of the Inspector that these cases are investigated by the Anti-Corruption Department which carries on its work on its own. On a complaint made to the Inspector he recorded the same and arranged the raid by noting each step taken thereafter in a regular manner. What has been done by the Inspector in this case in order to detect the accused while taking the bribe comes within the term 'investigation' under Section 4(1) of the Code of Criminal Procedure, 1898. The moment the Inspector had recorded the complaint with a view to take action to track the offender, whose name was not even known at that stage, and in this case proceeded to achieve the object, visited the locality, questioned the accused, searched his person, seized the note and other documents, turns the entire process into an investigation under the Code. Indeed the Inspector himself stated that he examined the witnesses under Section 161, Cr. P. C. and completed the investigation. The fact that he had also later on forwarded the complaint for

formal registration of the case at Lahori Gate Police Station does not do away with the character of the investigation already commenced by the Inspector on recording the complainant's statement disclosing a cognisable offence.

38. Therefore, any statement made by the accused in answer to questions put by the Inspector is inadmissible under Section 162, Cr. P. C. and neither the prosecution nor the accused can take advantage of these answers. These are, therefore, excluded from consideration in this case by us.

39. But all the same the conduct of the accused would be relevant under Section 8 of the Evidence Act if his immediate reactions to the illegal overture of the complainant or his action in inserting unwanted something in his pocket were revealed in the form of acts accompanied then and there or immediately thereafter by words or gestures reliably established. There is no evidence to support an innocent piece of conduct. In the entire circumstances of the case we agree with the High Court that it was not against the wishes of the accused that the money passed from the hands of the complainant into his pocket.

40. The High Court and the trial court cannot, therefore, be said to have made any gross error of Law in appreciating the evidence and coming to the conclusion that the charges against the accused were fully established.

41. In the result the appeal fails and is dismissed. The accused shall surrender to his bail to serve the sentence.

Appeal dismissed.

AIR 1976 SUPREME COURT 456

(From: ILR (1975) Cut 141)

P. N. BHAGWATI, P. K. GOSWAMI
AND N. L. UNTWALIA, JJ.

State of Orissa and another, Appellants v. Shri Manilal Singhania and another, Respondents.

Criminal Appeal No. 93 of 1975, D/-15-1-1976.

AT/AT/A137/76/LGC

(A) Maintenance of Internal Security Act (1971), Section 8 — Representation by detenu — Consideration of — Delay — Effect — Gap between receipt of representation and its disposal by Government, held, was satisfactorily explained — Detention could not be held to be invalid on ground of undue delay — ILR (1975) Cut 141, Reversed — (Constitution of India, Article 22 (5)).

The representation made by the detenu against the order of detention should be considered by the State Government as soon as possible, that is, with reasonable despatch and if that is not done, it would have the effect of vitiating the order of detention. But, it is neither possible nor advisable to lay down any rigid period of time uniformly applicable in all cases within which the representation of a detenu must be considered by the State Government. The Court would have to consider judicially in each case on the available material whether the gap between the receipt of the representation and its consideration by the State Government is so unreasonably long and the explanation for the delay offered by the State Government so unsatisfactory as to render the detention order thereafter illegal. AIR 1973 SC 824, Foll. (Para 3)

In the instant case the facts given in the counter-affidavit filed by the Deputy Secretary to the Government of Orissa in the Home Department, clearly indicated that there was no undue delay on the part of the State Government in considering the representation of the detenu. The representation made by detenu on 21-10-1974 could not straightway be placed before the Chief Minister for her consideration. It had to be sent to the concerned department for examination and notings and naturally it took time for the representation to move from a lower officer to a higher officer before it reached the Chief Minister. There was no delay at any stage in this movement of the representation from one officer to another. Every officer dealt with the representation promptly and after examining it and making his notings, submitted it to the higher officer. The representation undoubtedly went to the Chief Minister on 7th November, 1974, but since the Chief Minister was out of Headquarters between 7-11-1974 and 12-11-1974, it had to wait till the Chief Minister returned but as soon as she returned, she immediately, without any delay at all, disposed of the representation on 12-11-1974. The period of time which elapsed between the receipt of the representation and its disposal by the State Government has been satisfactorily explained in the affidavit of the Deputy Secretary filed on behalf of the State Government. Therefore the order of detention could not be held to be invalid on ground of undue delay on

the part of the State Government in considering the representation. ILR (1975) Cut 141, Reversed. (Para 4)

Cases Referred: Chronological Paras AIR 1973 SC 824 = 1973 Cri LJ 656 3

Mr. M. K. Ramamurthi Sr. Advocate (Mr. B. Parthasarathi Advocate with him), for Appellants; M/s. Shankar Das Banerjee and V. S. Desai, Sr. Advocates (M/s. B. P. Maheshwari and Suresh Sethi Advocates with them), for Respondent No. 1; Respondent No. 2, Ex parte.

Judgment of the Court was delivered by

BHAGWATI, J.— This appeal arises out of a writ petition filed by the 1st respondent challenging the order of detention dated 15th October, 1974, made by the District Magistrate, Sambhalpur in exercise of the powers conferred on him under Section 3 (2) (a) (iii) of the Maintenance of Internal Security Act, 1971. The High Court of Orissa allowed the writ petition and quashed the order of detention on two grounds; firstly, that the material before the District Magistrate was not such that any reasonable man could possibly arrive at a subjective satisfaction that it was necessary to detain the petitioner with a view to preventing him from acting in a manner prejudicial to the maintenance of supplies essential to the community, and in any event, there was relevant material in existence to the knowledge of the District Magistrate which he failed to take into account in reaching his subjective satisfaction, and secondly, there was delay on the part of the State Government in considering the representation of the 1st respondent against the order of detention and this delay was not satisfactorily explained. The validity of both these grounds is challenged in the present appeal brought by the State and the District Magistrate with special leave obtained from this Court.

2. So far as the first ground is concerned, it is not necessary to examine it and determine whether it is right or wrong, because we have been informed by the learned counsel for the State Government and the District Magistrate that they do not propose to detain the 1st respondent again on the self same material which was brought on record before the High Court even if they succeed in the appeal before us. We must, however, confess that as we read the judgment of the High Court, we cannot escape the feeling that the High Court travelled a little beyond its jurisdiction in entering upon a close and detailed scrutiny of the material before the District Magistrate as if it was sitting in appeal against the findings of the District Magistrate. The only limited jurisdiction possessed by the High Court was to examine whether the subjective satisfaction reached by the Dist-

riect Magistrate was based on no material at all or was such as no reasonable person would arrive at on the basis of the material which was before the District Magistrate. This restricted jurisdiction, it does seem *prima facie*, the High Court over-stepped in its anxiety and concern for personal liberty. But at the same time, while pointing out this infirmity into which the High Court *prima facie* seems to have lapsed, we cannot fail to take note of the fact that the inquiry, preliminary to the making of the order of detention, suffers from certain deficiencies, though they may not provide a legal ground for invalidating the order of detention. The District Magistrate relied almost entirely on the report of the Anti-Smuggling Magistrate for the purpose of arriving at his subjective satisfaction regarding the necessity of detention. The Anti-Smuggling Magistrate took samples of rice from the 'Stores' of D. M. P., Second Battalion, Jharsuguda and it was on the basis of these samples of rice that a conclusion was reached by him that the rice bought by Havildar Major from the 1st respondent's firm M/s. M. Manilal was fine or super-fine rice and not coarse rice as stipulated in the Release Order. But these samples of rice were taken by the Anti-Smuggling Magistrate in the absence of the 1st respondent or any other representative of M/s. M. Manilal and an elementary precaution was thus ignored. It is also a little surprising that neither the Anti-Smuggling Magistrate, nor the District Magistrate should have carried out an immediate raid on the godown of M/s. M. Manilal for the purpose of finding out what were the different varieties of rice in stock with them and whether the stocks of rice actually found in their possession tallied with the entries in the Stock Register. If M/s. M. Manilal did not deliver to Havildar Major 200 quintals of rice of coarse variety as provided in the Release Order but instead supplied him 200 quintals of rice of fine or super-fine variety as subsequently alleged by Havildar Major, the search of the godown of M/s. M. Manilal would have showed that they had actually in stock with them an excess of 200 quintals of rice of coarse variety over that appearing in the Stock Register. But, on the other hand, if the stock of rice of coarse variety actually found with M/s. M. Manilal on search of their godown tallied with the stock appearing in the Stock Register, it would have shown or at least gone a long way towards showing that 200 quintals of rice delivered by them to Havildar Major were of coarse variety. But for some inexplicable reason this elementary step was also not taken by the Anti-Smuggling Magistrate or the District Magistrate. Then again, neither the Anti-Smuggling Magistrate, nor the District Magistrate

examined the Quality Inspector who was always stationed at the godown of M/s. M. Manilal and who took out a sample from the quantity of rice delivered by M/s. M. Manilal to Havildar Major and sent it for analysis to the Public Analyst. It may be noted that the analysis of this sample by the Public Analyst showed that it was a sample of rice of coarse variety and unless collusion was established between the Quality Inspector and M/s. M. Manilal or negligence in the discharge of his duties was attributed to the Quality Inspector, this would go to show that the rice delivered by M/s. M. Manilal to Havildar Major was of coarse variety. These are all circumstances which could have been inquired into or at any rate got investigated by the District Magistrate before reaching a subjective satisfaction resulting in deprivation of personal liberty of the 1st respondent. When we say this we do not wish to lay down that these deficiencies in the inquiry preceding the making of the order of detention have an invalidating consequence on the order of detention. Whether they have such consequence or not is a matter on which we do not wish to express any opinion. But there can be no doubt that they cause a certain amount of anxiety in the mind of the Court that perhaps the detention of the 1st respondent might not really be justified and he might be wrongly incarcerated. It is true that this is not a matter which lies within the jurisdiction of the Court for the Court's jurisdiction is limited and its function is only to inquire whether the detention is in accordance with law. But a doubt does begin to gnaw at the mind of the Court and, therefore, we are glad that the State Government and the District Magistrate have stated before us that they would not re-detain the 1st respondent on the same material.

3. The second ground raises the question whether there was any unexplained delay on the part of the State Government in considering the representation made by the 1st respondent against the order of detention. Now, the law is well settled by several decisions of this Court, of which we may refer only to one, namely, *Rashid v. State of West Bengal*, AIR 1973 SC 824, that the representation made by the detenu against the order of detention should be considered by the State Government as soon as possible, that is, with reasonable despatch and if that is not done, it would have the effect of vitiating the order of detention. It was pointed out by this Court in *Rashid's case* (*supra*) that

"It is undoubtedly true that neither the Constitution nor the Act expressly provides for the consideration of a detenu's representation by the State Government

within any specified period of time. The constitutional requirement of expeditious consideration of the petitioner's representation by the State Government has, however, been spelt out by this Court from clause (5) of Article 22 of the Constitution — This right — to have the representation considered at the earliest flows from the constitutional guarantee of the right to personal liberty — a right which is highly cherished in our Republic and its protection against arbitrary and unlawful invasion."

But, as pointed out by this Court in the same case, it is neither possible nor advisable to lay down any rigid period of time uniformly applicable in all cases within which the representation of a detenu must be considered by the State Government. The Court would have to consider judicially in each case on the available material whether the gap between the receipt of the representation and its consideration by the State Government is so unreasonably long and the explanation for the delay offered by the State Government so unsatisfactory as to render the detention order thereafter illegal. We must examine the facts of the present case in the light of this principle for the purpose of determining whether there was any undue delay in consideration of the representation of the 1st respondent by the State Government.

4. The 1st respondent made a representation against the order of detention on 21st October, 1974 and it was received by the District Magistrate on the same day. The District Magistrate despatched the representation of the 1st respondent together with his parawise comments to the State Government on 24th October, 1974 and it was received by the Home Secretary on 25th October, 1974. The Home Secretary endorsed the representation to the Deputy Secretary and the Deputy Secretary in his turn endorsed it to the concerned section in his department for examination. Now it appears that the Secretariate was closed for the Pooja Holidays from 20th October, 1974 to 27th October, 1974 (both days inclusive) and 30th October, 1974 was also a holiday on account of Kumar Purnima. The Assistant dealing with the matter could not, therefore, place the record in regard to the representation before the Head Assistant until 31st October, 1974. The Head Assistant examined the representation and submitted his remarks on 2nd November, 1974 and on 4th November, 1974 the Deputy Secretary dealt with the representation. The representation then went to the Secretary and he made his remarks on it on 5th November, 1974. The representation was then processed by the Additional Chief Secretary on 6th November, 1974 and finally on 7th November, 1974 the file

was endorsed to the Chief Minister who was incharge of the Home Department. The Chief Minister was absent from Headquarters between 7th November, 1974 and 12th November, 1974 and immediately on return to Headquarters, she disposed of the representation and rejected it on 12th November, 1974. These facts, which are given in the counter-affidavit filed by the Deputy Secretary to the Government of Orissa in the Home Department, clearly show that there was no undue delay on the part of the State Government in considering the representation of the 1st respondent. The representation could not straightway be placed before the Chief Minister for her consideration. It had to be sent to the concerned department for examination and notings and naturally it took time for the representation to move from a lower officer to a higher officer before it reached the Chief Minister. What is important to note is that there was no delay at any stage in this movement of the representation from one officer to another. Every officer dealt with the representation promptly and after examining it and making his notings, submitted it to the higher officer. The representation undoubtedly went to the Chief Minister on 7th November, 1974 but since the Chief Minister was out of Cuttack, it had to wait till the Chief Minister returned and it is important to note that as soon as she returned, she immediately, without any delay at all, disposed of the representation. We do not, therefore, see any gap between the receipt of the representation and its consideration by the State Government which can be said to be unreasonably long. The period of time which elapsed between the receipt of the representation and its disposal by the State Government has been satisfactorily explained in the affidavit of the Deputy Secretary filed on behalf of the State Government. We do not, therefore, agree with the High Court that there was undue delay on the part of the State Government in considering the representation of the 1st respondent and in the circumstances the order of detention could not be held to be invalid on that ground.

5. In the result, in view of the statement made before us by the learned counsel appearing on behalf of the State Government and the District Magistrate that they do not propose to detain the 1st respondent again on the same material, we dismiss the appeal, but with no order as to costs throughout.

Appeal dismissed.

AIR 1976 SUPREME COURT 460

(From: Madhya Pradesh)*

Y. V. CHANDRACHUD, V. R. KRISHNA IYER AND A. C. GUPTA, JJ.

Bansidhar Prashar, Appellant v. Shaligram Srivastava and another, Respondents.

Civil Appeal No. 1325 of 1973, D/- 15-1-1976.

(A) Representation of the People Act (1951), S. 123 (4) — Corrupt practice — Allegation as to speeches and pamphlets by respondent attacking character and conduct of appellant — Considering antecedents of appellant, respondent held had good reason to believe imputations to be true.

The appellant, a Congress (R) candidate, was defeated by the respondent in the election to the State Assembly. The appellant filed an election petition challenging respondent's election on the ground that the respondent had delivered speeches and published pamphlets attacking appellant's personal character and conduct. The appellant admitted in his evidence that a criminal case under Sections 353 and 332, Penal Code was pending against him, that a shopkeeper had filed a criminal complaint against him under Section 427, Penal Code and that an inquiry was being held against him by a Tehsildar on the charge that he embezzled public funds while he was the President of a Trust from 1966 to 1969. The Chief Minister had stated in the Assembly that by an audit report the appellant was charged with having committed numerous irregularities and misappropriation of public funds, that an inquiry was held into those charges and that necessary action was being taken on the inquiry report. The offending portion of the publication was a mere reproduction of what was stated in a memorandum submitted by a Congress (R) member to the High Command. The petition was dismissed by the High Court. On appeal to the Supreme Court.

Held, that apart from the question whether the respondent did make the particular statements and assuming that he did so, it would appear that in view of the antecedents of the appellant, respondent had reason to believe that the statements were true. The case, therefore, did not fall under S. 123 (4). (Para 4)

Mr. G. L. Sanghi, Sr. Advocate (M/s. V. P. Nanda and K. C. Dua Advocates with him), for Appellant; M/s. R. N. Balgotra, S. K. Dhingra, S. K. Jain and S. S.

* (Ele. Petn. No. 34 of 1972, D/- 3-7-1973-Madh. Pra.)

AT/AT/A136/76/GMJ

Khanduja, Advocates, for Respondent No. 1.

The Judgment of the Court was delivered by

CHANDRACHUD, J.:— In the elections held to the Madhya Pradesh Legislative Assembly in 1972, respondent 1 who contested as an independent candidate defeated the appellant, a Congress (R) candidate, by a margin of 2600 votes. The appellant filed an election petition challenging the election of respondent 1 but that petition was dismissed by the Madhya Pradesh High Court by a judgment dated July 3, 1973. This appeal is directed against that judgment.

2. The High Court framed 19 effective issues out of which issues 1 to 7 and 10 to 14 are pressed before us. In so far as relevant, the appellant challenged respondent 1's election on the following grounds:

(1) That in a meeting held on March 2, 1972 which was largely attended by voters belonging to the Harijan and Muslim communities, respondent 1 made a speech assailing the personal character of the appellant in regard, particularly, to his attitude to the Harijans.

(2) That immediately after respondent 1 finished his speech in the aforesaid meeting, his agents and supporters distributed a booklet called 'Atma Ki Pukar' which contained aspersions against the personal character of the appellant.

(3) That on the 3rd and 6th March, 1972 respondent 1 delivered similar speeches and on the 3rd March he published a pamphlet under the title 'Panch Khas Baten', attacking the appellant's personal character and conduct.

3. Apart from himself the appellant examined Habib Khan (P.W. 7), Mankhan (P.W. 8), Devlal (P.W. 9) and Ramnath Gandhi Sewak (P.W. 14) in support of his case that respondent 1 made a derogatory speech on March 2, 1972 at the Purana Motor Stand, Nasrullaganj, and that the pamphlet Atma Ki Pukar was distributed at the meeting. Respondent 1 is alleged to have stated in the meeting that the appellant did not believe in the principles for which his party stood, that he looked down upon the Harijans, treated them as untouchables, that his brother was involved in a communal riot in Sukerwas for which he was prosecuted and that the appellant's co-worker, Ramnath Gandhi Sewak, was also communal minded. Respondent 1 admitted that he had addressed an election meeting on the particular day at Nasrullaganj but he denied that he had made the statements attributed to him or that any pamphlet was distributed at the meeting. It is significant that the version of respondent 1 is corroborated by Motilal Patel (R.W. 2)

who is a member of the Congress (R) and who held various offices in the organisation from time to time. He was President of the Block Tehsil Congress Committee of Nasrullaganj from 1967 to 1972. He has stated in his evidence that respondent 1 did not make any of the statements attributed to him and that no pamphlet was distributed during or at the end of the meeting. In fact, Bonder (P.W. 10), who is a Harijan, did not fully support the case of the appellant in regard to the statements said to have been made by respondent 1 in the meeting.

4. Apart from the question whether respondent No. 1 did make the particular statements and assuming that he did so, it would appear that in view of the antecedents of the appellant, respondent No. 1 had reason to believe that the statements were true. The appellant admitted in his evidence that a criminal case under Sections 353 and 332 of the Penal Code was pending against him in connection with an assault on a police constable, that a shopkeeper had filed a criminal complaint against him under Section 427 of the Penal Code and that an inquiry was being held against him by a Tehsildar on the charge that he embezzled public funds while he was the President of the Salkanpur Trust from 1966 to 1969. At Ex. R-9 is a certified copy of the proceedings of the Vidhan Sabha dated July 31, 1972 which shows that in answer to a question, the Chief Minister of Madhya Pradesh stated that by an audit report the appellant was charged with having committed numerous irregularities and misappropriation of public funds, that an inquiry was held into those charges and that necessary action was being taken on the inquiry report. Considering these facts and circumstances, the case cannot fall under Section 123 (4) of the Representation of the People Act, 1951 under which the corrupt practice consists of the publication of a statement which is reasonably calculated to prejudice the prospects of a candidate's election and which the maker of the statement "either believes to be false or does not believe to be true."

5. The High Court has recorded a finding that the booklet 'Atma-ki-Pukar' was distributed by respondent 1 and his agents but it is clear from the evidence that the offending portion of that publication was a mere reproduction of what was stated in a memorandum submitted by Motilal Patel to the Congress High Command. The Block Congress Committee of Nasrullaganj had recommended three names for Congress candidature from the Budni constituency. Respondent 1 was amongst those three but the Provincial Congress Committee added the name of

the petitioner to the list. Motilal Patel has stated in his evidence that he drafted a petition complaining against the appellant and distributed the copies thereof to the members of the All India Congress Committee. Motilal Patel says that the imputations which he made against the appellant were true to his personal knowledge and that every one concerned knew the whole truth. Banvirsingh Chatak who was examined as a court witness admitted that he composed the booklet partly on the basis of his personal knowledge and partly on the basis of what was stated in the memorandum submitted by Motilal Patel to the Congress High Command. In these circumstances, the High Court was justified in coming to the conclusion that, at any rate, respondent 1 had good reason to believe the imputations to be true.

6. The statements attributed to respondent 1, said to have been made by him in the meetings of the 3rd and 6th March, 1972 and in the pamphlet 'Panch Khas Baten' are more or less on the same pattern. In regard to those statements also the petitioner must be held to have had good reason to believe them to be true.

7. In these circumstances, the High Court was right in dismissing the election petition. The appeal, therefore, fails. The High Court deprived respondent 1 of the costs of the election petition on the ground that he falsely disowned all connection with the pamphlet 'Atma-ki-Pukar'. We must deny to respondent 1 the costs of this appeal for the same reason. The appeal shall therefore stand dismissed without any order as to costs.

Appeal dismissed.

AIR 1976 SUPREME COURT 461

(From: Allahabad)

R. S. SARKARIA AND S. MURTAZA
FAZL ALI JJ.

Madan Gopal Kanodia, Plaintiff-Appellant v. Mamraj Maniram and others, Defendants-Respondents and Vice Versa.

Civil Appeals Nos. 707 and 708 of 1968, D/- 15-1-1976.

(A) Constitution of India, Article 133 — Misreading of evidence by High Court — Decision of Allahabad High Court Reversed.

Held that on a consideration of the evidence of the plaintiff and the defendants the Supreme Court was clearly of the opinion that while the evidence of the

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plaintiff had a ring of truth and consisted of persons who had deposed correctly, the evidence of the defendants was not worthy of credence. In other words, the evidence of the plaintiff far outweighs the evidence of the defendants both in quality and credibility, and the High Court was wrong in accepting the evidence of the defendants. The finding of fact by the High Court was vitiated by non-consideration of material facts and admissions, misreading of evidence errors of record and a manifestly wrong and unreasonable approach. Decision of Allahabad High Court, Reversed. (Para 19)

(B) Civil P. C. (1908), Order 6, Rule 2 — Pleadings — Construction — Decision of Allahabad High Court, Reversed.

Pleadings are loosely drafted in the courts, and the courts should not scrutinise the pleadings with such meticulous care so as to result in genuine claims being defeated on trivial grounds. Decision of Allahabad High Court, Reversed.

(Para 26)

(C) Civil P. C. (1908), Order 13, Rule 2 — Object of — Discretion of Court — Decision of Allahabad High Court, Reversed.

Order 13, Rule 2 of the Code of Civil Procedure does not provide for any particular ritualistic formula in which the order of the Court has to be passed. The object of Order 13, Rule 2 is merely to prevent belated production of documents, so that it may not work injustice to the defendant. This provision clearly clothes the Court with discretion to allow production of documents, if it is satisfied that good cause is shown to its satisfaction. The Nakal Bahi, invoices and other documents were filed by the plaintiff along with the written statement containing better particulars. These documents were filed in pursuance of the order of the Court which was moved by the defendants themselves. The Court had passed an express order condoning the delay and directing the defendants to record their admission or denial of the documents. The defendants never took away any objection or exception to the filing of those documents, but complied with the order of the Court in regard to their admission or denial of the documents. The defendants had further ample opportunity to rebut these documents and to show that they were not genuine as the evidence had not begun. The original Khata and the original rokar had been filed by the plaintiff along with the plaint. The entries contained in the Nakal Bahis were merely reproduction of the entries in the original Khata. Therefore, the question of the entries in Nakal Bahis being fabricated or spurious could not arise. The Nakal Bahis merely gave further par-

ticulars or details of the entries already mentioned in the Ledger or the Khata. If in these circumstances, therefore, the Court exercised its discretion under Order 13, Rule 2, Civil Procedure Code to condone the delay and allowed the plaintiff to produce the documents no error at all had been committed by the Trial Court. Decision of Allahabad High Court, Reversed. (Para 27)

Mr. E. C. Agarwala, Advocate, for Appellant in Appeal No. 707 of 1968 and for Respondent in Appeal No. 708 of 1968; M/s. J. P. Goyal and Shreepal Singh, Advocate, for Respondents in Appeal No. 707 of 1968 and Appellants in Appeal No. 708 of 1968.

The Judgment of the Court was delivered by

M. FAZL ALI, J.:— Civil Appeal No. 707 is the plaintiff's appeal by certificate granted by the Allahabad High Court against its judgment and decree passed in First Appeal No. 252 of 1963, dated July 10, 1962 (sic). The defendants-respondents have also filed their Appeal No. 708/68 for recovery of Rs. 10,000/- from the plaintiff.

2. The plaintiff had brought a suit in the Court of the First Civil Judge, Kanpur for recovery of Rs. 39,956/5/- from the defendants on account of three main items. The plaintiff's case was that he was carrying on wholesale cloth business at Kanpur in the name and style of Anant Ram Madan Gopal. The defendants' firm was also carrying on cloth business at Kanpur and the defendants' firm was known as Mamraj Maniram. The plaintiff's case further was that apart from certain business dealings, the defendant firm used to borrow monies from the plaintiff on various occasions and used to purchase cloth from the plaintiff on credit. Similarly the plaintiff also purchased the cloth from the defendants' firm and used to send bales of cloth to the defendants' firm for retail sale. Badri Prasad one of the partners of the defendants' firm was a close friend of the plaintiff; they were on very good terms and each of them was willing to co-operate with the other in carrying on the business of the two firms. The plaintiff's case further was that some time in April, 1948, both the plaintiff and the defendants' firm had purchased 400 bales of cloth from M/s. Sidh Gopal Gajanan of Bombay. Out of the total goods the plaintiff had purchased 200 bales and the remaining 200 bales had been purchased by the defendants' firm. The plaintiff further averred that the purchase of the entire quantity of 400 bales was actually a joint venture, though both the plaintiff and the defendants' firm ordered separately for the same, the plaintiff hav-

3. The suit was contested by the defendants, who inter alia, pleaded that they had not at all sold 21 bales of cloth as alleged by the plaintiff nor was the purchase of 400 bales a joint venture or enterprise entered into between the plaintiff and the defendants, nor were the goods brought from Paphoond and unloaded in the godown of the defendants. The defendants further denied all the al-

5. After the plaint was filed by the plaintiff, the defendants filed an application before the Trial Court praying that the allegations made in the plaint being vague and ambiguous, the plaintiff may be directed under Order 6, Rule 4, Code of Civil Procedure to file better particulars in support of his case. The Trial Court directed the plaintiff to file better particulars by way of written statement by August 9, 1952. As the plaintiff could not file his written statement containing the better particulars by August 9, 1952, he was allowed to file the same by August 16, 1952. On this day the plaintiff filed his written statement containing better particulars and the details of his claim and along with his written statement he also filed 13 documents and prayed that the same may be allowed to be produced after condoning the delay. The Trial Court accordingly accepted the prayer of the plaintiff, condoned the delay, and directed the defendants to record their admission or denial on the documents filed by the plaintiff on August 16, 1952. In pursuance of the order of the Court the defendants recorded their admission or denial on those documents. We have mentioned these facts, particularly because the High Court seems to have made a huge capital

out of the fact that the plaintiff had filed the Nakal Bahi and other documents at a late stage of the suit without obtaining the permission of the Court — a fact which is not at all borne out from the order sheet of the Trial Court. We shall deal with this aspect of the matter a little later.

6. The Trial Court framed a number of issues and after taking evidence both oral and documentary of both the parties accepted the plaintiff's case in toto and passed a decree for Rs. 28,671/-. The defendants then went up in appeal to the High Court which reversed the judgment of the Trial Court and dismissed the plaintiff's suit accepting the case made out by the defendants. Thereafter the plaintiff filed an application before the High Court for grant of a certificate of fitness for filing an appeal to this Court and the certificate having been granted, Appeal No. 707 of 1968 is now before us.

7. We have heard the counsel for the parties at great length and have also gone through the judgment of the High Court and that of the Trial Court. We have also been taken through the entire evidence. We are constrained to observe that the High Court has not made a correct approach to the facts of the present case and has proceeded mostly on conjectures and speculations and has also committed errors of record, in arriving at some of the important findings. In view of the case made out by the plaintiff the area of the controversy has been very much narrowed down and centres round the question of the cost of 21 bales of cloth. Both the courts below seem to have concentrated most of their attention to the question as to whether the purchase of 400 bales of cloth was a joint venture or not and as to the mode and manner in which the sale of those bales of cloth was conducted. In our opinion, in order to decide the short point whether the defendants are liable to pay the cost of 21 bales of cloth to the plaintiff it is not at all necessary to go into the complicated question as to whether the purchase of 400 bales of cloth was a joint venture or not, nor is the question of the manner in which the sale was made at all material or germane for the purpose of deciding the main issue in the case. The pivotal points arising for consideration in this case are two — (1) whether the goods were admittedly brought from Phaphund to Kanpur were unloaded in the shop and godown of the defendants as alleged by the plaintiff or they were kept in the godown of the commission agent Harish Chandra Bagla; and (2) whether the defendants had sold the 21 bales of cloth and did not pay the price thereof to the plaintiff. We might mention that if the first point is answered against the defendants,

then it follows automatically that the defendants must account for the sale proceeds of those 21 bales of cloth. As the plaintiff expressly admits that he had received the money for 179 bales and confines his claim only to 21 bales of cloth, therefore, it is for the defendants to explain what they did with this quantity of cloth which was in their custody.

8. As regards the claim of the plaintiff regarding the retail sale of cloth worth Rs. 8,824-8-3 and the sum of Rupees 3,819-14-6 on account of cash borrowings by the defendants, on a consideration of the evidence we are clearly of the opinion that the plaintiff has not been able to prove any of these two items.

9. Thus the central point for determination in this case is regarding the sale of 21 bales of cloth which is alleged to have been sold by the defendants and whose price was not paid to the plaintiff. The High Court after considering the evidence of the witnesses of the plaintiff and of the defendants found that the plaintiff had not proved that the goods which were brought in trucks from Phaphund to Kanpur were actually unloaded in the godown of the defendants. In this connection the High Court observed as follows:

"There was thus no reliable evidence to show that the plaintiff's goods were actually placed in the defendants' godown.

xx xx xx

In this state of the evidence the plaintiff's case that his goods had been kept in the defendants' godown cannot be accepted."

In coming to this finding it seems to us that the High Court has approached the evidence in a most mechanical manner and seems to have discarded the evidence of the plaintiff on trivial and illusory grounds. In order to appreciate the question as to whether the goods were unloaded from the trucks, it may first be necessary to examine the topography of the defendants' shop, house and the godown in the light of which the evidence has to be read. It would appear that the shop of the defendants is situated in Moholla Kahu-Kothi. The house of the defendants is adjacent to their shop and the godown of the defendants is in front of the shop of the defendants adjacent to the temple of Ram-Janaki. The shop of the defendants as also the house contains a number of Angans, Dalans and Verandahs, the details of which have been given by the defendant Badri Prasad and his witnesses. It appears from the evidence that the godown actually belonged to the temple which has been taken on rent by D.W. 1 Badri Prasad in the name of Babulal Badri Prasad which appears to be an allied firm of the defendants. It further appears that this godown was used by the

hurriedly. The counting was done in five rounds. The total number of rejected ballot papers was 2039 and the rejection was also done in a mechanical manner. The counting of first and second rounds had been completed at about 4.30 P. M. and 7 P. M. respectively and thereafter the third round of counting was completed at about 11 P. M. The fourth and fifth rounds were taken together and their counting was completed at about 5 A. M. When the second round of counting was about to close, the light was fading and there was inadequate lighting arrangement. The counting continued in that fading light also in spite of protest being made that in that light even the marks of seal on the ballot papers were not distinctly visible and as such counting should be postponed. But the Returning Officer did not pay any heed to this protest. The respondent No. 1 himself had moved an application complaining about fading light but even then no action was taken by the Returning Officer. This gave an opportunity to the counting staff to bundle out and count the ballot papers in their own manner recklessly, negligently and carelessly. When in that fading light the petitioner's agent asked a number of times to show him a particular ballot paper, the counting staff did not agree but asked him to go to the Returning Officer who in his turn said that the counting was being done by the counting staff and not by him and it was not possible for him to go and supervise the counting being done at all the fourteen tables every time. In spite of these heavy odds, the petitioner was leading all other candidates including the respondent No. 1 in the first three rounds and he was fully convinced of the fact that had the counting taken place in the proper manner in accordance with the rules after giving due opportunity to his agents his lead in those three would have been by more 100 votes than what was actually counted by the counting staff. The petitioner further alleged that the counting staff which had mostly been drawn from the consolidation department attached to the Settlement Officer (Consolidation) was favourably inclined towards the Jan Sangh candidate the respondent No. 1. In the fourth round the petitioner's lead was reduced while in the fifth round the petitioner was made to lose. It was further alleged that on table No. 11 the number of ballot papers counted in favour of the petitioner as valid votes was 262 but that was entered as 162 in the result sheet which was however detected by the petitioner's counting agent immediately and on his protest that this had been done deliberately, it was corrected. This fact would be evident from a perusal of Form No. 20. The petitioner who had after the counting had started, gone back to his house as he was not keeping fit, received

a message sent by his agents that serious irregularities were being committed and efforts were being made by the counting staff to bring about his defeat and to bring about the success of respondent No. 1 by hook or crook. The petitioner then went to the counting Pandal in the early morning of 28-2-1974 before the result of fourth and fifth rounds was declared. By that time the petitioner could not collect all the information regarding the other rounds from his counting agents and so he moved an application before the Returning Officer for recounting of fourth and the fifth rounds. The Returning Officer invited objections from the respondent No. 1 who filed some objections in writing. After some talk between the agents of the respondent No. 1 and the counting staff, the respondent No. 1 was persuaded to withdraw his objection and then his application for recounting was allowed. In this recount which was confined to fourth and the fifth rounds some mistakes were found as a result of which the majority secured by the respondent No. 1 was reduced by two votes. By that time the petitioner learnt about the irregularities committed in the counting in other rounds also and on seeing that some mistakes had been committed in the counting of fourth and the fifth rounds, he moved an application for a total recount which was rejected by the Assistant Returning Officer on account of threats held out by the Jan Sangh candidate and his agents and supporters that if that application was allowed they would use violence. On the basis of the oral objections that were raised by the petitioner's counting agents but were overruled by the counting staff and the Returning Officer the petitioner gave some rough figures about improper rejection of valid votes in his favour and the improper acceptance of invalid votes in favour of respondent No. 1.

3. The petitioner prayed for a total recount and rescruity of the ballot papers and as a result thereof to declare him as duly elected after declaring the election of the respondent No. 1 as void.

4. The petition was contested by the respondent No. 1 who denied most of these allegations and alleged that the counting had been done properly and in accordance with the rules and there had been no irregularity or illegality in the counting votes. He also took some technical pleas about the validity of the election petition which will be evident from the issues framed in this case. These issues were as follows:

"1. Whether the size of the counting table was too small to allow the counting agents of the candidates to look into the work of sorting, counting, accepting and

rejecting of ballot papers and their bundling etc?

2. Was an objection to this effect taken by the petitioner at the very beginning of the counting as alleged in para. 15 of the petition? If not, is he entitled to take this objection in the election petition?

3. Whether any unauthorised persons entered the counting pandal after 12.30 P. M. as alleged by the petitioner in para. 21 of the petition? If so, its effect?

4. Whether at the close of the second round of counting when the light became dim on account of setting of the sun the counting was continued in that dim light before artificial light was provided, and whether that artificial light was not sufficient to allow the ballot papers to be seen distinctly as alleged by the petitioner in paras. 22 to 24 of the petition? If so, its effect?

5. (a) Whether the counting in fourth and fifth rounds was practically taken together as alleged in para. 19 of the petition? If so, its effect?

(b) whether no objection on this score was taken by the petitioner at that time? If so, its effect?

6. Whether on table No. 11 in the fourth round 262 ballot papers were counted in favour of the petitioner as valid votes but that was entered in the result sheet as 162 votes which was subsequently corrected on a protest being made by the petitioner's agent to the Returning Officer? If so, its effect on the petition?

7. whether on the partial recounting made on the application of the petitioner four votes originally counted as valid votes in favour of the petitioner and six votes originally counted as valid votes in favour of respondent No. 1 were found to be invalid votes and rejected as such? Can an inference be drawn from this fact that the entire recounting suffered from such mistakes?

8. Whether after the petitioner moved a second application for total recount any threats were held out by the Jan Sangh agent and supporters as alleged in para. 35 of the petition?

9. Whether the second recount application of the petitioner was wrongly rejected by the Returning Officer?

10. Whether any valid votes cast in favour of the petitioner were wrongly rejected, or wrongly counted as votes in favour of the other candidates as alleged in paras. 37 to 39 of the petition?

11. Whether about hundred invalid votes were wrongly credited to respondent No. 1 as valid votes as alleged in para. 38 of the petition?

12. Whether the result of the election has been materially affected by the above stated irregularities, if any?

13. Whether it is a fit case for general scrutiny and recounting as has been alleged by the petitioner?

14. Does the petition suffer from the defect of not containing a concise statement of material facts on which the petitioner relies as required by Section 83 (1) (a) of the Representation of the People Act? If so, is the petition liable to be rejected on this ground?

15. Whether the petition was not validly presented by the petitioner in accordance with the provisions contained in Section 81 of the Representation of the People Act?

16. Whether the copy of the Election Petition served on respondent No. 1 was not attested by the petitioner under his own signature to be a true copy of the petition as required by Section 81 (3) of the Act? If so, its effect?"

5. The petitioner applied for a general inspection of the ballot papers which was allowed by me under my order dated 5-11-1974. In that order I had directed that inspection shall be done under the supervision of the Joint Registrar and the respondent No. 1 or his counsel shall have an opportunity to be present when the inspection is made. I further directed that the votes which were undisputedly in favour of the petitioner or the respondent No. 1 as admitted by them shall be separately sorted out and counted. The ballot papers in respect of which there was a dispute between the parties shall be separately counted and bundled so that decision on them may be given by the Court.

6. After that inspection had been made the petitioner moved an application for amendment of the election petition which was allowed and the respondent No. 1 was given an opportunity to file an additional written statement in the light of that amendment. He filed additional written statement. He also wanted to file a recriminatory petition at that stage which was not accepted as it was barred by time. In the light of these amended pleadings of the parties the following further issues were framed:

17. Whether the 80 ballot papers or any of them detailed in Schedule A were valid votes cast in favour of the petitioner but were wrongly rejected as invalid?

18. Whether the 286 ballot papers detailed in Schedule B or any of them were valid votes cast in favour of the petitioner but were wrongly accepted and counted as valid vote in favour of respondent No. 1?

19. Whether the 14 ballot papers or any of them specified in Schedule C were valid votes cast in favour of the petitioner but were wrongly accepted and counted

as valid votes in favour of other candidates (excluding respondent No. 1)?

20. Whether the 51 ballot papers detailed in Schedule 1 to the additional written statement or any of them valid votes cast in favour of the respondent No. 1 but were wrongly rejected by the Returning Officer as invalid votes?

21. Whether the 150 ballot papers specified in Schedule 2 to the additional written statement or any of them were invalid and liable to be rejected but were wrongly counted as valid votes in favour of the petitioner?

22. Whether the 3 ballot papers specified in Schedule 3 to the additional written statement or any of them were valid votes in favour of other candidates (excluding the respondent No. 1) but were wrongly accepted as valid votes in favour of the petitioner?

23. Whether the 9 ballot papers specified in Schedule 4 to the additional written statement or any of them were valid votes in favour of the respondent No. 1 but were wrongly counted as valid votes in favour of the petitioner?

24. Whether the 13 ballot papers specified in Schedule 5 to the additional written statement or any of them were valid votes in favour of respondent No. 1 but were wrongly counted as valid votes in favour of other candidates (excluding the petitioner)?

25. Whether the pleas covered by Issues Nos. 20 to 24 are open to the respondent No. 1 in the absence of any recriminatory petition being filed by him within the prescribed time?

7. After that the petitioner's counsel Sri Umesh Chandra Srivastava stated that since the ballot papers had been inspected by the petitioner and counted under the orders of the Court under the supervision of the Joint Registrar of the Court, he did not propose to adduce any oral evidence in the case and would confine himself only to those disputed ballot papers which according to him should have been counted as valid votes in favour of the petitioner but were either wrongly rejected or counted as valid votes in favour of the respondent No. 1 or other candidates. Further he would also point out those disputed ballot papers which have been wrongly counted as valid votes in favour of the respondent No. 1 though they are liable to be rejected as invalid votes.

8. Sri S. K. Vidyarathi counsel for the respondent No. 1 also did not adduce any oral evidence. He further stated that he would point out the validity or otherwise of the disputed ballot papers about which the petitioner claims that they have been either wrongly rejected or wrongly accepted as valid votes in favour of respondent No. 1 or other candidates and

that he would also point out those disputed ballot papers which have been wrongly counted in favour of the petitioner though they were liable to be rejected, or counted in favour of the respondent No. 1.

9. The Issues Nos. 15 and 16 were tried as preliminary issues and they were answered in the negative under my order dated 27-9-1974* which shall be deemed to be a part of this judgment.

Issues Nos. 1 to 3.

10. There is no evidence in support of these issues. They are found in the negative.

Issue No. 4.

11. This issue on the dim light has been considered by me when I allowed the petitioner's application for inspection of ballot papers. No separate finding on this issue is necessary at this stage.

Issue No. 5 (a) and (b).

12. There is no evidence in support of this issue. Part (a) of Issue No. 5 is found in the negative. Part (b) does not arise.

Issue No. 6.

13. There is no evidence in support of this issue. It is found in the negative.

Issue No. 7.

14. It is an undisputed fact that in the partial recount the mistakes as mentioned in this issue were detected as a result of which the majority of respondent No. 1 was reduced by two votes; from this fact alone it cannot be inferred that the entire counting suffered from such mistakes. This circumstance however along with other facts may raise an inference that mistakes had been committed in the counting. Those mistakes have now been pin-pointed by the petitioner after an inspection of the ballot papers. They shall be dealt with at their proper place.

Issue No. 8.

15. There is no evidence in support of it. It is found in the negative.

Issue No. 9.

16. It does not require any finding after a general recount has been made under the orders of this Court.

Issues Nos. 10 and 11.

17. These issues do not call for any finding because they have now been superseded by Issues Nos. 17 to 19 framed after the amendment of the pleadings.

Issue No. 13.

18. Since the general scrutiny and recounting of the ballot papers had been

*[Note: The order answering Issues 15 and 16, dated 27-9-1974, has been printed at the end of this judgment and the paras of that order are numbered as 9-A, 9-B, 9-C etc. — Ed.]

allowed under my order dated 5-11-1974 this issue does not call for any separate finding again.
Issue No. 14.

19. The petition does not apparently suffer from the defect of not containing concise statement of material facts as required by Section 83 (1) (a) of the Representation of the People Act. This issue was also not pressed on behalf of respondent No. 1. It is decided in the negative.

Issue No. 17.

20. The 80 ballot papers as detailed in Schedule A to the amended election petition were rejected by the Returning Officer as invalid votes. Each of these ballot papers was scrutinised by me and as a result of that scrutiny I find that while 43 ballot papers mentioned at Serial Nos. 1, 2, 7 to 12, 14, 17, 18, 23, 30, 32, 35, 36, 39, 40, 42, 43, 45 to 48, 50 to 60, 62, 67, 70 to 72, 76 to 79 were rightly held as invalid by the Returning Officer, the remaining 37 ballot papers mentioned at Serial Nos. 3 to 6, 13, 15, 16, 19 to 22, 24 to 29, 31, 33, 34, 37, 38, 41, 44, 49, 53, 61, 63 to 66, 68, 69, 73 to 75 and 80 were valid votes in favour of the petitioner which had been wrongly rejected. The petitioner is entitled to get a credit of 37 votes to the number of votes already counted in his favour. The issue is decided accordingly.

Issue No. 18.

21. In Schedule B to the amended election petition, the petitioner gave details of 286 ballot papers which were counted by the Returning Officer as valid votes in favour of respondent No. 1 but according to the petitioner they ought to have been counted in his favour. I scrutinised all those ballot papers in the presence of the counsel of the parties. As a result of that scrutiny I find that 14 ballot papers specified at Serial Nos. 54, 66, 89, 106, 118, 134, 147, 149, 153, 155, 156, 157, 158 and 162 were actually valid votes in favour of the petitioner but were wrongly counted as valid votes in favour of the respondent No. 1. So the petitioner is entitled to get a credit for 14 valid votes and the respondent No. 1 has to get a debit of those votes out of the votes counted in his favour.

22. It was further found that the ballot papers mentioned at Serial Nos. 5, 6, 8, 32, 42, 43, 46, 47, 49, 51, 73, 75, 80, 84, 85, 88, 102, 109, 110, 112, 115, 117, 119, 120, 122, 123, 125, 126, 127, 130, 131, 138, 139, 150, 163, 164, 168, 170, 175, 195, 209, 212, 214, 215, 216, 224 to 227, 232, 238, 239, 248, 252, 254, 257, 260, 263, 275 and 278 are invalid votes which have been wrongly counted as valid votes in favour of the respondent No. 1. So 61 votes have

to be debited against the votes purported to have been secured by the respondent No. 1. One ballot paper detailed at Serial No. 166 is in fact a valid vote in favour of respondent No. 6 but it was wrongly counted in favour of the respondent No. 1. So this one vote has also to be debited against the votes purported to have been secured by the respondent No. 1. The remaining votes mentioned in this Schedule were however found to be valid votes in favour of respondent No. 1. In this way, the petitioner has to get a credit of 14 votes and 76 votes have to be debited against the respondent No. 1.

Issue No. 19.

In this Schedule the petitioner has specified 14 ballot papers which, according to him, were valid votes in his favour but were wrongly accepted and counted as valid votes in favour of other candidates excluding respondent No. 1. These ballot papers were also scrutinised by me. The ballot paper specified at Serial No. 1 is not a valid vote and it ought to have been rejected and not counted in favour of any candidate. The ballot papers specified at Serial Nos. 2 to 10 and 12 to 14 are valid votes in favour of the petitioner which had been wrongly counted in favour of other candidates. The ballot paper specified at Serial No. 11 is not a valid vote in favour of the petitioner. So the petitioner has to get a credit of 12 votes under this head. The issue is found accordingly.

Issue No. 25.

23. During the inspection of the ballot papers which was allowed in the presence of the contesting parties and their counsel the respondent No. 1 also picked up certain ballot papers as specified by him in Schedules I to V attached to his additional written statement filed after the election petition had been allowed to be amended. According to him he found certain loopholes and defects in these ballot papers which would have the effect of reducing the total number of valid votes that were counted in favour of the petitioner by the Returning Officer and to increase the number of votes in favour of respondent No. 1. To cover those matters Issues nos. 20 to 24 were framed.

24. On behalf of the petitioner it was however objected that the respondent No. 1 having failed to give notice of recrimination within the time allowed by Section 97 (2), he is not entitled to give any evidence to show that some votes have been wrongly counted in favour of the petitioner which ought to have been rejected or counted in favour of the respondent No. 1 or some other candidates in view of the proviso to sub-section (1) of Section 97. In support of his objection, the learned counsel for the petitioner

relies on the latest decision of the Supreme Court in *P. Malai Chami v. M. A. Ambalam*, (AIR 1973 SC 2077) in which the Supreme Court after a review of the earlier case law held (vide Index Note (A)) that in a case where an election petitioner prays not merely for setting aside the successful candidate's election but also for declaring himself as elected, the only ground on which he can be so declared is that in fact he had received a majority of valid votes. It is in deciding as to who has got the majority of valid votes that Section 97 comes into play. In such a case it is the duty of the successful candidate to file a recrimination petition as contemplated by Section 97. If he does not do so, he will not be allowed to lead any evidence raising any plea against the validity of the claim of the election petitioner.

25. In that case also the main attack of the petitioner like that in the present case was in respect of the counting of votes in which a number of mistakes were alleged to have been committed in favour of the successful candidate. The petitioner prayed for recount which was hotly contested by the successful candidate. The learned Judge hearing the election petition however allowed the petitioner's application for recount. It was ordered that the recount would be done by four advocates acting as tellers two from each side out of a list of four furnished by each side. Both the parties and their respective counsel were permitted to be present along with four counting agents for the petitioner as well as the respondent (the successful candidate) and an Assistant Registrar of the High Court was appointed to preside over the recount of the ballot papers and to be assisted by the members of the staff dealing with election cases. The Assistant Registrar was required to submit his report and on receipt thereof an opportunity was to be given to both the parties to be heard on that report and necessary orders would be passed thereon. The Assistant Registrar himself dealt with those votes only which were conceded by one side or the other as having been validly cast in favour of the opposite side. Thus before him out of the votes which were held invalid by the Returning Officer, 2583 were agreed as rightly held invalid but there was dispute about 800 which were left for decision of the Court. Similarly, with regard to the votes counted in favour of the successful candidate it was conceded by both the sides that 11951 were valid votes in his favour while there was a dispute with regard to 567 votes. In respect of the election petitioner it was conceded by the counsel for the parties that 11301 votes had been rightly counted in his favour as valid votes but 395 ballot papers were disputed which were left for

the decision of the Court. In this way, more than 1700 ballot papers were in dispute which had to be scrutinized by the learned Judge and he had to give his decision in respect of each of those ballot papers. He scrutinized those ballot papers and gave his decision. As a result of this it was found that the successful candidate had got 37372 votes while the election petitioner had secured 37297 votes. Thus the majority of the successful candidate, was reduced from 127 to 75, but still he remained the successful candidate, though by a reduced majority. It was, however, urged on behalf of the election petitioner before the learned Judge that in a case where an election petitioner had applied not merely for setting aside the election of the successful candidate but also for declaring himself as elected, it was the duty of the successful candidate to have filed a recrimination application under Section 97. This argument was based on the earlier decision of the Supreme Court in *Jabar Singh v. Genda Lal*, (AIR 1964 SC 1200). This objection was upheld by the learned Judge who took the view that in the absence of a recrimination petition under Section 97 the appellant (successful candidate) was not entitled to question any votes which might have been improperly received on behalf of the respondent (the defeated candidate). If that had been done, the successful candidate as indicated earlier would still have won by a majority of 75 votes. But as he was not entitled to do so, the result of leaving out of account votes improperly received on behalf of the unsuccessful candidate and taking into account only the votes which ought to have gone to the unsuccessful candidate, which had been improperly rejected it was found that the unsuccessful candidate has secured 96 votes more than the successful candidate. The election petition was allowed and the petitioner was declared elected. The successful candidate filed an appeal before the Supreme Court. The Supreme Court relying on its earlier decision in *Jabar Singh v. Gendalal*, AIR 1964 SC 1200 (supra) and quoting some passage from it upheld the decision of the learned Judge and dismissed the appeal.

26. One of the arguments raised before the Supreme Court was that when the election petitioner himself prayed for recount of all the votes on the ground of breach of election rules, there was no need for filing recrimination petition even when the recount was asked for the purpose of obtaining a declaration that the successful candidate's election was void and a further declaration that the petitioner himself had been elected. This argument was repelled and the Supreme Court held that where an election petitioner prayed for recount of all the votes on ground of breach of election rules, it

could not be said that there was no need for filing recrimination petition when the recount was asked for the purpose of obtaining a declaration that the successful candidate's election was void and a further declaration that the petitioner himself had been elected.

27. Dealing with the question that it was conceded on behalf of the election petitioner himself that some of the votes counted in his favour were invalid votes which ought to be excluded, the court held (vide Index Note (C)):

"Where an election petitioner prayed for recount of votes for the purpose of obtaining a declaration that the successful candidate's election was void and a further declaration that he himself had been elected and the successful candidate was precluded from giving evidence against the validity of the petitioner's claim due to non-compliance with the provisions of Section 97, Representation of the People Act, no question of estoppel can arise on account of concession made by the parties as to the votes validly given in favour of each other. Concession is akin to admission and the use of such admission would be evidence. The successful candidate can give evidence either by relying on the petitioner's concessions or leading independent evidence. Since giving of evidence was barred, the concessions cannot be used as evidence in favour of the successful candidate."

28. This ruling applies with full emphasis to the facts of the present case. So far as the facts are concerned, the present case stands even on a stronger footing. In his original written statement the contesting respondent No. 1 had nowhere given any indication that some votes had been wrongly counted in favour of the petitioner which ought to have been rejected or counted in favour of the respondent No. 1 or any other candidate. On the other hand, he refuted all the allegations of the petitioner that there had been any irregularity or illegality in the counting of votes or any improper rejection or acceptance of ballot papers. When the petitioner's application for recount was allowed by me, though contested by the respondent No. 1, under my order dated 5-11-1974 and the inspection was going on under the supervision of the Joint Registrar of this Court, the petitioner moved an application (C. M. An No. 80 (E) of 1974) that he did not want to inspect ballot papers which had been counted as valid votes in his favour and that the Respondent No. 1 should also not be allowed to inspect those ballot papers in view of the Supreme Court decision in *P. Malai Chami v. M. A. Ambalam*, AIR 1973 SC 2077 (supra). Under my order dated 28-11-1974, I provisionally permitted the respondent No. 1 also to inspect

the ballot papers counted as valid votes in favour of the petitioner which would be without prejudice to the petitioner and I had reserved my decision on the question whether the respondent No. 1 was entitled to challenge any ballot papers counted as valid votes in favour of the petitioner. In view of the above Supreme Court decision it is not permissible to allow the respondent No. 1 to challenge any of those ballot papers which have been counted as valid votes in favour of the petitioner because he failed to file a recrimination petition within the time allowed by Section 97 (2).

29. The learned counsel for the respondent No. 1 however relied on a Full Bench decision of this Court in *N. R. Shikshak v. R. P. Dikshit*, 1965 All LJ 25 = (AIR 1965 All 454) (FB). In this case *Desai, C. J.*, speaking for the Bench observed (vide second head-note):

"In an election petition to challenge the election on the ground of Section 100 (1) (d) (iii) of the Representation of the People Act it must be alleged that votes counted in favour of the returned candidate were improperly received or that votes cast in favour of a defeated candidate were improperly refused or rejected. The petitioner is not at all concerned with improper rejection or refusal of votes cast in the returned candidate's favour or with improper acceptance of votes cast in a defeated candidate's favour because the result of the election cannot be said to have been materially affected by any of these things."

These observations are fully in consonance with the law laid down by the Supreme Court in *Jabar Singh v. Genda Lal* AIR 1964 SC 1200 and *P. Malai Chami v. M. A. Ambalam*, AIR 1973 SC 2077 (supra). He made further observations (vide head-note 4):

"A returned candidate may defend an election petition by rebutting the prima facie case made out by the petitioner and also by making a counter-claim against him; it is the latter that requires a notice of recrimination. A returned candidate is a counter petitioner only in respect of the counter claim set up by him and not in respect of the case set up against him in the election petition. A notice of recrimination is required only when the returned candidate wants to attack and not when he wants to defend, i.e., do something in addition to what he has already done to defend the petition."

Held, that Section 97 did not apply to the supplementary written statement filed by the petitioner and to his right to produce evidence, by way of rebuttal, to prove that the result of his election was not materially affected by the improper reception etc. of votes mentioned in the lists attached to the petition."

The first sentence of this observation is again in consonance with the law laid down by the Supreme Court but the rest of the observation appears to run counter to that law. Desai, C. J., referred to the case of *Jabar Singh v. Genda Lal* and after quoting certain observations from that decision, tried to distinguish it by holding that it did not apply to the case of rebuttal to which the respondent had an inherent right.

30. No one can dispute the proposition that a respondent has a right to defend himself by rebutting the allegations made against him by the petitioner. In this case the petitioner alleged that 80 votes as detailed in Schedule A were wrongly rejected by the Returning Officer though they were valid votes in his favour. The respondent could defend himself by rebutting this allegation and showing that all ballot papers were validly rejected by the Returning Officer. This he did and was partially successful in showing that at least 43 of these ballot papers were rightly rejected by the Returning Officer as they were not valid votes according to rules. Similarly he successfully defended himself though partially that the allegations of the petitioner with regard to the ballot papers detailed in Schedules B and C were not correct. But as a net result of the allegations made by the petitioner and their rebuttal by the respondent with partial success it was found that the result of election had been materially affected by the wrongful rejection of some of the ballot papers which were valid votes in favour of the petitioner and the wrongful acceptance of some of the ballot papers as valid votes in favour of the respondent No. 1 though they were invalid ballot papers liable to be rejected. The overall position after that was that the petitioner secured 106 more votes than the respondent No. 1.

31. The respondent No. 1 then wanted to show that some of the ballot papers counted as valid votes in favour of the petitioner were also invalid ballot papers and liable to be rejected and further that some of the ballot papers which were valid votes in favour of the respondent No. 1 were wrongly rejected by the Returning Officer. Here he starts an offensive against the petitioner and is not simply on the defensive. This is not permissible unless the respondent No. 1 has filed a recriminatory petition under Section 97. This distinction does not appear to have been realised by the Full Bench and the following material observations made by the Supreme Court in *Jabar Singh v. Genda Lal*, AIR 1964 SC 1200 which were extracted in the latest case *P. Malai Chami v. M. A. Ambalam*, AIR 1973 SC 2077 also do not seem to have been noticed by the Full Bench.

"Held: (i) The scope of the enquiry in a case falling under Section 100 (1) (d) (iii) is to determine whether any votes have been improperly cast in favour of the returned candidate or any votes have been improperly refused or rejected in regard to any other candidate. These are the only two matters which would be relevant in deciding whether the election of the returned candidate has been materially affected or not. At this enquiry the onus is on the petitioner to prove his allegations. Therefore, in the case of a petition where the only claim made is that the election of the returned candidate is void, the scope of the enquiry is clearly limited by the requirement of Section 100 (1) (d) itself. In fact Section 97 (1) has no application to the case falling under Section 100 (1) (d) (iii), the scope of enquiry is limited for the simple reason that what the clause requires to be considered is whether the election of the returned candidate has been materially affected and nothing else.

(ii) There are cases in which the election petition makes a double claim: it claims that the election of a returned candidate is void and also asks for a declaration that the petitioner himself or some other person has been duly elected. It is in regard to such a composite case that Section 100 as well as Section 101 would apply, and it is in respect of the additional claim for a declaration that some other candidate has been duly elected that Section 97 comes into play. Section 97 (1) thus allows the returned candidate to recriminate and raise pleas in support of his case. The result of Section 97 (1) therefore, is that in dealing with a composite election petition the Tribunal enquires into not only the case made out by the petitioner, but also the counter-claim made by the returned candidate. In this connection the returned candidate is required to comply with the provisions of Section 97 (1) and Section 97 (2) of the Act. If the returned candidate does not recriminate as required by Section 97, then he cannot make any attack against the alternative claim made by the petitioner. In other words the returned candidate will not be allowed to lead any evidence because he is precluded from raising any pleas against the validity of the claim of the alternative candidate."

32. In view of the latest decision of the Supreme Court following its earlier decision in *Jabar Singh v. Genda Lal*, AIR 1964 SC 1200 and *Bhim Sen v. Gopal* reported in (1961) 22 ELR 288, the law laid down by the Full Bench shall be deemed to have been impliedly overruled. I therefore answer this issue in the negative.

Issues Nos. 22 to 24.

33. In view of my finding on Issue

No. 25, it is not necessary to record any finding on these issues.

Issue No. 12.

34. The mistakes committed by the Returning Officer in the counting of votes have materially affected the result of the election. Now we find that out of 16486 votes purported to have been received by the respondent No. 1, 76 votes have to be deducted. After that he is left with 16410 votes. On the other hand, the petitioner has received 63 more valid votes besides 16453 votes counted in his favour. Thus the petitioner secures 16516 votes. The petitioner has therefore a lead over the respondent No. 1 by 106 votes and he has secured the largest number of votes.

35. The election petition is allowed. The election of respondent No. 1 is declared void and set aside and in his place the petitioner is declared to have been validly elected as Member of the Legislative Assembly from Constituency No. 148 known as Mahsi Constituency District Bahraich. The petitioner shall also receive his costs from the contesting respondent No. 1 which are assessed at Rs. 2,000/- (rupees two thousand).

Petition allowed.

[Order answering Issues Nos. 15 and 16 in Election Petition No. 3 of 1974, dated 27-9-1974 See para 2.]

9-A. In this election petition Issues Nos. 15 and 16 were tried as preliminary issues. These issues are:

"15. Whether the petition was not validly presented by the petitioner in accordance with the provisions contained in Section 81 of the Representation of the People Act?

16. Whether the copy of the Election Petition served on respondent No. 1 was not attested by the petitioner under his own signature to be a true copy of the petition as required by Section 81 (3) of the Act? If so its effect?

Findings.

Issue No. 15.

9-B. The factual position as it has emerged from the statement on oath of the petitioner Sri Ram Harsh Misra is that he had engaged Sri Ramesh Kumar Srivastava Advocate and some other Advocates as his counsel for the conduct of this election petition. On 12-4-1974 at about 4 P. M. the petitioner accompanied by his counsel Sri Ramesh Kumar Srivastava went to the court-room of the petition Judge for presenting the election petition. By that time no particular Judge had been assigned for this purpose by the Chief Justice under sub-section (2) of Section 80-A. The petition Judge was therefore to receive this petition also under the Rules of the Court. When the petitioner and his counsel reached the court-room the learned Judge had retir-

ed in his Chamber. So they went to his Chamber and requested that the election petition may be taken. The learned Judge directed his Bench Secretary to take the petition. The petitioner stated on oath that thereupon he handed over the petition to his counsel Sri Ramesh Kumar Srivastava who passed it on to the Bench Secretary Sri Ram Singh Jauhari P. W. 1. The Bench Secretary wrote the following endorsement on this petition:

"Presented today by Sri R. K. Srivastava an Advocate of this Court.

Hon'ble Trivedi, J.

Lay before the Hon'ble the Chief Justice for orders after obtaining the S. R.'s report."

This endorsement was signed by the Hon'ble Petition Judge Omprakash Trivedi, J. This statement of the petitioner is corroborated in material particulars by the Bench Secretary Sri Ram Singh Jauhary who stated that the counsel Sri R. K. Srivastava was accompanied by some other persons though he did not specifically state about the petitioner being one of those persons. On these facts the petition shall be deemed to have been validly presented as held by the Supreme Court in Sheodan Singh v. Mohan Lal. (AIR 1969 SC 1024). In that case the election petition was presented to the Registry by an Advocate's clerk in the immediate presence (of the petitioner, and therefore) though not in form it was presented by the petitioner himself. Hence the requirement of law was fully satisfied.

9-C. There is yet another aspect of the matter. Sub-section (1) of Section 81 provides:

"An election petition calling in question any election may be presented on one or more of the grounds specified in to the High Court by any candidate to such election or any elector within forty-five days from, but not earlier than, the date of election of the returned candidate or if there are more than one returned candidate at the election and the dates of their election are different, the later of these two dates."

9-D. It has been argued by the learned counsel for the petitioner that this sub-section provides as to who can file or institute election petitions, the forum where such election petitions are to be filed and the limitation within which they are to be filed. It does not specifically provide for the mode of presentation of the petition which was formerly provided in sub-section (2) of Section 81 which was subsequently repealed when the forum of filing such election petition was changed from Election Commission to High Court. Perhaps at the time of the repeal of that sub-section the Legislature did not think it expedient to provide any specific mode of presentation of the elec-

tion petition which was after that to be presented in the High Court in the usual manner in which other petitions are presented. In support of his argument the learned counsel relies on two Bench decisions of this Court. In one case *Ganpat Singh v. Election Tribunal Mainpuri*, (1960 All LJ 48) before a Division Bench consisting of Mootham, C. J. and R. Dewal, J. (as his Lordship then was), the question arose about the interpretation of Rule 47 of the U. P. Town Areas (Conduct of Election of Chairman) Rules, 1953, which was similarly worded as sub-section (1) of Section 81 of the Representation of the People Act so far as presentation of election petition is concerned. That rule provided:

"An election petition may be presented by any candidate whose name has been entered in a list under Rule 12 of the U. P. Town Areas (Conduct of Election of Chairman) Rules, 1953, or whose nomination has been rejected under Rule 11 of the aforesaid Rules read with para. 22 of the U. P. Town Areas (Conduct of Election of Member) Order, 1953. Election petitions will be presented by only those persons who were candidates for an election against which election petition is filed."

It was held by the Bench that there is no sufficient ground for placing the restricted interpretation on that rule that an election petition could be presented only by the petitioner in person so as to exclude its presentation through a duly authorised agent. The Bench was of the opinion that the primary object of that rule was to define and thereby limit the class of persons who can challenge an election and not to prescribe the manner in which the election petition is to be presented. It was further held that unless there is some thing in an enactment which shows that a certain act must be performed by a particular person, or the nature of the act is itself such that it can be performed only by that person, that act can ordinarily be done by a duly authorised agent.

9-E. The learned counsel for the petitioner also referred to the provisions contained in Section 33 (1) and Section 37 of the Representation of the People Act wherein it was provided that a nomination paper could be presented to the Returning Officer by a candidate either personally or through his proposer, or a nomination paper could be withdrawn by a notice in writing presented to the Returning Officer by such candidate either personally or by his proposer. It is argued that wherever the Legislature intended that a particular act should be done by a candidate personally it had made specific provision to that effect giving such alternative mode to its being done through another person as was

also provided therein. On the other hand, sub-section (1) of Section 81 as it now stands after the repeal of sub-section (2) thereof does not indicate that an election petition can be presented to the High Court by a candidate or elector in person and not through an authorised agent. In my opinion, this argument is not without force. Even in *Satya Narain v. Dhuja Ram*, (AIR 1974 SC 1185) on which strong reliance is placed on behalf of respondent No. 1, the election petition was presented before the High Court by the petitioner's counsel. But neither in the High Court as evident from the facts of this case as reported in *Satya Narain v. Dhuja Ram*, (AIR 1973 P. & H. 431) nor in the Supreme Court any objection was raised that the election petition was not properly presented.

9-F. The other decision relied upon by the learned counsel for the petitioner is *L. B. Singh v. Vishal Singh*, (1963 All LJ 542). This case related to the interpretation of Rule 24 of the U. P. Panchayat Raj Rules, 1947 which also provided that election petitions will be presented by only those persons who were candidates for an election against which election petition is filed. A bench of this Court consisting of A. P. Srivastava and R. S. Pathak, JJ., held that this rule could not be interpreted to mean that the election petition could be presented only by the candidate personally and not through an authorised agent.

9-G. The learned counsel for the respondent No. 1 then pointed out that the Vakalatnama executed by the petitioner in favour of Sri R. K. Srivastava Advocate did not authorise him to present the election petition even if it is held that presentation of election petition through an authorised agent is also permissible. The Vakalatnama in favour of the Advocate is worded in general terms so as to give him all possible authority for the conduct of the election case including the filing of any paper. The expression "filing of any paper", in my opinion, includes the presentation of election petition also. In any case, on the facts as found above, the petition was handed over to the Bench Secretary of the Court under the direction of the Court by the Advocate of the petitioner in the immediate presence of the petitioner and that presentation would be quite valid in view of the Supreme Court decision referred to above. The issue is decided in the negative.

Issue No. 16.

9-H. On this issue the factual position as it has emerged from the statements on oath of the petitioner Sri Ram Harsh Misra P. W. 3 and the Stamp Reporter of this Court Mohd. Zaheer Hasan Rizvi P. W. 2, was that the election petition when it was presented was accom-

panied by atleast 11 copies of the petition which had duly been attested by the petitioner under his own signature to be true copy of the petition. The Stamp Reporter Sri Mohd. Zaheer Hasan Rizvi had also endorsed his report on this petition that it was in accordance with Sections 81, 82, 83 and 117. Mohd. Zaheer Hasan Rizvi has affirmed that he had checked up, as he was required to do under the Rules of the Court, the copies which had accompanied the election petition and had satisfied himself that they were equal to the number of the respondents in the election petition plus one more and each copy was duly attested as required by Section 81 (3). (See Rule 3 of Chapter XV-A of the Rules of Court). There is no evidence in rebuttal and I see no reason to disbelieve this witness or the petitioner on this point. In fact, the objection that has been taken by the respondent No. 1 is not that when the election petition was filed it was not accompanied by the requisite number of copies thereof attested in the manner provided in Section 81 (3). On the other hand, the objection is that the copy that was served on the respondent No. 1 was not duly attested in that manner. Sub-section (3) of Section 81 in terms only lays down a duty on the petitioner to file requisite number of copies of the election petition attested in the manner provided therein and it does not speak about the service of such copy on the respondent. If the petitioner has filed only as many copies as there are respondents in the election petition and no more and it is further proved that one of the copies which had been served on one of the respondents was not attested in the manner provided in Section 81 (3), an inference of fact may be drawn that all the copies filed by the petitioner with his election petition were not attested in the manner required by law and as such compliance of Section 81 (3) had not been made. But if the petitioner has filed not only the requisite number of copies which are all duly attested but also some extra copies which may or may not be so attested, it will not make the election petition invalid under Section 81 (3). The filing of extra copies, whether duly attested or not, is only superfluous. In such a case if the office of the Court sends one of those extra copies to one of the respondents while it retains a duly attested copy on the record, the petitioner cannot be penalised for it by holding that he had not complied with the provisions of Section 81 (3). On this record there is still another extra copy of the petition which is duly attested according to the requirements of Section 81 (3) besides those which had been issued to the respondents. None of the other respondents besides respondent No. 1 complained that the copy received by him was not duly attested.

9-I. So far as this Court is concerned it has provided in Rule 6 of Chapter XV-A of the Rules of the Court that notice of election petition shall issue to the respondents by ordinary process and simultaneously by registered post. With each notice a copy of the election petition is also sent. The rule however does not provide as to who would prepare the extra copies which are to be sent to the respondents by registered post in addition to the requisite number of attested copies which a petitioner is under a legal obligation to file under Section 81 (3). The practice however is that those extra copies are also supplied by the petitioner. There is no legal requirement that those extra copies should also be attested in the same manner as provided in Section 81 (3). The petitioner stated that 4 or 5 days after filing his election petition he was required to file some more copies and on that occasion he filed another 11 or 12 copies which had been signed by him on the last page and last but one page. Those copies were not however attested by him as true copies, nor he had subscribed his signature on every page of those copies.

9-J. After both these sets of copies had been received by the Court, the office of the Court issued notice to the respondents by ordinary process and also by registered post, each notice being accompanied by a copy of the election petition.

9-K. Sri Sukhadraj Singh respondent No. 1 who appeared as D. W. 1 stated that he received only that notice along with the copy of the election petition which had been sent by ordinary process but not the other one which was sent by registered post. The copy which he purports to have received by ordinary process has been filed by him as Ext. A-1. This copy bears the signature of the petitioner on the last page and the last but one page but it has not been attested as a true copy. Whether or not this copy also satisfied the requirements of Section 81 (3) will be considered by me later on. At this stage, it may be recorded that the other copy which was sent to the respondent No. 1 at his correct address under registered cover was not returned to the Court. So the presumption under Section 27 of the General Clauses Act is that it was received by the addressee or by some one on his behalf. The counsel for the respondent No. 1 was possessed of another copy of the election petition which was duly attested under the signature of the petitioner as required by Section 81 (3). On seeing that copy, the learned counsel for the petitioner asked the respondent No. 1 in his cross-examination about that copy. He admitted that his counsel was using the other copy which was duly attested under the signature of the petitioner but he offered an

explanation by saying that after he had filed his own copy Ext. A-1 in this Court he borrowed that copy which was being used by his counsel from respondent No. 3 Parasram. That person was not produced to corroborate this fact. It is very unusual that the counsel for the respondent No. 1 instead of preparing a private copy for his use at the time of filing the copy Ext. A-1 received by the respondent No. 1 from the Court, would require the respondent No. 1 to borrow a copy from another respondent. In my opinion, this explanation appears to be an afterthought. Perhaps, it is the other copy which was also sent by the Court to the respondent No. 1.

9-L. But even assuming what the respondent No. 1 has stated is all correct that he received only the copy Ext. A-1 through the process server and that the other copy sent to him by the Court under registered cover was not actually received by him, it will not make any difference so far as the validity of the election petition is concerned. Once the petitioner had filed at least 10 copies of the petition duly attested in the manner provided in Section 81 (3), he has complied with the requirements of law. If out of those copies one attested copy was retained on the record or the same was sent to respondent No. 1 under registered cover which he did not receive, the petitioner is not liable for it. The respondent No. 1 had admittedly received at least one copy of the petition which is Ext. A-1. It has not been pointed out by the learned counsel for the respondent that it is not a correct copy or that this copy in any way handicapped him in drafting his written statement. It was held by the Supreme Court in *Murarka Radhey Shyam v. Roop Singh*, (AIR 1964 SC 1545) that the word "copy" in sub-section (3) of Section 81 does not mean an absolutely exact copy, but means that the copy shall be so true that nobody can by any possibility misunderstand it. The same view was taken in another case *Ch. Subbarao v. Member Election Tribunal*, (AIR 1964 SC 1027).

9-M. Lastly, it was argued by the learned counsel for the petitioner that even if it is assumed for arguments' sake that the copy Ext. A-1 is one of those ten copies which the petitioner was required under Section 81 (3) to file along with the election petition, this copy in itself also substantially satisfied the requirement of that provision. It bears the signature of the petitioner in original. The only defect in it, if it can be called a defect, is that it does not bear the words "True Copy" above the signature of the petitioner. It was held by the Supreme Court in *Dr. Anoop Singh v. Abdul Ghani*, (AIR 1965 SC 815) following the decision in *Ch. Subbarao v. Member Election Tribunal*,

that as the signature in original was there in the copy the presence of such original signature in the copy was sufficient to indicate that the copy was attested as a true copy even though the words "true copy" were not written above the signature in the copies. It was held to be substantial compliance with Section 81 (3). So from whatever point of view the matter may be looked at the election petition does not, in my opinion, suffer from any non-compliance with the provisions of Section 81 (3). The issue is decided against the respondent No. 1.

Answered in the negative.

AIR 1976 ALLAHABAD 59

P. N. BAKSHI, J.

Mahendra Singh, Petitioner v. The State of Uttar Pradesh and another, Opposite Parties.

Civil Misc. Writ Petn. No. 4693 of 1975, D/- 16-9-1975.

(A) U. P. Co-operative Societies Act (11 of 1966), Section 29 (4) — Expression "to elect members for the committee of management" — It means actual election of members of Committee of Management and not entire process of election.

(Para 4)

(B) Constitution of India, Article 226 — Question of fact — Disputed question about qualification of particular person to be nominated as member of Committee of Management — Cannot be decided in exercise of writ jurisdiction. (Para 6)

Cases Referred: Chronological Paras AIR 1952 SC 64 = 1952 SCR 218 4

G. C. Saxena, R. S. Nigam and S. C. Khare, for Petitioner; Vinay Singh, for Opposite Parties.

ORDER:— The petitioner is the President of the Nanawta Co-operative Society, Dist. Saharanpur from the year 1969. Since then he and the Committee of Management of the said Society are functioning in office and no fresh elections have been held after the expiry of this period to the Committee of Management of the Society. A notice under Section 29 (4) of the U. P. Co-operative Societies Act (hereinafter referred to as the Act) was given by the Assistant Registrar, Co-operative Societies on 31st December, 1974, to hold elections within three months from the date of communication of the order. It appears, that the Society still failed to hold the elections with the result that on 6th May, 1975, the Assistant Registrar nominated a Committee of Management under Section 29 (5) of the Act. A representation was sent against the order

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D/- 6th May, 1975 Annexure 'I' on 13th May, 1975. A report was called for by the Deputy Registrar which was submitted by the Additional District Co-operative Officer on 14th May 1975 vide Annexure 'II'. Thereafter the present writ petition was filed on 19th May 1975. This petition was admitted on 23rd May, 1975, and a direction was issued by this Court that the representation should be decided before 7th July, 1975. On 5th July, 1975, the representation was decided by the Assistant Registrar against the petitioner. Thereafter an amendment application was moved in the writ petition which included the prayer for challenging the order of the Assistant Registrar dated 5th July, 1975.

2. The main submission made by the petitioner's counsel is that the Assistant Registrar had no jurisdiction to take action under Section 29 (5) of the Act, because the society had not failed to elect the members for the Committee of Management after the expiry of their term. In the alternative it is urged that even if he had the power to nominate a new Committee of Management under Section 29 (5) of the Act, the same had been exercised, arbitrarily and unreasonably.

3. For the purposes of the above submissions learned counsel for the petitioner has brought to my notice certain decisions which I shall refer to hereafter. In Rule 445 of the Rules, framed under the Co-op. Societies Act the term of office of the elected members of the Committee of Management has been limited to three co-operative years including the co-operative year of the election. Under Section 2 (i) of the said Act 'a co-operative year' commences on the first day of July and ends on 30th day of June of the following year. In paragraph 1 of the writ petition, the petitioner claims to be the President of the Nanawta Co-operative Society from the year 1969. It is to be noticed that details have not been furnished by the petitioner to show as to when the Committee of Management of the said Society was elected. But from the facts narrated above, it would be reasonable to infer that the Committee of Management was elected sometime in the year 1969. If, however, the election took place prior to 1st July, 1969, then the three co-operative years of the Committee of Management would end on 30th June, 1971. If, on the other hand, the election took place after the 1st July, 1969, then three co-operative years would end on 30th June, 1972. Accepting the position most favourable to the petitioner, let us assume that the term of the Committee of Management of the Society expired on 30th June, 1972. Under Rule 90 of the aforesaid Rules the Annual General Meeting for holding the election of the members of the Committee of Manage-

ment should be held by 31st of December i. e. in the instant case such a meeting should have been held by 31st December 1972. It is, however, open to the Registrar to extend this time further under Rule 90, but no facts have been supplied by the petitioner to show that this time was extended beyond 31st December, 1972 by the Assistant Registrar. The position, therefore, is that it was incumbent upon the Committee of Management to hold fresh elections by 31st December 1972. Admittedly no elections have been held even to this day. Annexure C1 indicates that reminders were sent for holding elections. Thus it is evident that the society has failed to hold the annual general meeting and to elect a fresh Committee of Management after the expiry of its term as has been laid down under Section 29 (3) of the Act. Since the Society failed to elect the members of the Committee of Management, the Assistant Registrar issued a notice under Section 29 (4) of the Act on 31st December, 1974, calling upon the Society to elect its Committee of Management within three months of the date of communication thereof. The Society still failed to elect its members. Therefore, on 6th May, 1975, the Assistant Registrar nominated a Committee of Management by virtue of the power conferred on him by Section 29 (5) of the Act.

4. The petitioner's counsel submits that the expression 'fails to elect members for the committee of management' used in Section 29 (4) of the Act should be given a very wide interpretation. It should include the entire process of election and not the Act of polling alone. For the purpose of his submission he has relied upon a decision of the Supreme Court reported in AIR 1952 SC 64, H. P. Punnoswami v. The Returning Officer etc. He has drawn my attention to Chapter XXIX of the Rules for election framed under the Act. It is not necessary for me to deal with all the rules in this connection. Suffice it to say that under R. 409 before election can be held to the Committee of Management a co-operative society should divide its membership into different groups on territorial or any other rational basis. It has to submit such a list for the approval of the Registrar. It is urged that such a list was submitted to the Deputy Registrar on 28th October, 1974. On 27-1-1975 the Deputy Registrar approved this list of constituencies. Objections were filed thereafter which were finally decided by the Deputy Registrar on 3rd May, 1975. It may be significantly noted here that the writ petition is absolutely silent with regard to the details of these objections. By whom these objections were filed, when they were filed, what was the nature of the objections, and what actually was the decision of the

Deputy Registrar thereon have not been placed before this Court. Counsel for the petitioner also submits that before these objections were decided on 3rd May, 1975, a member of the Society filed a suit on 23rd April 1975, for an injunction restraining the election of delegates and obtained an ex parte injunction order. This order was finally vacated on 1st May, 1975. Here also it must be noticed that the petitioner has again failed to take the Court in confidence by omitting to give details regarding the institution of this suit. By whom the suit was filed and what were the allegations in the suit have not been placed before this Court. It may be that the suit was filed by somebody in collusion with the petitioner. The Court has been left completely in the dark to speculate on this question. On 3rd May 1975 it is urged that the Deputy Registrar wrote to the District Magistrate for the appointment of an Election Officer as required under Rule 414 of the said Rules and 18th May 1975 was fixed as the date for the election of the Committee of Management. On the basis of the facts mentioned above the petitioner's counsel submits that the process for the holding of the election of the Committee of Management had commenced on 26th October, 1974 and was in progress and as such it cannot be said that there was a failure to elect a fresh Committee of Management as envisaged in sub-section (4) of Section 29 of the Act. I am not inclined to accept this submission of the petitioner's counsel. In the first place, as mentioned already, several details on the question involved have been suppressed from the Court, which would be very necessary for coming to the conclusion whether these proceedings, which are alleged to have commenced on 26th October, 1974 and the suit filed on 24th April, 1975, were bona fide or collusive proceedings. In the second place, since the term of the Committee of Management expired on 31st December, 1972, as held by me above, there is no explanation as to why no steps were taken for holding the election from that date upto 26th October, 1974. That is for at least two more co-operative years the Society failed to take any step for holding fresh elections and thus rendered themselves liable for action being taken under Section 29 (4) and (5) of the Act. Thirdly, the wider meaning of the term 'election' cannot possibly be given in the context in which the word is used in Section 29 of the Act. Under sub-section (2) of Section 29 of the Act the term of the elected members of the committee of management shall be such as may be provided under the rules. The word 'elected' here means the actual election itself. It cannot mean the entire process of the election. Otherwise sub-section (2) of Section 29 of the Act would

become meaningless. The proviso to sub-section (2) of Section 29 of the Act is to the effect that even though the term of the committee of management may have expired, yet it has been allowed to continue to manage till fresh elections are held by the society. Here again the expression 'fresh elections' would mean the actual holding of the election and not the entire process of election. Otherwise this proviso would also be rendered nugatory. In sub-section (3) of Section 29 of the Act it has been mentioned that the 'Co-operative Society shall in the ensuing general meeting elect members of the committee of management'. This obviously refers to the actual election of the members and not to the entire process of election. In my opinion, in the context in which this expression has been used in Section 29 of the Act, the most natural and reasonable interpretation of the expression 'to elect members' would be to interpret it as the actual election of the members of the Committee of Management. The wider and liberal meaning as submitted by the petitioner's counsel cannot be given to this expression, as used in sub-section (4) of Section 29 of the Act. Since I have held above that the society has failed to elect members of the Committee of Management, the Assistant Registrar was fully competent to issue the notice dated 31st December, 1974, to the Society directing it to hold the elections within three months of the date of communication of the order. Since the Society failed to hold the election within this specified period, the Asstt. Registrar was further justified in nominating a fresh Committee of Management under Section 29 (5) of the Act.

5. Petitioner's counsel has next submitted that the power exercised by the Assistant Registrar is arbitrary and unreasonable. He has nominated members of the Committee of Management who are not authorised to be nominated. For this purpose he has placed reliance upon Section 29 (5) of the Act which runs as follows:

"(5) If the society still fails to elect the members of the Committee of management, the Registrar may himself nominate such persons as under the rules and the bye-laws are qualified for being elected as members of the committee of management"

The submission is that the members nominated by the Assistant Registrar were not qualified for being elected on the Committee of Management and hence their appointment was arbitrary. Reliance was placed upon Annexure C-3 to the counter-affidavit filed by Shiam Lal Gautam.

6. Counsel for the State contested the allegation of the petitioner that the

nominated members were not qualified for being elected as members of the Committee of Management. He has placed reliance upon the counter-affidavit of Lehna Singh in support of his submission. Whether these members were qualified to be nominated or not thus becomes a disputed question of fact. I am not inclined to enter into disputed questions of fact, which should not be decided in the exercise of writ jurisdiction. Moreover, the factual position is that on 6th May 1975 the impugned order had been passed by the Asstt. Registrar under Section 29 (5) of the Act. Section 29 (6) of the Act lays down.

"within six months from the date of nomination made by the Registrar under sub-section (5), the Registrar shall call a general meeting of the general body of the society for electing the members of the committee of management. When the general meeting has elected members for the committee of management the persons nominated by the Registrar under sub-section (5) shall forthwith vacate their office and the members so elected shall continue for the remainder of the term."

In view of this sub-section the election to the membership of the Committee of Management must be held by 5th November, 1975. On that date the nominated Committee of Management shall cease to function and shall have to vacate their office so as to enable the elected members of the Committee of Management to continue for the remainder of the term. From a perusal of paragraph 15 of the counter-affidavit of Shiam Lal Gautam, I find that on 27th May, 1975, a request has already been made to the District Magistrate to appoint an Election Officer. Steps have now to be taken for holding the actual election under the provisions of this Act. In my opinion, no useful purpose would be served in setting aside the nomination made by the Assistant Registrar for a period of six weeks only. As such it would be futile to issue a writ in this connection.

7. Before, however, disposing of this writ petition I feel it necessary to direct the Registrar, Co-operative Societies concerned to take immediate steps for holding the election to the committee of management of the said society so as to complete the same before the 5th of November, 1975.

8. For the reasons given above, I am of the opinion, that there is no merit in this writ petition which is hereby dismissed with costs.

Petition dismissed.

AIR 1976 ALJ AH/BAD 62

K. B. ASTHANA, C. J. AND
R. L. GULATI, J.

Hasmat Ullah, Appellant v. District Magistrate, Basti and others, Respondents.

Special Appeal No. 379 of 1974, D/- 11-8-1975.*

(A) U. P. District Boards Act (1922), Section 90 (1) (b) — Expression "pending enquiry into his conduct" — Meaning of. Order in Civil Misc. Writ No. 5060 of 1974, D/- 18-11-1974 (All), Reversed.

A preliminary investigation or enquiry on the receipt of the reports of alleged misconduct is not an enquiry into the conduct of the erring servant but it is merely intended to assure the punishing authority that there is prima facie truth or substance in the allegations.

(Para 2)

The words "pending enquiry into his conduct" plainly mean 'during the enquiry into his conduct'. Even the appointment of an Enquiry Committee and direction to serve charges will not amount to commencement of the enquiry. It may be that the Committee of Enquiry appointed may not be able to act on account of unforeseen circumstances and another Committee may have to be appointed. The enquiry cannot then be said to have commenced when the Enquiry Committee itself has not started the proceedings. The correct view to take is that an enquiry will commence when the enquiry officer or the Enquiry Committee takes cognizance and issues notice to the delinquent officer for answering the charges. Order in Civil Misc. Writ No. 5060 of 1974 D/- 18-11-1974 (All), Reversed. (Para 3)

M. Asif Ansari, for Appellant; S. N. Kacker, G. N. Verma and Standing Counsel, for Respondents.

K. B. ASTHANA, C. J.:— This is an appeal by the petitioner against the dismissal of his writ petition by a learned Single Judge. The petitioner had questioned the validity of an order of suspension passed against him by the District Magistrate, Basti, exercising the powers of the Zila Parishad, of Basti. The petitioner was employed as an Engineer at the material time in the Zila Parishad. Some reports were made against him and investigation into the allegations were made and the material so collected at the investigation satisfied the District Magistrate as being prima facie genuine. He directed that an enquiry into the conduct of the petitioner be made. By an order

*(Against Judgment and Order of Gopi Nath, J., in Civil Misc. Writ No. 5060 of 1974, D/- 18-11-1974 (All)).

dated 22-8-1974 the District Magistrate appointed a committee of enquiry and framed charges. He further directed that the charges be served on the petitioner and pending enquiry he be suspended and 1/4th of his pay was ordered to be paid to him as subsistence allowance. In due course the charges were served on the petitioner and he was asked to explain the charges by the enquiry committee. The petitioner approached this Court under Article 226 of the Constitution questioning the validity of the suspension order, mainly on the ground that under Section 90 (1) (b) of the District Boards Act, which provisions were applicable to his case, he could not have been suspended by the District Magistrate exercising the powers of the Board on 22-8-1974 as there was no enquiry pending into his conduct. In its counter affidavit the respondent Zila Parishad took the stand that the District Magistrate had the power to suspend the petitioner on 22-8-1974 as an enquiry was contemplated against him as charges were framed and an enquiry committee appointed. The learned Single Judge on a consideration of the provisions of Sec. 90 (1) (b) of the District Boards Act, which admittedly were applicable to the case of the petitioner, held that as an enquiry was imminent, the enquiry committee having been appointed and serving of charge sheet ordered, the District Magistrate in the circumstances was vested under the law with the power to pass a suspension order. The petition was dismissed.

2. The decision of this appeal will turn on the meaning and the scope of the words "pending enquiry into his conduct", occurring in S. 90 (1) (b) of the U. P. Dist. Boards Act. It was urged on behalf of the appellant that mere appointment of an enquiry committee and direction to serve charges on the erring servant of the Zila Parishad would not amount to a pending enquiry into his conduct within the meaning of the said section, and inasmuch as the District Magistrate passed the order of suspension when no such enquiry into petitioner's conduct was pending, the order was without jurisdiction and lacked legal authority. On behalf of the respondents its learned counsel submitted in reply that 'enquiry' not having been defined or explained in any of the provisions of the U. P. District Boards Act or Rules framed thereunder, will bear the ordinary dictionary meaning and even the preliminary stage what is known as fact finding investigation into the allegations made against the conduct of the servant of the Zila Parishad would be nothing but an enquiry into his conduct, therefore, the District Magistrate was within his rights and acted within the scope of his powers in suspending the appellant on 22-8-1974

as the enquiry against the petitioner had commenced much earlier within the meaning of the said section. To put it differently the submission of the learned Counsel for the respondents was that the fact finding investigation before the framing of the formal charges and then actual trial of the erring servant before the enquiry committee ultimately resulting in the award of punishment by the appropriate authority is one whole proceeding which can be termed as enquiry within the meaning of Section 90 (1) (b) of the U. P. District Boards Act. It is difficult for us to accept this submission put forward on behalf of the respondents. Preliminary investigation or enquiry on the receipt of the reports of alleged misconduct is not an enquiry into the conduct of the erring servant but it is merely intended to assure the punishing authority that there is prima facie truth or substance in the allegations. When an investigation is made by any authority to assure itself into the prima facie truth or falsity of the allegations made then it is not an enquiry into the conduct of the servant of the Board but is actually a process for satisfying himself as to the weight to be attached to the allegations made. It is only when the punishing authority prima facie is satisfied that there is substance and weight in the allegations and there is sufficient material to prove those allegations that it frames definite charges against the erring government servant. It is obvious, therefore, that when definite charges are framed against the erring servant then an enquiry into his conduct will ensue. Prior to that stage though the investigation into the facts might have been made, with respect to the allegations alleging misconduct but that will not mean enquiry into misconduct. Enquiry into the misconduct of an erring servant would be when he is confronted with the definite charges and is called upon to explain the charges. We are of the opinion that this interpretation and construction of Section 90 (1) (b) is more appropriate and proper for that would prevent the abuse of power by the District Magistrate or by any other punishing authority to suspend a servant even on just hearing from some sources orally or in writing about some misconduct and suspending him at once. To accept the interpretation of Section 90 (1) (b) as put forward by the learned counsel for the respondents, would mean that a servant of the Zila Parishad could be suspended even on mere information received of his misconduct which ultimately in the preliminary enquiry itself may be found to be baseless or without substance. This the Legislature would have never intended when the power of suspension pending enquiry into the conduct of a Government servant was conferred upon the punishing authority.

3. Learned counsel for the respondents relying upon the history of the Legislation submitted that the words "pending enquiry into his conduct" would mean "until the enquiry into his conduct". But that does not solve the problem. Unless a point of time is determined when the enquiry will commence into the conduct of the servant, the starting point of the pendency cannot be fixed. In our judgment the words "pending enquiry into his conduct" plainly mean 'during the enquiry into his conduct'. Even the appointment of an Enquiry Committee and direction to serve charges will not amount to commencement of the enquiry. It may be that the Committee of Enquiry appointed or the officer appointed to conduct that enquiry may not be able to act on account of unforeseen circumstances and another officer or Committee may have to be appointed. The enquiry cannot then be said to have commenced when the Enquiry Committee itself has not started the proceedings. The correct view to take is that an enquiry will commence when the enquiry officer or the Enquiry Committee takes cognizance and issues notice to the delinquent officer for answering the charges.

4. For the reasons stated above we allow the appeal, set aside the judgment and order of the learned Single Judge and quash that part of the order of the District Magistrate dated 22-8-1974 by which the petitioner was suspended. The petitioner will be entitled to his costs. Appeal allowed.

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M. P. MEHROTRA, J.

Mahadeo Nath, Appellant v. Smt. Meena Devi, Respondent.

Second Appeal No. 2856 of 1968, D/- 23-7-1975.*

(A) Insurance Act (1938), Section 38 (5) — Assignment and nomination — Difference between.

Assignment is a transfer and created right in the assignee to claim the benefits of the policy in his own name. Nomination, however, does not amount to a transfer but it merely enables the nominee in the event of the death of the assured to get the amount of the insurance policy. The nomination creates no interests in the nominee in respect of the title to the insurance policy. The true owner's right will not be affected by the nomination. AIR 1960 SC 403, Relied on. (Paras 6, 11)

*(Against Judgment and decree of Addl. Dist. J., Saharanpur, D/- 17-7-1968).

JS/KS/D676/75/RSK

(B) Evidence Act (1872), Section 114 — Instructions to advocate — Presumption is that the advocate acts on the instructions of the client. (Para 14)

(C) Hindu Law — Mahant of a math — Powers of.

The powers of a Mahant can in no case extend to alienating the assets of the Math for the benefit of his dependants.

(Para 15)

Cases Referred: Chronological Paras
AIR 1972 All 167 = 1971 All WR (HC) 3, 8
785 (FB)

AIR 1970 Cal 513 = ILR (1970) 2 Cal 85 3

(1968) 72 Cal WN 696 = ILR (1969) 2 Cal 70 3

(1966) 2 Mad LJ 484 = (1966) 2 ITJ 655 3, 7

AIR 1962 All 355 = 1962 All LJ 265 3, 9

AIR 1961 Ker 126 = (1960) 2 Ker LR 576 (FB) 3

AIR 1960 SC 403 = 1960 Pat LR (SC) 27 3, 10

AIR 1957 Andh Pra 757 = 1957 Andh LT 431 3

AIR 1957 Mad 115 = (1956) 2 Mad LJ 476 3, 7

(1856) 6 Moo Ind App 393 (PC) 16

Girdhar Malviya, for Appellant; S. D. Agarwal, K. C. Saxena, Chandra Kishore and C. P. Ghildayal, for Respondent.

JUDGMENT:— This is the plaintiff's second appeal.

2. The relevant facts are these: The plaintiff filed the suit against two defendants-respondents. Defendant-respondent No. 1 is the alleged widow of Mahanth Shankeranand Nath deceased and the defendant-respondent No. 2 is the Life Insurance Corporation of India. Two main reliefs were claimed by the plaintiff.

(1) A declaration was sought to the effect that the plaintiff was entitled to Rs. 7,000/- or any other amount due on the two insurance policies in dispute.

(2) A permanent injunction was claimed in favour of the plaintiff against the defendant-respondent No. 1 restraining her from realising the amounts due on the said two policies from the defendant-respondent No. 2. According to the plaint allegations there is a Math known as Bawa Sarwanath Math of which Mahanth Mahadeo Nath happened to be the Mahanth Gaddinashin and in that capacity he filed the suit. It was stated that the Mahanth had no personal interest in the income of the Math's properties. Mahanth Shankeranand Nath was the preceding Mahanth of the Math who got himself insured with the Life Insurance Corporation of India under two policies — one dated 28-12-1957 for Rupees 25,000/- and the other dated 5-8-1960 for Rs. 30,000/-. Certain instalments of premium due under the said two policies

were paid by the assured out of the Math's fund and the said policies were taken out for the benefit of the Math and belonged to the Math. Subsequently, Mahanth Shankeranand Nath resigned his Mahantship in 1961 and the plaintiff became the Mahanth of the Math. Mahanth Shankeranand Nath died on 2nd September, 1963. On his death the plaintiff claimed the proceeds of the two policies of the defendant-respondent No. 2 but the latter stated that the assured had nominated the defendant-respondent No. 1 as the nominee of the two policies and as such she was entitled to the proceeds of the policies unless the court directed to the contrary. It was further alleged in the plaint that the claim of the defendant-respondent No. 1 that she was the wedded wife of the deceased Mahanth Shankeranand Nath was incorrect and she was a mere kept and there was no valid marriage. The defendant-respondent No. 1 contested the suit. She claimed to be the legally wedded wife of the deceased Mahanth Shankeranand Nath. She further claimed that the deceased Mahanth owned personal assets, moveable and immovable and the Math had no concern with the same. It was also asserted that the instalments of premium in respect of the said policies were paid out of his personal funds by the assured and not out of the Math's fund. The policies were not taken out for the benefit of the Math but were taken out for his own benefit and the benefit of the nominee. After his marriage with the defendant-respondent No. 1 the assured endorsed the policies in favour of the said defendant-respondent No. 1 and nominated her as the person to whom the amount was to be paid in the event of the death of the assured. By the will dated 18-7-1963 executed by the deceased Mahanth, she was entitled to the proceeds of the said policies. The suit was also said to be bad under the provisions of the Specific Relief Act.

3. The trial court framed eleven issues. No finding, however, was returned on issues Nos. 1 to 6 and 8 in view of the statement made by the counsel on behalf of the parties. These issues raised the question of the validity of the alleged marriage of the deceased Mahanth with the defendant-respondent No. 1. In respect of issues Nos. 9 and 10 it was observed by the trial Court that no arguments were addressed by the contesting defendants. They were therefore, treated as not pressed and decided in the negative. Issue No. 11 was as follows:

"To what relief, if any, is the plaintiff entitled?"

Issue No. 7 alone was examined on merits and decided by the trial court. The said issue was as follows:

"What was the source from which the moneys were paid by Shankeranand

Nath towards the premiums of the policies in dispute? Its effect?"

The trial Court after examining the evidence adduced by the parties held that it was not proved that the moneys towards the insurance premiums were paid from the Math's funds. It was further held that even if it were accepted that the Math's funds were utilised for making payment towards the insurance premium, still, the defendant-respondent No. 1 was in law entitled to the proceeds of the two policies and not the plaintiff. The plaintiff took out an appeal to the lower appellate Court but did not succeed. The lower appellate Court also endorsed the aforesaid findings recorded by the trial Court. Feeling aggrieved the plaintiff has come up in the instant appeal and in support thereof I have heard Shri V. K. S. Chaudhary, learned counsel for the plaintiff-appellant. In opposition, Shri K. C. Saxena, the learned counsel for the defendant-respondent No. 1 has made his submissions. Shri Chaudhary's first contention is that the Courts below have not correctly interpreted the relevant provisions of the Insurance Act. The trial Court and the lower appellate Court on an interpretation of Section 39 of the Insurance Act held that the nominee was bound to be paid the amount of the policies and the Insurance Company had no choice in the matter. The Lower Appellate Court in its judgment relied upon the following three cases:

Kesari Devi v. Dharma Devi, 1962 All LJ 265 = (AIR 1962 All 355); D. M. Mudaliar v. I. I. & B. Corpn., (AIR 1957 Mad 115); M. Brahmamma v. K. Venkataraman Rao, (AIR 1957 Andh Pra 757); Shri Chaudhary's first contention is that under the Insurance Act there is a difference between assignment and nomination. Nomination is only for the purpose of enabling the insurer to get a valid discharge but it creates no title in the nominee whereas the assignment of the policy does create a title in the assignee. Counsel has drawn attention to sub-section (5) of Section 39 of the Insurance Act and contends that the provisions therein clearly prove that the nominee gets no vested right in the policy, otherwise his heirs would be entitled to the proceeds of the insurance policy. It is contended that sub-section (1) and sub-section (6) of Section 39 are injunctions for the benefit of the insurer but a court of law is not bound by the said injunction and it has full right to direct payment of the policy to persons other than the nominee. Reliance has been placed on the following cases:

Kesari Devi v. Dharma Devi, (AIR 1962 All 355); Raja Ram v. Mata Prasad, (AIR 1972 All 167) (FB); Sarojini Amma v. Neelkanta, (AIR 1961 Ker 126) (FB); L. I. C. v. United Bank, (AIR 1970 Cal 513); Parbati Kuer v. Sranghar, (AIR 1960

SC 403); Radha Debi v. Controller, Estate Duty, (1968) 72 Cal WN 696; Sethalakshmi Ammal v. Controller of Estate Duty, (1966) Mad LJ 484.

4. The next contention of the learned counsel for the appellant is that an ascetic cannot have his separate property. If he acquires any it will be of the Math. Whatever property will be found to belong to the Mahanth at the time of his death will devolve not on his personal heirs but on his disciples. Further, all the offerings made to a Mahanth belong to the Math and not to him personally. For this submission reliance has been placed on the following:

(1) Mulla's Hindu Law, 1966 Edn. Section 58 and Section 111.

(2) Mitakshara, Section 8, verses (i), (ii), (iii), (iv), (v) and (vi). Colebrook's Translation.

Counsel also relied on para. 3 of the Memorandum of Association and on Rules 3, 14, 19, 20, 21 and 23 of the Rules and Regulations of Panchayati Akhara Shri Nirajani Gosais of Naga Sect. It may be stated that the said documents are sought to be brought on the record in this appeal with the aid of Order 41, Rule 27, Civil Procedure Code. Shri Chaudhary's next contention is that the finding of fact recorded by the two courts below to the effect that the plaintiff failed to prove that the instalments of insurance premium were paid from the Math fund is vitiated in law. He contends that the relevant entries of the cash book of the Math were fully proved to prove the payment from the fund of the Math. Moreover, the payments were made by cheques or bank draft and, therefore, there was no dispute about the payment. The instalments in question were admittedly received by the insurer and no instalment was paid on the said policies after the deceased Mahanth resigned his Mahantship on 28-3-1962. It was next contended that the courts below did not properly appreciate the probative value of Ex. B-14 which is the letter dated 2-4-1960 addressed by the deceased Mahanth Shankeranand Nath to the insurer. In this letter the Mahanth wrote that he would make the nomination in respect of the policies after the election of the Mahanth was held. It was alleged in the letter that that was the practice or custom. Similarly, it was contended that the courts below did not properly appreciate the probative value of Ex. 5 which is the reply to the Income-tax Officer, A-Ward, Saharanpur on behalf of the deceased Mahanth with reference to the notice under Section 23 (3) of the Income-tax Act for the assessment year 1959-60, which had been issued by the said officer to the deceased Mahanth. Counsel also drew attention to certain

other exhibits on the record, viz., Ex. B-5, B-7, B-8, B-9, B-10, B-11 and B-18 which documents have been filed by the defendant-respondent No. 2 and to Exts. 1, 2 and 3 which are the plaintiff's documents.

5. Shri K. C. Saxena, learned counsel for the defendant-respondent No. 1, contended that the two courts below recorded a finding of fact in favour of his client, namely, that the premium was paid by the deceased Mahanth from his personal fund and not from the fund of the Math. In the second appeal the said finding of fact could not be assailed as it was based on good evidence and was not perverse. Both the courts below had recorded a finding of fact that the deceased Mahanth was possessed of his personal property apart from the assets of the Math. Again, the said finding was a finding of fact which could not be assailed in second appeal. Moreover, in addition to her status as the nominee of the two policies, the defendant-respondent No. 1 was also entitled to the proceeds of the policies under a registered will which had been executed by the deceased Mahanth in her favour. Learned counsel next submitted that there is no law which lays down that a Mahanth can have no separate personal property apart from the property of the Math. Indeed, his powers as a Mahanth are very extensive in respect of even the Math funds. Reliance has been placed on paras. 814 and 819 of Derret's Introduction to Modern Hindu Law. Sri Saxena further contended that the Insurance Company in law is bound to pay the proceeds of the policies to the nominee and to no one else. On the death of the deceased Mahanth, who had ceased to be a Mahanth earlier, the insurance policies did not become the assets of the Math. If a person has advanced moneys to enable the policy holder to make payments towards the premium then such a creditor can have his remedies against the policy holder for the recovery of the amount advanced by him but he has no claim to the insurance policy or its proceeds. Counsel contended that the appreciation of the evidence by the courts below was not legally defective.

6. In my opinion, Shri V. K. S. Chaudhary is right in his contention that there is a big difference between assignment and nomination under the Insurance Act. Assignment is a transfer and creates right in the assignee to claim the benefits of the policy in his own name. Nomination, however, does not amount to a transfer but it merely enables the nominee in the event of the death of the assured to get the amount of the insurance policy. In (1968) 72 Cal WN 696 it was laid down:

"Under the Insurance Act, 1938, assignment of a policy stands on a footing

different from nomination, by a policy-holder, of a person to whom the money secured by the policy should be paid in the event of the death of the policy-holder. An assignment is transfer of a policy. The consequences which follow on assignment of a policy are to be found in sub-section (5) of Section 38 of the Insurance Act.

Nomination by a policy-holder is governed by the provisions of Section 39 of the Insurance Act. The nomination effects no transfer or assignment of the policy which has merely the effect of nominating the person or persons to whom the money, secured by the policy, shall be paid in the event of the death of the policy-holder."

7. In (1966) 2 Mad LJ 484 a Division Bench of the Madras High Court laid down as under:

"A nomination does not involve a transfer of the rights under a policy unlike an assignment. This distinction was recognised by a Division Bench of this Court in Mohanavelu Mudaliar v. The Indian Insurance and Banking Corporation Ltd., (1956) 2 Mad LJ 476 = (AIR 1957 Mad 115) in relation to Sections 38 and 39 of the Insurance Act. Section 38 (5) clearly states the effect of an assignment as that the assignee is the only person entitled to benefit under the policy and such a person shall also be subject to all liabilities and equities to which the assignor was subject at the date of assignment. But "nomination" as seen from sub-section (1) of Section 39 merely means that the person nominated is the one to whom the moneys secured by the policy shall be paid in the event of the death of the assured. Unlike an assignment which is irrevocable, a nomination may, at any time before the policy matures for payment, be cancelled or charged. In the event of the policy maturing during the lifetime of the assured, the nomination will have no effect and the policy money will, in that event, be payable to the assured. It follows that while an assignee is not merely entitled to receive but has a right to the policy money itself, a nominee is no more than a person who is competent to receive the money if the assured did not survive maturity of a policy and has no right to the money."

8. In AIR 1972 All 167 (FB) it was laid down as under:

"The policy-holder continues to hold interest in the policy till the moment of his death and if the policy matures during his lifetime then the benefit arising thereunder shall be his and not of his nominee. As the benefit secured by the policy forms part of the estate of the deceased policy-holder, his creditors can realise their loans from the money paid to the nominee. Nominee in such circumstances

would be legal representative of the deceased policy-holder."

9. In AIR 1962 All 355 the contest was between the widow of the assured and the heirs of the nominee. The assured had died before the maturation of the insurance policy. The nominee died after the maturation of the policy but before payment of the policy money. In these circumstances, the Division Bench held that the heirs of the nominee were entitled to the payment of the money from the Insurance Company. The facts in the present case are different.

10. In AIR 1960 SC 403 it was laid down as under:

"There is no proposition of law by which insurance policies must be regarded as the separate property of the coparceners on whose lives the insurance is effected by a coparcenary and that the proceeds of an insurance policy do not belong to the joint family.

It might be true that for purposes of insurance by the family is meant the wife and children of the Karta, the assured. But the question is not whether the Karta took out the policies for the benefit of his own family but whether he did so without detriment to the joint family funds and if it was the latter, then any thing obtained with the joint family funds would belong to the joint family."

11. It is not necessary to discuss the other cases as the point seems to be clear that the nomination creates no interest in the nominee in respect of the title to the insurance policy. I, therefore, hold that the courts below were not right in thinking that in view of her nomination the defendant No. 1 was entitled to the proceeds of the policy in dispute. The true owner's right will not be affected by the nomination. In my view, the Supreme Court case referred to above is clear on the point.

12. In the instant case, if the insurance policies in dispute be found to be the assets of the Math then, in my view, the defendant-respondent No. 1 as a nominee cannot have preference over the title of the Math to the policies in dispute.

13. The two courts below have undoubtedly recorded findings of fact as to the source of the premiums paid and in a second appeal ordinarily I should be disinclined to interfere with such finding. However, in the facts of the present case I felt that the courts below have not properly considered the significance and effect of the documentary evidence on the record. Ex. B-14 is a communication by the deceased Mahanth Shankeranand Nath addressed to the defendant-respondent no. 2 (Life Insurance Corporation). It is clearly recited there that the nomination would be made after the election

and it also stated that such was the practice. On a reasonable interpretation of this document it is clear that it referred to the election of the Mahant of the Math. This document clearly negatives the case set up by the defendant-respondent No. 1 that the insurance policies were the personal or private assets of the deceased Mahant. Ext. B-7 is the letter dated 28-7-1962 from the defendant No. 2 to the deceased Mahant. It is stated in this letter:

"With reference to your unsigned letter dated 14th inst. we have to inform you that at the time of taking over the above policies you were having no dependants to provide for and you could not nominate any person as a nominee. You also informed us vide your letter dated 2-4-1960 that according to your rules the nominee would be nominated only after the election of the successor for the Gaddi of the Mahant. But now you want to nominate your wife Smt. Uma Sharma aged about 23 years instead of your successor for the Gaddi. Besides this your present address shows that you are residing at Dehradun. Therefore, please let us know if you have left the Mahant Shrawan Nath Math and have married yourself in a near future (?) or you changed the idea of nominating your successor due to some other reason."

To this letter Shri Shankeranand Nath, the deceased Mahant, sent his reply dated 16-8-1962 which is Ext. B-8. He wrote:

"With reference to your letter No. PHS/Hom. dated 28-7-1962 I beg to inform you that I have resigned from the Mahantship of Shri Shrawan Nath Math and have married with my nominee Smt. Uma Sharma. Therefore, I have changed my previous idea and I have accordingly nominated my wife."

14. In my view, these documents make it clear that at the earlier stage before his marriage with the defendant-respondent No. 1 the deceased Mahant was clear in his mind and stated so that the nominee was to be the successor in the office of the Mahant of the Gaddi. These documents (whose genuineness has not been questioned by the courts below) reasonably establish that the policies were the assets of the Math and the deceased Mahant dealt with the same on the said footing till he got himself married with the defendant-respondent No. 1. In the same way, I think, the true significance of Ex. 5 has not been appreciated by the courts below. The said exhibit is the reply addressed on behalf of Mahant Shankeranand Nath, the deceased Mahant, to the Income-tax Officer, A-Ward, Saharanpur. The said communication was sent in reply to the notice under Section 23 (3) of the Income-Tax Act for the year 1959-60 which had been issued by the

said I-T. Officer. This reply is dated 5th May, 1960, and it is stated there:

"Insurance. The Mahant got himself insured in the year 1950 and correspondence is going on with the Life Insurance Corporation of India, Head Quarters for the purpose of nominating the successor Mahant for the benefit of the policy. This can safely be said as a great saving of the Muth. The insured is Rs. 25,000/- and after the death of the present Mahant the next Mahant i. e. the Muth would be entitled to get this big sum. The Mahant has not done this for the purposes of utilising the sum assured for his personal benefit or the benefit of any person whom he may nominate."

The genuineness of this letter has also not been questioned by the courts below. A reference in this document is made to the correspondence with the defendant-respondent No. 2 which the deceased Mahant was having with regard to the question of making nomination in respect of the insurance policy. I have already referred to Ex. B-14 which is dated 2-4-1960. Its reply, which is dated 5-5-1960, therefore, seems by implication, to make a reference to the said Ex. B-14. Both these documents should be read together and when so read together, in my opinion, they make it clear that the insurance policies were really the assets of the Math. This finding based on these documents can stand despite the infirmities which have been rightly pointed out by the courts below in regard to the cash book etc., filed on behalf of the plaintiff-appellant. I do not think that the courts below were right in discarding the probative value of Ex. 5 on the ground that there was nothing to show that the counsel, who signed the said communication on behalf of the deceased Mahant, had instructions to do so. In my opinion, there is a presumption that a counsel acts on the instructions of the client and, therefore, taking a reasonable view I think that these documents clearly prove the ownership of the Math in regard to the two insurance policies. Despite my limitation to interfere in second appeal, I think, in the instant case, I am entitled to do so inasmuch as the courts below have not correctly interpreted the documents which throw light and clearly establish the ownership of a party. It is also important to bear in mind that no instalment of premium was paid by the deceased Mahant after he ceased to be the Mahant of the Math.

15. Sri K. C. Saxena emphasised that the powers of a Mahant of a Math are wider than the powers of a Shebait. That may be so but the width of such powers can, in no case, extend to alienating the assets of the Math for the benefit of his dependants. In Mulla's Hindu Law, 13th Edn. para. 414 it is laid down:

"The property of a Math is held by the Mahant as spiritual head of the institution, but the property may by the usage and custom of the institution vest in trustees other than the spiritual head. In any case, the property is held solely in trust for the purposes of the institution; surplus income must be added to the endowment and not applied for the personal enjoyment of the head of the Math. A Mahant is not a trustee in the English legal sense of the term. His functions and duties are regulated by custom. His very wide discretion as to the application of the income is subject to the obligation to manage the property so as to serve effectively the objects for which the Math exists. In the conception of Mahantship as in Shebaitship, both the elements of an office and property are blended together and neither can be detached from the other. The personal or beneficial interest of the Mahant in the endowment attached to an institution is manifested in his large powers and disposal and his right to create derivative tenures in respect of endowed properties and these and other rights of a similar character of proprietary right which, though anomalous to some extent, is still a genuine legal right. A Mahant, as a superior of a Math has in addition to his duties, a personal interest of a beneficial character which is much larger than that of a Shebait in a debutter property."

16. In para. 415 of the said book it is laid down as under:

"As a general rule of Hindu Law, property given for the maintenance of religious worship, and all charities connected with it, is inalienable. It is competent, however, for the Shebait or Mahant in charge of the property, in his capacity of Shebait or Mahant and as manager of the property, to incur debts and borrow money on a mortgage of the property for the purpose of keeping up the religious worship, and for the benefit and preservation of the property. The power, however, to incur debts must be measured by an existing necessity for incurring them."

The power of a Shebait or a Mahant to alienate debutter property is analogous to that of a manager for an infant heir as defined by the Judicial Committee in *Hunooman Persaud v. Mussamat Buboonee*, (1856) 6 Moo Ind App 393 (PC). As held in that case, he had no power to alienate debutter property except "in a case of need or for the benefit of the estate." He is not entitled to sell the property for the purpose of investing the price of it so as to bring in an income larger than that derived from the property itself. Nor can he, except for legal necessity, grant a permanent lease of debutter property, though he may create proper derivative

tenures, and estates conformable to usage."

17. In para. 814 of Derrett's *Introduction to Modern Hindu Law* it has been laid down:

"The Mahant as spiritual leader of the sect has a customary right to offerings from the members of that sect. These are normally both for the upkeep of the Math and its purpose, which naturally include the dignity and the efficiency of the Mahant himself, and such offerings are accepted by him as acquisitions of the Math. If he takes offerings as presents to himself personally, on the other hand, he may well treat them as a personal estate, for even Sanyasis are competent in law to own personally property."

18. In para. 819 of the same volume it is laid down:

"A mahant is entitled to be installed and put into possession of all the Math property, which will remain distinct from the Mahant's private property, though it is open to him at any time to merge his private assets with the former."

19. In my opinion, these observations are not relevant in the instant case. Even if the deceased Mahant had private sources of income, still, we are really concerned with the question whether the two insurance policies were the assets of the Math or whether the same were his private assets. In my opinion, the documentary evidence to which I have made a reference, clearly establishes that the insurance policies were the assets of the Math and were so declared by the deceased Mahant himself to two independent bodies like the defendant-respondent No. 2 and the Income-tax Department before any controversy arose about the ownership of the said insurance policies. Therefore, it is not necessary to discuss whether the deceased Mahant had private sources of income or not. Even if he had, the insurance policies were held by him as the assets of the Math and it was not open to him to transfer or alienate the same for the benefit of his wife. The ownership of the Math remained unaffected by the nomination made by the deceased Mahant after he ceased to be the Mahant. The policies in question could not be disposed of by the Mahant except for a legal necessity or benefit of the estate in his lifetime and he could not make the said assets the subject-matter of a will for the benefit of his wife.

20. The appeal is accordingly allowed and the decree passed by the courts below is set aside. The plaintiff's suit shall stand decreed against the defendant-respondents. In the circumstan-

ces, the parties shall bear their costs throughout.

Appeal allowed.

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CHANDRA PRAKASH, J.

Sita Ram, Appellant v. Moti Lal and others, Respondents.

Second Appeal No. 4155 of 1965, D/- 11-7-1975.*

(A) Civil P. C. (1908), Section 100 — New plea — Payment of arrears by tenant to landlord whether accepted by him resulting in estoppel — As it involves evidence new plea is not permissible.

(Paras 6 and 7)

(B) T. P. Act (1882), Section 111 (b) — Ejectment notice — Unambiguously requiring tenant to vacate house and give possession on expiry of 30 days after receipt thereof — Default to result in ejectment suit also clearly indicated — Notice is valid. AIR 1965 All 323 and 1971 All LJ 752, Distinguished; AIR 1965 SC 101, Relied on. (Paras 9 and 10)

Cases Referred: Chronological Paras
1971 All LJ 752 = 1971 Ren CR 801. 10
AIR 1965 SC 101 = (1964) 5 SCR 239 10
AIR 1965 All 323 = 1964 All LJ 1105 9

K. B. Mathur and K. C. Saxena, for Appellant; Radhakrishna, for Respondents.

JUDGMENT:— This is an appeal against the order dated 8-9-1965 of Sri S. K. Rai, Civil Judge, Allahabad, allowing the defendant's appeal in part and decreeing the plaintiff's suit for the recovery of Rs. 31/- as arrears of rent and possession.

2. The suit giving rise to this appeal was filed by the plaintiff-respondent against the defendant-appellant for the recovery of Rs. 59/- as arrears of rent and Rs. 9/- as damages for use and occupation and ejectment in respect of a house detailed in the plaint on the allegations that the defendant was a tenant of the plaintiff in the house in dispute on a monthly rent of Rs. 15/- and Rs. 930/- were due from the defendant to the plaintiff for arrears of rent for the period between 1-1-1959 and 31-3-1964 after crediting the amount of Rs. 111/- sent by the defendant by money order and Rs. 54/- paid by the defendant towards House Tax and Water Tax. The plaintiff terminated the tenancy of the defendant by a notice dated 7-5-1964. Hence the suit.

3. The defendant resisted the claim on the ground that the correct rate

of rent as Rs. 5/- per mensem. It was alleged that the plaintiff had filed a previous suit No. 272 of 1961 for arrears of rent for the period between 1-1-1958 and 29-3-1961 and it was dismissed, and that the judgment in that suit operated as res judicata. It was further alleged that the defendant sent Rs. 111/- to the plaintiff in full satisfaction of his claim and the plaintiff accepted that amount unconditionally and cannot go behind that position. The validity of the notice to quit was challenged.

4. The learned Munsif, before whom the suit was originally filed, after taking evidence of the parties, came to the conclusion that the correct rate of rent between the parties was Rs. 5/- per mensem. He also held that the decision in suit No. 272 of 1961 was res judicata between the parties. He further held that Rs. 185/- were due to the plaintiff from 1-3-1961 to 31-3-1964, out of which the defendant paid only Rs. 111/- to the plaintiff and the defendant paid Rs. 54/- as taxes to the Municipal Board. The balance of Rs. 28/- was due to the plaintiff, out of which the defendant sent only Rs. 10/- by money order which was rightly refused by the plaintiff as that amount fell short of the rent due. He further held that the notice of ejectment was perfectly valid and there was a wilful default on the part of the defendant. On these findings, the learned Munsif decreed the suit for possession and recovery of Rs. 59/- as arrears of rent besides Rs. 9/- as damages for use and occupation.

5. On appeal by the defendant against the aforesaid decree, the First Appellate Court confirmed the findings of the trial court that the rate of rent was Rs. 5/- per mensem only. The findings of the trial court that the judgment in suit No. 272 of 1961 operated as res judicata was set aside. The Lower Appellate Court also agreed with the finding of the trial court that there was a wilful default in payment of rent; but it came to the conclusion that only Rs. 20/- were due to the plaintiff for the arrears of rent plus Rs. 11/- on account of damages for use and occupation. The validity of the notice to quit was not challenged in the court below. The Lower Appellate Court, therefore, maintained the decree for possession and reduced the decretal amount from Rs. 59/- to Rs. 31/-.

6. Against the above decree, the defendant has come up in appeal in second appeal before me. Only two contentions have been raised before me. The first contention raised before me was that the defendant by a notice dated 17-3-1964 offered Rs. 111/- by money-order to the plaintiff in full satisfaction of his claim, and since the plaintiff accepted this amount without any protest, he is estopp-

* (Against decree of S. K. Rai, Civil J., Allahabad, in C. A. No. 121 of 1965, D/- 8-9-1965.)

ed or debarred from claiming any further amount on account of arrears of rent. The second contention raised before me was that the notice of ejectment was not valid.

7. The learned counsel for the respondent raised a preliminary objection that none of these points was taken by the appellant in the court below, and, therefore, it is not open to him to take these fresh points in second appeal. A perusal of the judgment shows that both the above points were not argued in the court below. The first contention involves matter of evidence and it is difficult to see that it can be raised in second appeal without its having been argued in the First Appellate Court. The second contention is purely a question of law. It could certainly be looked into in second appeal.

8. Coming to the first contention on merits, I find that it has no substance. The paper Ext. 10 is the copy of the notice dated 17-3-1964 sent by the defendant to plaintiff, in which he alleged that the rate of rent between the parties was Rs. 5/- per mensem and that he had paid Rs. 54/- on account of Water Tax and House Tax and although the defendant had spent more than Rs. 15/- on repairs, he wanted a deduction of Rs. 15/- only. Thus, according to the defendant, out of the amount of Rs. 180/- due to the plaintiff in all, the defendant was remitting Rs. 111/- by money order, after deducting Rs. 54/- paid on account of taxes and Rs. 15/- spent on repairs.

According to the learned counsel for the defendant-appellant, the plaintiff accepted this amount unconditionally and without any protest. But, this does not appear to be a fact. The plaintiff had claimed arrears of rent by an earlier notice dated 19-2-1964 at the rate of Rs. 15/- per mensem. The defendant by a notice (Ext. 10) challenged the above rate and further alleged that he had spent some amount on repairs. The plaintiff sent a reply to the defendant's notice (Ext. 10), and that reply is dated 27-4-1964 contained in paper No. Ext. 1. In this reply, the plaintiff repudiated the defendant's assertion that he had spent anything on repairs. It is, therefore, not correct to say that the plaintiff accepted Rs. 111/- unconditionally and without any protest. The contention raised on behalf of the appellant on this point has, therefore, no substance and it must be rejected.

9. Coming to the second contention, the notice sent by the plaintiff terminating the tenancy of the defendant is contained in paper No. Ext. 1. In this notice, the plaintiff claimed Rs. 920/-, after adjusting Rs. 111/- sent by the defendant by money order and Rs. 54/- paid

by the defendant towards taxes, at the rate of Rs. 15/- per mensem, and in the end, the plaintiff asked the defendant to vacate the premises in dispute on the expiry of 30 days from the receipt of the notice and give its possession to the plaintiff. The plaintiff added that on the expiry of that period, the plaintiff would take legal action for the recovery of the balance and possession of the house in a proper court and the defendant would be held responsible for the expenses. In this notice, the plaintiff has expressed in unambiguous and unequivocal terms that the defendant should vacate the house and give its possession to the plaintiff on the expiry of thirty days after the receipt of the notice. The learned counsel drew my attention to the ruling in *Chidra Ram v. Naru Mal*, 1964 All LJ 1105 = (AIR 1965 All 323). In that case, the terms of the notice were as follows:—

"Under instructions and on behalf of my clients M/s. Naru Mal son of Guloo Mal and Bahru Mal son of Chhugo Mal residents of Shahganj, Agra, please take notice:—

1. That whereas you are in occupation of one big Kamra on the ground floor at the rate of Rs. 4/- per month.

2. That whereas you are a bad paymaster in respect of the rent and have not paid the rent since 1-8-1958 despite repeated demands made in this behalf.

3. And that whereas you insult and intimidate my clients whenever they demand the rent from you and have constituted a nuisance in the premises.

This is, therefore, to call upon you please to vacate the premises in your occupation on the expiry of the 30th day of the receipt of this notice and also please remit to my client the amount of rent due till then along with Rs. 3.50 nP, as the cost of this notice failing which I have instructions to proceed legally in the matter at your risk as to costs and consequences which please note.

And also please note that the rent that you are paying is absolutely insufficient and inadequate and taking in consideration the accommodation, the rent prevailing in the locality for similar accommodation and all other facts, the most fair rent of the premises cannot be less than Rs 8/- per month and you are required to pay rent at the said rate with effect from 1st January, 1960, failing which I have instructions to take legal action in this respect as well."

The above case is distinguishable on facts because, in that case, the plaintiff gave an option to the defendant to continue to live in the disputed premises on an enhanced rate of rent. That is not the case in the present case.

10. My attention was also drawn to a Single Judge case *Ram Bhushan v.*

K. R. Chakravarty, (1971 All LJ 752). The notice in that case was in the following terms:—

"You are required to deposit Rupees 195/- arrears of rent within one month of receipt of the notice, failing which you should vacate the portions of the premises which are in your tenancy on expiry of 30 days of the receipt of the notice otherwise on expiry of the said period necessary legal proceedings will be taken against you."

This case is also distinguishable on facts for in that case, there was no indication in the notice that the plaintiff was going to file a suit for ejectment or possession. The learned Single Judge referred to the Supreme Court case *Mangi Lal v. Suman Chand Rathi*, (AIR 1965 SC 101) and distinguished it on the ground that in the Supreme Court case, there was an indication in the notice of ejectment that a suit for ejectment would be filed, while in *Ram Bhushan's* case, 1971 All LJ 752 there was no indication of the filing of any suit for ejectment. In the present case, as I have noted above, there is a clear indication in the notice of ejectment that in default by the defendant, the plaintiff would take legal proceedings regarding the ejectment of the defendant in a proper law court. The Supreme Court case is, therefore, fully applicable on the facts of the present case, and the ground of distinction found by my brother in the case reported in 1971 All. L. J. 752 does not exist at all. The notice of ejectment served by the plaintiff on the defendant was perfectly valid and the contention advanced by the appellant to the contrary must be rejected.

11. An application was moved on behalf of the defendant appellant for filing additional evidence in the case. This is hardly a stage for admitting fresh evidence. The application for filing additional evidence is, therefore, rejected.

12. The result, therefore, is that the appeal fails and is dismissed with costs. The appellant is allowed one month's time to vacate.

Appeal dismissed.

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K. B. ASTHANA, C. J. AND
H. N. SETH, J.

Hari Cold Storage and Gen. Mills Co. Pvt. Ltd. and others, Petitioners v. State of U. P. and another, Respondents.

Civil Misc. Writ No. 2456 of 1972, D/- 11-7-1975.

(A) Defence of India Rules, 1971. Rule 114.— U. P. Cold Storage Order

KS/LS/E134/75/KNA

1972 — Fixation of hiring charges for cold storage of potatoes — Order is not valid.

Rule 114, while conferring a very wide discretion on the State Government in regard to making of orders providing for the matters enumerated therein, contemplates that there should be a nexus between the order and the opinion framed by the State Government, which necessitates the making of it. (Para 15)

An order directed towards regulating cold storage of potatoes cannot be said to be directed towards regulating trade or commerce in potatoes. (Para 16)

A cold storage owner who hires out space for storing agricultural produce to growers or depositors, does not himself, as contemplated by Rule 114, use the cold storage. It is a grower or depositor who actually uses the cold storage. (Para 17)

An order controlling the business activities of cold storage owners is not envisaged by Rule 114 (2) of the Defence of India Rules. (Para 17)

The Cold Storage Order 1972 is therefore not valid. AIR 1959 SC 626, Dist.

(Paras 18, 20)

Order fixing the storage rates could not have been made without the prior concurrence of the Central Government, which in this case has not been obtained.

(Para 29)

The order neither falls within the ambit of the regulations contained in Rule 114 (2) of the Defence of India Rules, nor was the satisfaction of the State Government recited therein, which was condition precedent for making the order, based on relevant material. (Para 32)

Cases Referred: Chronological Paras
Civil Misc. Writ No. 4217 of 1974, decided on 12-9-1974 (All) 22
AIR 1959 SC 626 = (1959) Supp 2 SCR 123 25

Chand Kishore, for Petitioners;
Standing Counsel, for Respondents.

H. N. SETH, J.:— In these connected petitions under Article 226 of the Constitution, common questions of law arising in identical circumstances, are involved. Accordingly, all these petitions are being disposed of by a common judgment.

Petitioners in all these cases are owners of cold storages located in the State of U. P. They carry on the business of providing cold storage facility to those who agree to pay charges for hiring space for storage of potato.

2. On 18th of March 1972, the State of U. P. purporting to exercise its powers under rule 114 of the Defence of India Rules 1971, promulgated an Order entitled U. P. Cold Storage Order 1972. This order sought to regulate the running of cold storage business by issue of licences and by obliging the cold storage owners not to levy hire charges

for storage of agricultural produce at a rate higher than that specified in the second schedule of the Order (storage charges specified for storing potato were not to exceed Rs. 8/- per quintal for the entire period February to November or part thereof). Aforesaid Order was subsequently amended on 27th June, 1972, 9th February, 1973, and 20th March, 1975. By these petitions under Article 226 of the Constitution, the petitioners challenge the validity of the Cold Storage Order 1972, and particularly, its clause which fixes the maximum hiring charges for storage of agricultural produce, inter alia on the ground that neither the provisions contained in the order fall within the ambit or scope of the powers conferred by Rule 114 of the Defence of India Rules, nor the conditions precedent for making the order existed.

3. Relevant portion of Rule 114 of the Defence of India Rules under which the impugned Order was made, runs thus:—

"114. General Control of Industries etc. (1) In this rule, unless the context otherwise requires—

(a) any reference to any article or thing shall be construed as including a reference to electrical energy;

(b) the expression 'undertaking' means any undertaking by way of any industry, trade or business and includes the occupation of handling, loading or unloading of goods in the course of transport.

(2) If the Central Government or the State Government is of opinion that it is necessary or expedient so to do for securing the defence of India and civil defence, the efficient conduct of military operations or the maintenance or increase of supplies and services essential to the life of the community or for securing the equitable distribution and availability of any article or thing at fair prices, it may, by order, provide for regulating or prohibiting the production, manufacture, supply and distribution, use and consumption of articles or things and trade and commerce therein or for preventing any corrupt-practice or abuse of authority in respect of any such matter.

(3) Without prejudice to the generality of the powers conferred by sub-rule (2) an order made thereunder may provide for—

(a) regulating by licence, permits or otherwise the production, manufacture, treatment, keeping, storage, movement, transport, distribution, disposal, acquisition, use and consumption of articles or things of any description whatsoever;

(b) regulating or prohibiting any class of commercial or financial transactions in respect of any article or thing, which in opinion of the Government are, or if not regulated or prohibited, are like-

ly to be detrimental to any of the purposes specified in sub-rule (2).

..... (h) controlling the price or rates at which articles or things of any description whatsoever may be sold or hired or for relaxing any maximum or minimum limits otherwise imposed on such prices or rates.

..... (4) Notwithstanding anything contained in sub-rules (2) and (3) an order under these sub-rules for regulating by licences, permits or otherwise the movement or transport of any foodstuffs, including edible oil seeds and edible oils or for controlling the prices or rates at which any such foodstuffs may be bought or sold, shall not be made by the State Government except with the prior concurrence of the Central Government."

4. A perusal of Rule 114 (2) shows that the power under this rule can be exercised if certain conditions pre-exist, namely, that the State Government has formed an opinion that it is necessary or expedient so to do for securing either—

(a) Defence of India and Civil Defence; or

(b) The efficient conduct of military operations; or

(c) The maintenance or increasing of supplies and services essential to the life of the community or

(d) Equitable distribution and availability of any article or thing at a fair price.

5. Once the State Government forms such opinion it gets jurisdiction to make an order providing for regulating or prohibiting the following things:—

(1) Production of any article or thing; or

(2) Manufacture of any article or thing; or

(3) Supply and Distribution of any article or thing; or

(4) Use and consumption of any article or thing; or

(5) Trade and commerce in any article or thing; or

(6) Preventing any corrupt practice or abuse of authority in respect of any of the aforementioned matters.

6. Rule 114 (3) then provides that without prejudice to the generality of the powers conferred by sub-rule (2) an order made thereunder may also provide for the various matters enumerated therein.

7. It will thus be seen that a provision in an order under Rule 114 can be made only with regard to production, manufacture, supply and distribution, use and consumption and trade and commerce in an article or thing, or for preventing any corrupt practice in respect of any of the aforementioned matters.

7-A. According to the preamble of the Order, the State Government exer-

cised its jurisdiction to make the impugned order as in its opinion it was necessary and expedient so to do for (a) securing the maintenance and increasing the supplies and services essential to the life of the community and (b) for securing the equitable distribution and availability of essential commodities at fair price.

8. When asked to elucidate, the learned Advocate-General, appearing for the State, stated that as in this case the State Government was of opinion that it was necessary to secure the maintenance and increase of supply of potato (a supply) and the service of cold storage (a service), which were essential to the life of the community, as also the equitable distribution of potato (an essential commodity) at a fair price; that it made the impugned order providing for the use of cold storages, trade and commerce therein and for preventing corrupt practice in respect of the use thereof.

9. In order to appreciate the rival contentions of learned counsel appearing for both the parties, it will be desirable to state the circumstances in which the U. P. Cold Storage Order, as amended from time to time, came to be promulgated, as also its salient features.

10. According to the counter-affidavit of Sri S. C. Tripathi, Deputy Secretary, Agricultural Department, the Government had been receiving complaints from various quarters in the last several months with regard to the working of cold storages in the State of U. P. Certain materials and other information had also been given to the State which showed that for the past two years the cold storage owners had been charging exorbitantly for keeping potato and other agricultural produce in their cold storages. Information received by the Government also showed that there was agitation against the unreasonable demand of high prices and in that connection some representations had also been made. It was apprehended that in subsequent years also the situation was such which needed immediate attention. The State Government therefore formed an opinion that it was necessary to make an order for securing the maintenance and increase of supply of an essential commodity and its equitable distribution at fair price. Accordingly, it promulgated the Order in question. However, before promulgating the Order, the Government appointed a Committee consisting of Members of the Legislature and officials, asking it to submit a report regarding the working of cold storages and other matters connected with it. The Committee made its report regarding the rent to be charged by cold storages and finding it to be reasonable the Government fixed the maximum hiring charge accordingly.

11. Sri Yashpal Chandra, Deputy Director Potato U. P. also filed a counter-affidavit on behalf of the State. He asserted that in the past it had been found that cold storage owners were merely interested in earning profits and did not care for the quality of the food stuff stored by them. It was reported that they were not maintaining proper refrigeration conditions and were storing more potato than their licensed capacity with the result that the required temperature was not maintained and spoilage occurred. It was further observed that the agreement that was entered into between growers of agricultural produce and cold storage owners were generally vague. If something went wrong with the food stuff stored in cold storage there was no security for the concerned grower-depositor. The agreements did not contain any clause for compulsory insurance with the result that in case of break down, there were heavy losses and usually the farmers were not compensated. The Cold Storage owners also charged heavy rent in the growing district like Farrukhabad and adopted unfair means by declaring in advance that their capacity was full thereby compelling the farmers to sell their potato at a very low rate through them or to store them at exorbitantly high rate. This practice affected the regular supply of potato and also resulted in its being available to the consumer at a price which was very much higher than the price at which it could generally be made available in case the cold storage owners were not permitted to charge such high rent. In the year 1971, in Farrukhabad and other districts, it was reported that the cold storage owners had raised the charges for storing potato from Rs. 8/- to Rs. 18/-. This rise in storage charges jumped by leaps and bounds and it gave rise to agitation creating law and order problem on a large scale which the Government authorities found it difficult to face.

12. According to the affidavits of Sri S. C. Tripathi and Yashpal Chandra, the necessity to promulgate the impugned order regulating the cold storage business arose as the Government thought that cold storage owners were charging exorbitant rent for storing potato. They did not maintain proper refrigeration conditions and indulged in certain malpractice so as to enable them to levy extortionate storage charges. This, in the opinion of the State Government, adversely affected the maintenance of supply of potato and its availability at fair price.

13. So far as the provisions in the Order are concerned clause (2) of the Order defines certain words mentioned therein. Clause (3) lays down that no person can carry on the business of storing

any agricultural produce in a cold storage except under and in accordance with the terms and conditions of a licence issued under the Order. Clauses (4) to (7) lay down the manner in which the applications for licence are to be made by the persons intending to carry on the business of storing agricultural produce in cold storages, and how those applications are to be dealt with. Clause (8) lays down the statutory conditions subject to which the licence is to be granted. Clauses (9) to (11) then deal with the cancellation, expiry and renewal of licence. Clause (12) enables the licensing Officer to procure information and authorises him to enter and search any premises in which the cold storage is installed for satisfying himself that the requirements of the order are being complied with. Clause (13) provides for the keeping and maintenance of certain records and for submission of returns and statements. Clause (14) provides for an appeal against the order of the licensing authority. Clauses (15 to 17) make provision relating to issue of receipts to hirers by the cold storage owners. Clause (18) then precludes the licensee (owner of the cold storage) from levying in any period after the commencement of the order, storage charges exceeding the charges specified against each of the agricultural produce in Schedule II of the Order and for the refund of the excess charges. Clause (19) makes it obligatory upon the licensee to get the goods stored in his cold storage insured. Clauses 20 to 29 provide for certain obligations of the licensees vis-a-vis the goods which are stored in his cold storage. Clause 30 provides for the manner in which disputes regarding damages arising between the licensee and the depositor etc., are to be settled. Clauses 32 and 33 which were subsequently added in the year 1975 obliged the licensee to display at or near the main entrance of the cold storage certain information and compel him to accept goods for storage in case the space for the same is available.

14. A re'sume' of the facts stated in the affidavits of Sri S. C. Tripathi and Sri Yashpal Chandra as also that of the provisions contained in the impugned Order shows that impugned order is directed primarily towards regulating the business done by owners of cold storages in U. P. and one of the most important regulations in this regard is by providing for the maximum amount that a cold storage owner can charge for storing agricultural produce. The Order is not at all directed towards regulating the manner and the circumstances in which a cold storage is to be used by the persons storing potato or any other agricultural produce therein. Even if it be accepted that the State Government was satisfied

that it was necessary or expedient so to do for securing the maintenance of increasing supplies and services essential to the life of the community and for securing the equitable distribution and availability of potato at a fair price, it could under Rule 114 (2), make an Order for the purposes of regulating or prohibiting—

- (1) production of any article or thing,
- (2) manufacture of any article or thing; or
- (3) Supply and distribution of any article or thing; or
- (4) Use or consumption of any article or thing; or
- (5) Trade and commerce in any article or thing; or
- (6) Preventing any corrupt practice by or on behalf of an authority in respect of any of the aforementioned matters.

15. We further feel that Rule 114 of the Defence of India Rules, while conferring a very wide discretion on the State Government in regard to making of orders providing for the matters enumerated therein certainly contemplates that there should be a nexus between the order and the opinion framed by the State Government, which necessitates the making of it. In other words after framing a particular opinion the State Government will have jurisdiction to make such provisions which are relevant for, or are directed towards achieving that object. It may not be open to the State Government to make such provisions in the order which have no bearing on the subject-matter of the opinion, e.g., if the State Government is of opinion that it was necessary or expedient to maintain or increase the supply of sugar it may make an order providing for regulating the production, use and consumption and trade and commerce in sugar-cane which has bearing on the supply of sugar. But, for achieving that purpose it will not be open to the State Government to make an order regulating production etc., of an article which has absolutely no bearing on the maintenance of supplies of sugar.

16. The learned Advocate-General accepts that the impugned order is not directed towards regulating or prohibiting production or manufacture of any article or thing. In our opinion the order is also not directed towards regulating the supply and distribution of any article or thing. The Order merely aims at regulating cold storage business and has no relevance to supply and distribution of potato or any other article or thing. Since the order is directed towards regulating cold storage business it cannot be said that it is directed towards regulating trade or commerce in potato or any other agricultural produce or article or thing sought to be stored therein. However,

the learned Advocate-General vehemently urged that the impugned order is essentially directed towards regulating the use of a cold storage (a thing), as also for preventing a corrupt practice in respect of its use viz., to prevent mal-practices by cold storage owners in taking advantage of their position and charging exorbitant rent for the storage of potato.

17. It is true that Rule 114 (2) permits the State Government to make an order regulating the use and consumption of an article or thing which has a bearing on the question of maintenance or increase of supplies and services essential to the life of the Community. But, use and consumption of an article or thing can be regulated only by providing for the manner and circumstances in which a person is to use and consume the same i.e., by regulating the activity of the person using the article or thing. The object cannot be achieved by regulating the activity of any other person who does not use or consume the article or thing. This immediately brings us to the question whether in a case where a cold storage owner hires out space in the cold storage, it is the owner who uses the cold storage or it is the hirer who uses the same. In our opinion a cold storage owner who hires out space for storing agricultural produce to growers or depositors, does not himself, as contemplated by Rule 114, use the cold storage. He merely carries on the business of making cold storage space and facility available to the grower or depositor. It is a grower or depositor of agricultural produce who actually uses the cold storage for the storage of potato or other agricultural produce. In this view of the matter, the order intended to be made under Rule 114 (2) could not have been directed towards controlling the business activities of cold storage owners who did not themselves use the cold storage.

18. Learned Advocate General argued that in wider sense, even an owner of cold storage who makes the storage facility available to other, can be said to use the cold storage in connection with his business. Accordingly, if such use has any relevance on the question of maintenance or increasing of the supplies essential to the life of the community, it could also be regulated under Rule 114 (2) of the Defence of India Rules. We are unable to accept this submission. The rule provides for the regulation of 'use and consumption' of an article or thing. In the context, the expression 'use and consumption' implies the actual physical user or consumption of an article or thing and not its use in the sense suggested by the Advocate-General. When a cold storage owner hires out space for storing agricultural produce, the storage facility or the space in the

storage is used by the person who stores his produce and not by the owner who, on receipt of consideration merely makes the storage available for use by the grower or the depositor. A provision in an Order, made under Rule 114, providing for prevention of a corrupt practice can also be directed only against the activity of a person who uses the cold storage and not in respect of the acting of a person who does not use the cold storage. Neither in the affidavits filed by Sarvasri S. C. Tripathi and Yashpal Chandra, nor in any provision contained in the impugned Order is there any indication that the order is directed towards regulating the activity of a person who uses the cold storage. The order is clearly directed towards regulating business activity of a person who was merely making cold storage facility available to a person who wanted to use the same for storing his agricultural produce. We are, therefore, of opinion that the impugned Order cannot be justified as an order providing for use and consumption of any article or thing or for preventing any corrupt practice in respect of such user.

19. Learned Advocate-General then argued that in any case, regulation of cold storage business was clearly authorised by clauses (a), (b) and (h) of sub-rule (3) of Rule 114 of the Defence of India Rules. According to him, these clauses clearly enable the Government to make an Order providing for regulation by licence of storage of any article or thing (clause a), any class of commercial and financial transaction in respect of an article or thing (clause b) and to control the price or rates at which an article or thing may be sold (clause h). According to him the regulation specified in sub-rule (3) could be made over and above the regulation as contemplated by sub-rule (2).

20. We are unable to accept the argument that sub-rule (3) enables the Government to make an order which goes beyond the ambit and scope of sub-rule (2). The opening words of sub-rule (3) read thus:—

"Without prejudice to the generality of the power conferred by sub-rule (2), an order made thereunder may provide....."

These words clearly indicate that sub-rule (3) does not confer upon the Government any power in addition to that conferred upon it under sub-rule (2). It merely clarifies the types of orders which can, if they have a nexus to the exercise of power under sub-rule (2), also be made. In our opinion, an order purporting to be made under Rule 114, if it travels beyond the ambit of sub-rule (2), cannot be justified with reference to the provisions contained in sub-rule (3).

21. It thus appears to us that even if it be assumed that the condition precedent for making the order existed, the impugned order did not fall within the ambit of the regulations which could be made under Rule 114 (2) of the Defence of India Rules.

22. We are also not satisfied that before making the impugned order, the State Government had a clear idea about matters regarding which it had to be satisfied before making an order under Rule 114 (2) of the Defence of India Rules. Preamble of the Order recites that the State Government was of opinion that it was necessary and expedient to make the Order in order to secure the equitable distribution and availability of an essential commodity at a fair price. It was argued on behalf of the petitioners that the fixing of the cold storage charges did not at all reflect on the ultimate price at which the agricultural produce is sold in the market. Being a perishable commodity, price of agricultural produce depends solely on its supply and demand position at a particular time. He contended that mere fixation of cold storage charges, without, in any manner determining the price at which the agricultural produce may ultimately be sold to the consumer, has no bearing on the availability of the produce at a fair price.

22-A. The learned Advocate-General appearing for the State contended that storage of agricultural produce is an intermediate stage in the process of production of an agricultural produce and its ultimate distribution or availability to the consumer. Accordingly, if the charges for storage of agricultural produce are controlled, it is bound to have a repercussion on the price at which the commodity is ultimately sold to the consumer. A provision fixing maximum charges for the storage of agricultural produce, therefore, is calculated towards making the agricultural produce available at the fair price. He, however, conceded that in this case, there was no material before the State Government on which it could form an opinion as to what should be the fair price at which potato should be made available to members of public in a particular season. He justified the Order as having an impact on its fair price, whatever it may be at a particular time. In the case of *Gaya Prasad v. Board of High School and Intermediate Education*, Civil Misc. Writ No. 4217 of 1974, decided on 12-9-1974 (All) a Division Bench of this Court observed thus:—

"It is first necessary to consider the nature of the power conferred by Rule 114 (2) leaving out those parts of Rules 114 (2) and (3) which are also material to this case. The provision may be summarised thus:—

For the purposes of securing availability of articles essential to the life of the community at a fair price the State Government may regulate their supply by controlling their prices.

How can Government make an article available at a fair price without fixing or determining the fair price? The power to control price can only be exercised by fixing the fair price of the article which is the subject matter of the regulation. In our opinion keeping the purpose of the provision in mind i. e. to make available an article at a fair price the power to regulate its supply by controlling the price necessarily involves and means fixing a fair price for the article. Therefore in the present case the Government had to fix price for the course books."

23. These observations in our opinion clearly imply that if the Government intends to exercise its power under rule 114 of the Defence of India Rules with a view to secure availability of any article at a fair price then it should apply its mind and find out as to what should be the fair price at which the article in question has to be made available and thereafter to make the Order providing for such regulations as may have a bearing on the availability of the commodity at that price.

24. Merely because regulating the manner in which an agricultural produce is to be stored in a cold storage or fixing the maximum charge for its storage may have some bearing on the price at which the produce may be available to the consumer, it does not follow that it, necessarily, has a repercussion on its availability at a fair price. Unless the State Government has an idea as to what the fair price of the agricultural produce should be, it will not be possible for it to assess the impact of the provisions proposed to be made by it, on the question of availability of the produce at a fair price. We are, therefore, of opinion that in the absence of such a data it could not be concluded that the regulations under the U. P. Cold Storage Order had a bearing on the availability of agricultural produce at a fair price, specially when the price at which the commodity in question is to be sold to the consumer is not sought to be regulated in any manner.

25. The learned Advocate-General relied upon a decision of the Supreme Court in the case of *Messrs. Diwan Sugar and General Mills v. Union of India*, reported in AIR 1959 SC 626 wherein, under similar provisions of the Essential Commodities Act, the Supreme Court upheld the action of the Government also, instead of fixing the retail price for sugar, fixed its ex-factory price. The Supreme Court held that fixation of ex-factory price of sugar, without determining the price at which it should be made avail-

able to consumer, was valid. Learned counsel argued that similarly, in this case, it was open to the State Government to fix the maximum limit of storage charges for agricultural produce without in any way considering as to what effect such charges will have on the price at which the produce will be available to a consumer and whether such price will or will not be a fair price. We are unable to accept this submission. In Diwan Sugar and General Mills case the learned Judges of the Supreme Court observed thus:—

"The argument under this head is two fold. It is said that in the first instance Section 3 of the Act requires that prices for consumer only should be fixed. The object of Section 3 is undoubtedly to secure essential commodities at fair prices for the general public i.e., the consumer. It is well known that there are three kinds of prices prevalent in the market for a commodity like sugar, ex-factory price, wholesale price and retail price. It is the last that the consumer has to pay. It is urged that when Section 3 provides for availability of essential commodity at fair price to the general public it means that the price can only be fixed at the stage where the consumer is the purchaser. In particular our attention was invited to clause (c) of Section 3 (2) which provides for control of price at which any essential commodity may be bought or sold. Now there is no doubt that the object of the Act is to secure essential commodities for the consumer i.e., the general public at fair price; but it does not follow from this that this object can only be achieved if retail prices are fixed and that there is no other way of achieving it. In any case clause (c) of Section 3 (2) which speaks specifically of control of price is very general in terms. It provides for fixation of price at which any essential commodity may be bought or sold. It does not specify the stage at which the price should be fixed. Therefore we are of opinion that the control provided under clause (c) of Section 3 (2) is control at any of the three stages mentioned above. There is no reason to cut down the generality of the words used in clause (c) so as to make them applicable only to the last stage, namely retail price. This contention therefore that Section 3 only authorises the Central Government to fix the retail price i.e., the price for the consumer fails."

26. It will thus be seen that the real ratio for upholding the fixation of ex-factory price, without fixing the retail price was that in the opinion of the Supreme Court Section 3 (2) (c) permitted fixation of price at any of the three stages, namely, ex-factory price, wholesale price or retail price. In the opinion of the learned Judges such fixation of price

could have an indirect bearing on the availability of sugar to the consumer also at a fair price. But what had weighed with them was that there was no reason to cut down the generality of the words used in clause (c) of Section 3 of the Essential Commodities Act so as to make them applicable only to the last stage, i.e., the retail price. It should be noted that the Order fixed the price of sugar for sale at the factory. Here in the instant case price of potato has not been fixed.

27. Rule 114 of the Defence of India Rules is, however, different from Section 3 (2) (c) of the Essential Commodities Act. Whereas Section 3 (2) (c) enabled the State Government to make provision for controlling the price at which any essential commodity may be bought or sold, Rule 114 enables the concerned Government to make an order regarding equitable distribution of or availability of an article or thing at a fair price i.e., its availability at a fair price to a consumer.

28. Even if, for the sake of argument, the submission of the learned Advocate-General that fixing maximum charges for cold storage has a direct bearing on the availability of potato to a consumer at a fair price is accepted, the objective of the impugned provision obviously would be to control the price or rate at which potato may be ultimately bought or sold. Sub-rule (4) of Rule 114 runs thus:—

"Notwithstanding anything contained in sub-rules (2) and (3) an order under these sub-rules for regulating by licences, permits or otherwise the movement or transport of any food stuffs including edible oil seeds and edible oils or for controlling the price or rates at which any such foodstuff may be bought or sold shall not be made by the State Government except with the prior concurrence of the Central Government."

29. It cannot be disputed that potato is a food stuff and according to the argument of the respondents, the storage charges have been fixed so as to make it available at a price i.e., it may not be sold at a price higher than what is considered to be a fair price. Such an object obviously will be to control the price or rate at which potato may be sold to consumer. Accordingly, the order fixing the storage rates could not have been made without the prior concurrence of the Central Government, which in this case has not been obtained. Learned Advocate-General argued that since in this case the price at which potato may be bought or sold has not been fixed it cannot be said that the provisions were aimed at controlling the price at which the potato may be

bought or sold within the meaning of sub-rule (1). In our opinion the expression controlling the price at which any food stuff may be bought or sold does not necessarily imply fixing the price at which the food stuff should be bought or sold. What it means is that the provision should be directed towards securing that the purchase price or sale price of foodstuff does not go above or below a certain amount. If the provision is directed towards achieving the object that potato may not be sold above a price which may be considered to be a fair price, it is certainly directed towards controlling the price at which potato may be sold to a consumer. Accordingly, the fixation of storage charges, which according to the learned Advocate-General will have a direct bearing on the fair price of potato, would be bad because prior concurrence of the Central Government had not been obtained.

30. In case the State Government wanted to get space in various cold storage available to the growers, for storage of potato, at a reasonable rate, necessary action could have been taken under Rule 154 of the Defence of India Rules which provides that the competent authority may by order in writing require the owner of any warehouse or cold storage depot or of any premises capable of being used for storage purposes (not being premises used for residential purposes), to place at his disposal the whole or any part of the space or accommodation available in such a warehouse or cold storage depot or premises and to employ such space or accommodation for the storage of any articles or things specified in the order; and such an order may require the said owner or person to afford such facilities and maintenance of such services in respect of the storage of such article or things as may be specified. Whenever in pursuance of any such Order any space or accommodation in a warehouse or cold storage depot or premises is placed at the disposal of the competent authority the owner of such warehouse, cold storage depot or premises shall be paid therefor at such rate as the competent authority may by order made in this behalf determine having regard to the usual rates paid for like space or accommodation during 12 months immediately preceding the date of proclamation of emergency.

31. It will thus be seen that short of requisitioning the space in cold storage and taking up the responsibility of paying reasonable charges as provided in Rule 154 by the Prescribed Authority for such requisitioned space, the object underlying promulgation of the impugned cold storage Order is almost identical to that for achieving which an Order under Rule 154 could be made. In our opinion, in

order to achieve the objects underlying the impugned U. P. Cold Storage Order, the respondents could have more appropriately acted under Rule 154, which they have not done in this case.

32. In view of the aforesaid discussion we are of opinion that the impugned order neither falls within the ambit of the regulations contained in Rule 114 (2) of the Defence of India Rules, nor was the satisfaction of the State Government recited therein, which was condition precedent for making the order, based on relevant material.

33. All these writ petitions, therefore, succeed and are allowed with costs. The impugned U. P. Cold Storage Order 1972 as amended from time to time is quashed as being invalid.

Petitions allowed.

AIR 1976 ALLAHABAD 79

M. P. MEHROTRA, J.

Ram Lal Singh, Appellant v. The District Judge, Fatehpur and others. Respondents.

E. F. A. No. 255 of 1973. D/- 5-3-1975.

(A) U. P. Kshetra Samitis (Election of Pramukhs and Up-Pramukhs and Settlement of Election Disputes) Rules (1962), Rules 41 (2), 37 (b) — Abatement of election petition — Death of successful petitioner (respondent in appeal) during pendency of appeal — If and how far appeal must be allowed. (Representation of the People Act (1951), Section 112).

A petition under Rule 37 (b) for declaring the petitioner duly elected, holding the election of the returned candidate void is based on a personal cause of action and it does not survive on the death of either the petitioner or the respondent irrespective of whether the death takes place pending the petition or appeal. As such when the petitioner succeeds but dies during the appeal by the returned candidate, the appeal has to be allowed directing the petition to have abated.

(Paras 4, 18 and 23)

When the other unsuccessful candidates had been impleaded in the petition but they had not challenged the election of the returned candidate by an election petition, such abatement order cannot be objected to on the ground that those unsuccessful candidates have a right to contest the appeal. Impleading of unsuccessful candidates is not required when a declaration is sought under Rule 37 (a) (merely for declaring the election of returned candidate void) but they are necessary if the proceeding is under Rule 37 (b). They have been given a limited right then only with reference to the declara-

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tion sought by the petitioner that he himself or any other candidate has been elected. It follows that the election of the returned candidate can be challenged only by an election petition and not as a respondent in a petition. The impleaded unsuccessful candidates not having so challenged it is clear they can claim no locus standi to make such challenge in the appeal. Under the Representation of the People Act (1951), Sec. 112, other non-successful candidates could under certain circumstance challenge the election, but under Rule 41 which is materially different, they cannot. Case law discussed.

(Para 21)

Cases Referred: Chronological Paras
AIR 1969 SC 1024 = (1969) 3 SCR 417

4. 7-A

AIR 1968 SC 384 = (1968) 1 SCR 372 4. 8

AIR 1967 SC 498 = (1964) 3 SCR 590 4. 9

AIR 1967 SC 1124 = (1967) 1 SCR 93

4. 7, 10

AIR 1964 All 431 = 1964 All LJ 178

7. 17, 18

AIR 1958 SC 253 = 1958 SCR 1156 4. 11

AIR 1953 SC 357 = 1953 SCR 1028 4. 12

AIR 1950 Pat 184 = ILR (1949) 28 Pat 989

4. 13, 18

AIR 1936 PC 93 = 63 Ind App 180 4. 15

AIR 1934 PC 81 = 61 Ind App 158 4. 14

AIR 1916 PC 21 = 43 Ind App 192 4. 16

S. C. Khare, B. N. L. Katiyar and V. K. S. Chaudhari, for Appellant; A. N. Varma, S. N. Varma, K. M. Dayal and B. L. Yadav, for Respondents.

JUDGMENT:— This is the appellant's application praying that the instant election appeal be allowed, the order of the District Judge, Fatehpur dated 29th September, 1973, be set aside and the election petition be directed to have abated. In the alternative, it has been prayed that in case the aforementioned prayed cannot be granted then the name of the respondent No. 2 be struck off and a note be made that he is dead. This application is supported by an affidavit. A counter-affidavit has been filed on behalf of the respondent No. 4, Shri Sukhram, opposing the said application. The appellant has filed an affidavit-in-rejoinder in opposition to the aforesaid counter-affidavit and in support of his aforesaid application.

2. Brief facts necessary for the disposal of the application are these: An election took place to elect the Pramukh of Kshetra Samiti, Teliyani, District Fatehpur and the appellant, Ram Lal Singh, was declared to have been elected. There were four contesting candidates, including Ram Lal Singh. One of the unsuccessful candidates, Jai Ram Singh (respondent No. 2 herein) filed an election petition challenging the election of Ram Lal Singh and in the petition besides Ram Lal Singh two other unsuccessful candidates were also impleaded as opposite

parties. The said two unsuccessful candidates are Balkrishna Dubey and Sukhram who are respondents Nos. 3 and 4 herein.

In the election petition a declaration was sought that the election of the returned candidate Ram Lal Singh was void and that the petitioner, Jai Ram Singh, had been duly elected the Pramukh. The returned candidate contested the petition but the same was allowed by the Election Tribunal and the entire relief sought in the petition was granted i.e., the election of the returned candidate, Ram Lal Singh, was declared to be invalid and the petitioner, Jai Ram Singh, was declared to be duly elected Pramukh. It may be stated that the petition was allowed "on technical points and for no fault of respondent No. 1."

3. Against the decision of the Election Tribunal the instant appeal was filed in this Court. During its pendency Jai Ram Singh, respondent No. 2 herein, and the petitioner before the Election Tribunal, died on 31-10-1974. After the said death the appellant moved the aforesaid application and in support of it I have heard Shri V. K. S. Chaudhari at length. In opposition Sri K. M. Dayal has made his submissions.

4. Sri Chaudhari has contended that the application should succeed on both the two grounds or on either of them firstly, because the petitioner, Jai Ram Singh, who filed the election petition and who died during the pendency of the appeal, had a personal cause of action and with his death the same came to an end. In other words, the cause of action has not survived and, therefore, the petition stands abated and the appeal accordingly should be allowed and it be declared that the petition has abated in consequence of the death of the petitioner and, secondly, the election petition stands abated upon the death of the petitioner by virtue of Rule 41 (2) of the U. P. Kshetra Samitis (Election of Pramukhs and Up-Pramukhs and Settlement of Election Disputes) Rules, 1962 which should be held to be applicable not only to the proceedings before the Election Tribunal but also to the appellate stage on the ground that an appeal is a continuation of the proceedings before the Election Tribunal. Learned counsel's contention is that it makes no difference whether the death of the petitioner occurs at the trial stage or at the stage of the appeal. He has placed reliance on the following cases:

Sheodan Singh v. Mohan Lal, (AIR 1969 SC 1024); Collector Varanasi v. Gauri Shanker, (AIR 1968 SC 384); Subodh v. Ajit Kumar, (AIR 1937 SC 498); Girjanandini v. Bijendra, (AIR 1967 SC 1124); Syedna Taher v. State of Bombay, (AIR 1958 SC 253); N. S. Thread Co. v. James Chadwick and Bros., (AIR 1953 SC 357);

Ram Swarup Das v. Rameshwar Das, (AIR 1950 Pat 184); Maung Ba Thaw v. Ma Pin, (AIR 1934 PC 81); Hem Singh v. Basant Das, (AIR 1936 PC 93); Secretary of State v. Rama Rao, (AIR 1916 PC 21).

5. Shri K. M. Dayal, learned counsel for the respondents, has not disputed that if the death had taken place during the pendency of the election petition before the Election Tribunal then in view of Rule 41 (2) the election petition would have abated upon the death of the sole petitioner, Jai Ram Singh. He, however, contends that after the petition was allowed by the Tribunal and the election of the returned candidate (the appellant before me) was set aside then the said order took immediate effect from the date of the order as laid down in rule 46 of the aforesaid Rules and the death of the petitioner during the pendency of the appeal will not cause abatement of the petition and the appeal cannot be automatically allowed on the ground that the petitioner-respondent is dead during the pendency of the appeal.

6. Mr. Dayal's basic contention is that under the U. P. Kshetra Samiti and Zila Parishad Adhiniyam, 1961, there are three clear and distinct stages, namely (1) the election to the office in question (2) Election Petition before the Judge and (3) appeals to the High Court against the order made by the Judge in the election petition. He contends that the three stages are absolutely unrelated and it would be wrong to treat the appeal as a continuation of the proceedings before the Election Tribunal.

7. The learned counsel contends that his contention that the appeal is not a continuation of the proceedings before the Election Tribunal is sustained by the fact that in the appeal there is a provision for the deposit of Rs. 500/- as security and the security deposited in the Court below amounting to Rs. 250/- is not considered to be of any avail when the matter travels to the appellate stage. Counsel's contention is that many quasi-judicial orders are passed during the conduct of the elections, e.g., Returning Officer decides about nomination and many other matters are similarly decided but despite the nature of such decision, the Election Petition before the Election Tribunal is not deemed to be a continuation of the proceedings relating to the conduct of the election.

Similarly, his contention is that the proceedings in the appeal are not deemed to be in continuation of the proceedings before the Election Tribunal. Counsel, therefore, submitted that the contingencies provided for in Rule 41 are merely applicable to the stage of the proceedings before the Election Tribunal and the said provisions have no applicability when the

matter goes to the appellate stage. In the alternative, he has contended that once the petitioner is declared elected by the Election Tribunal, then he is in the position of a respondent in the appeal and, therefore, his death will not attract the provisions of Rule 41 (2).

Regarding the applicability of Order 22, Civil Procedure Code to the instant proceedings, Mr. Dayal contends that his submissions are two-fold; Firstly, that Order 22 is not applicable to these proceedings and, in the alternative, if it does apply, then by virtue of the provisions contained in Order 22, Rule 11, Civil Procedure Code the appellant shall be deemed to be in the position of the petitioner. Learned counsel contends that Section 107, Civil Procedure Code which enables the appellate court to exercise all the powers of the trial court is not applicable to the instant proceedings and, therefore, the Appellate Court cannot be deemed to have the powers which are exercisable by the Election Tribunal. He also emphasises that powers under Section 97, Civil Procedure Code are wide and comprehensive. Counsel places reliance on *Amar Nath v. Ashta Bhuja Prasad*, (AIR 1964 All 431).

7-A. In AIR 1969 SC 1024 (supra) it was laid down in head note (B):—

"An election petition alleging corrupt practices etc., against the respondent does not abate or become infructuous on the dissolution of the assembly as per the President's Proclamation under Article 356 (1) of the Constitution.

In an election petition, the contest is really between the constituency on the one side and the person or persons complained of on the other. Once the machinery of the Act is moved by a candidate or an elector, the carriage of the case does not entirely rest with the petitioner. The reason for the elaborate provisions is to ensure to the extent possible that the persons who offend the election law are not allowed to avoid the consequences of their misdeeds.

The law relating to withdrawal and abatement of election petition is exhaustively dealt with in Chapter IV of Part VI of the Act. In deciding whether a petition has abated or not the Court cannot travel outside the provisions contained in that Chapter. There is no provision providing for the dropping of an election petition for any reason other than those mentioned therein. The Act does not provide for the abatement of an election petition either when the returned candidate whose election is challenged resigns or when the assembly is dissolved. As the law relating to abatement and withdrawal is exhaustively dealt with in the Act itself no reliance can be placed on the provisions of the Civil Procedure Code

nor is there any provision in the Civil Procedure Code under which the election petition can be held to have abated."

8. In AIR 1968 SC 384 (Supra) it has been laid down as under:—

"Neither the Act nor the rules framed thereunder prescribe any special procedure for the disposal of appeals under Section 19 (1) (f). Appeals under that provision have to be disposed of just in the same manner as other appeals to the High Court. Obviously after the appeal has reached the High Court it has to be determined according to the rules of practice and procedure of that Court. The rule is well settled that when a statute directs that an appeal shall lie to a court already established then that appeal must be regulated by the practice and procedure of that Court.

It may be noted that the appeal provided in Section 19 (1) (f) is an appeal to the High Court and not to any Judge of the High Court. Broadly speaking, Court is a place where justice is judicially administered

The fact that the arbitrator appointed under Section 19 (1) (f) is either a designated person or a tribunal does not in any way bear on the question whether the 'High Court' referred to under Section 19 (1) (f) is a court or not. Our statutes are full of instances where appeals or revisions to courts are provided as against the decisions of designated persons and tribunals."

9. In AIR 1967 SC 498 (Supra) it was held as under:

"that a pending appeal is a continuation of the suit out of which it arises. In other words, the suit is pending on appeal."

10. In AIR 1967 SC 1124 (Supra) it was held as under:—

"A claim for rendition of account is not a personal claim. It is not extinguished because the party who claims an account or the party who is called upon to account dies. The maxim "*actio personalis moritur cum persona*" a personal action dies with the person, has a limited application. It operates in a limited class of actions *ex delicto* such as actions for damages, for defamation, assault or other personal injuries not causing the death of the party, and in other actions where after the death of the party the relief granted could not be enjoyed or granting it would be nugatory. An action for account is not an action for damages or *ex delicto*, and does not fall within the enumerated classes. Nor is it such that the relief claimed being personal could not be enjoyed after death, or granting it would be nugatory. Death of the person liable to render an account for property received by him does not, therefore, affect the liability of his estate."

11. In AIR 1953 SC 253 (supra) it was held as under:—

"The question is whether in the events which have happened, the appeal can proceed. We are of opinion that it cannot. It should be remembered in this connection that no decree had been passed in the suit. Only a finding has been given on a preliminary point, and it is that finding that has been the subject of appeal to the High Court of Bombay and thereafter to this Court. There are other issues still to be tried and the action is thus undetermined. Now, the claim with which the plaintiff came to Court was that he was wrongly excommunicated, and that was an action personal to him. On the principle, "*actio personalis moritur cum persona*" when he died, the suit should abate. As a matter of fact, his legal representative applied to be brought on record, but the application was not pressed. The result is that the suit has abated. This would ordinarily entail the dismissal of this appeal."

12. In AIR 1953 SC 357 (Supra) it was held as under:—

"Ordinarily after an appeal reaches the High Court, it has to be determined according to the rules of practice and procedure of that Court and in accordance with the provisions of the Charter under which that Court it constituted and which confers on it power in respect to the method and manner of exercising that jurisdiction. Thus, Section 76, Trade Marks Act, confers a right of appeal to the High Court and says nothing more about it. That being so, the High Court being seized as such of the appellate jurisdiction conferred by Section 76 it has to exercise that jurisdiction in the same manner as it exercises its other appellate jurisdiction and when such jurisdiction is exercised by a single Judge, his judgment becomes subject to appeal under Clause 15 of the Letters Patent, there being nothing to the contrary in the Trade Marks Act."

13. In AIR 1950 Pat 184 (supra) it was held as under:—

"If a plaintiff is suing to establish his right to a certain property in his own rights and not by virtue of his office, certainly the cause of action for the suit will survive, and his legal representative can continue the suit on the death of the original plaintiff, either during the pendency of the suit or of the appeal. But where the plaintiff's suit is primarily to establish his personal right to an office which would entitle him to possession of the property, on his death, either during the pendency of the suit or during the pendency of the appeal, the right to sue would not survive, and the suit will therefore, abate. The principle is well established that the substituted party can only prosecute the cause of action as ori-

ginally framed in the suit, and, if it becomes necessary materially to alter the pleadings it becomes manifest that the original cause of action is being substituted for another cause of action which could very well form the subject-matter of a separate suit. In such a case, therefore, it is a new suit which has to be tried.

A dispute amongst three chelas as regards succession to the shebaitship was settled by an ekrarnama according to which the three chelas were to succeed one after another as shebait and after them worthy bairagi of Brahmin descent was to be selected by the locality and the Sadhus of neighbourhood. It was also agreed that those three persons would not nominate their successors. When the last of the aforesaid three chelas became shebait and applied for mutation his application was opposed by the defendant. The land registration case ended in favour of the defendant who then dispossessed the former from the office of the shebaitship. Plaintiff therefore brought a suit for declaration according to the terms of the ekrarnama that he was a shebait, the defendant was a trespasser and for possession of property and mesne profits. The trial court decreed the suit holding the plaintiff as shebait and defendant in wrongful possession. During the pendency of appeal by the defendant the plaintiff died and his chela applied for substitution in his place;

Held that the plaintiff's right related to his personal rights as a shebait. The original plaintiff had based his cause of action on the ekrarnama which had enjoined upon the plaintiff not to nominate his successor. The person sought to be substituted in his place could succeed only by virtue of the appointment by election or selection according to the custom of the locality. If the Chela were to be substituted in place of the deceased a number of questions would arise for decision and plaintiff would have to be amended substantially giving rise to the defendant's right of amendment of his pleadings. Thus new issues would be raised necessitating a fresh trial which was not contemplated by the provisions of Order 22. Thus on the death of the plaintiff the suit became infructuous and the chela could not be substituted in place of the deceased plaintiff."

14. In AIR 1934 PC 81 (supra) it was held as under:—

"when a right of appeal is given to one of the ordinary courts of the country, the procedure, orders and decrees of that Court will be governed by the ordinary rules of the Civil Procedure Code. An appeal to the Privy Council is, therefore, maintainable from the decision of the High Court under Section 75 from the order of the District Judge under Section 4."

15. In AIR 1936 PC 93 (supra) it was held as under:—

"The provision in the Gurdwara Act that appeals from the tribunal are to be heard by a Division Court and not by a Single Judge does not indicate that the High Court in dealing with such matters would be exercising a special jurisdiction. The provisions of the Civil Procedure Code with reference to appeals to His Majesty apply to decrees of the High Court made under Section 34 and hence a right of appeal to the Privy Council from such decree exists."

16. In AIR 1916 PC 21 (supra) it was held as under:—

"Where an appeal was preferred to the District Court against the decision of the Forest Settlement Officer under Section 10 (2), the District Court is appealed to as one of the ordinary Courts of the country, with regard to whose procedure, orders and decrees, the ordinary rules of the Civil Procedure Code apply."

17. In AIR 1964 All 431 (supra) it was held as under:—

"An application by the appellant, who was the applicant under Section 81, on the death of the sole respondent asking the Court to exercise its powers under Section 116 and publish a notice in the Gazette that the sole respondent is dead and there is no other respondent opposing the petition, in order to enable any other person interested to get himself substituted in the place of the deceased respondent, does not lie under Section 116-A or any other provision of the Act.

Section 116 does not apply to appeals. Section 116 bears the title "Abatement or Substitution on death of respondent" and provides for the situation created by the death of the sole respondent. As the statute stands it seems that the intention is that the provisions about withdrawal and abatement would apply to petition only when it is either before the Commission or the tribunal and not to an appeal filed in the Court against the order of tribunal.

On the other hand the Court must decide such application under the provisions of Order 22 of the Civil P. C. in view of Section 116-A (2) of the Act. But the underlying assumption in all the rules under Order 22 is that the right to sue must have survived after death. It follows that if the right to sue itself does not survive the death of the deceased respondent, there can be no substitution and no continuation of the dispute. The appellant had a right under Section 81 of the Act to ask the tribunal to set aside the election of the respondent but on the death of the sole respondent that right did not survive against any other person. Hence the Court has no power to make a notification under Section 116 or to allow a third person to defend the petition."

18. In my view, the appellant is entitled to succeed on the first contention raised by Shri V. K. S. Chaudhari and, therefore, it is not necessary to examine his other contentions. There can be no denying the fact that the relief which is sought in the election petition is based on a personal cause of action and it does not survive either on the death of the petitioner or of the respondent. The Division Bench decision of our Court in AIR 1964 All 431 has clearly laid down to the said effect. In the instant case when the respondent No. 2, Jai Ram Singh, died the cause of action did not survive and indeed it has not been contended by the learned counsel for the respondents that on the death of the respondent No. 2 any heir or legal representative of the deceased needed to be brought on record. Obviously the heirs and legal representatives of Jai Ram Singh have got nothing to do with the dispute which Jai Ram Singh was carrying on with the returned candidate as a result of the election for the office in question.

In my view, whether the death occurs during the pendency of the petition or at the appellate stage will make no difference in an election case. The Division Bench case reported in AIR 1950 Pat 184 (Supra) undoubtedly supports the contention of Shri Chaudhari. It should be seen that in the said case the death of the plaintiff occurred during the pendency of the appeal and it should also be appreciated that the plaintiff (like the petitioner in the instant case) had succeeded in the trial court and a decree had been passed in his favour. Yet when he died it was held that as he was suing to establish his personal right to an office, therefore, on his death "either during the pendency of the suit or during the pendency of the appeal the right to sue could not survive and the suit will, therefore, abate". In the said case the defendant's appeal was, therefore, allowed and the judgment and the decree passed by the trial court was discharged.

19. It should be emphasised that the scheme under the Representation of the People Act, 1951 is materially different from the one under the enactment with which we are concerned here. A comparison between Section 112 of the Representation of the People Act, 1951 and Rule 41 of the U. P. Kshetra Samitis (Election of Pramukhs and Up-Pramukhs and Settlement of Election Disputes) Rules, 1962 is instructive. The said provisions are reproduced below:—

"112. Abatement of election petitions. — (1) An election petition shall abate only on the death of a sole petitioner or of the survivor of several petitioners.

(2) Where an election petition abates under sub-section (1) the High Court shall cause the fact to be published in such manner as it may deem fit.

(3) Any person, who might himself have been a petitioner may, within fourteen days of such publication, apply to be substituted as petitioner and upon compliance with the conditions, if any, as to security, shall be entitled to be so substituted and to continue the proceedings upon such terms as the High Court may deem fit."

"41. Abatement of petitions. — (1) An election petition claiming a declaration mentioned in clause (a) of Rule 37 shall abate upon the death of the returned candidate.

(2) An election petition shall abate upon the death of the sole petitioner or all the petitioners.

(3) If any election petition claims the declaration mentioned in clause (b) of Rule 37 and the returned candidate dies, the Judge shall cause notice of such event to be published in the Gazette and thereupon any person who might have been a petitioner, may within fourteen days of the publication apply to be substituted in place of the returned candidate to oppose the petition and shall be entitled to continue the proceedings upon such terms as the Judge may think fit."

20. It is obvious that there are material differences between the aforesaid provisions in the said two enactments. Under the Representation of the People Act even on the death of the sole petitioner a right has been given to a person who might himself have been a petitioner to apply within 14 days of the publication under Section 112 (2) to be substituted as petitioner. This is not so under the aforesaid Rule 41. The only contingency when a person can apply to be substituted in an election petition arises when the returned candidate dies. No provision is, however, made for any substitution when the sole petitioner dies. This basic difference between the two enactments shows that the legislative intent underlying the rules framed under the U. P. Kshetra Samitis and Zila Parishads Adhiniyam, 1961, materially differs from such intention underlying the Representation of the People Act, 1951.

21. Shri Dayal has contended that the respondents on record, namely, respondents Nos. 3 and 4 have a right to contest the appeal and, therefore, the appeal cannot be automatically allowed on the death of the respondent No. 2. I cannot accept this contention. The said two respondents were the two unsuccessful candidates in the election. However, they did not file any petition to challenge the election of the returned candidate. Rules 36 and 37 of the said Rules are reproduced below:—

"36. Form, etc., of petition. — (1) An election petition shall specify the ground or grounds on which the election of the returned candidate is questioned and shall contain a summary of the circumstances alleged to justify the election being questioned on such ground.

(2) The person whose election is questioned and where the petitioner claims that any other candidate shall be declared elected in the place of such person, every unsuccessful candidate shall be made a respondent to the petition."

"37. Relief that may be claimed by the petitioner. — A petitioner may claim either of the following declarations—

(a) that the election of the returned candidate is void;

(b) that the election of the returned candidate is void and that he himself or any other candidate has been duly elected."

It is obvious that the unsuccessful candidates need to be impleaded only when a declaration is sought under rule 37 (b) otherwise they need not be impleaded in the election petition. In other words, if a petitioner merely seeks a declaration that the election of the returned candidate is void he has to implead only the returned candidate and not the other unsuccessful candidate. This clearly goes to show that the election of the returned candidate must be challenged by an election petition and it is not possible or open to challenge such election as a respondent in a petition. The limited right which has been granted to the unsuccessful candidates impleaded as respondents in an election petition is with reference to the declaration which is sought by the petitioner that he himself or any other candidate has been duly elected. It is obvious that this right has been given to the unsuccessful candidate because he may contend that not the petitioner but the respondent should be declared to be elected.

In the instant case, the respondents Nos. 3 and 4 were impleaded because they were the other unsuccessful candidates and because the petitioner was seeking a declaration under Rule 37 (b) of the aforesaid Rules. In respect of such declaration they had a locus standi but no such locus standi can be claimed by them with reference to the election of the returned candidate which they themselves did not challenge by filing any election petition.

22. I have not found it necessary to decide any of the other interesting questions which were raised at the Bar touching upon the applicability of the Civil Procedure Code to the instant proceeding because, in my opinion, it is not necessary to do so.

23. In the result, the application is allowed. The appeal succeeds and the order of the Election Tribunal dated 29th September, 1973, is discharged and the election petition is directed to have abated in consequence of the death of the respondent No. 2. There will be no order as to costs.

Appeal allowed.

AIR 1976 ALLAHABAD 85

GOPI NATH, J.

Smt. Imaman, Appellant v. Union of India, Respondent.

Second Appeal No. 264 of 1970, D/- 7-8-1975.*

(A) Tort — Negligence — Defence of contributory negligence could not be a bar to an action in Tort.

A goods train was running at a high speed exceeding permissible limit. The deceased a person who had purchased a ticket was knocked down by the train while crossing the track as there was no over-bridge. He had to catch the train which had almost arrived. The driver of the train did not employ due care, caution and skill while driving it at a high speed and the railway staff did not issue any warning of approaching train. No plea was raised by the railway that the deceased appeared suddenly before the engine and so accident could not be averted.

Held, that the deceased was not negligent. A man bound to catch another train was likely to be inattentive to the audibility of sound of approaching train. The train which the deceased had to catch had almost arrived; if he had heard the noise of the train he would never have risked his life by dashing against it. On the other hand the railway itself was negligent as the driver of the train did not employ due care, caution and skill while driving it at a high speed and the railway staff did not issue any warning of approaching train. And a plea of contributory negligence was more appropriately concerned with the quantum of damages and could not be a bar to an action in tort. (Case law discussed.)

(Paras 7, 8)

Cases Referred:	Chronological	Paras
AIR 1975 SC 1324 = 1975 Cri LJ 1105	9	
AIR 1973 Pat 129 = ILR (1973) 52 Pat 361	7, 8	
AIR 1972 SC 221 = 1972 Cri LJ 49	9	
AIR 1963 Assam 117 = ILR (1963) 15 Assam 135	7	
(1956) 2 All ER 625	8	

*(Against judgment and decree passed by B. L. Goel, Dist. J., Fatehpur, in Civil Appeal No. 38 of 1969, D/- 24-11-1969).

KS/KS/D987/75/AMG

(1939) 2 All ER 142 7
 AIR 1937 Sind 118 = 30 Sind LR 413 9
 AIR 1932 Bom 452 = 34 Bom LR 826 9
 AIR 1928 Cal 504 = 48 Cal LJ 45 9

K. P. Singh, for Appellant; Gur Pratap Singh, for Respondent.

JUDGMENT:— This is a plaintiff's appeal arising out of a suit for recovery of Rs. 10,000/- by way of damages for an accident which the plaintiff's husband suffered at railway station Katoghan on the Northern Railway. The plaintiff's husband was knocked down by a goods train on 10-5-1966 on that station.

2. The plaintiff's case was that Sri Babu Lal alias Babu Khan, the plaintiff's husband, had to go to Khaga by a passenger train on 10-5-1966 in the morning. The train was about to arrive at 8 a.m. He went shortly before that time and purchased ticket No. 19375 for Khaga. It is admitted by the defendant-respondent that there was no over-bridge at the Katoghan railway station for platform No. 3 where the passenger train was to arrive, and passengers used to cross the railway lines in order to reach that platform. Babu Khan having purchased the ticket went to platform No. 3 on the announcement that the train was arriving. The platforms of this station are not high according to the statement of P. W. 1. They are only 6" to 9" high. As soon as the plaintiff's husband walked down the platform No. 1 he was knocked down by a goods train which was coming at a high speed. Both the courts below have held that the goods train was running at a speed of 45 miles per hour, the permissible speed being only 35 miles per hour. Babu Khan died as a result of the accident. His wife, the plaintiff-appellant filed the suit claiming Rs. 10,000/- by way of damages against the railway administration.

3. The defence delivered was that Babu Khan was a trespasser having no railway ticket and hence having no right to cross the railway lines. It was further pleaded that the railway administration was not required or bound to construct an over-bridge for the railway traffic and that the deceased contributed to the accident by his own negligence. There was, however, no plea that he appeared suddenly before the train and the driver could not avert the accident. The two main defences thus raised were that the deceased was a trespasser on the railway lines and that he was guilty of contributory negligence. The claim accordingly was not sustainable and the amount claimed in any view was excessive.

4. The trial court decreed the suit for the amount claimed on the finding that the deceased was a bona fide passenger for Khaga having purchased ticket No. 19375, that he was passing through

the railway track only because there was no over-bridge provided for going to platform No. 3; thus he was not a trespasser but a licensee; that the goods train was passing at a high speed of 45 miles per hour, which was in excess of the permissible speed; that neither the Driver gave any whistle, nor did the station staff give any warning. There was thus negligence on the part of the railway and it was responsible for the accident.

5. On appeal by the defendant, the Union of India, the court below reversed the decree on the findings, that though the deceased was a bona fide passenger holding ticket No. 19375, he was negligent in crossing the railway lines, and if he had taken proper care of himself the accident would have been avoided. The learned Judge held that though the goods train was running at a high speed of 45 miles per hour and beyond the permissible limit, the accident could have been averted if the deceased had taken care to look to either side of the Railway track and listened to the noise produced by the incoming train. Learned Judge observed that it was common knowledge that goods trains driven by diesel engines make considerable noise and give sufficient warning by their running. In this context he further observed that one of the witnesses produced on behalf of the Department stated that the goods train arrived at Katoghan railway station sounding a whistle. The plaintiff's witnesses denied this fact. The driver of the goods train was not examined. He could have been the best witness to testify to the fact whether he sounded a whistle or took any precaution to avoid the accident. The learned Judge, however, held that the deceased was negligent in crossing the railway lines without taking proper precautions, and the defendant could not be held liable for the accident. He further held that the damages claimed were excessive and if the claim lay, the reasonable amount would be a sum of Rs. 5,400/- on the basis of the earning capacity of the deceased at the rate of Rs. 75/- per month, he being 60 at the time of his death and his span of life in the normal course being only six years more.

6. Aggrieved, the plaintiff has filed this appeal, and it has been contended on her behalf that the negligence was on the part of the goods train driver. He was driving the train at a speed of 45 miles per hour, much in excess of the permissible limit, and the deceased being a bona fide passenger crossed the railway lines in order to reach platform No. 3 but was crushed on account of the negligence and carelessness of the driver of that train.

7. The deceased was in a position of a licensee or an invitee on the tracks

and the accident occurred on account of the high speed of the goods train. In *Daly v. Liverpool Corporation*, 1929 (2) All ER 142 it was held that the driver of an omnibus has a duty to exercise meticulous and high standard of care and skill while driving a vehicle at a high speed. If a vehicle or a train is driven at a speed higher than the one permissible, some degree of rashness is attributable to the driver. See *Swarnatala Barua v. Union of India* (AIR 1963 Assam, 117). The Railway is further bound to give a warning of an approaching train. The station staff did not appear to have given a warning. The driver of the train has not been examined. In *Swarnatala Barua's case* (supra) it was held that failure to give warning amounts to negligence on the part of the railway. As to the audibility of the sound of an approaching train it was held in *Union of India v. Supriya Ghosh*, (AIR 1975 Pat 129) that a man bound to catch another train is likely to be inattentive to it, his attention being focussed to the catching of another train. In the instant case the train which the deceased had to catch had almost arrived. If the deceased had heard the noise of the goods train he would never have risked his life by dashing against it. No plea was raised in the written statement that the driver had taken all care and precaution to avert the accident but could not do so on account of the sudden appearance of the deceased or his dashing against the train. The Driver would have been the best person to testify to these facts.

8. Both the courts below have held that the goods train was running at a speed higher than the permissible one. It further appears that the care and skill needed at such a speed was not employed by the driver. There was thus negligence on the part of the railway and the accident was caused due to their fault. The defence was of contributory negligence and it was suggested that by crossing the railway lines when a train was approaching the deceased undertook a risk. That however did not mean that he was undertaking a risk of the negligence of the driver. A plea of contributory negligence is more appropriately concerned with the quantum of damages. It is no bar to an action in Tort. In *Salter v. Clay Cross Co. Ltd.*, (1956) 2 All ER 625 a lady was struck by a train while walking through a tunnel. It was found that she was a licensee on the track and the Driver of the train was negligent. The court of appeal held that the defence of *volenti non fit injuria* was not available and if the lady was guilty of contributory negligence, it was a matter concerning the quantum of damages. Learned counsel for the appellant urged on the basis of *Union of India v.*

Supriya Ghosh, (AIR 1973 Pat 129) (supra) that if an invitee crosses the railway lines and meets with an accident while doing so he cannot be held guilty of contributory negligence. The principle though depending upon mutual fault and responsibility and comparative care and caution required of respective parties, does not need any elaborate discussion as in this case the accident seems to have occurred mainly due to the negligence of the railways, the driver not exercising the due care, caution and skill and the staff not issuing any warning.

9. Learned counsel for the respondent invited my attention to *B. N. Rly. Co. Ltd. v. Tara Prasad Maity*, (AIR 1928 Cal 504), *J. D. Haywood v. F. M. Huggins*, (AIR 1937 Sind 118) and *Ismail Haji Nana Mafat v. B. B. and C. I. Rly.*, (AIR 1932 Bom 452) and urged that the Railway is not responsible for an accident to a trespasser who is not careful about himself and is guilty of contributory negligence. The instant was not a case of trespasser. The deceased was a bona fide passenger holding a ticket for Khaga from Katoghan. He was a licensee or an invitee on the railway tracks and his negligence has also not been established. The cases cited on behalf of the respondent are thus distinguishable. Learned counsel then invited my attention to some cases on Section 304-A, Indian Penal Code. He referred to *Mahadeo Hari v. The State of Maharashtra*, (AIR 1972 SC 221) where a pedestrian suddenly crossing a road met with an accident with a vehicle driven slowly and on the correct side of the road. The driver was not held guilty of negligence. The case is wholly distinguishable on facts, besides being one under Section 304-A, Indian Penal Code. It is not the case of the defendant that the deceased appeared suddenly and the accident could not be averted. The relevant paragraphs of the written statement to which my attention was invited by the learned counsel for the respondent were paragraphs 3 and 5 of the written statement. They, so far as material, read:

"Para. 3. The maximum permissible speed of goods train is 40 miles per hour and booked speed is thirty five miles per hour. The passengers have to take precaution while crossing tracks."

Para 5. Noise of engine and moving vehicles as well as the loud whistle of an approaching train is warning by itself and the passenger should not have been negligent in attending to it."

None of them make any suggestion about the deceased appearing suddenly before the engine. Learned counsel then relied on *Mrs. Shakila Khadar v. Nausher Gama*, (AIR 1975 SC 1324). In that case the High Court had set aside the conviction of the first respondent of of-

fences under Sections 304-A, 337, 338 and 427, Indian Penal Code passed by the City Magistrate and confirmed on appeal by the Sessions Judge. The acquittal was reversed by the Supreme Court and the conviction upheld on the finding that the accused was guilty of rash and negligent driving, he being on the wrong side of the road and trying to overtake another vehicle. In that connection their Lordships laid down some tests regarding rash and negligent driving of cars. The case is not helpful to the respondent.

10. The plaintiff, for the reasons discussed above was entitled to damages for the death caused to her husband by the accident.

11. As regards the quantum, the court below after calculation fixed it at Rs. 5,400/-. The deceased was 60 years of age at the time of his death. His monthly income was found Rs. 75/- and his further span of life another 6 years. Neither side has seriously challenged the findings or questioned the assessment. It is, therefore, unnecessary to re-assess the quantum of damages. I accordingly hold that the plaintiff was entitled to a sum of Rs. 5,400/- by way of damages.

12. The appeal accordingly succeeds and is allowed. The decree of the court below is set aside and the suit for damages is decreed for a sum of Rupees 5,400/-. In the circumstances of the case I direct the parties to bear their own costs.

Appeal allowed.

AIR 1976 ALLAHABAD 88

SATISH CHANDRA, J.

Official Liquidator, Petitioner v. Swarup Cold Storage, Respondent.

Company Petn. No. 10 of 1971, D/- 5-8-1975.

(A) Contract Act (1872), Section 221 — Partnership agreement between individual and company — Partner in possession of assets of company by virtue of agreement — Company subsequently in liquidation — Partner whether entitled to invoke lien under Section 221.

In the present case, the partner of a firm was in possession of assets of the company (another partner) by virtue of an agreement between them. The company subsequently went into liquidation.

Held, the partner was not entitled to invoke the lien under Section 221 of the Contract Act over the assets of the company (in liquidation) on the ground that money due to him under the agreement was not paid up.

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The lien, if any, created by a contract between a principal and his agent mentioned in Section 221 is enforceable between the parties to the agreement. In the first place, after the compulsory winding up, the Company (in liquidation) met with a civil death. The Official Liquidator is not a representative of the Company (in liquidation) for purposes of Section 221. There was hence no occasion to enforce the lien as against the Official Liquidator. Furthermore, Section 221, in so far as one may seek to bring the Official Liquidator within its purview, being contrary to Section 125 of the Companies Act, 1956, which expressly declares such a charge to be void as against the liquidator will be subservient to it. Section 221, therefore, cannot be enforced against the Official Liquidator. (Para 14)

Further, Section 221 applies to an agent qua his principal. The position of partners under a partnership agreement is not that of principal and agent. In between themselves they are principals as against the other. For this reason also Section 221 is not applicable. (Para 15)

(B) Contract Act (1872); Sections 172, 148 — Transaction not case of pledge or bailment — Illustrative case.

A bailment relates to specific moveable property, of which delivery has been given by one person to another for a specific purpose. (Para 17)

In the present case, specific moveable and immovable properties were given in possession by one party to the other under the contract. But the right of realisation of dues was not confined to the specific moveable properties of which delivery of possession was given. It extended to other assets also.

Held, since possession of any specific moveable property was not delivered to the transferee upon a contract that the same shall be held as security for the debts of the transferee, it cannot be said that the transaction in question was a bailment, much less a pledge, as defined by the Contract Act. (Para 19)

B. N. Asthana for Petitioner; Probodh Gaur, B. C. Dev, R. R. Agarwal and Bharatji Agarwal, for Respondent.

ORDER:— This is an application by the Official Liquidator for a direction to Inder Raj Swarup to hand over possession of certain assets of the Moradabad Flour Milling and Refrigeration Co. Ltd. (in liquidation).

2. According to the Official Liquidator the assets mentioned in the application belong to the Company in liquidation and are being illegally withheld by Sri Inder Raj Swarup.

3. The Company aforesaid went in creditors voluntary liquidation on 29th September, 1962. On 20th December, 1971, this Court passed an order placing

the Company under compulsory winding up. Thereupon the Official Liquidator made the application mentioned above.

4. Sri Inder Raj Swarup opposed the prayer. He set up a partnership agreement between him and the Company (in liquidation) and claimed that in virtue of the aforesaid agreement he was the owner in possession of the assets and was entitled to retain possession thereof till his dues were paid off. The learned Company Judge held that the agreement did not transfer the title of the assets in question from the Company to the partnership firm. Sri Inder Raj Swarup was hence not entitled to retain possession on the ground that he was the owner of the assets. The learned Company Judge directed the Official Liquidator to take possession over the assets in question.

5. Sri Inder Raj Swarup went up in appeal. A Division Bench of this Court by its judgment dated 18th April, 1972, affirmed the finding that on a construction of the various terms and conditions mentioned in the agreement dated 24th April, 1958, it was clear that the assets which originally belonged to the Company continued to remain with the Company and their ownership did not stand transferred to Sri Inder Raj Swarup.

6. The Division Bench further repelled the submission made on behalf of Sri Inder Raj Swarup that he was entitled to remain in possession so long as the agreement continued. The Bench held that the agreement was for ten years. That period came to an end in 1968. Further, the effect of the Company going into liquidation was the same as if the Company had met with a Civil death, and that with the death of partnership the partnership agreement came to an end. Sri Inder Raj Swarup was, therefore, not entitled to retain possession under the clause which entitled him to continue to remain in possession for the duration of the agreement.

7. Before the Division Bench it was urged on behalf of Sri Inder Raj Swarup that in view of clauses (3) and (18) of the agreement he had a charge or a lien over the assets of the Company and in enforcement of that lien he was entitled to remain in possession even against the liquidator so long as the money due to him under the agreement was not paid up. It was also argued that the status of the appellant was that of a partner and in circumstances like the present the appellant was entitled to invoke the lien contemplated by Section 221 of the Contract Act and thereunder to retain possession till his dues were paid off. The Division Bench felt that these aspects though raised before him were not dealt with by the learned company Judge. It, therefore, while affirming the finding

that the assets remained under the ownership of the Company, set aside the ultimate order and sent the case back for consideration of these various aspects.

8. Thus the two principal questions which require consideration are, first, whether Sri Inder Raj Swarup had a charge or a lien in enforcement of which he could remain in possession even against the Liquidator, and secondly, whether he was entitled to invoke the lien under Section 221 of the Contract Act.

9. Section 125 of the Companies Act provides that a "charge created on or after the 1st day of April, 1914, by a Company and being a charge to which this section applies shall, as far as security on the Company's property or undertaking is conferred thereby be void against the Liquidator and any creditor of the Company, unless the prescribed particulars of charge, together with the instrument, if any, by which the charge is created or evidenced, or a copy thereof verified in the prescribed manner, are filed with the Registrar for registration in the manner required by this Act."

10. The section applies to a charge, inter alia, on any immovable property as well as moveable property of the Company, provided that in the latter case it is not a pledge. The charge in question was claimed against the moveable as well as immovable properties of the Company. Section 125 was, therefore, clearly attracted to it.

11. After the case came back on remand from the Division Bench Sri Inder Raj Swarup, through his counsel, made an application that the files be called from the office of the Registrar of Companies relating to the filing of return under Section 125 of the Companies Act in respect of the charge created by the deed dated 24th April, 1958. This Court on 21st February, 1974, directed the Registrar of Companies, U. P. Kanpur, to send the file to this Court. The Registrar of Companies on 15th March, 1974, addressed a letter to the Deputy Registrar of this Court stating that "Form No. 8 regarding a floating charge for Rs. 41,247.22 on the assets of the Company under a partnership deed between M/s. Moradabad Flour Milling and Refrigeration Co. Ltd. and Sri Inder Raj Swarup was filed with this office in 1960. Since the amount of Rupees 41,247.22 (mentioned in Form No. (8) for which the charge was created was not specifically mentioned in the partnership deed, the Company was advised to amend the partnership deed by inclusion therein of the specific amount of charge created and furnish the same to this Office". The letter continued to state—

"From a perusal of this office records it appears that the Form No. 8 in regard thereto had been returned to the Company and the charge in question could

not be registered under Section 125 of the Companies Act, 1956 due to non-compliance of the above requirement by the Company."

After the receipt of this letter the matter was listed in Court before the learned Company Judge, on 29th March, 1974. The contents of the letter of the Registrar were not disputed on behalf of Sri Inder Raj Swarup. Accordingly on that date the learned Company Judge dismissed the application moved on behalf of Sri Inder Raj Swarup on the view that evidently the charge had not been registered under Section 125.

12. Under Section 125 of the Companies Act any such charge is void against the Liquidator if it had not been properly registered as required by Part V of the Companies Act. Since the charge was not registered and the provisions in that regard had not been followed by the Company, Sri Inder Raj Swarup is not entitled to enforce the charge, if any created by the agreement dated 24th April, 1958, as against the Official Liquidator. Since the charge is void against the Official Liquidator, Sri Inder Raj Swarup is not entitled to retain possession of the assets of the Company on the ground that he had a charge over them.

13. Section 221 of the Contract Act provides—

"In the absence of any contract to the contrary, an agent is entitled to retain goods, papers and other property, whether moveable or immovable, of the principal received by him, until the amount due to himself for commission, disbursements and services in respect of the same has been paid or accounted for to him."

14. The lien, if any, created by a contract between a principal and his agent mentioned in Section 221 is enforceable between the parties to the agreement. In the first place after the passing of the order for compulsory winding the Company (in liquidation) met with a civil death. The Official Liquidator is not a representative of the Company (in liquidation) for purposes of Section 221. There was hence no occasion to enforce the lien as against the Official Liquidator. Furthermore, Section 221, in so far as one may seek to bring the Official Liquidator within its purview, being contrary to Section 125, which expressly declares such a charge to be void as against the liquidator will be subservient to it. Section 221 cannot, in my opinion, be enforced against the Official Liquidator.

15. Further, Section 221 of the Contract Act applies to an agent qua his principal. The position of partners under a partnership agreement is not that of

principal and agent. In between themselves they are principals as against the other. For this reason also Section 221 of the Contract Act is not applicable.

16. It was then urged that the agreement in question created in law a pledge of the specific moveable properties of which possession was delivered by the Company to Sri Inder Raj Swarup. The latter was, under Section 173 read with Section 176 of the Contract Act entitled to retain possession of the goods pledged to him and also to sell them after giving reasonable notice of the sale to the pawnor.

17. Section 172 of the Contract Act defines a pledge to be the bailment of goods as security for payment of debt or performance of a promise. Section 148 provides that a bailment is the delivery of goods by one person to another for some purpose, upon a contract that they shall, when the purpose is accomplished, be returned or otherwise disposed of according to the directions of the person delivering them. Thus a bailment relates to specific moveable property, of which delivery has been given by one person to another for a specific purpose with a direction that it shall be returned or disposed of according to the directions of the person delivering the goods, that is, the bailor.

18. Under the agreement in question, the Company delivered possession of land, buildings, machineries, stores etc., to Sri Inder Raj Swarup upon the condition that the latter will spend as much money as is required for bringing the plants into working condition or repairing or purchasing new machinery and other material etc., Sri Inder Raj Swarup was to work the Cold Storage plant and the earnings were to be divided half and half between the parties. Clause 9 of the agreement provided that the profits of the first party shall first liquidate the amount spent by the second party in repairs and for bringing the plant in working order etc., as stated in Clause 3 in ten equal yearly instalments or by the sale of the cold storage, ice plant, land, buildings etc. belonging to the Company, first party. Clause 3 of the agreement provided that the money spent by Sri Inder Raj Swarup on repairs and purchase of new machinery etc., shall be the first charge on the first party company's assets. He was entitled to recover the amount with 6 per cent interest from the income of the first party company's share in profit or by sale of machineries, buildings, premises etc. This was in tune with the provisions of clause 9 of the agreement. Under clause 18 Sri Inder Raj Swarup was entitled to get his full amount with interest remaining due as stated in clause 3 from the property and assets of the first party company.

19. These various provisions in the agreement show that although specific movable properties along with immovable properties were given in the possession of Sri Inder Raj Swarup, yet the security was the Company's assets. Sri Inder Raj Swarup was entitled to realise his dues in the stated situations by sale of machineries, buildings, premises etc., as mentioned in Clause 3, or from the Cold Storage ice plant and land, buildings etc., belonging to the Company as mentioned in Clause 9, and from the property and assets of the first party Company, as mentioned in Clause 18. None of these clauses confined the right of realisation to the specific moveable properties mentioned in the Schedule of the agreement of which delivery of possession was given to Sri Inder Raj Swarup. The right of sale was not confined to such specific moveable properties. It extended to the Company's assets, including machineries, buildings, premises, cold storage and ice plant and lands, buildings etc. The word "etc." in each of these clauses clearly brings out the intention that the entire assets of the Company were the security of Sri Inder Raj Swarup's dues. Since possession of any specific moveable property was not delivered to Sri Inder Raj Swarup upon a contract that the same shall be held as security for the debts of Sri Inder Raj Swarup, it cannot be said that the transaction in question was a bailment, much less a pledge, as defined by the Contract Act.

20. In this view, Sri Inder Raj Swarup was not entitled to retain possession of the goods given to him in virtue of Section 173 of the Contract Act.

21. It is noticeable that the properties mentioned in the Schedule constituted parts of the Cold Storage and ice plant. They were given to Sri Inder Raj Swarup with a view to enable him to run the cold storage and ice plant as a working unit after proper repairs etc. The cold storage, including the land and buildings were the subject-matter of the agreement. The agreement was in respect of immovable as well as moveable property. In this view also it cannot be said that any specific moveable property was given in the possession of Sri Inder Raj Swarup as security for the debts that may in future be payable by the Company to the latter. I am not satisfied that the transaction in question could, under law, be a pledge under the Indian Contract Act. In my opinion the transaction created a floating charge on the general assets of the Company. Such a floating charge requires registration under Sec. 125 of the Companies Act, which admittedly was not done because of the default of the Company in complying with the provisions of that section. Since I have held that the transaction was not in law a pledge, it is not ne-

cessary to refer to the various decisions cited on behalf of the parties as to the rights, of a pawnee, or as to the rights of an official liquidator as a representative of the general body of creditors of the Company qua a creditor who claims to be in possession as a pawnee.

22. Under the Companies Act the position of Sri Inder Raj Swarup is that of an ordinary creditor who is, in law, entitled to file his claim and prove it before the official liquidator. He will be entitled to receive what amounts the official liquidator finds to be due to him in accordance with the provisions of the Companies Act. In my opinion Section 173 or 221 of the Contract Act cannot entitle Sri Inder Raj Swarup to retain possession of the assets of the company. He is, in law, duty-bound to hand over possession of such assets to the official liquidator.

23. In the result Sri Inder Raj Swarup is hereby directed to hand over possession of the properties and assets in question to the Official Liquidator within a month from today.

24. A copy of this order may be supplied to the Official Liquidator within three days.

Petition allowed.

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FULL BENCH

K. B. ASTHANA, SATISH CHANDRA AND N. D. OJHA JJ.

Nanha and another, Petitioners v. Deputy Director of Consolidation, Kanpur and others, Respondents.

Civil Misc. Writ No. 7924 of 1971, D/- 15-5-1973.

(A) Constitution of India, Article 226 — Error apparent on face of record — When, said to be established — Interference under Article 226.

If it appears that a court of fact has in substance based its findings on no evidence or that its finding is perverse in the sense that no reasonable person could possibly come to that conclusion or that it erroneously ignores a vital plea or material evidence which affects the result, a manifest error of law apparent on the face of the record leading to failure of justice can be said to be established. But if a court or a tribunal bases its finding on a consideration of all relevant evidence, but an appellate or a revisional court or tribunal while affirming the finding does not refer to some material or some contrary evidence in its order it cannot be said that it has been ignored from consideration so as to entitle the High Court to interfere under Article 226 of the Constitution. Observation to the contrary in AIR

KS/LS/E213/75/SSG

1972 All 51 held to be obiter. Case law discussed. (Paras 17, 6, 5)

Cases Referred: Chronological Paras

AIR 1972 SC 1903 = (1972) 3 SCR 910	15
AIR 1972 All 51 = 1971 All LJ 857	1, 7
AIR 1971 SC 1537 = 1970 UJ (SC) 829	12
AIR 1971 All 54 = 1970 All LJ 1177 (FB)	4
AIR 1971 All 82 = 1970 All LJ 1197 (FB)	4
AIR 1970 SC 992 = (1971) 1 SCR 227	11
AIR 1970 SC 1834 = (1969) 2 SCR 976	13
AIR 1970 SC 1401 = (1970) 3 SCR 343	14
AIR 1970 All 468 = 1968 All LJ 809 (FB)	3
1969 All LJ 1060 = 1969 All WR (HC) 514	5
AIR 1967 SC 1124 = (1967) 1 SCR 93	2
AIR 1966 SC 142 = (1965) 3 SCR 71	11
AIR 1966 SC 1827 = (1966) 2 SCWR 524	3
AIR 1964 SC 735 = (1964) 51 ITR 291	8
AIR 1963 SC 1723 = (1964) 3 SCR 25	11
AIR 1955 SC 425 = (1955) 2 SCR 1	11
AIR 1954 All 497 = 1954 All WR (HC) 305	11
AIR 1952 SC 192 = 1952 SCR 583	9

SATISH CHANDRA, J.:— During consolidation operations the petitioners filed an objection claiming to be co-sharers in the holding. Their claim was contested by respondents 4 and 5. One of the issues framed by the Consolidation Officer was whether Beni and Gappu died before the death of Chandi, if so, its effect. In support of their case that Chandi had died before the other two, the petitioners had, inter alia, filed extracts from death registers. The Consolidation officer after considering the evidence on record, held that Gappu and Beni died before Chandi. On, inter alia, this finding the objection of the petitioners was rejected. The petitioners went up in appeal. The Settlement Officer elaborately discussed the extracts from the death registers and rejected them. He confirmed the finding of the Consolidation Officer and dismissed the appeal. The petitioners filed a revision. The Deputy Director of Consolidation stated that he had carefully gone through the record of the case in the two courts below and heard the arguments of the learned counsel for the applicants as well as those of the learned counsel for the opposite parties. The arguments put forward before him by the learned counsel for the applicants were not new and were the same which had been put forward before the two learned lower courts. He observed:—

“For the reasons already mentioned in great detail in the orders of both the learned lower courts I do not find any force whatsoever in those arguments. I find myself in agreement with the conclusion drawn and the findings arrived at by the two learned lower courts and I do not find any good justification to interfere with them. I do not

even consider it necessary to repeat these points in this order.”

On this view the revision was dismissed. Aggrieved, the petitioners filed a writ petition in this Court. For the Petitioners it was argued that the Deputy Director of Consolidation was in error in not considering the material evidence adduced by the petitioners to support their case. In support reliance was placed upon a decision of the Division Bench in Chedda Lal v. Sub-Divisional Officer 1971 All LJ 857 = (AIR 1972 All 51). The Bench felt doubtful about the correctness of this decision. After referring to several Supreme Court decisions it observed:—

“In view of the aforementioned decisions the question whether omission to consider material evidence can furnish a ground for interference in a writ petition requires consideration by a Full Bench we, therefore, refer the following question to a Full Bench.—

“Whether an order or a finding of a Court or tribunal, based on evidence on the record, can be interfered with under Article 226 of the Constitution, if some material evidence has not been referred to by the court or the tribunal?”

In the penultimate paragraph of the referring order the emphasis has been placed on omission to consider. We have reframed the question as follows:—

“Whether an order or a finding of a court or tribunal, based on evidence on the record, can be interfered with under Article 226 of the Constitution, if some material evidence to the contrary has been ignored from consideration by the court or the tribunal?”

2. In *Girijanandini Devi v. Bijendra Narain Choudhary* (AIR 1967 SC 1124) (Para 12) the Supreme Court held that:—

“It is not the duty of the appellate Court when it agrees with the view of the Trial Court on the evidence either to restate the effect of the evidence or to reiterate the reasons given by the Trial Court. Expression of general agreement with reasons given by the Court decision of which is under appeal would ordinarily suffice.”

3. In *State of Madras v. A. R. Srinivasan* (AIR 1966 SC 1827) it was held that it is unreasonable to suggest that a superior authority must record its reasons as to why it accepts the findings of the inferior authority. The matter was examined in detail by a Full Bench of this Court in *Haji Manzoor Ahmad v. State of U. P.* 1968 All LJ 809 = (AIR 1970 All 468 (FB)). It was held that:—

“Where an order of an inferior authority is carried in appeal or revision before a superior authority, and the superior authority in disposing of the appeal or revision makes an order in the exercise of quasi-judicial jurisdiction:—

(1) In all cases where the superior authority interferes with the order of the in-

ferior authority the order of the superior authority must set out its reasons.

(2) In cases where the superior authority merely affirms the order of the inferior authority, and

(a) where the order of the inferior authority does not set out its reasons, the superior authority must disclose its reasons in its order;

(b) where the order of the inferior authority sets out the reasons, and

(i) where the superior authority finds the reasons of the inferior authority acceptable to it, it need not specify the reasons in its order but may merely refer to the reasons given by the inferior authority or give an outline of the process of reasoning by which it finds itself in agreement with the inferior authority;

(ii) where the superior authority does not find the reasons of the inferior authority acceptable to it the superior authority must set out its own reasons in its order."

4. The view of this Full Bench was re-affirmed by a Larger Bench in *Ram Murti Saran v. State of U. P.* 1970 All LJ 1177 = (AIR 1971 All 54) (FB), as well as *Prem Prakash Virmani v. State Government* 1970 All LJ 1197 = (AIR 1971 All 82) (FB)

5. When an inferior authority records a finding after consideration of the evidence on the record it is not necessary for the superior authority, if it agrees with the finding, to reiterate its reasons. Ex hypothesi, the superior authority's affirmatory order will not be invalid on the ground that it does not refer in its order to some material or the evidence on the record. If the superior authority while affirming the finding refers to some salient features of the case without mentioning the contrary evidence the order will not be bad for such an omission.

6. The reason for this view was succinctly expressed in *Ram Agyan Singh v. Murlidhar Agrawal* 1969 All LJ 1060. It was observed:—

"It is established from the record that the State Government gave personal hearing to the parties before disposing of the application under Section 7-F, and there is no reason to doubt that the entire material on the record must have been placed before it by the parties according as it supported their respective interests. The statement of reasons on which the impugned order under Section 7-F was made was drawn up after this personal hearing, and although all that is stated there is that the benefit under the proviso should be given to the tenant and not to the landlord there is no reason to suppose that the State Government considered part only of the material which was before it. In my opinion, the omission of the State Government to refer in its order to all the material on the record does not vitiate the order."

In cases where the superior authority dismisses an appeal or a revision after oral hearing, it can safely be assumed that the parties must have placed before the authority the evidence on the record, as it supported their cases. Since the superior authority is not required to independently state reasons for affirming the finding, the omission to refer to contrary evidence in its order, will not mean that it has not been considered.

7. Our attention was invited to a Division Bench decision in *Chheda Lal v. Sub-Divisional Officer* (AIR 1972 All 51) (supra). In that case it was argued on behalf of the appellant that the Sub-Divisional Officer did not consider four material circumstances while considering the question whether the ballot papers had been tampered with. The Bench held that three out of the four circumstances were not material while the fourth was considered by the Sub-Divisional Officer. On this view the appeal was dismissed. But in the course of the judgment the Bench observed that the finding that the ballot papers had not been tampered with may be a finding of fact, but such a finding can be successfully assailed in a writ petition, if it can be shown that the Sub-Divisional Officer had recorded that finding on the basis of some evidence leaving out of consideration other material evidence or circumstances.

8. In view of the actual decision of the Bench these observations were clearly obiter. Moreover, in that case the writ petition was filed against the original court's order. The tribunal of first instance has to consider all material evidence. But as seen above, the position is different in respect of an appellate or revisional order of affirmance. This decision is not applicable to such orders of superior authorities. In support of its view the Bench relied upon *Commr. of Income-tax v. Indian Woollen Textiles Mills* (1964) 5 ITR 291 = (AIR 1964 SC 735). The Court observed that if the conclusion of the Tribunal was based upon some evidence, ignoring other essential matters, it could not be regarded as a finding not giving rise to a question liable to be referred to the Court. The Court was considering the scope of a question of law arising out of the order of the Tribunal within meaning of Section 66 of the Indian Income Tax Act. In our opinion such a case is not helpful in considering the scope of jurisdiction under Article 226 of the Constitution.

9. In *G. Veerappa Pillai v. Raman and Raman Ltd.* AIR 1952 SC 192 (Para 20) the Supreme Court held that:—

"Such writs as are referred to in Article 226 are obviously intended to enable the High Court to issue them in grave cases where the subordinate tribunals or bodies or officers act wholly without jurisdiction, or in excess of it, or in violation of the principles of natural justice, or refuse to exercise a jurisdiction vested in them, or there is

an error apparent on the face of the record, and such act, omission, error or excess has resulted in manifest injustice."

10. Article 226 has a two-fold requirement. There should be a manifest error of law apparent on the face of the record and that such an error has resulted in manifest injustice.

11. It is well settled that under Article 226 of the Constitution the High Court does not act as a Court of appeal for the purposes of judging the correctness of the impugned decision. See *Deoria Sugar Mills Ltd. v. Government of U. P.* AIR 1954 All 497 (FB) and *Sangram Singh v. Election Tribunal, Kotah* AIR 1955 SC 425. In *State of Andhra Pradesh v. S. Sree Rama Rao* AIR 1963 SC 1723, it was held that it is not the function of the High Court to review the evidence and to arrive at an independent finding under Article 226 of the Constitution. It cannot reappraise or re-examine the evidence or facts. See *Sales Tax Officer, Jodhpur v. M/s. Shiv Rata G. Mohatta* AIR 1966 SC 142 and *Joint Registrar of Co-operative Societies v. P. S. Rajagopal Naidu* AIR 1970 SC 992.

12. Cases may arise where a court or a tribunal bases its findings on several reasons some of which are erroneous or otherwise unsustainable. In such cases where the conclusion is based on objective facts, if it is found that there was legal evidence before the tribunal then even if some of it was irrelevant, the superior court would not interfere with the finding if it can be sustained on the rest of the evidence. The reason is that in writ petition for certiorari the superior court does not sit in appeal, but exercises only supervisory jurisdiction and therefore does not enter into question of sufficiency of evidence. See *Zora Singh v. J. M. Tandon* AIR 1971 SC 1537.

13. On the other hand if a tribunal has disabled itself from reaching a fair decision by some considerations extraneous to the merits of the case or if its conclusion on the very face of it is so wholly arbitrary and capricious that no reasonable person can ever arrive at that conclusion, interference under Article 226 would be justified. See *M/s. Parry and Co. Ltd. v. P. C. Pal*, AIR 1970 SC 1334.

14. For the Petitioner reliance was placed upon *M/s. Hindustan Steels Ltd. v. A. K. Roy*, AIR 1970 SC 1401. In that case a writ petition was filed directly against the order of an industrial tribunal. The Supreme Court observed that if a statutory tribunal exercises its discretion on the basis of irrelevant considerations or without regard to relevant considerations certiorari may properly issue to quash that order. In other words if a finding is based on no evidence interference can properly be made under Article 226 of the Constitution: Provided of course the Court is satisfied that there has been failure of justice. This case has no

material bearing to a situation where a court of fact records a finding after considering all relevant evidence and its finding is affirmed in appeal or revision by not so elaborate orders.

15. For the petitioner reliance was placed upon *M/S Bigli Cotton Mills (P) Ltd. v. The Presiding Officer Industrial Tribunal II, Allahabad* AIR 1972 SC 1903. In this case a writ petition was filed against the order of an industrial tribunal. There, the principal plea raised by the employers was that there was no practice or custom for allowing festival holidays with wages. On behalf of the employers one M. P. Jaiswal had made a statement on this point. The industrial tribunal held that Shri Jaiswal's statement was a clear admission overriding the plea taken in the written statement. On this view the industrial Tribunal disallowed evidence on the question of the practice and custom in the textile industry in Kanpur. The Supreme Court held that in law the clarificatory statement made under Rule 12 was in the nature of a supplementary pleading. It could not be treated as evidence. In relation to the pleas the Court said that a statement was to be read as a whole and if so read it did not constitute any admission as taking away the effect of the basic plea. It held that the industrial tribunal had erroneously ignored the real plea and had on the basis of this manifest blatant error which was clear on the face of the record, disallowed the evidence on the question of practice and custom in the textile industry in Kanpur. The error was palpable and gross and was manifest on the face of record and the same had resulted in failure of justice by excluding evidence on the most vital point.

16. Since the High Court does not under Article 226 sit in appeal, it insists that the inferior Court or Tribunal should consider all relevant aspects and evidence. If this is not done, manifest error of law becomes apparent. The High Court then further considers whether the omission by the inferior court is so blatant or palpable that failure of justice has resulted.

17. Our answer to the question referred to us is—

"If it appears that a court of fact has in substance based its findings on no evidence or that its finding is perverse in the sense that no reasonable person could possibly come to that conclusion or that it erroneously ignores a vital plea or material evidence which affects the result, a manifest error of law apparent on the face of the record leading to failure of justice can be said to be established. But if a court or a tribunal bases its finding on a consideration of all relevant evidence, but an appellate or a revisional court or tribunal while affirming the finding does not refer to some material or contrary evidence in its order it cannot be said that it has been ignored from consideration so as to entitle the High Court to interfere under Article 226 of the Constitution."

18. Let the papers be laid before the concerned bench with this opinion and answer.

Answered accordingly.

AIR 1976 ALLAHABAD 95

CHANDRA PRAKASH, J.

Sankatha Prasad, Appellant v. Abdul Aziz Khan, Respondent.

Second Appeal No. 2733 of 1963, D/- 3-9-1975*.

(A) Specific Relief Act (1963), Sec. 16 (C) — Suit for specific performance — Failure on the part of plaintiff to plead and prove his readiness and willingness to perform his part of contract — Effect.

Where the averment to the effect that the plaintiff has all along been ready and willing to perform his part of the contract, is lacking in the plaint, the plaintiff is not entitled to any decree for specific performance notwithstanding the fact that no breach of contract was committed by the plaintiff and that it was the defendant who tried to evade execution of the contract by hook or by crook. (1969) 2 SCC 539 and AIR 1968 SC 1355 and AIR 1974 All 294 Rel. on.

(Paras 9, 12)

Even where the suit for specific performance has been filed before the enforcement of the new Specific Relief Act, the law as regards averment in the plaint was not different under the old Act, AIR 1928 PC 208, Rel. on. (Para 15)

Cases Referred: Chronological Paras
AIR 1974 All 294 = 1974 All LJ 378 10, 16

(1969) 2 SCC 539 = (1970) 1 SCR 921 10

AIR 1968 SC 1355 = (1968) 3 SCR 645 10

AIR 1928 PC 208 = 55 Ind App 360 14

Dhruva Nurain, for Appellant; Sankatha Pd., for Respondent.

JUDGMENT:— This is a second appeal against the judgment and decree dated 4-2-1966 of Sri Basdeo Lal Srivastava I Additional District Judge Varanasi modifying the decree of the trial Court and dismissing the appellant's appeal.

2. The suit giving rise to this appeal was filed by the plaintiff appellant against the defendant respondent on the allegations that the respondent was the owner of the house detailed in the plaint, and the plaintiff appellant was occupying its portion as a tenant. On 21st of June 1960 there was an agreement between the parties by which the defendant respondent agreed to sell the disputed house to the plaintiff appellant for the consideration of Rs. 6000/- after accepting

*(Against judgment and decree passed by Basdeo Lal Srivastava 1st Addl. Dist. J. Varanasi in Civil Suit No. 150 of 1965 D/- 4-2-1966).

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Rs. 200/- as earnest money. It was further agreed between the parties that after the marriage of the daughter of the respondent, the respondent will show all the title deeds to the plaintiff and would execute the sale deed within 31st of December 1961 after accepting the balance of consideration and after adjusting the other dues due from the respondent to the appellant. It was further agreed that in case the sale deed was not executed by 31st of December 1961 it would be executed within one year from that date, and the parties will bear expenses of the execution of the sale deed half and half. In the deed of the agreement it was also written that the plaintiff has been paying the rent of the house for month to month and the respondent would be responsible for the annual repairs, white washing etc. It was pleaded that the respondent did not get the annual repairs done and the plaintiff appellant had moved an application under Section 7 of Act 3 of 1947 before the City Munsif Varanasi and displeased with this the respondent claimed arrears of rent amounting to Rs. 440/- from the plaintiff. Although the demand was unjustified the appellant in order to save himself from eviction deposited that money. It was further alleged that in spite of the demand made by notice to the respondent the defendant did not execute a sale deed in question hence the suit for specific performance of the alleged contract.

3. The suit was resisted by defendant respondent on the allegations that he had not executed any agreement set up in the plaint. It was further pleaded that the alleged agreement was vitiated by fraud. It was also pleaded that the appellant took thumb impression of the defendant respondent on a blank paper in connection with certain gift deed which the defendant wanted to make in favour of his sons. It was thus said that taking advantage of the illiteracy of the defendant respondent the plaintiff appellant who was the clerk of a Vakil has forged the agreement set up in the plaint. The defendant respondent denied that he received Rs. 200/- as earnest money and the house in question was at least worth Rs. 16000/- and not Rs. 6000/-.

4. The trial Court after taking evidence of the parties came to the conclusion that the respondent had executed an agreement dated 21st of June 1960 after fully understanding the terms of agreement and the allegation that it was vitiated by fraud or coercion were false. The trial court has also held that the plaintiff has only 2/3 share in the said house and he cannot dispose of the entire house. The trial Court further found that the plaintiff appellant had not made any allegation in the plaint that all along he had been ready and willing to perform his part of the contract of which the defendant has had notice and in the absence of this allegation the plaintiff appellant could not get any decree of the specific perform-

ance. On the above finding the trial court dismissed the suit.

5. Against the above decree the plaintiff appellant filed an appeal before the lower appellate court and the lower appellate court after considering the facts arrived at the conclusion that the defendant respondent was the owner of the house in dispute and the agreement was not vitiated by any fraud or coercion. The lower appellate court further agreed with the finding of the trial court that in the absence of the aforesaid allegation in the plaint the plaintiff appellant could not get any decree of specific performance.

6. Since the plaintiff could not get a decree of specific performance of the contract the lower appellate court awarded a decree of Rs. 200/- to the plaintiff appellant on the finding that there was no breach of contract from his side. The decree of the trial court therefore was modified to the extent that the plaintiff's suit for recovery of Rs. 200/- was decreed and the rest of the claim was dismissed.

7. Feeling aggrieved by the above order the plaintiff appellant came up in second appeal before me. I have heard learned counsel for both the parties and have gone through the record of the case. I have come to the conclusion that the finding of the courts below cannot be disturbed.

8. The Civil Procedure Code prescribed a Form of suit of specific performance and that Form is printed in Form No. 47 of the Appendix. According to this Form para 3 the plaintiff has to prove as follows:—

"Form No. 47 (para 3).

"The plaintiff has been and still is ready and willing specifically to perform the agreement on his part of which the defendant has had notice."

Section 16 (C) of the Specific Relief Act 1963, reads as under:—

"Specific performance of a contract cannot be enforced in favour of a person who fails to aver and prove that he has performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him, other than terms the performance of which has been prevented or waived by the defendant.

Explanation:— For the purposes of clause (C).

(i) Where a contract involves the payment of money, it is not essential for the plaintiff to actually tender to the defendant or to deposit in Court any money except when so directed by the court:

(ii) the plaintiff must aver performance of, or readiness and willingness to perform the contract according to its true construction."

9. The perusal of the above Section 16 (C) leaves no room for doubt that a suit for specific performance has to fail if the plaintiff fails to plead and prove his readi-

ness and willingness to perform his part of the contract.

10. Thus the above two provisions were interpreted by the Supreme Court in (1969) 2 SCC 539 and AIR 1968 SC 1355 and 1974 All LJ 378 = (AIR 1974 All 294).

11. In the above cases it has been held that the want of averment in the plaint to this effect is fatal to suit for specific performance. Now the question arises whether this averment is to be found in the plaint that the plaintiff appellant has been ready and willing to perform his part of the contract. Both the courts below have given concurrent finding of fact that the above averment does not find place in the plaint. The learned counsel for the plaintiff appellant drew my attention to the para 6 of the plaint which translated into English reads as follows:

"Therefore the defendant on being displeased of the demand did not show the title deeds to the disputed house, nor did he execute a sale deed in plaintiff's favour. Therefore on 13th of November 1962 the plaintiff sent notice to the defendant requiring him to execute the sale deed in favour of the plaintiff within a week after showing the title deeds etc."

12. The above words did not amount to an averment that the plaintiff has all along been ready and willing to perform his part of the contract. The above averment was therefore lacking in the plaint with the result that the plaintiff appellant is not entitled to any decree for specific performance. The plaintiff appellant therefore could not get a decree of specific performance notwithstanding the fact that no breach of contract was committed by the plaintiff-appellant and that it was the defendant-respondent who tried to evade execution of the sale deed by hook or by crook.

13. It was contended on behalf of the plaintiff appellant that Section 16 (C) was introduced in the year 1963 by new Specific Relief Act which was enforced from 13th December 1963, while the suit of partition(?) was filed in the year 1963 before the enforcement of the new Specific Relief Act. Section 16 (C) prohibits the enforcement of the specific performance after 13-12-1963. No decree has been passed before the enforcement of the Act. A decree was to be passed after the enforcement of the new Relief Act and in view of the provision 16 (C) the specific performance will not be enforced. Even if Section 16 (C) had not been there the law of the specific performance was not different.

14. AIR 1928 PC 208 states as follows:

"Although so far as the Act is concerned there is no express statement that in suit for specific performance the averment of readiness and willingness on the plaintiff's part upto the date of decree is as necessary as it was always in England, it seems invari-

AIR 1925 Mad 248 = 47 Mad LJ 759 7
AIR 1922 Mad 31 = 42 Mad LJ 361 6

R. V. Subba Rao, for Petitioner; E. Ayyapa Reddy (for No. 1), K. Palaksha Reddy (for No. 2) and K. Somakonda Reddy (for No. 5), for Respondents.

ORDER:— The revision petition arises in the matter of insolvency of a judgment-debtor whose property was brought to sale in execution at the instance of a decree-holder and assets were realised by the executing Court before the insolvency petition was filed. We are concerned in this revision petition largely with what effect Section 51 (1) of the Provincial Insolvency Act, hereinafter referred to as 'the Act' will have on such assets.

2. On 28-10-1967 a creditor's insolvency petition, No. 24 of 1967 was filed on the file of the Court of the Subordinate Judge, Kurnool, against one N. Ramachandra Reddy who is the judgment-debtor in O. S. No. 68 of 1962 on the file of the same Court. pending adjudication, the Official Receiver was appointed as Interim Receiver to his properties. The judgment-debtor was finally adjudicated insolvent on 11-7-1968. Even before the insolvency petition was filed, the properties of the insolvent were brought to sale on 27th and 28th September, 1967 and they were sold for a sum of Rs. 53,400/- in E. P. No. 28 of 1966.

On the date of the sale, 25 per cent. of sale amount was deposited and the balance 3/4ths sale amount was deposited within 15 days therefrom, the time allowed as provided under Order 21, Rule 85 of the Code of Civil Procedure. Thus, the entire amount of Rs. 53,400/- was realised in execution earlier than the filing of the insolvency petition. The sale warrant amount was only Rs. 8,808-75 ps. Some decree-holders filed applications under Section 73 of the Code of Civil Procedure for rateable distribution among them of the assets realised. Before the executing Court passed any orders on those applications, the Official Receiver filed the present application, out of which this civil revision petition has arisen; on 21-9-1968 claiming the balance amount of Rupees 44,591-25 ps. after deducting the sale warrant amount from the money realised in execution, for the benefit of the general body of creditors of the insolvent, which the court negatived.

3. The relevant provisions of the Act are Sections 28 and 51. It is provided under Section 28 (2) of the Act that on the making of an order of adjudication, the whole of the property of the insolvent shall vest in the Court or in a receiver and shall become divisible among the creditors, and therefore, except as provided by the Act, no creditor to whom the insolvent is indebted in respect of any debt provable shall during the pendency of the insolvency proceedings have any remedy against the property of the insolvent

in respect of the debt. It is provided under section 28 (7) of the Act that an order of adjudication shall relate back to and take effect from, the date of the presentation of the petition on which it is made. Therefore, the crucial date in this case is 28-10-1967 on which date the insolvency petition was filed though the adjudication order was passed subsequently on 11-7-1968, but that is subsequent to 13-10-1967 on or before which date the sale amount was deposited in the Court.

In Section 51 (1) of the Act it is provided that where execution of a decree has issued against the property of a debtor, no person shall be entitled to the benefit of the execution against the Receiver except in respect of assets realised in the course of the execution by sale or otherwise before the date of the admission of the petition. In the present case, as already mentioned above, the assets in question were realised in the course of execution by sale before the date of the filing of the insolvency petition. From a plain reading of Section 51 (1) of the Act it appears clear that in respect of assets realised in the course of execution by sale if they were realised before the date of filing of the insolvency petition, the ordinary law will take its course with regard to claims of persons on those assets. It means that in such a case the persons who will be entitled in law to the benefit of the assets realised in execution will not be affected by the subsequent adjudication of the judgment-debtor.

4. It is provided under Section 73 of the Code of Civil Procedure that where assets are held by a Court and more persons than one have, before the receipt of such assets, made application to the court for the execution of decrees for the payment of money passed against the same judgment-debtor and have not obtained satisfaction thereof, the assets after deducting the costs of realisation shall be rateably distributed among all such persons. Therefore when assets in execution were realised by the executing Court before the insolvency petition was filed, as provided under Section 73 of the Code of Civil Procedure, the assets would be available for rateable distribution among the decree-holders who made applications for execution of their decrees for payment of money passed against the same judgment-debtor insolvent.

5. In this connection, Sri R. V. Subba Rao learned counsel for the petitioner, has placed reliance on a number of decisions. But none of the decisions is of any avail to support his argument that as per the provision contained in Section 51 (1) of the Act the decree-holder at whose instance the properties of the insolvent were sold in execution would only be safe and not the other decree-holders who applied for rateable distribution.

6. In the decision Official Receiver, Tanjore v. M. R. Venkatarama Iyer, AIR 1922 Mad 31 the insolvency petition was filed

after an order was passed by the executing Court for rateable distribution. Their Lordships of the Madras High Court held that from the time of the order of rateable distribution, the money must be treated as belonging not to the judgment-debtor but to the decree-holders in whose favour the order was passed and the Official Receiver therefore could no more recover the money from the Court which passed the order than from the decree-holder, nor can he claim the money for the benefit of the general body of creditors. On the facts of that case, their Lordships held so. They did not further say that before any order was actually passed by the executing Court for rateable distribution if the insolvency petition was filed the money would be available for the benefit of the general body of creditors.

7. In the decision *Official Receiver, West Tanjore v. Sambasiva Ayyar*, AIR 1943 Mad 118 what the Madras High Court said was where in an execution sale one-fourth of the purchase money is deposited before and the balance three-fourths is paid into Court after the admission of the insolvency petition, the sale proceeds cannot be deemed to have been realised within the meaning of Section 51 (1) of the Act. To the same effect is the decision *Ramanathan v. Subramanian*, AIR 1925 Mad 248. In the present case, admittedly the entire purchase money was received by the executing Court before the insolvency petition was filed.

8. In the decision *Official Receiver, Cuddapah v. Subbamma*, AIR 1944 Mad 389 the Madras High Court said that when some money was attached before judgment, mere filing of an execution petition cannot convert the money into assets realised in execution.

9. In the decision *Brij Behari v. Budh Sen*, AIR 1942 All 263 what the Allahabad High Court said is that the insolvent's property vests in Official Receiver from the date of insolvency petition and therefore the Official Receiver can challenge the sale in execution of the decree against the insolvent held after the insolvency petition was filed.

10. Therefore, none of the decisions relied on by the learned counsel for the petitioner supports his argument. There are no merits in the revision petition and accordingly it is dismissed with costs.

Petition dismissed.

AIR 1976 ANDHRA PRADESH 50

SAMBASIVA RAO, J.

Nazeeruddin, Petitioner v. Ram Devi, Respondent.

Civil Revn. Petn. No. 274 of 1973, D/- 23-1-1975.*

*(To revise order of 5th Addl. J. City Civil Court, Hyderabad, D/- 1-3-1972).

GS/IS/C734/75/JRM

(A) Civil P. C. (1908), Ss. 151, 152 — Amendment of decree — Decree for specific performance of sale not fixing date for completion thereof — When can be amended — (Specific Relief Act (1963), S. 20).

Where a decree for specific performance of a sale omits to fix the date for completion of the sale, it is not specific and such omission is an accidental slip which defeats the very decree and renders it nugatory. In view of the grave injustice that will be caused to both parties it is a fit case to exercise the power under Section 151. (1961) 2 Andh WR 54, Followed; AIR 1963 All 49, Distinguished. (Paras 2 and 3)

Cases Referred: Chronological Paras
AIR 1963 All 49 = 1962 All LJ 1082 4
(1961) 2 Andh WR 54 3

H. G. Kulkarni, for Petitioner; Y. Sivaramasastri, for Respondent.

ORDER:— The question which arises in this Civil Revision is whether the Court can amend under Section 152, Civil P. C. the judgment and decree granting specific performance, when it had omitted to specify the time before which the specific performance should be completed.

2. The material facts are: The respondent filed the suit on the foot of an agreement of sale for specific performance. It was decreed on 12-2-1971 saying that on the payment of Rs. 15,000/- the defendant should execute the reconveyance document in favour of the plaintiff. It, however, omitted to fix the time before which such amount should be paid and the reconveyance deed should be executed. So, the defendant filed a petition, out of which the present revision arises, to amend the judgment and decree under Sections 152 and 151 to rectify the defect as it arose out of an accidental slip or omission.

It is well known that the time for payment and the execution of the document are generally fixed in judgments and decrees for specific performance. The omission to do so in this case is clearly an accidental slip or omission coming within the meaning of Section 152. The lower court however, stated that the judgment and decree are in accordance with the pleadings and it was for the plaintiff to choose to execute the decree. The decree can be executed within the time stipulated for execution of the decree. In view of Section 48 of the Civil P. C. the execution can drag on for 12 years. If the view of the lower Court is right what would be the result?

Though a decree for specific performance has been passed, the positions of the parties are left in a very vague, indefinitely and nebulous condition. The defendant is now bound to execute the reconveyance deed and will have to await the sweet will and pleasure of the plaintiff for paying the amount and calling upon him to execute the document which he may do at any time within 12 years.

True, he will have to keep it alive once in three years. Such could never be the intention of judgment and decree for specific performance. The very expression 'Specific performance' indicates that the performance of an agreement should be specific. Without the time fixed for its performance, the decree ceases to be specific. So, omission to fix the date for performance would be defeating the very decree and making it nugatory. Omission to mention the times for payment and execution is clearly an accidental slip or omission on the part of the Court.

3. In any case, in view of the grave injustice that will be caused to both parties it is a fit case where the power of the Court under Section 151, Civil P. C. can be properly exercised. In *Sreerama Chengal Varayanaidu v. Ramaiah*, (1961) 2 Andh WR 54. Venkatrama Sastry, J. took the view that the Court has jurisdiction under Section 151, Civil P. C. to fix a date subsequently for performance of the contract by the plaintiff, though the application was filed under Section 152, Civil P. C.

4. Sri Kameswara Rao appearing for the plaintiff respondent relies on *Ram Krishna v. Mukand Shanker*, AIR 1963 All 49. That case has no application because, what the learned Judge held was that a decree cannot be said to be not executable on the ground that there was no provision as to when sale price was to be paid or whether it was to be paid prior to execution of the sale deed. At the same time the decree provided that the defendant should execute the sale deed within 30 days. The learned Judge in those circumstances held that the decree was executable. That has no application to the present case. As I have said, to hold otherwise would be defeating the very decree for specific performance and to cause grave injustice to the parties.

5. I, therefore, set aside the order of the lower Court and grant the application of the defendant-petitioner for amendment and fix the date for deposit of the amount by the plaintiff decreed against him into Court as one month from to-day. i.e., 23rd of February, 1975 and also the costs for reconveyance and the time for the defendant to execute the reconveyance deed as on or before 7th March, 1975. In the result, the revision petition is allowed with costs.

Petition allowed.

AIR 1976 ANDHRA PRADESH 51

FULL BENCH

KONDAIAH, RAMACHANDRA RAJU
AND RAGHUVIR, JJ.

Appalaneni China Veera Raghaviah,
Appellant v. Estates Abolition Tribunal
(Dist. Judge) Guntur and others, Respondents.

Writ Appeal No. 343 of 1973, D/-
25-9-1975.*

(A) A. P. (Andhra Area) Estates
Land Act (1 of 1908), Ss. 3 (10), 185 —
Whether particular land is private land —
Determination — Presumption under Section
185 — Rebuttal of — On facts and
circumstances of case landholders held
entitled to patta under S. 15 of Estates
Abolition Act, (A. P. (Andhra Area) Estates
(Abolition and Conversion into Ryot-
wari) Act (26 of 1948), S. 15).

The theory of the land being appurtenant to, or surrounding the palace or mansion of the zamindar or landholder, otherwise known as mansion test, cannot be applied to determine a particular land being homefarm or not. The actual distance of the land or its exact location in the main village or in any other village in the estate is not material and relevant. There is no basis or warrant for an assumption that the two words 'domain' and 'homefarm' are synonymous having identical import either in precedents or etymology. (Para 16)

The statutory presumption that the land is in inam villages is not private but ryoti is not absolute but only rebuttable. The presumption can be displaced by positive evidence on record irrespective of the source from which it emanated as evidenced by S. 185 of the Estates Land Act. S. 185 specifies the guidelines for the determination of the question whether a particular land is private or ryoti. Such question is a question of fact depending upon the facts and circumstances of each case. (Para 17)

The landholder, in order to establish his claim that the land in dispute is his private land, must prove direct cultivation by himself or the members of his family or through his agents or farm-servants for some period and on the material dates or in the alternative prove his intention to retain the land for his personal cultivation and use as and when he desires. The mere possession of both the warams by the landholder would not displace the statutory presumption unless something in the evidence either by way of proof of direct cultivation or by some

*(Against order of Kuppuswami, J. in
W. P. No. 4843 of 1970, D/- 24-8-1972.)

clear indication of an intent to regard the land as retained for his personal use is established. The tests laid down by the majority of the Full Bench in AIR 1952 Mad 323 (FB) are in no way in conflict with the test of personal cultivation and the intention to retain for personal cultivation enunciated by the Supreme Court in AIR 1968 SC 1005. Methods of proving land to be private land pointed out.

(Para 17)

Hence, it cannot be said that the test of personal cultivation alone can be applied to cases where the nature and character of the land from its inception is not known. The Supreme Court in AIR 1968 SC 1005 did not intend to overrule by implication the decision in AIR 1952 Mad 323 (FB) as the doctrine of implied overruling can only be applied or invoked where it is impossible to reconcile the two pronouncements. (Para 17)

Where the landholders had personally cultivated the land for some time and by virtue of the short term leases and the other admitted facts, the landlords were found to have the intention to retain the land for personal use and cultivation and there was no material to hold that the land was ryoti and the tenants had acquired occupancy rights therein, the land in dispute must be held to be the private land of the landholders and they were entitled for the grant of a patta under S. 15 of the Estates Abolition Act. Case law discussed. (Para 20)

Cases Referred: Chronological Cases

- AIR 1973 Andh Pra 281 = W. P. No. 2748 of 1968, D/- 10-8-1972 1, 15
 (1973) W. P. No. 2863 of 1968, D/- 17-1-1973 (Andh. Pra.) 14
 (1972) 2 Andh LT 30 13
 (1972) 2 Mad LJ 594 14
 (1971) 2 Andh LT 17 13, 14
 AIR 1969 Andh Pra 55 = (1968) 2 Andh LT 148 (FB) 10
 (1969) Writ App. No. 17 of 1968, D/- 27-11-1969 (Andh. Pra.) 1, 15
 AIR 1968 SC 1005 = (1968) 2 SCR 754 1, 3, 4, 10, 11; 13, 14, 15, 17, 20
 (1968) W. P. No. 685 of 1968 (Andh Pra) 13
 (1957) 1 Mad LJ 72 = 70 Mad LW 421 10
 (1957) AC 228 = (1956) 2 All ER 669 13
 (1957) 2 QB 564 13
 (1954) 1 WLR 1357 = (1954) 3 All ER 303 13
 AIR 1952 Mad 323 = (1952) 1 Mad LJ 71 (FB) 1, 3, 4, 8, 10, 11, 12, 13, 14, 15, 17, 20
 AIR 1946 Mad 214 = (1946) 1 Mad LJ 23 6, 7, 8, 17
 (1946) App. Nos. 176 to 178 and 493 of 1946 (Mad) 7, 10, 17
 AIR 1918 PC 182 = ILR (1919) 42 Mad 400 6, 7, 10, 17
 AIR 1915 Mad 750 (2) = ILR (1916) 39 Mad 341 6, 8, 9

(1901) AC 495

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P. M. Gopala Rao, for Appellant; Govt. Pleader for Excise on behalf of (Nos. 1 and 2) and M/s C. Poornaiah and K. B. R. Krishnamurthy for N. Rajeswara Rao (for No. 3), for Respondents.

KONDAIAH, J.:— The village of Kantetivari Kandriga, Narasaraopet, taluk in the district of Guntur was notified and taken over under the provisions of the Andhra Pradesh (Andhra Area) Estates (Abolition and Conversion into Ryotwari) Act (XXVI of 1948) (hereinafter referred to as the Estates Abolition Act) on September 7, 1951. Respondents 4 and 5 and one Chennapati Lakshmaiah applied for the grant of a patta in respect of a piece of land comprised in R. S. No. 14/1 (O. S. 3/9) having an extent of Ac. 3-04 cents, under Section 15 of the Estates Abolition Act, claiming that it constituted their private land. According to the applicants-inamdars, the land in question was gifted to their predecessors in the year 1911 and it was given on short term leases evidenced by Exs. P-4 and P-5 in favour of Gorantla Veerayya and Venkataswamy for the periods commencing from 1918 and ending with 1923 and from 1929 to 1934 respectively.

Thereafter, it was cultivated by the inamdars through one Raghavulu from 1944 to 1949 and from 1949 to 1953-54 personally. The claim of the inamdars was opposed by the appellant herein contending inter alia that he and his predecessors-in-title were in possession of the land ever since 1925 and he is entitled to a ryotwari patta. The Settlement Officer, by his order dated July 8, 1959, rejected the claim of the inamdars holding that the land in question is paramboke land. On appeal by the inamdars, the Estates Abolition Tribunal set aside the finding of the Settlement Officer and remanded the case to his file for determining the question whether it is private land or not.

In the meanwhile on November 24, 1962 the land was sold by the inamdars to one Vidapalapati Venkateswararao, the 3rd respondent herein. However, he was not then added as a party to the proceeding before the Estates Abolition Tribunal or the proceeding before the Settlement Officer after remand. The Settlement Officer, by his order dated November 30, 1964, came to the conclusion that the land was ryoti land and therefore, the inamdars were not entitled to a patta under Section 15 of the Estates Abolition Act on the basis of their claim that it was their private land. Aggrieved by the decision of the Settlement Officer the 3rd respondent transferee and the applicants for the grant of patta preferred an appeal to the Estates Abolition Tribunal.

(i) the domain or home-farm land of the landholder by whatever designation, such as Rambattam, Khas, sir or pannai land;.....”

"Ryoti land" is "cultivable land in an estate other than private land". The definition of "ryoti land" does not include beds and bunds of tanks, drainage or irrigation channels, threshing floor, cattle stands, village sites and lands granted on service tenure as indicated in clauses (a) to (c) of Section 3 (15). A presumption that land in inam village is not private land is created under Section 185 which contains guidelines for determination of the question whether a land is a private land. Section 185 to the extent relevant for our purpose, reads thus:—

"Presumption that land in inam villages is not private land—When in any suit or proceeding it becomes necessary to determine whether any land is the landholder's private land, regard shall be had—

(1) to local custom.

(2) In the case of an estate within the meaning of sub-clause (a), (b), (c) or (e) of clause (2) of Section 3, to the question whether the land was before the first day of July, 1898, specifically let as private land; and

(3) to any other evidence that may be produced;

Provided that the land shall be presumed not to be private land until the contrary is proved."

Whether a particular land is a private land or a ryoti land fell for determination in several decided cases as the definition of 'private land' merely states that 'private land' means the 'domain or home-farm land of the landholder' but nowhere in the Estates Land Act the words 'domain or home-farm land' have been defined. We shall now refer to a few leading cases which are relevant for the purpose of deciding the controversy with which we are concerned.

6. The earliest important decision on this aspect of the case is that of the Judicial Committee in *Yerlagadda Mallikarjuna Prasad Naidu v. Somayya*, ILR (1919) 42 Mad 400 = (AIR 1918 PC 182) affirming the decision of the Madras High Court in *Zamindar of Chellapalli v. Somayya*, ILR (1916) 39 Mad 341 at p. 346 = (AIR 1915 Mad 750 (2) at p. 753). The question that fell for consideration therein was whether the lands in dispute which were admittedly ryoti at an earlier point of time, had been converted into or proved to be, the private lands of the Zamindar. On the evidence on record, it was found by the Madras High Court in *Zamindar of Chellapalli v. Somayya*, ILR (1916) 39 Mad 341 at p. 346 = (AIR 1915 Mad 750 (2) at p. 753) that the Zamindar did never cultivate the suit lands but they were always cultivated by tenants. Wallis C. J., observed:

"Once it is shown as here that they were a ryoti, down to a certain date the effect of Section 8 is that even if the Zamindar subsequently acquired the kudivaram right that would not of itself convert them into private land and we have to see whether what has happened subsequently is sufficient to convert the land into private land, that is to say, into domain or home-farm land."

Seshagiri Ayyar, J., in his concurring judgment, meant the terms 'domain' and 'homefarm' in the same way and the expression 'Demesne' land was held to mean 'land immediately surrounding the mansion or dwelling house, the park or chase'. The expression 'domain' in the Madras Estates Land Act was held to have been used in that limited sense. In these circumstances, the test that was applied by the High Court was that private land is "land which a zamindar has cultivated himself and intends to retain as resumable for cultivation by himself even when from time to time he demises it for a season." The Judicial Committee approved the aforesaid test laid down by Wallis C. J. as "That test is obviously suggested by Section 185 of the Act." It does not lay down that the test of personal cultivation is applicable even to cases where the question is whether the land which was not once ryoti and whose original was not known, was validly converted into the category of private land.

The next important case is *Jagadeesam Pillai v. Kuppummall*, AIR 1946 Mad 214 at pp. 221 and 222). Therein it fell for consideration whether the lands in dispute formed part of the Tanjore Palace Estate. It was held that those lands were ryoti and they were in the hands of tenants prior to 1862 when fresh title was conferred on the Raja by the Crown Grant as a result of which the landholder got both the melvaram and Kudivaram rights. On a careful review of the entire evidence—oral and documentary it was found that the lands in question remained the holdings of the tenants in which they had occupancy rights. It was further found that there was no material to hold that the lands in question had been cultivated or retained by the landholder. However, certain observations had been made by the learned Judge, Wadsworth, Officiating C. J., speaking for the court, about the meaning of the expression 'domain' and 'homefarm', thus:—

"It seems to us that sub-clause (b) (i) of the definition is intended to cover those lands which come obviously within what would ordinarily be recognised as the domain or homefarm; that is to say lands appurtenant to the landholder's residence and kept for his enjoyment and use."

The two words 'domain' and 'Home-farm' appear to have been found to be synonymous having identical import. In our view, there is no basis or justification for such an assumption either in precedent or etymology. What had been stated by the Judges therein would be applicable to domain land but not home-farm land. After pointing out the clauses other than sub-clause (b) (i) of the definition which deal with lands which would not necessarily be regarded as home-farm lands in the ordinary usage of the term but cultivated personally by the landholder for the requisite number of years, or lands in which the tenant's right has been purchased by the landholder, the learned Officiating Chief Justice observed (at pages 221, 222) thus:—

"It seems to us that the definition read as a whole indicates clearly that the ordinary test for 'private' land is the test of retention by the landholder for his personal use and cultivation by him under his personal supervision. No doubt such lands may be let on short leases for the convenience of the landholder without losing their distinctive character; but it does seem to us to be inconsistent with the scheme of the Madras Estates Land Act, as amended, to treat as private those lands with reference to which the only peculiarity is the fact that the landholder owns both the varams in the lands and has been letting them out on short term leases. There must, in our opinion, be something in the evidence either by way of proof of direct cultivation or by some clear indication of an intent to regard these lands as retained for the personal use of the landholder and his establishment, in order to place those lands in the special category of private lands in which a tenant under the Madras Estates Land Act cannot acquire occupancy rights."

Applying the aforesaid test applicable to the facts of that case where the lands were found to be ryoti ones, it was found that the lands in question were not proved to have been converted into private lands as there was no personal cultivation or intention to retain the same for personal use by the landholder. This may be noticed from the following passage (at p. 222):—

"It seems to us that there are no materials in the present case to show that these lands have been so cultivated or retained by the landholder. It is said that they are situated within a mile or two of one of the palaces in the estate; but they were not in origin home-farm lands, before the seizure of the estate from the Raja, and seeing that the estate has been under successive Receivers almost continuously since the re-grant, there is no evidence that the grantee treated these lands as lands kept for his personal use

and occupation or cultivated them under his personal supervision. Seeing that the lands cannot come under any other clause of the definition than Clause (b) (i) of sub-section (10) of Section 3 and having regard to the fact that the presumption is in favour of the ryoti character of the lands, we must hold that the plaintiff has failed to prove that the lands are private lands."

The aforesaid passage indicates without doubt that the test applied by the court governed the facts of that case. If the court had come to the conclusion that there was personal cultivation or intention of the landholder to retain the lands though situate one or two miles away from one of the palaces in the estate, the court would not have hesitated to uphold the contention of the landholder that they were private lands. The distance to the lands from the palace or the mansion of the landholder is not material and not a guideline on which the character of the land—whether private or ryoti can be determined. That apart, in the class of estates falling under Section 3 (2) (d), the landholder who resides in the main village, can, under no circumstances, own and possess private lands in such estates if the mansion test alone is to be applied.

In fact, the estates falling under Section 3 (2) (d) were found to comprise private lands of the landholder and hence, the category of home-farm land cannot validly be confined only to lands surrounding or appurtenant to the palace or mansion of the zamindar or landholder. In other words, lands irrespective of their location within an estate, can be proved to be private lands of the landholder, provided he satisfactorily displaces by positive evidence the presumption under Section 185 that a land is not private.

7. We shall now turn to an unreported decision of the learned Judges, Subbarao and Chandra Reddi, JJ. (as they then were) in *Parish Priest of Karayar Parish v. Thiagarajaswamy Devasthanam* (Appeal Nos. 176 to 178 and 493 of 1946 of the Madras High Court). Broadly accepting the test laid down in *Jagadeesam Pillai v. Kupppammal* (AIR 1946 Mad 214) the learned Judges summed up the legal position thus:—

"Private land as defined under the Madras Estates Land Act comprises two categories, private lands, technically so-called and lands deemed to be private lands. In regard to private lands strictly so-called, it must be a domain or home-farm land as understood in law. The mere fact that particular lands are described in popular province as pannai, Kambattam, sir, khas, is not decisive of the question unless the lands so-called partake of the

characteristics of domain or homefarm lands.

The test as to ascertain whether a land is domain or home farm is that accepted by the Judicial Committee in *Malikarjuna Prasad v. Somayya*, ILR (1919) 42 Mad 400 = (AIR 1918 PC 182) i. e. land which a zamindar has cultivated himself and intends to retain as resumable for cultivation by himself even if from time to time he demises for season. Whenever a question therefore arises whether a land is private land technically so-called as defined in sub-clause (1) of clause (b) to Section 3 (10) the presumption is that it is not a private land. The recitals in the leases, pattas etc. after 1918 must be excluded and the recitals in similar documents prior to 1918 in themselves are not sufficient evidence. There must be in addition direct evidence that these lands were either domain or homefarm lands in the sense that they were in their origin lands directly cultivated by the landlord or reserved by him for his direct cultivation."

The aforesaid dicta laid down by the learned Judge, Subba Rao, J. (as he then was) would not support the theory that the lands which are either cultivated personally or preserved by the landholder for his direct cultivation must invariably be appurtenant to the palace or mansion of the Zamindar in order to come within the category of domain or homefarm lands. The broad general test as enunciated by the Judicial Committee in *Malikarjuna Prasad v. Somayya*, ILR (1919) 42 Mad 400 = (AIR 1918 PC 182) that there must be proof that the lands were in their origin directly cultivated by the landholder or reserved by him for his direct cultivation in order to establish that they are domain or homefarm lands, was applied.

8. The next important decision is that of a Full Bench of the Madras High Court in *Periannan v. A. S. Amman Kovil*, AIR 1952 Mad 323 = (1952) 1 Mad LJ 71 (FB)). Therein the Devasthanam represented by its managers claimed to be the owners of malwaram and Kudiwaram interests in the lands which were being enjoyed as pennai lands or private lands. They also claimed that they were leasing out the lands, from time to time changing tenants and were also collecting 'swamibhogam' in recognition of their full proprietary rights. The defendants sought to evict the tenants. The tenants resisted the suit claim contending inter alia that the village in question was in estate under Section 3 (2) (d) of the Estates Land Act and they were cultivating tenants having occupancy rights and the lands in question were not private but ryoti. Both the courts below found the village to be an estate under Section 3 (2) (d). It was further found that the plain-

tiff-temple sold melwaram and Kudiwaram interests that the lands were private lands and that the defendants had not acquired occupancy rights in the lands either under the Act or by prescription. On an elaborate review of the entire case law on the subject and the impact of the provisions of Sections 3 and 185 of the Estates Land Act, the learned Judge, Satyanarayana Rao, J. enunciated the following propositions for the determination of the question whether the land in a given case is a private or ryoti land.

"1. If the land is known to be ryoti at its inception the only mode by which it could be converted into private land is by proof of continuous cultivation for a period of 12 years prior to the commencement of the Act.

2. Even if the nature of the land is not known, continuous cultivation for the required period of 12 years before the commencement of the Act would conclusively establish that the land is private land.

3. If there is no proof of cultivation for a continuous period of 12 years before the commencement of the Act, the land may be proved to be private land by the other methods provided the land was not shown to be once ryoti.

4. Cultivation of the lands or leasing of the lands under short-term leases may be one mode of proof.

5. An intention to cultivate or resume for cultivation is also a test to decide that the land is private land and such intention may be established by any other means, not necessarily by cultivation alone.

6. The essence of private land is continuous course of conduct on the part of the landholder asserting and acting on the footing that he is the absolute owner thereof and recognition and acceptance by the tenants that the landholder has absolute right in the land.

7. Mere proof that the landholder is the owner of both the warams is not sufficient to prove that the land is private land." (page 346).

The learned Judge disapproved the view taken by Seshagiri Ayyar, J. in the case of *Zamindar of Chelipalli v. Somayya*, ILR (1916) 39 Mad 341 = (AIR 1915 Mad 750 (2)) in assigning a restricted meaning to the words 'domain' and homefarm and the observations of Wadsworth, Officiating Chief Justice, in *Jagadeesan Pillai v. Kupppammal*, (AIR 1916 Mad 214) to the same effect, as the statutory provision of Section 185 of the Estates Land Act does not indicate or support the theory of such restricted meaning to the expressions 'domain' and 'homefarm'. The learned

Judge, Viswanatha Sastry in a separate judgment, concurred with the view expressed by Satyanarayana Rao, J. and the principles enunciated by him. We may notice the following passage at p. 358 where the learned Judge indicates the test for finding out whether the land is private or ryoti where its original character is not known and no evidence of direct cultivation is forthcoming due to lapse of time:—

"If, owing to lapse of time or other reasons, evidence of direct cultivation is not forthcoming its absence is not fatal to the claim that the land is private. Section 185 of the Act does not shut out, but on the other hand allows all evidence that would be relevant and admissible under the law of evidence, to prove that fact in issue, namely, whether the land is private or ryoti. Local usage or custom and the letting of the land as private land in leases before 1898 are specifically mentioned in Section 185 (1) and (2) as being relevant evidence but other evidence is also expressly made admissible under Section 185 (3)."

The classification of lands as private lands at the time of the permanent settlement or in the early records of zamindaries, the terms of the grant of an under-tenure, the assertion and enjoyment by the landholder of the right to both the warams, the intention to retain with himself the kudiwaram right and the consequent right to resume direct cultivation if he chooses, leases of the lands as private lands or with terms and conditions inconsistent with any right of occupancy in the leases, admissions by tenants that the landholder is the owner of both warams and that they have no occupancy rights, changes in the personnel of the tenants, variations in the rates of rent, payable by the tenants, these and kindred matters would be relevant and admissible in evidence to prove that the lands are private lands. The probative value of such evidence depends on the facts and circumstances of the each case.

9. We may now notice the view taken by Raghava Rao, J. in interpreting the words 'domain' and 'homefarm'. According to the learned Judge, the word 'homefarm' has not been confused in *Zamindar of Challapalli v. Somayya*, [LR (1916) 39 Mad 341 = (AIR 1915 Mad 750 (2))] with the expression 'domain' but 'interpreted and given effect to with reference to the land in question in that case'. The learned Judge observed (at page 363) thus:—

"The question in that case in fact arose with reference to other than domain land, i.e., land situated far away from the dwelling house of the zamindar and actually in a village of the zamindari known

as 'iyanki' different to the village Chella-pally in which the dwelling house of the zamindar was situated.

In that case as well as in other cases in which the question of the character of the land as private or ryoti arose with reference to the lands situated far away from the dwelling house or in any other village or villages than the villages in which the dwelling house was situate, the work of the court in the matter of the determination of the character of the land would have stood absolutely simplified, had the mansion house test been applied. In that case it was not the word 'homefarm' that fell to be applied to the land in question, and the test of direct cultivation propounded was really because of what was implicit in the word 'homefarm'.

It is not correct, in my opinion, to say that the Judges who decided that case treated the words 'domain' and 'homefarm' together as importing that the zamindar's private land must be confined to land surrounding his place or residence as in the case of demesne land of an English Lord of the manor. I not only feel highly reluctant, I find it in fact wholly impossible to impute to Judges so distinguished and so experienced as these who decided that case any ignorance of very well known fact that private land in an estate might not only be situate far away from the dwelling house of the zamindari in the same village but might also well lie scattered in different villages throughout the estate, especially when the case before the learned Judges was itself concerned with the latter type of land."

From the aforesaid passage, it is evident that the mansion house test can have reference and application only to domain lands but not homefarm lands.

10. We shall now turn to the decision of the Supreme Court in *Chidambaram Chettiar v. Santanaramaswami Odayar*, AIR 1968 SC 1005. The question that fell for decision was whether the disputed lands purchased by the appellant, Chidambaram, under a sale deed dated November 11, 1948, situated in Orathur Padugai attached to Pannimangalam, one of the villages comprised in what is known as Tanjore Palace Estate, were private lands as claimed by the appellant, or ryoti lands as urged by the respondents. Incidentally the court had to decide whether Orathur Padugai constituted a whole village and, therefore an estate within the meaning of Section 3 (2) (d) of the Estates Land Act. The Subordinate Judge, Tanjore dismissed the suits holding that Orathur Padugai was an estate and the lands situated in an estate were ryoti lands in which the defendants had

acquired occupancy rights. On appeal, the Madras High Court affirmed the decision of the trial court. See Chidambaram Chettiar v. Ramaswami Odayyar, (1957) 1 Mad LJ 72. The learned Judge, Govinda Menon, J. speaking for the court, applied the principles enunciated in Perianan's case AIR 1952 Mad 323 (FB) for determining the nature of the lands, as seen from the following passage (at p. 95):—

"What is private land is explained in the head note of the Full Bench decision in Perianan v. A. S. Amman Kovil, which is to the effect that mere proof, that the landholder is the owner of both warams does not necessarily mean that it is private land. Passages at pages 81, 89, 90, 97, 105 and 108 were also relied upon. We are satisfied that on the evidence there is no question of the lands being private." On further appeal, the Supreme Court, on a consideration of the material on record, found that Orathur Padugai is a whole village and, therefore constituted an estate within the meaning of Section 3 (2) (d) and proceeded to consider whether the suit lands were private lands within the meaning of Section 3 (10) (b) of the Estates Land Act. The learned Judge, Ramaswami, J. speaking for the court, observed at p. 1011 thus:

"Under Section 3 (10) of the Act, private land comprises of two categories, private lands technically so-called and lands deemed to be private lands. In regard to private lands technically so-called, it must be the domain or homefarm land of the landholder as understood to in law. The mere fact that particular lands are described in popular parlance as pennai, Kambattam, sir, khas, is not decisive of the question unless the lands so-called partake of the characteristics of domain or homefarm lands. In our opinion, the correct test to ascertain whether a land is domain or homefarm is that accepted by the Judicial Committee in Yerlagadda Mallikarjuna Prasad Naidu v. Somayya, ILR 42 Mad 400 = (AIR 1918 PC 182) that is whether it is land which a zamindar has cultivated himself and intends to retain as resumable for cultivation by himself even if from time to time he demises for a season."

The aforesaid passage is exactly similar to the one in the judgment of Subbarao, J. (as he then was) in the unreported decision of the Madras High Court in Appeals Nos. 176 to 178 and 493 of 1946, which we have extracted earlier. The learned Judge, Ramaswami J., proceeded to observe:

"The Legislature did not use the words 'domain' or 'homefarm land' without attaching to them a meaning; and it is reasonable to suppose that the Legislature would attach to these words the

meaning which would be given to them in ordinary English. It seems to us that the sub-clause (b) (i) of the definition is intended to cover those lands which come obviously within what would ordinarily be regarded as the domain or home-farm, that is to say, lands appurtenant to the landholder's residence and kept for his enjoyment and use. The homefarm is land which the landlord cultivates himself, as distinct from land which he lets out to tenants to be farmed. The first clause is, therefore meant to include and signify those lands which are in the ordinary sense of the word homefarm lands. The other clauses of the definition appear to deal with those lands which would not necessarily be regarded as homefarm lands in the ordinary usage of the term; and with reference to those lands there is a proviso that lands purchased at a sale for arrears of revenue shall not be regarded as private lands unless cultivated directly by the landlord for the required period. It seems to us that the definition read as a whole indicates clearly that the ordinary test for 'private land' is the test of retention by the landholder for his personal use and cultivation by him or under his personal supervision. No doubt, such lands may be let on short leases for the convenience of the landholder without losing their distinctive character; but it is not the intention or the scheme of the Act to treat as private those lands with reference to which the only peculiarity is the fact that the landlord owns both the warams in the lands and has been letting them out on short term leases. There must, in our opinion, be something in the evidence either by way of proof of direct cultivation or by some clear indication of an intent to regard these lands as retained for the personal use of the landholder and his establishment in order to place those lands in the special category of private lands in which a tenant under the Act cannot acquire occupancy rights."

Applying the aforesaid principles, the learned Judge considered the facts of that case for finding out whether the lands are private or ryoti in character and observed:—

"In the present case there is no proof that the lands were ever directly cultivated by the landholder. Admittedly soon after the grant of 1862 the estate came under the administration of Receivers, who always let out the lands to the tenants to be cultivated.....the description of the land as 'Padugai' is not of much consequence."

On a consideration of the entire evidence, it was found that "the appellant has not adduced sufficient evidence to rebut the presumption under Section 185 of the

Act, that the lands in the inam village are not private lands"..... In that case, the lands were admittedly once ryoti in character and they had been cultivated continuously by the ryots and therefore the test of direct cultivation or retention of by the landholder for his personal cultivation has been applied. Nowhere in that case, it has been held that the homefarm land must invariably be appurtenant for or surrounding the mansion or palace of the Zamindar or landholder but on the other hand, the land personally cultivated by the landholder was considered to be homefarm which is distinct from the land let out to tenants to be farmed and the same cannot be equated to domain land which is appurtenant to the landholder's residence.

Hence, any general observations made by the court in that decision must be confined to the facts of that case. We do not find any inconsistency between the decision of the Full Bench of the Madras High Court in Perianman's case, AIR 1952 Mad 323 (FB) and that of the Supreme Court in Chidambaram Chettiar's case (AIR 1968 SC 1005). Nor do we find any justification for holding that Perianman's case AIR 1952 Mad 323 (FB) has been impliedly overruled by the Supreme Court in Chidambaram Chettiar's case AIR 1968 SC 1005 and that therefore, Perianman's case is no longer good law. As pointed out earlier, the decision of the Division Bench of the Madras High Court in Chidambaram Chettiar's case (1957) 1 Mad LJ 72 has referred to and applied the principles laid down by the Full Bench of the Madras High Court and that decision of the Madras High Court has been affirmed by the Supreme Court on a consideration of the facts and circumstances.

The decision of the Full Bench in Perianman's case AIR 1952 Mad 323 (FB) is more based on the language of the provisions of Section 3 (10) of the Estates Land Act, which defines 'private land' and Section 185 which prescribes the tests for the determination of the question whether a particular land is a private land or not. Proof of direct cultivation by the landholder is undoubtedly a valuable and weighty evidence. Direct cultivation can be inferred from the accounts and other records usually kept by the landholder. However, if, due to lapse of time or other reasons, evidence of direct cultivation is not forthcoming, Section 185 can be applied for the determination of the issue, viz., whether the land is a private or ryoti. Local usage or custom and letting of the land as private land in leases executed before 1898 are specifically indicated in sub-sections (1) and (2) of Section 185 as being relevant and material evidence. Similarly any other evidence

that may be adduced is also expressly made admissible under Section 185 (3).

In view of the specific statutory provisions, it cannot be said that any evidence other than evidence to prove direct or personal cultivation by the landholder is either excluded, or not permissible to establish that a particular land is a private land. The burden of proof that a particular land in an estate is private land undoubtedly rests on the landholder himself as the statutory presumption is the other way. The statutory presumption however, is not absolute but rebuttable. The onus of proof assumes importance where no positive evidence is available or where the evidence adduced by either party or gathered by the Settlement Officer is not sufficient or adequate to displace this statutory presumption. But on the other hand, in cases where there is sufficient material on record, it loses its importance as it would be of little or no consequence and the concerned authority has to apply its mind to the entire material and determine the question whether the land in dispute is private or ryoti.

The onus to establish a particular land being private cannot be discharged merely by establishing that both the warams were granted to, or enjoyed by, the landholder without specific evidence of the treatment of the land as private land by the landholder either by direct cultivation or otherwise in the manner indicated above. The Supreme Court had to consider a case where the appellant had purchased lands situate in an estate in the year 1948 under a sale deed. With regard to such lands which shall not ordinarily be regarded as homefarm lands, the second proviso in Section 3 (10) (b) (iv) of the Estates Land Act to the effect that lands purchased in a sale for arrears of revenue shall not be deemed to be private lands unless they are proved to have been cultivated directly by the landholder for the required period, would come into play.

The appellant therein, therefore could succeed in his plea that the lands in question were private lands only on proving that they were directly cultivated by the landholder in order to replace the presumption under Section 185 that the lands in an inam village are not private lands. In view of the concurrent finding of fact that the lands were never cultivated by the landholder and they were always let out to tenants by receivers who administered the estate consistently after the grant of the estate in the year 1962, the Supreme Court held that the lands in question were not proved or established to be private lands and they were ryoti in character. The application of the test of direct cultivation to the lands in that case

by the Supreme Court must be confined to the facts therein and the test cannot be said to have been declared by the Supreme Court in law so as to apply to cases where from the inception, the nature of character of the lands in an estate is not known or traceable. It may not be out of place but is apt and necessary to notice in this context the weighty observations of Lord Halsbury in *Quinn v. Leathem*, 1901 AC 495.

"I wish to make, and one is to repeat what I have very often said before, that every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. The other is that a case is only an authority for what it actually decides."

See also *Suryanarayana Rao v. The Revenue Divisional Officer, Land Acquisition Officer, Guntur*, AIR 1969 Andh Pra 55 (FB) which is an authority for the proposition that a precedent is an authority for what has actually been decided but not the observations in that decided case. The observations of a general nature made by a court of law must be confined to the facts of the case before such court but cannot be extended to cases having dissimilar facts and circumstances.

11. We are also unable to agree with the appellant's counsel that the tests laid down by the Full Bench of the Madras High Court in clauses 4 to 6 of paragraph 49 of its judgment in *Periannan v. A. S. Amman Kovil* (AIR 1952 Mad 323 (FB)) are inconsistent with, or contrary to the test of direct cultivation prescribed by the Supreme Court for the determination of the question whether a particular land is private or ryoti. The sum and substance of the aforesaid three clauses is nothing but the test of direct cultivation by the landholder. As referred to above, the Supreme Court also was conscious of the fact that the lands retained by the landholder for his personal use and cultivation by him or under his personal supervision would not lose their character or nature as private lands even if they are let out to tenants on short term leases "for the convenience of the landholder without losing their distinctive character".

The heart of the matter is that there must be something in evidence to prove direct cultivation, or clear or unambiguous indication of an intention on the part of the landholder to regard the lands as retained for his personal use, to successfully claim them as his private lands in which a tenant under the Estates Land Act cannot acquire rights of occupancy.

If direct cultivation is proved, no further evidence is needed. Alternatively, the intention of the landholder to resume the lands for his personal cultivation can be established. One of the modes of proving such intention is the consistent conduct of the landholder in leasing out the lands to tenants under short term leases, as laid down by the Full Bench. Clause (4) of para 49 of the judgment of the Full Bench indicates nothing but personal cultivation or leasing of lands under short term leases as one of the modes of proof to hold them to be private lands.

Clause (5) as well as clause (6) indicates, in substance, the same view. The proof of continuous course of conduct of the landholder in asserting and acting on the basis that he is the absolute owner of the lands and recognition and acceptance by tenants of such right in the landholder, is nothing but establishing the fact that the landholder intended to cultivate or resume the lands for his personal use and occupation as and when he so desires and the tenants who were in possession and enjoyment for some time have not acquired the rights of occupancy. For the reasons stated, we have no hesitation to hold that there is absolutely no conflict between the decision of the Supreme Court in *Chidambaram Chettiar's case* AIR 1968 SC 1005 and that of the Madras High Court in *Periannan's case* AIR 1952 Mad 323 (FB).

12. Admittedly, there is no reference in the Supreme Court's judgment in *Chidambaram Chettiar's case*, to the case of *Periannan* and the latter decision is not specifically overruled. We do not however, find any justification or basis for the application of the doctrine of implied overruling in this regard. The Full Bench of the Madras High Court, in *Periannan's case*, AIR 1952 Mad 323 (FB) as referred to earlier, had reviewed the entire case law on the subject and based its decision on the interpretation of the provisions of Section 3 (10) and Section 185 of the Estates Land Act. If the test of direct cultivation that has been applied for by the Supreme Court is alone declared to be the law on the subject, then it would result in doing violence to the very language used by the legislature in Section 185 and Section 3 (10) of the Estates Land Act.

We are not prepared to hold that Section 185 (3) is redundant or the same has been enacted superfluously by the legislature. The legislature in its wisdom, had enacted the provisions of Section 185 (2) and (3) with a definite purpose so as to take in cases where there is no evidence of direct cultivation by the landholder due to lapse of time. Hence, the court has to look to and following the specific guidelines indicated in the very statute to

determine the nature and character of such lands.

13. We may notice the decided cases subsequent to the decision of the Supreme Court in Chidambaram Chettiar's case AIR 1968 SC 1005. The view now sought to be pressed upon us by the appellant's counsel that the decision of the Full Bench of the Madras High Court in Periannan's case AIR 1952 Mad 323 (FB) must be deemed to have been overruled by the Supreme Court in Chidambaram Chettiar's case and it is no longer good law, has been expressed by our learned brother, Chinnappa Reddy J. in W. F. No. 685 of 1968 (Andh. Pra.) and batch, quashing the decisions of the Estates Abolition Tribunal (District Judge, West Godavari, Eluru) in respect of certain lands in the inam estates of Kukundru and Veerabhadrapuram villages in the district of West Godavari holding that they are ryoti lands but not private lands.

Aggrieved by the decision of the learned single Judge, the landholders preferred an appeal. In *Narasimhachar v. Assistant Settlement Officer*, (1971) 2 Andh LT 17 a Division Bench consisting of Narasimham, J. (as he then was) and Parthasarathi J. reversed the decision of the single Judge and held that the dual test of direct cultivation or some clear indication of an intention to retain the lands for personal use propounded by the Supreme Court in Chidambaram Chettiar's case AIR 1968 SC 1005 is not repugnant to the propositions of law laid down in Periannan's case AIR 1952 Mad 323 (FB) and there is no incompatibility between the ratio of the decision of the Supreme Court and the propositions formulated by the majority of the Full Bench and the Full Bench decision has not been overruled either expressly or impliedly and it is still good law.

We approve the view taken by the Division Bench in *Narasimhachar v. Assistant Settlement Officer*, (1971) 2 Andh LT 17 at p. 35. There is no material to support the plea that Periannan's case AIR 1952 Mad 323 (FB) must be deemed to have been overruled on the application of the doctrine of implied overruling. It is well-settled that a decided case can be deemed to have been impliedly overruled only when the ratio of the subsequent decision of a superior court is inconsistent with, or is contrary to, that of the decision of the inferior court. As observed by Parthasarathi J. speaking for the court, in *Narasimhachar v. Assistant Settlement Officer*, (1971) 2 Andh LT 17 at p. 35:

"The doctrine of implied overruling can be resorted to only when there is no means of reconciling two pronouncements. An overruling is implied when the ratio of the later decision of a superior court is

inconsistent with that of the inferior court. The inconsistency becomes material only when it is attributable or is implicit in the ratio of the later decision. The mere existence of dicta suggestive of an inconsistency is insufficient foundation for invoking the rule of implied overruling. The test to be adopted for applying the rule of implied overruling may be gathered from *Morris v. Edmonton Corporation*, (1957) 2 QB 564. At p. 571 Lord Goddard, C. J. observed as follows:

"With regard to *Keats v. London County Council*, (1954) 1 WLR 1357 = ((1954) 3 All ER 303) my view is that it is irreconcilable with *East Riding County Council v. Park Estate (Bridlington) Ltd.* (1957 AC 228) and I think in effect although their Lordships did not refer to Keat's case in their speeches, it must be taken to be overruled by it. I cannot reconcile the reasoning of this court in Keat's case with the reasoning of the House of Lords in the *East Riding* case." We have, therefore, no hesitation to hold that the doctrine of implied overruling cannot be applied to the facts of the present case and there is no merit in this submission of the appellant. We may add that another Division Bench of this Court in *Yelipurupu Appadu v. S. Lakshminarayana* (1972) 2 Andh LT 30 at p. 34 opined that the proof of direct cultivation is not the only method by which it can be proved that the lands are private lands" and "proof can let in to show the intention of the landholder to regard the lands as retained for the personal use of the landholder and his establishment to treat the lands as private lands" but did not determine the question whether Chidambaram Chettiar's case has impliedly overruled Periannan's case, as it was considered to be unnecessary.

14. We may add that the Madras High Court, in *Arunachalam v. Estates Abolition Tribunal, Salem*, (1972) 2 Mad LJ 594 at pp. 597 and 598 applied the principles and tests laid down by the Full Bench of that court in Periannan's case AIR 1952 Mad 323 (FB) on the ground that the Supreme Court, in Chidambaram Chettiar's case AIR 1968 SC 1005 has reiterated the same propositions and that Periannan's case is still good law. Ramaprasada Rao, J. was of the view that the statement of law laid down by the Supreme Court in Chidambaram Chettiar's case is referable only to homefarm lands but not domain lands, and observed thus:

"The reference to domain lands in the earlier part of the paragraph has one purpose to serve, but the later tests laid down by the Supreme Court in the very same paragraph are of general connotation and apply to the genus, as I referred to, of private lands of which one such spe-

cies is domain or homefarm land. I understand the Chidambaram Chettiar's case as practicably repeating and accepting the well known tests laid down in Periannan's case, wherein the learned eminent Judges of our court have indicated the formula which has to be applied to ascertain whether lands in a Zamindari are private lands of a landholder or otherwise."

After referring to the propositions laid down by the Full Bench of the Madras High Court in Periannan's case, the learned Judge proceeded to state as follows:—

"These propositions are practically reiterated in Chidambaram Chettiar's case, excepting for the fact that some of the indications contained in the propositions in Periannan's case, have not been elaborately repeated in Chidambaram Chettiar's case. My understanding of Chidambaram Chettiar's case, is that the material propositions required to establish whether a particular land is private or not have been reiterated by the Supreme Court in Chidambaram Chettiar's case, and in this sense Periannan's case, is still good law."

The Madras High Court, therefore, rightly accepted the view expressed by the Division Bench of this court in Narsimhar v. Assistant Settlement Officer (1971) 2 Andh LT 17 referred to above and that Court is still of the view that the Full Bench decision in Periannan's case is still good law and governs the field and the same has not been overruled by the Supreme Court in Chidambaram Chettiar's case. In the circumstances, we overrule the contrary view reiterated by Chinappa Reddy, J. in W. P. No. 2863 of 1968 dated 17-1-1973 (Andh. Pra.) to the effect that the general principles laid down by the Supreme Court with regard to private lands cannot be lightly brushed aside.

15. The unreported decisions in W. A. No. 17 of 1968 dated 27-11-1969 (Andh Pra) and W. P. Nos. 2748 to 2755 of 1968 dated 10-8-1972. = (AIR 1973 Andh Pra 281) referred to in the order of reference in the present case, as taking the contrary view to the one expressed in Periannan's case, do not render any assistance to the appellant. In W. A. No. 17 of 1968 dated 27-11-1969 (Andh. Pra.) there was no reference even to Periannan's case but the court, on the material on record, upheld the concurrent findings of the Estates Abolition Tribunal and the Assistant Settlement Officer that the lands in question were never personally cultivated by the landholders and it was not their case that they demised them on short term leases with intent to resume cultivation and, therefore, rejected the claim of the landholders for the grant of patta on

the ground that they are their private lands.

In Writ Petitions Nos. 2748 to 2755 of 1968, dated 10-8-1972, a Division Bench consisting of Gopalrao Ekbote, C. J. and Madhava Rao J. did not hold that Periannan's case AIR 1952 Mad 323 (FB) has been overruled or the correctness of the principles enunciated therein for the determination of a particular land, being private or ryoti, has been doubted by the Supreme Court in Chidambaram Chettiar's case AIR 1968 SC 1005. Therein, the contention of the petitioner that the Estates Abolition Tribunal has misunderstood the position of law for the determination of the question whether the lands were ryoti or private lands, was rejected with an observation that "whatever may be the position earlier, the Supreme Court has now clearly established what the test is in regard to private land". After referring to the passage in the Supreme Court's judgment, the court proceeded to examine the facts for finding out whether the landholder has proved the lands in question to be his private lands. The learned Judge, Gopalrao Ekbote, C. J., speaking for the court, observed (at p. 34) thus:—

"In no case the petitioner asserts that he had personally cultivated the lands at any time. In no case again it has been successfully made out that the leases were given on short terms to various persons. In no case again any specific facts have been brought out which would indicate the intention of the petitioner to resume the lands for personal cultivation. There are no facts which would give a clear indication of an intent to regard all these lands as having been retained for personal use of the landholder. There is no proof whatsoever, which can be said to be satisfactory, to place all these or some of them in the special category of private lands in which the tenant under the Act cannot acquire occupancy rights. Some acts of cleansing the lands or growing some grass cannot be said to be such acts as would indicate an intention to cultivate personally the lands sometime or the other.

In fact, in regard to certain lands the Tribunal has held that these lands were converted as ryoti lands".

We therefore, hold that these unreported Division Bench decisions are consistent with the view taken by us, as there was a specific mention of the absence of letting the lands on short term leases to different individuals, which was considered to be one of the tests in Periannan's case, and do not even remotely come to the aid of the plea raised by the appellant herein.

16. To sum up 'Ryoti land' in which cultivating tenants acquire occu-

pancy rights, is cultivable land in an estate other than 'private land' defined under Section 3 (10) of the Estates Land Act, tank beds and bunds, drainage and irrigation channels, may be of different kinds. 'Domain' and 'Homefarm' lands, irrespective of their description such as kambattam, khas, sir or pannai, are different and distinct and do not belong to one and the same category of private lands. Land immediately surrounding the mansion, palace or dwelling house, park or chase of the landholder may fall under the category of 'domain land'. The theory of the land being appurtenant to, or surrounding the palace or mansion of the zamindar or landholder, otherwise known as mansion test, cannot be applied to determine a particular land being homefarm or not. The actual distance of the land or its exact location in the main village or in any other village in the estate is not material and relevant. There is no basis or warrant for an assumption that the two words 'domain' and 'homefarm' are synonymous having identical import either in precedent or etymology.

17. The statutory presumption that the land is in inam villages is not private but ryoti is not absolute but only rebuttable. The presumption can be displaced by positive evidence on record irrespective of the source from which it emanated, as evidenced by Section 135 of the Estates Land Act. Section 185 specifies the guidelines for the determination of the question whether a particular land is private or ryoti. Such question is a question of fact depending upon the facts and circumstances of each case. But however, what tests, guidelines and principles that should be applied for the determination of this moot question fell for consideration in a catena of decided cases of which Mallikarjuna Prasad v. Somayya, ILR (1919) 42 Mad 400 = (AIR 1918 PC 182), Jagadesam Pillai v. Kupparammal [AIR 1946 Mad 214], Parish Priest of Karayar Parish v. Thiagarajisami Devasthanam (Appeals Nos. 176 to 178 and 493 of 1946) (Mad.), Perianan v. A. S. Amman Kovil, AIR 1952 Mad 323 (FB) and Chidambaram Chettiar v. Santhanaramaswami Ocayar (AIR 1968 SC 1005) are the land marks. The nature of character of some land may or may not be known from its inception. It may also be altered or changed. A private land may become ryoti and a ryoti land can similarly be converted into a private land. Where a land is admitted to be ryoti from its inception, the only method by which such land can be proved to have been converted into private land is by establishing continuous cultivation by the landholder for a period of 12 years prior to the commencement of the Estates Land Act, i.e. 1908 or 1936 when the definition of 'estate' was amended. If the nature or

character of the land is not known from its origin, the guidelines that should be applied for the determination of the land being private or ryoti, would differ and vary. Personal cultivation for a continuous period of 12 years before the commencement of the Estates Land Act would conclusively prove the land to be private land. Where it is not possible to establish personal cultivation for a continuous period of 12 years before the commencement of the Estates Land Act due to lapse of time or any other permissible ground, it is still open to the landholder, as indicated in S. 185, to establish his claim by proving any of following, provided the land was not proved or shown to be one ryoti: (i) personal cultivation or enjoyment of the land by himself or the members of his family or through his agents or farm-servants for some period coupled with his right to possession—be it physical or constructive on the appointed day fixed for the abolition of the estate and taking over of the same by the Government under the Estates Abolition Act. Mere possession of the land on the material dates by a tenant or a trespasser would not deprive the landholder from claiming the land as his homefarm land.

(ii) intention of the landholder to cultivate or resume the land for personal cultivation. Such intention of the landholder can be inferred from admitted or proved facts such as (a) continuous course of conduct of the landholder asserting and acting on the basis that he is the absolute owner of the land and (b) recognition and acceptance on the part of the tenants who are inducted into possession of the lands under short term leases that the landholder has absolute right, interest and title in the land. It is the totality or the cumulative effect of the relevant facts and circumstances that would be material to determine the existence or otherwise of the intention of the landholder to cultivate or retain the land for his personal cultivation, but each factor or circumstances by itself would be of little or no consequence or importance. The heart of the matter is that the landholder, in order to establish his claim that the land in dispute is his private land, must prove direct cultivation by himself or the members of his family or through his agents or farm-servants for some period and on the material dates or in the alternative prove his intention to retain the land for his personal cultivation and use as and when he desires. The mere possession of both the warams by the landholder would not displace the statutory presumption unless something in the evidence either by way of proof of direct cultivation or by some clear indication of an intent to regard the land as retained for his personal use is

established. The tests laid down by the majority of the Full Bench in clauses 4 to 6 of paragraph 49 of its judgment in *Periannan v. A. S. Amman Kovil*, AIR 1952 Mad 323 (FB) are in no way in conflict with the test of personal cultivation and the intention to retain for personal cultivation enunciated by the Supreme Court in *Chidambaram Chettiar v. Santhanaramswami Odayar* (AIR 1968 SC 1005). The test laid down and applied in *Chidambaram Chettiar's* case as well as in *Jagadeesam Pillai's* case must be confined to the facts of those cases where the lands in dispute are known once to be ryoti. Hence, it cannot be said that the test of personal cultivation alone can be applied to cases where the nature and character of the land from its inception is not known. The tests laid down in paragraphs 4 to 6 of paragraph 49 of the judgment in *Periannan's* case have not been overruled either specifically or impliedly in *Chidambaram Chettiar's* case and they are still good law. Some observations of the Supreme Court in *Chidambaram Chettiar's* case, even if construed to suggest contrary principles in detail, are in substance in accord with the dicta and guidelines enunciated in *Periannan's* case. From such observations or from a reading of the entire judgment, it cannot be inferred that the Supreme Court intended to overrule by implication the decision in *Periannan's* case, as the doctrine of implied overruling can only be applied or invoked where it is impossible to reconcile the two pronouncements. There is absolutely no basis or foundation either to suggest or point any inconsistency or conflict between the two decisions warranting the application of the rule of implied overruling.

18. For all the reasons stated, our answer to the question No. 1 is in the negative and against the appellant.

19. This brings us to examine the facts found by, or admitted before, the Estates Abolition Tribunal, the final fact-finding authority, and apply the principles enunciated by us for the purpose of determining the land in dispute to be private or ryoti.

20. The learned District Judge, Sri K. Punnayya (as he then was) constituting the Estates Abolition Tribunal, Guntur, on a careful appraisal of the entire evidence—oral and documentary, found that the landholders were getting the land in question cultivated ever since 1918 till 1943 through short period leases of 2 or 3 years without losing their kudiwaram rights and continuously asserting their ownership and making the tenants conscious of the fact that the landholders are the absolute owners of the land and the landholders personally cultivated the

land from 1944 to 1949 through one Raghavulu and thereafter directly cultivated the land themselves from 1949 to 1953-54 and that the present respondent-tenant was inducted into possession only in the year 1954 but not earlier. The aforesaid findings of fact are amply supported by the evidence—oral and documentary—on record and those findings of fact are binding on this writ court.

In this premise, it must be held that on the material date i.e., 7-9-1951 when the village of Kantetivari Kandriga, Narasaraopet taluk in the district of Guntur, was notified and taken over under the provisions of the Estates Abolition Act, the land in question was in the possession and enjoyment of the landholders and the appellant herein did not have any connection with, or right in, this land, as he was inducted into possession even as tenant only in the year 1954 but not earlier. He has absolutely no claims for the grant of patta on the ground that he was in possession of the land on the material date as a cultivating tenant and the land in question was a ryoti land. This finding itself is sufficient to reject the claim of the appellant. However, the Tribunal, in our view, has rightly considered whether the land in question is private land of the landholders or ryoti land. Whether a particular land in a given case is a private land or a ryoti land, is a question of fact depending upon the facts and circumstances of that case.

The Tribunal, on a very careful consideration of the entire facts and circumstances has, in our view, rightly held that the landholders have personally cultivated the land for some time and by virtue of the short term leases and the other admitted facts, the landlords must be found to have the intention to retain the land for personal use and cultivation and there is no material to hold that the land is ryoti and the tenants have acquired occupancy rights thereon. The documents and other evidence pointed out earlier while narrating the facts would clearly establish that the landholders have, by adducing positive evidence oral and documentary, established beyond doubt that the land in question was not only personally cultivated by them for some reasonable period but they also intended to retain the same for their personal use and cultivation, and discharged the onus of proof that the land is private land and not ryoti so as to bring the same within the category of private lands.

The finding of fact arrived at by the Tribunal that the land in dispute is the private land of the landholders and they are entitled for the grant of a patta under Section 15 of the Estates Abolition Act is

binding on the writ Court and the same cannot be interfered with until and unless this court is satisfied that the finding is vitiated by illegal considerations or erroneous or wrong application of the principles of law and the tests laid down by decided cases for determining the question whether the land is a private land as claimed by the landholders or ryoti land as contended by the tenant.

On a careful consideration of the entire judgment of the Tribunal, we are satisfied that the Tribunal has applied the correct principles of law enunciated in Perianan's case (AIR 1952 Mad 323 (FB)) and reiterated by the Supreme Court in Chidambaram Chettiar's case (AIR 1968 SC 1005) and arrived at a correct conclusion that the land in question is private land of the landholders. We have absolutely no reason to interfere with the finding of the Tribunal which is supported by ample evidence—oral and documentary, in support of its conclusion. We may add that our learned brother, Kuppuswami, J., also has agreed with the finding of fact on a careful appraisal of the entire material on record and we are not persuaded to take a different view.

21. The further submission of Sri Gopal Rao is that the finding of the Tribunal that the land in question is a private land is based on inferences drawn on inadmissible evidence and the evidence on record is not sufficient to replace the presumption under Section 185 of the Estates Land Act, that the land was once ryoti and that the landholders cannot succeed unless they prove personal cultivation for a continuous period of 12 years prior to the said Act. The plea that the land in question was once ryoti was not raised at the inception. The specific case set up by the appellant before the Assistant Settlement Officer as well as the Tribunal was that he was in possession of the land as a cultivating ryot under the landholder since 1925. The appellant failed to substantiate his plea that he was a cultivating tenant since 1925 onwards and the Tribunal has in our view, rightly rejected his claim. That apart, it is found on the material on record that this land was originally a Government poramboke but not a ryoti land. The appellant was inducted into possession as tenant by the landholders only in the year 1954 and he had nothing to do with the land prior thereof. Hence, the present plea cannot be availed of by the appellant. He cannot be permitted to raise the new plea which is not supported by any evidence.

22. The further submission of the appellant that Exs. P-4 and P-5 are inadmissible in evidence as they have not been registered and they cannot be looked into for any purpose to show that the land in question is a private land, also is de-

void of any merit. As pointed out earlier, the Tribunal has, in our view, rightly held that the land in question was under the personal cultivation of the landholders from 1944 to 1949 through one Raghavulu (P.W. 12) and under direct cultivation by themselves from 1949 to 1953-54 and from 1928 to 1943 they were let out to ryots on short term leases of 2 or 3 years and that too, by changing the tenants. In the circumstances, the Tribunal has found that the landholders intended to resume the land for personal cultivation and use even during the period when it was let out on short term leases to different tenants.

23. In the circumstances, our answer to the second question is that the land in question is a private land but not a ryoti land and the appellant has not acquired any rights of occupancy.

24. In the result, the appeal merits dismissal and we, hereby dismiss the same with costs to respondent No. 3. Advocate's fee Rs. 250.

Appeal dismissed.

AIR 1976 ANDHRA PRADESH 65

ALLADI KUPPUSWAMI AND
GANGADHARA RAO, JJ.

Khaja Begum, Petitioner v. Gulam Mohiuddin and others, Respondents.

Civil Revn. Petn. No. 1215 of 1972, D/- 9-4-1975.*

(A) Civil P. C. (1908), S. 153 and O. 22, R. 4 — Power to amend defects in proceedings — Money suit filed against already dead sole defendant — Death known subsequently — If and when substitution of legal representatives not permissible.

The section confers a general power to amend defects in a proceeding and so when a suit is filed against a dead person the plaint can be amended to substitute the legal representatives of the deceased. Therefore when a money suit is filed against a dead sole defendant and the death is known only subsequently the suit is not void ab initio and can be continued against the legal representatives of the deceased if their substitution is made within the limitation period for the suit.

(Paras 5 and 9)

It cannot be said the section does not apply when there is a sole defendant since on his death before the suit there is "no proceeding in a suit" within the meaning of the section. Case law discussed.

(Para 9)

*(Decided by Division Bench on order of reference made by Obul Reddi, J., D/- 21-9-1973.)

HS/JS/C995/75/JRM

(B) Civil P. C. (1908), O. 1, R. 9, O. 22, R. 4, S. 52—Non-joinder — Money suit based on promissory note — Only some of legal representatives of deceased sole defendant substituted — If and when fatal.

When in a money suit based on promissory note only some of the legal representatives of the deceased sole defendant are substituted and some more of his heirs are left behind, the suit cannot be claimed to be bad for non-joinder. In view of S. 52 it is the estate in the hands of the substituted legal representatives that is liable for satisfaction of the decree. AIR 1966 SC 792, Followed.

(Para 10)

(C) Hyderabad Money Lenders Act (5 of 1349), Ss. 9 (2), 2 (4) — Bar to suit by unlicensed moneylender — If and when will not operate.

When money is not advanced on interest in cash or in kind, in view of S. 2 (4) it is not a loan. When in a transaction no interest had been stipulated but the borrowers had still to pay interest such transaction is not a loan under S. 2 (4) and therefore the money lender need not have a licence to file a suit thereon. Thus his suit cannot be dismissed for his not holding a licence. ILR (1956) Hyd 690 and (1962) 1 Andh WR 144, Followed.

(Para 13)

Cases Referred: Chronological Paras

AIR 1966 SC 792 = (1966) 1 SCR 937	10
(1962) 1 Andh WR 144	13
AIR 1961 Andh Pra 239 = (1960) 2 Andh WR 268	4, 7, 8, 9
AIR 1961 Pat 480	4, 8
ILR (1956) Hyd 690	13
AIR 1955 Mad 294 = (1955) 1 Mad LJ 337	9
AIR 1955 Mad 644 = (1955) 2 Mad LJ 184	4, 5, 7, 8
AIR 1953 Bom 356 = 55 Bom LR 331	7, 9
AIR 1946 Sind 20 = ILR (1945) Karachi 321	9
AIR 1937 Bom 401 = 39 Bom LR 444	7
AIR 1933 Mad 454 = 37 Mad LW 489	6, 9
1928 Mad WN 240	6, 9
AIR 1925 Mad 1210 = 49 Mad LJ 590	6
(FB)	
AIR 1918 Mad 794 (1) = 42 Ind Cas 539	6, 9
AIR 1916 Mad 440 = 2 Mad LW 828	6, 9
AIR 1914 Cal 895 = 24 Ind Cas 112	9
(1908) ILR 31 Mad 86 = 17 Mad LJ 551	5, 7, 9
(1893) ILR 16 Mad 319	6

GANGADHARA RAO, J.:— This Civil Revision Petition has come up before us on a reference made by our learned brother Justice Obul Reddi (as he then was) on the ground that the question of

law involved in this case is of importance which should be decided by a Bench.

2. The plaintiff is the petitioner, she filed a Small Cause Suit No. 1109 of 1970 in the Court of the Additional Chief Judge, City Small Causes Court, Hyderabad against one Gulam Mohiuddin the 1st defendant, alleging as follows:

The defendant borrowed from him Rs. 750 on 30-12-1965 and executed a promissory note and also a receipt in his favour. Subsequently the defendant paid Rs. 25 on 15-11-1968 and made an endorsement of payment on the back of the promissory note. He was still due in a sum of Rs. 725 which he did not pay in spite of repeated demands. Hence the suit was filed for recovery of Rs. 725 on 16-11-1970.

Subsequently when he came to know that the sole defendant died on 12-11-1970 i.e., four days before the suit, he filed I. A. No. 1515/70 on 10-12-1970 to bring the legal representatives of the deceased defendant as defendants 2 to 5 on record and it was allowed by the lower court on 1-4-1971. Defendants 2 to 5 in their written statement denied the truth of the suit debt, and contended that the suit was not maintainable since it was filed against a dead person and also there are three more legal representatives of the defendant who were not impleaded and hence the suit was bad for non-joinder of parties. They further contended that the plaintiff is a money lender and since she did not possess a licence, she cannot maintain the suit under Section 9 (2) of the Hyderabad Money Lenders Act.

3. The lower court while holding that the original debt and part payment were true, dismissed the suit on three grounds. Firstly, the suit was originally instituted against a dead person. Therefore, it was void ab initio and it could not be continued subsequently against the legal representatives of the deceased defendant. Secondly that two more daughters and son of the deceased defendant were not impleaded as parties and, therefore, the suit was bad for non-joinder of necessary parties. Thirdly, the plaintiff was a money lender and since she did not possess a licence, she could not file the suit.

4. The learned counsel for the petitioner Md. Mukarramuddin in a neat and brief argument has assailed the findings of the lower court. He contended that though originally the suit was filed against a dead person, still his legal representatives were brought on record before the period of limitation expired, and, therefore, the suit is maintainable against defendants 2 to 5. In this connection, he relied upon Section 153, Civil Procedure Code and the decisions reported in K. Ismail v. Pavu Amma, AIR 1955 Mad 644

C. Raju v. D. D. Italia, AIR 1961 Andh Pra 239 and Jagarnath v. Commrs. of Buxar Municipality, AIR 1961 Pat 480.

5. Section 153, Civil P. C. says:

"The Court may at any time, and on such terms as to costs or otherwise as it may think fit, amend any defect or error in any proceeding in a suit; and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on such proceeding."

This section is new. It confers a general power on the court to amend the defects and errors in any proceeding in a suit and to make all necessary amendments for the purpose of determining the real question or issue between the parties in the suit. So when a suit is filed against a dead person the plaint can be amended by substituting the legal representatives of the deceased defendant, but the suit should be treated as instituted on the date of the application for amendment. If on that date the suit is not barred by limitation it will be in effect a suit validly instituted against the legal representatives of the deceased defendant. In the case reported in *K. Ismail v. Pavu Amma*, AIR 1955 Mad 644 the facts are that a suit O. S. No. 1150/44 was filed against two defendants and after summons were taken out, it was discovered that both the defendants were dead. Thereafter, by an Interlocutory Application the legal representatives of the two defendants were brought on record, and the suit was decreed.

Subsequently another suit O. S. No. 1170/45 was filed to set aside the decree in O. S. No. 1150/44 on the ground that it was void because both the defendants in that suit were dead at the time when the suit was filed and the court had no jurisdiction to bring on record the legal representatives of the persons who were dead before the institution of the suit for the reason that a plaint filed against dead person cannot be considered to be in existence at all and the whole proceedings are ab initio void and illegal.

Both the lower courts held that the entire proceedings in O. S. No. 1150/44 were void from the very inception and decreed the suit. They relied upon the decision reported in *Veerappa Chetti v. T. Ponnai*, (1908) ILR 31 Mad 86 which held that a plaint filed against a dead person is non est and that there are no proceedings that can be deemed to be pending in court by the filing of such a plaint as there is nothing in the Civil Procedure Code which authorises the institution of such a suit against a deceased person. It was further held that there is no jurisdiction in the Court to allow the plaint in such a case to be amended by substitut-

ing the names of the representatives of the deceased person even when the suit was instituted bona fide and in ignorance of the death of the defendant. Adverting to this decision, Justice Govinda Menon observed as follows:—

"It has to be mentioned that Sec. 153, C.P.C. was not in existence at the time of the decision in *Veerappa Chetti v. T. Ponnai*, (1908) ILR 31 Mad 86. Supposing the plaintiff in O. S. No. 1150/44 when apprised of the fact of the death of the persons impleaded as defendants in the plaint before the filing of the suit, took return of the plaint and by using the same stamps scored out the names of the existing defendants and in their place had the proper persons impleaded and presented the plaint as a fresh one can it be said that such a plaint cannot be treated as instituted on the day on which the fresh presentation was made. In my opinion there is nothing wrong in that procedure. All the cases in which it has been held that the court has no power to amend the plaint filed against a deceased person by substituting the names of the representatives of the deceased person arose out of the applications for amendment of the plaint made at a time when the suit if instituted would have become barred. The result of the amending would put back the suit to the date of the original presentation of the plaint and thereby save the period of limitation. No case has been cited before me at the bar in which it has been held that even if a fresh suit filed on the date when the amendment was made is not barred, still the court is deprived of the power of amending which results in making the suit a new one filed afresh."

6. The learned Judge further held that in that decision there is no consideration of the correctness or otherwise of the proposition regarding the validity of the amendment if the amended plaint were to be considered as having been filed on the date when the amendment was sought for and when the suit against the persons newly impleaded would not be barred. He also referred to the earlier decisions of the Madras High Court reported in *Mallikarjuna v. Pullayya*, (1893) ILR 16 Mad 319; *Rasa Goundan v. Bichamuthu Pillai*, AIR 1918 Mad 794 (1); *Arunachalam Chettiar in Re*, AIR 1916 Mad 440; *Calicut Municipal Council v. Kunhipathumma*, AIR 1933 Mad 454; *Chidambaram Chettiar v. Narayanswami Iyer*, 1928 Mad WN 240; and *Gopalakrishnayya v. Lakshmanarao*, AIR 1925 Mad 1210 (FB).

The case reported in *Gopalakrishnayya v. Lakshman Rao*, AIR 1925 Mad 1210 (FB) is case of an appeal and the Full Bench held that "if an appeal is presented against a person who is dead at

the date of presentation the Court may under Section 153, C.P.C. permit the cause-title to be amended or may return the appeal memorandum for amendment and representation. If the appeal memorandum is not allowed to be amended, the party may apply for refund of the spoiled stamp and may present a fresh appeal. But if the appeal is out of time against the legal representative, the court has always power to excuse the delay in presentation before it can proceed to hear the appeal but it is a matter for its discretion whether it would excuse the delay."

Justice Govinda Menon observed that the principles laid down in the Full Bench case apply to the facts of the case he was dealing with and that Section 153, C.P.C. in so many words speaks of an amendment by a Court of first instance and this can be extended so far as the appellate court is concerned, by the operation of Section 141, C.P.C. That being the case there is nothing that prevents the trial court from considering the plaint as if it was filed against the new parties on the date the application for amendment was made.

7. In the case of our High Court reported in C. Raju v. D. D. Italia, AIR 1961 Andh Pra 239 the facts are that a suit was originally filed against father and his son as surety, and it subsequently transpired that the father was dead before the institution of the suit. So an application was filed by the plaintiff to bring on record, defendants 2 to 7 as the legal representatives of the 1st defendants and it was allowed by the trial court. Questioning the validity of that order, a revision was filed in the High Court. Umamaheswaram J. on a review of the entire case law on the subject held that the case reported in Veerappa Chetty v. T. Ponnen, (1908) ILR 31 Mad 86 cannot be regarded as good law after the enactment of Sec. 153 in the new Code.

He agreed with the view of Justice Govinda Menon reported in K. Ismail v. Pavu Amma, AIR 1955 Mad 644 and held that there is nothing which prevents the trial court from construing the plaint as if it was filed against new parties on the date the application for amendment was made so long as the suit against them was not barred by limitation. The learned Judge disagreed with the view taken in Bai Pani Vankar v. Madhabhai Galabhai, AIR 1953 Bom 356 but followed the decision reported in Alabhai Vajsurbhai v. Bhura Bhaya, AIR 1937 Bom 401. He finally held that the terms of Section 153, C.P.C. are sufficiently wide and it is open to the Court to implead the legal representatives as party defendants so long as the suit against them is not barred by limitation.

8. We respectfully agree with the reasoning of Justice Govinda Menon in K. Ismail v. Pavu Amma, AIR 1955 Mad 644 and of Justice Umamaheswaram in C. Raju v. D. D. Italia, AIR 1961 Andh Pra 239. This is also the view of the Patna High Court vide Jagannath v. Commrs. of Buxar Municipality, AIR 1961 Pat 480. Ultimately all laws of procedure should be so interpreted as to advance justice but not to defeat it on technical considerations.

9. Md. Jahangir Ali the learned advocate for the respondents has relied upon the decision reported in Veerappa Chetty v. Tindal Ponnen, (1908) ILR 31 Mad 86 and the subsequent decisions of the Madras High Court reported in In Re A. L. A. R. R. M. Arunachalam Chettiar, AIR 1916 Mad 440, Rasa Goundan v. Pichamuthu Pillai, AIR 1918 Mad 794 (1), Calicut Municipal Council v. Kunhipathumma, AIR 1933 Mad 454 and Chidambaram Chettiar v. Narayanaswamy Iyer, 1928 Mad WN 240 which followed Veerappa Chetty v. Tindal Ponnen, (1908) ILR 31 Mad 86. For the reasons stated supra, we hold that the decisions reported in Veerappa Chetty v. Tindal Ponnen, (1908) ILR 31 Mad 86 is no longer good law.

In Calicut Municipal Council v. Kunhipathumma, AIR 1933 Mad 454 the primary question was whether Section 14 of the Limitation Act was applicable when the Court wrongly allows an application to bring the legal representatives on record and the plaintiff seeks to deduct the period between the filing of the plaint and the order of the court allowing that application. The decision reported in Chidambaram Chettiar v. Narayanaswami, 1928 Mad WN 240 does not show whether the petition to bring the legal representatives of the deceased defendant on record was filed before the period of limitation has expired. Sri Mohd. Jahangir Ali has also argued that Section 153, C.P.C. does not apply when there is a sole defendant and he dies before the institution of the suit, "for there is no proceeding in a suit within the meaning of that section". We are unable to appreciate this distinction.

He also tried to distinguish C. Raju v. D. D. Italia, AIR 1961 Andh Pra 239 on the ground that in that case there were two defendants and only one defendant died and the other defendant was alive. We do not see how it makes any difference. He referred to a decision reported in Mohideen v. V. O. A. Mohomed, AIR 1955 Mad 294. But there the facts are altogether different. Where a foreign firm instituted a suit in its firm's name which it cannot do in view of Order 30, Rule 1 and when the maintainability of the suit was objected to on that ground, the plaint

was amended by the substitution of the names of the partners. In this connection it was held that there was no addition of new plaintiffs but merely a clarification of the individual already on record and as such Section 22 of the Limitation Act was not attracted to the case.

He also referred to the decisions reported in *Bejoy Chand v. Amulya Charan*, AIR 1914 Cal 895; *Bai Pani v. Madibhai*, AIR 1953 Bom 356 and *Karachi Municipality v. Baradio*, AIR 1946 Sind 20. They followed *Veerappa Chetty v. Tindal Ponnen*, (1908) ILR 31 Mad 86. But they did not consider the question whether the suit would still be bad if the legal representatives of the deceased defendant are brought on record before the period of limitation has expired. In the result we do not agree with the view of the lower court that the suit as instituted was ab initio void and it could not be continued by the legal representatives of the deceased defendant when admittedly they were brought on record before the period of limitation for the suit had expired.

10. The next question is whether the suit is bad for the non-joinder of three of the legal representatives of the deceased defendant. Admittedly defendants 2 to 5 are the legal representatives of the deceased defendant. It is stated that the deceased defendant had left behind him two more daughters and a son besides defendants 2 to 5. But we find from the order of the Additional Chief Judge that while allowing the petition i.e. impleading of defendants 2 to 5 as legal representatives under Order 22, Rule 4, C.P.C. it was observed by the then learned Judge that the other daughters and the son need not be impleaded. Apart from that under Section 52, C.P.C. it is the estate in the hands of the defendants that would be liable for satisfaction of the decree. It has been held by the Supreme Court in *Mohd. Sulaiman v. Mohd. Ismail*, AIR 1966 SC 792 as follows:

"Ordinarily the Court does not regard a decree binding upon a person who was not impleaded *eo nomine* in the action. But to that rule there are certain recognised exceptions. Where by the personal law governing the absent heir the heir impleaded represents his interest in the estate of the deceased, there is yet another exception which is evolved in the larger interest of administration of justice. If there be a debt justly due and no prejudice is shown to the absent heir, the decree in an action where the plaintiff has after bona fide enquiry impleaded all the heirs known to him will ordinarily be held binding upon all persons interested in the estate. The Court will undoubtedly investigate, if invited, whether the decree was obtained by fraud, collusion or other

means intended to overreach the court. The Court will also enquire whether there was a real contest in the suit, and may for that purpose ascertain whether there was any special defence which the absent defendant could put forward, but which was not put forward. Where however on account of a bona fide error, the plaintiff seeking relief institutes his suit against a person who is not representing the estate of a deceased person against whom the plaintiff has a claim either at all or even partially, in the absence of fraud or collusion or other ground which taint the decree, a decree passed against the persons impleaded as heirs binds the estate, even though other persons interested in the estate are not brought on the record. This principle applies to all parties irrespective of their religious persuasion."

11. In view of this pronouncement of the Supreme Court we do not agree with the lower Court that the suit is bad for non-joinder of some of the necessary parties.

12. The third question is whether the plaintiff who is a money lender cannot file the suit because she did not obtain the licence under the Hyderabad Money Lenders Act. The lower Court has found on evidence that the plaintiff is a money lender who collects interests at the rate of 36% per annum. Her usual mode of lending monies is by way of taking a sale deed with an agreement to reconvey the property and to recover the interest calling it as rent. The advocate for the plaintiff has not chosen to canvass this finding of fact and we have no reason to disagree with this conclusion of the lower court.

13. The next question is whether in the absence of a licence the plaintiff's suit for recovery of the amount in question should be dismissed. Loan is defined under Section 2 (4) of the Hyderabad Money Lenders Act (V of 1349) as a loan secured or unsecured advanced on interest in cash or in kind, and shall also include every transaction which is in substance a loan, but shall not include the following: We are not concerned with the other clauses of the section. Section 2 (7) defines money lender as a person including a pawn-broker, who within the meaning of this Act, only advances loan in the ordinary course of his business or does so along with other business, and shall also include the legal representative.

Section 9 (2) says that if it is proved that the plaintiff is a money lender as defined in sub-section (7) of Section 2, but does not hold a licence granted under Section 3, the Court shall dismiss his suit. So it will not be a loan if it is not advanced on interest in cash or in kind. Ad-

mittedly in this case no interest was stipulated nevertheless they had to pay interest. They have not also adduced any evidence in this regard. Therefore, the suit transaction is not a loan as defined in the Act and consequently the plaintiff need not have a licence to file this suit. This is also the view taken in Dondiba v. Narsinga, ILR (1956) Hyd 690 and Dwarakadas v. Habib Mohammad Jaffer, (1962) 1 Andh WR 144. Therefore, we disagree with the finding of the lower Court that since the plaintiff did not hold a licence the suit should be dismissed.

14. In the result, we allow the Civil Revision Petition and decree the Small Causes Suit No. 1109 of 1970 on the file of the Additional Chief Judge, City Small Cause Court, Hyderabad in a sum of Rs. 725 to be recovered from out of the assets of the deceased defendant in the hands of the defendants 2 to 5. The plaintiff is entitled to her costs in the Small Cause Suit but not in this Revision.

Petition allowed.

AIR 1976 ANDHRA PRADESH 70

MADHAVA RAO, J.

Ghatmal Champalal, Petitioner v. Amaravathi Dyeing Private Ltd., Respondent.

Civil Revn. Petn. No. 494 of 1974, D/- 8-4-1975.

(A) Civil P. C. (1908), O. 14, R. 2 — Preliminary issues — Power of Court to try first.

The salutary rule of procedure which must be generally followed is that the Court should give its decision on all the issues in the case so as to avoid unnecessary remand and protraction of litigation.

(Para 4)

But where the question of returning the plaint for want of territorial jurisdiction is involved, it is better having regard to the territorial jurisdiction that the question should be decided first.

(Para 4)

(B) Civil P. C. (1908), S. 115 — "Case decided" — Order to try preliminary issue first — No revision lies.

An order that a preliminary issue should be taken first for decision, does not decide any rights of parties and is not a "case decided" within the meaning of S. 115 of the Code and cannot be interfered with in revision. AIR 1973 All 499, Rel. on.

(Para 4)

Cases Referred: Chronological Paras
AIR 1973 All 499 = 1973 All WR (HC)
426

AIR 1964 SC 497 = (1964) 4 SCR 409
AIR 1962 All 572

JS/LS/D960/75/KNA

(1961) 1 Andh WR 250 = 1961 Andh LT
175

AIR 1951 Ajmer 57 (1) = (1951) 25 Ajmer
LJ 40

AIR 1950 Mad 596 = (1950) 1 Mad LJ 657

AIR 1933 PC 33 = 64 Mad LJ 142 = 60
Ind App 49

AIR 1932 Bom 128 = 34 Bom LR 6

AIR 1922 PC 405 = (1923) 44 Mad LJ 388
= (1923) 50 Ind App 247

(1963) 10 MIA 476

M. S. K. Sastry, for Petitioner; P. Nagaraja Rao for C. Obul Pathi Choudhary, for Respondent.

ORDER :— This is a revision filed by the plaintiff against the order passed in I. A. No. 94 of 1974 in O. S. No. 237 of 1971 by the Subordinate Judge, Rajahmundry, whereby he wanted to take up a preliminary issue. The learned counsel for the petitioner contended that the lower Court could not have heard the preliminary issue first as it requires some evidence to be recorded. To understand the above argument, it is necessary to state the brief facts of the case.

2. The plaintiff is a registered firm and deals in fancy goods at Rajahmundry. The defendant is the manufacturer of sewing threads etc. The plaintiff was appointed as a Distributor for the East and West Godavari Districts excluding Tuni for the supply of the defendant's sewing threads under a letter dated 20th January 1965, for which there was an oral agreement at Rajahmundry dated 15-1-1965. The plaintiff is entitled to a commission of 5% on all the orders received, executed and completed. The said agreement was for three years but subject to renewal. The agreement was not renewed. Even then, the plaintiff continued to work as a Distributor till 15-8-1968 under the oral terms with the defendant's representative at Rajahmundry. Thus, the agreement dated 15-1-1965 was no longer in force. The plaintiff opened a Khata in the defendant's name and continued the same till 15-8-1968. An amount of Rs. 14,550-51 ps. was found due by 6-9-1968 from the defendant. Thus the defendant is liable to pay the said amount. Subsequent to 15-8-1968 there were no further dealings. The amount is payable at Rajahmundry. The account is mutual, open and current. Deepavali is the accounting year. The plaintiff issued a registered notice through his advocate on 29-3-1971. The defendant acknowledged the same and got issued a false and frivolous reply notice with untrue and untenable allegations. Such allegations were invented for the purpose of the defence. The defendant, in the reply notice, also stated that he shall send the amount of Rs. 6,536-93 ps. in full satisfaction either to the plaintiff or to its advocate and thus the amount is also payable

at Rajahmundry even otherwise. In para. 12 of the plaint, it was stated that the cause of action for the suit arose on 15-1-1965 the date on which the contract was concluded at Rajahmundry, on 20-1-1965, the date on which the letter was executed, on 20-1-1968, the date on which the agreement ceased to be in force, or 15-1-1966, the date on which the khata was opened in the plaintiff's account in the name of the defendant, on 21-1-1968 till 15-8-1968, the date on which the plaintiff continued to work as such Distributor, on 15-1-1965, the date on which the plaintiff paid the advance amount at Rajahmundry by way of cheque, on 29-3-1971, the date on which the plaintiff issued a registered notice and on 7-4-1971, the date on which the defendant sent a false and frivolous reply notice. The subsequent oral agreement took place at Rajahmundry within the jurisdiction of the Court. It is, therefore, stated that the Rajahmundry Court has got jurisdiction. The written statement filed by the defendant is not supplied with material papers; but the affidavit filed by the defendant is supplied. In the affidavit filed in I. A. No. 94/74, it is stated in para. 3 that the Court has no jurisdiction to entertain the suit since there was an express condition in the agreement dated 20-1-1965 entered into between the plaintiff and the defendant, by which all the disputes between the parties were subject to jurisdiction of Udumalpet. The plaintiff, in order to get over the agreement came to an end after 20th January 1968 and there was subsequent oral understanding between the plaintiff and the defendant's representative at Rajahmundry and, therefore, the agreement dated 20-1-1965 was no longer in force. There was a continuous correspondence between the plaintiff and defendant ever since the khata was opened in January 1965 till the business transaction affair was stopped. The defendant called upon the plaintiff to produce the entire correspondence that was exchanged between them from the inception to the date of giving the notice; but the plaintiff has not produced the same. The defendant has in his possession letters addressed by the plaintiff and the office copies of the correspondence, which he addressed to the plaintiff. In para. 6 of the affidavit, it was specifically stated that a plea was taken in the written statement that the Court at Rajahmundry has no jurisdiction to entertain the suit and an issue was also framed by the Court since the question of jurisdiction goes to the root of the case and is a question of law, which can be decided on the documentary evidence to avoid the cumbersome procedure involved in going through the trial of the suit on the other issues. Therefore, the defendant filed the interlocutory ap-

plication that it will be just and convenient to decide the question of jurisdiction as a preliminary issue.

The lower court passed a very short order which is as under:—

"Counter filed. Heard. It will be heard as a preliminary issue. Petition allowed."

3. The revision is filed against this order.

4. The learned counsel for the revision petitioner contended that the issue of jurisdiction cannot be decided without any evidence. Therefore, the question for consideration would not be purely one of law but it becomes a mixed question of law and fact and hence it cannot be treated as a pure question of law and decided as a preliminary issue. The learned counsel for the respondent, on the other hand, contended that there is no case decided by the lower Court. The lower Court has only chosen to state that it will decide the question of jurisdiction as a preliminary issue for which an issue is already framed. When no right or a part of the case is decided by the lower Court, it cannot be treated as a case decided and therefore the Provisions of Section 115, C.P.C. cannot be attracted. The learned counsel for revision petitioner relied upon Sayyed Shad Abdul Latif Mohideen Khadiri Sujjatha Shibathullahi Sahib v. Mohammad Labbai (AIR 1950 Mad 596) Sri Sarveswaraswamy Vari Temple at Kakaramilli Represented by its Trustees v. Rudrapaka Veerabhadrayya, ((1961) 1 Andh WR 250), M/s. Basti Ram Roop Chand v. M/s. Radhey Shyam Gulab Chand (AIR 1973 All 499), Major S. S. Khanna v. Brig. F. J. Dillon (AIR 1964 SC 497) and Lala Dhanpat Rai v. Sri Prem Sunder Bhargava (AIR 1962 All 572). In Sri Sarveswaraswamy Vari Temple at Kakaramilli Represented by its Trustees v. Rudrapaka Veerabhadrayya, ((1961) 1 Andh WR 250) the case came to the High Court in appeal. As many as twenty issues were framed. But issues 3 and 4 were taken up for trial and for consideration by the learned Subordinate Judge as preliminary issues. Those issues were:

"3. Whether this Court has got jurisdiction to entertain the suit?

4. Whether the jurisdiction is barred by Sections 87 and 93 of the Hindu Religious and Charitable Endowments Act?" Only those issues were taken up for trial and for consideration by the learned Subordinate Judge. The Subordinate Judge held that it had no jurisdiction to try the suit as it was barred by Sections 93 and 88 of the Madras Act XIX of 1951 and hence he dismissed the suit. Therefore, an appeal was filed. The High Court, on a consideration found that the decision of

the Subordinate Judge on those issues was not sustainable and the appeal was allowed and the suit was remanded for disposal on the remaining issues. The High Court was pleased to observe that "We must, however observe that it is most undesirable that Courts against whose judgments appeals eventually lie to the High Court should dismiss the suits on preliminary issues". In *Mahommed Sulaiman v. Birendia Chandra Singh* (1923) 44 Mad LJ 388 = 50 Ind App 247 = (AIR 1922 PC 405) the Privy Council, following an earlier decision of Lord Justice Turner in *Bannarjee v. Puddomoney Dobsee* ((1863) 10 MIA 476) held that by forbearing from deciding all the issues, the Courts below not infrequently oblige the Court of Appeal to remand the case which otherwise might finally be decided, involving serious inconvenience to the parties. The same view has again been reiterated in *Jagannatha Rao Dani v. Rambharosa* (1932) 64 Mad LJ 142 = 60 Ind App 49 = (AIR 1933 PC 33) by the Privy Council. "It was further pointed out by Viswanatha Sastri, J. in *Shibarhullahi Saheb v. Mohammed Labbai*, (1950) 1 Mad LJ 657 = (AIR 1950 Mad 596) that apart from the high authority of the decided cases, a specific circular was issued by the High Court that as a general rule the Subordinate Courts, as far as possible, receive the evidence adduced and decide all the issues in order to avoid piece-meal trial and a protracted litigation in the shape of an appeal and remand in case the decision of the Subordinate Court on the preliminary issue is not upheld by the appellate Court. This is the most salutary procedure and must be generally followed. The learned counsel, pointing out the said observations, contends that when issues have been framed, the lower court must be directed to record evidence on all the issues and decide the matter. Sayyed Shah Abdul Latif Mohideen Khadiri Sujatha Shibathullahi Sahib v. Mohammad Labbai (AIR 1950 Mad 596) referred to by the petitioner has already been referred to in *Sri Sarveshwaraswamy Vari Temple at Kakaramilli Represented by its Trustees v. Rudrapaka Veerabhadrayya* ((1961) 1 Andh WR 250) which point out that in appealable cases, Courts should, as far as possible decide all issues to avoid piece-meal trial and protracted litigation. The learned counsel for the petitioner relied upon *Basti Ram Roop Chand v. Radhey Shyam Gulab Chand* (AIR 1973 All 499) in which it is stated that under O. 14, R. 2, the court is bound to try as preliminary issue the question of law on which the entire suit may be disposed of. But where the question is not purely of law or it is a mixed question of law and fact, the court has no jurisdiction to try the issue as a preliminary issue. In that

case, the defendants filed a written statement objecting to the jurisdiction of the Court and filed an application to try the said issue as a preliminary issue. The trial Court found that it is a suit for recovery of damages on account of breach of contract. The question of jurisdiction was a mixed question of law and fact and hence the trial Court did not consider it expedient to try the issue as a preliminary issue and consequently dismissed the application. A revision was filed before the District Judge. The learned District Judge declined to interfere with the said order holding that there was no illegality in the order passed by the lower court. There, the question was; whether the goods were to be delivered and price was to be paid in pursuance of the contract at Kanpur or not. When a revision was filed in the High Court, the High Court also declined to interfere with the said order and dismissed the revision petition holding that the question of jurisdiction is a mixed question of law and fact in that case. He also relied upon *S. S. Khanna v. Brig. F. J. Dillon*, (AIR 1964 SC 497) for the proposition that the Civil Procedure Code confers no jurisdiction upon the Court to try a suit on mixed issues of law and fact as preliminary issues. It was held that normally all the issues in a suit should be tried by the Court; not to do, especially when the decision on issues even of law depending upon the decision of issues of fact, would result in a lop-sided trial of the suit." In the above Supreme Court case, the lower Court held that a suit was not maintainable. When a revision was filed in the High Court, the High Court was pleased to hold that the trial Court erred in holding that the suit was not maintainable. The main question that arose in the Supreme Court decision was: Whether the provisions of Section 115, C.P.C. could be attracted and the High Court could interfere in the matter when the preliminary issue was decided by the trial Court? The Supreme Court was pleased to hold that if a part of the suit is decided, it would be deemed that a case is decided and taking that view the Supreme Court held that the suit was not maintainable as it affects the rights of the parties, and therefore, the High Court was justified in interfering in the said order by entertaining a revision. It interfered in the said order as the lower Court acted with material irregularity and illegality in the exercise of its jurisdiction. Justice Hidayatullah delivered a separate judgment and discussed the scope of the provisions of Section 115, C.P.C. and his Lordship was pleased to hold that it amounts to a case decided and that when the lower Court was wrong in holding that a suit was not maintainable it could not have kept the suit pend-

ing and ought to have dismissed it and allowed the party to go in appeal and thus the order involved clearly a question of jurisdiction and it is revisable and the High Court was within its rights in correcting it by exercise of its powers under Section 115, C.P.C. Thus, relying upon the above decision, the learned counsel for the petitioner contended that as it is mainly a mixed question of fact and law involved in this preliminary issue, the lower Court had no jurisdiction to try it as a preliminary issue. The learned counsel for the respondent relied upon Major S. S. Khanna v. Brig. F. J. Dillon [AIR 1964 SC 497] for the proposition that if the lower court decided to take up the issue as a preliminary issue, that does not amount to a case decided and the provisions of Section 115, C.P.C. could not be attracted. In S. S. Khanna v. Brig. F. J. Dillon (AIR 1964 SC 497) it is clearly laid down what is a case decided. It is stated that when an order is passed in a case or a part of the suit, it amounts to a case decided. But in the instant cases, no part of the suit can be said to have been decided when the lower Court held that the issue should be tried, as a preliminary issue. It in no way affects the rights of the parties. Therefore, when this is not a case decided, the provisions of Section 115, C.P.C. cannot be invoked. There is sufficient strength in this argument. It is evident that the lower Court has not decided any of the rights of the parties except to hold that the preliminary issue with regard to jurisdiction will be taken up first. The decision in M/s. Bastiram Roop Chand v. M/s. Radhey Shyam Gulab Chand (AIR 1973 All 499), supports the contention raised by the respondent. It may be stated here that the question raised here is that the Court at Rajahmundry has no jurisdiction and that under the agreement the Court at Udamalpet has jurisdiction to entertain the suit. That is, the parties have agreed to whatever may be their disputes for the settlement, over all those disputes, the Court at Udamalpet will have jurisdiction. If the lower Court finds that on the basis of the agreement between the parties, the court at Udamalpet has jurisdiction and the court at Rajahmundry has no jurisdiction, it will simply return the plaint and will not try the suit. When such is the nature of the case, this case has to be distinguished with other cases where the preliminary issues are to be tried in which the question of returning of plaint may not be involved. When the question of returning the plaint is involved, it is better, having regard to the territorial jurisdiction, that the said question is decided first. The learned counsel for the respondent relied upon Lala Dhanpat Rai v. Sri Prem Sunder Bhargava (AIR 1962 All 572). In that

case, an objection to the territorial jurisdiction was raised. Issues were framed; but it was stated that the preliminary issue would be decided after hearing the entire suit but at a later stage the preliminary issue was taken up and the learned Civil Judge there, after going into the evidence of the parties, found that he had no jurisdiction to entertain the suit and so he ordered the return of the plaint for presentation to the proper court. Against that, an appeal was filed under Order 43, Rule 1, C.P.C., the point raised in the High Court was that when the Court finds that it had no jurisdiction, it ought to have dismissed the suit should not return the plaint to be presented to a proper Court. The Allahabad High Court was pleased to hold that the provision of returning the plaint has been made under Order 7, Rule 10 (1) of the Civil P. C. It gives a discretion to return the plaint at any stage of the suit for the presentation to the proper Court. It further held that "The law does not require the Court to dismiss the suit on the plea of want of jurisdiction. It is only in cases where the plea of jurisdiction has been contested and the evidence of the parties has already been recorded on the merits of the case that the order of dismissal of the suit for want of jurisdiction has been upheld by the different High Courts. The learned counsel could not cite a single case in which the order of the return of plaint passed after hearing the preliminary issue of jurisdiction was held to be bad by any High Court. The cases cited all relate to those type of cases in which the Court after recording the evidence of the parties on all the issues came to the conclusion that it had no jurisdiction and then dismissed the suit. Such order of dismissal passed by the Court was found to be justified. In the instant case the plaint was ordered to be returned after hearing the preliminary point of jurisdiction raised on behalf of the defendant. This case was quite distinct from the facts of the case cited by the learned counsel". Thus the Court was of the view that when a preliminary point is raised in a case which affects the very entertainment or maintainability of the suit, it is not always proper to pass an order after hearing the preliminary point at the time of final hearing of the suit. Such a point should ordinarily be decided at an early stage. In the instant case, the question of entertainment or maintainability of the suit in Rajahmundry Court is involved and, therefore, it is contended that it is proper that this issue is decided first. The learned counsel for the respondent also relied upon Narain Glass Works v. Beni Prasad (AIR 1951 Ajmer 57(1)). In the Ajmer case, the lower court refused to decide the preliminary issue. The ques-

tion there was whether the suit was cognisable by the Civil Court at Ajmer or by the Civil Court at Agra. When the trial court refused to decide this issue as a preliminary one, the High Court was pleased to hold that this was certainly an issue of law going to the very root of the case. It further held that the plaintiff obviously for reasons best known to him, has suppressed the agreement. There, the carbon duplicate of the agreement has been produced by the defendant, which was not specifically denied by the plaintiff. Keeping those facts in view Atma Charan, J. was pleased to allow the revision and direct the lower court to decide the preliminary issue first. It was further held that an independent issue and the evidence on such issue can be conveniently separated from the rest of the evidence and the finding on that issue may not render the trial of the other issues unnecessary. The above observations made in *Sowkabal v. Tukoji Rao* (AIR 1932 Bom 128) relied in the Ajmer case clinch the issue that when this issue could be separated and the evidence could be recorded in that issue where the question of return of the plaint would be involved, it is always safe to decide the same and this would save unnecessary expenditure and waste of time on the side of the parties in case the finding on the issue is against the plaintiff. This clearly supports the case of the respondent-defendant. In this instant case, the defendant has clearly stated that he has in his possession all the correspondence which is sufficient to decide the question of jurisdiction. When this is the case, I think, the lower Court was justified in holding that it will take up this issue as a preliminary issue and decide it. For the above discussion, I do not think that there are any merits in this revision petition. This revision is accordingly dismissed with costs.

Revision petition dismissed.

AIR 1976 ANDHRA PRADESH 74
MUKTADAR, J.

Dimili Narayana and others, Petitioners v. Dimili Satyanarayana and others, Respondents.

Civil Revn. Petn. No. 371 of 1971, D/- 2-4-1975.

(A) Registration Act (1908), S. 17 (1) (d) — Lease for vernacular year is not compulsorily registrable.

The words 'year' and 'year to year' in S. 17 (1) (d) of the Act means years according to British Calendar and not vernacular years. A lease of immovable pro-

perty for a vernacular year is not compulsorily registrable. (Para 2)

C. Poornaiah, for Petitioners; Bhagiratha Rao, for Respondent No. 2.

ORDER :—The petitioner is the plaintiff in S. C. No. 33 of 1969 on the file of the Additional District Munsifs Court, Chodavaram. The suit was filed for recovery of rent of Rs. 400 due to the petitioner as per the lease deed dated 8-4-1968. The respondents contended that the lease deed in question is not admissible in evidence as it is not registered as required under Section 17, Cl. (d) of the Indian Registration Act. The trial Court after going through the lease deed in question came to the conclusion that the document in question is a lease of immovable property reserving a yearly rent. As such it falls within the scope of Sec. 17 (1) (d) of the Indian Registration Act and therefore inadmissible in evidence.

2. In this revision Mr. C. Poornaiah, the learned counsel for the petitioner, contends that the trial court erred in coming to the conclusion that the document in question is a lease of immovable property reserving yearly rent and therefore falls within the scope of Sec. 17 (d). He contends that a perusal of the document would show that the document was for a vernacular year and the lease amount mentioned therein was for the vernacular year. According to the General Clauses Act the word 'year' referred to in Section 17 of the Indian Registration Act would mean 'British Calendar' year. Therefore the document in question cannot be considered as a lease of immovable property reserving yearly rent. Hence this document is admissible in evidence in spite of the fact that it has not been registered. I am of the opinion that the contention advanced by Mr. Poornaiah has some force. Section 17 of the Indian Registration Act provides that "leases of immovable property from year to year, or for any term exceeding one year, or reserving a yearly rent" should be registered. The word 'year' has been interpreted in the Indian General Clauses Act. Section 3, Cl. (66) reads 'year' shall mean a year reckoned according to the British Calendar. In those circumstances the words 'year to year' in Section 17 (d) of the Indian Registration Act would mean that it relates to a year according to the 'British Calendar' and not according to vernacular calendar. If this position is accepted the lease deed of immovable property from year to year would become compulsorily registrable if it is for a British Calendar year and not for a vernacular calendar year.

Mr. Bhagiratha Rao, learned counsel for the respondents, contends that the words "reserving yearly rent" should be

interpreted to mean a yearly rent for the vernacular year. I regret I cannot accede to this contention, because it would be rather contradictory to interpret the words 'year to year' under Section 17, cl. (d) of the Indian Registration Act as a year according to the British calendar and to interpret yearly rent according to the vernacular calendar. The words 'yearly rent' surely will have to be interpreted in the same manner as the words 'year to year' are interpreted viz. the yearly rent according to the British calendar and not according to the vernacular calendar.

Hence I am of the opinion that the order of court below has to be set aside and the revision allowed. Accordingly the revision is allowed. The lower court will take the suit on file and dispose it of according to law. Having regard to the circumstances of the case there will be no order as to costs.

Revision allowed.

**AIR 1976 ANDHRA PRADESH 75
KONDAIAH, J.**

G. Papaiah, Petitioner v. Assistant Director, Medical Services, Secunderabad, Respondent.

Writ Petn. No. 5175 of 1973, D/- 19-3-1975.

(A) Constitution of India, Arts. 226 and 311 — Domestic inquiry — Disciplinary Authority exercises quasi-judicial powers — Order should be a speaking one — Satisfaction of the disciplinary authority about guilt should be objective and not subjective. AIR 1972 SC 2083, Followed. (Para 4)

(B) Constitution of India, Arts. 226 and 311 — Disciplinary proceedings for alleged misbehaviour and disobedience — Delinquent should be given copies of the proceedings — Failure would amount to denial of reasonable opportunity. AIR 1969 SC 1302, Followed. (Para 5)

(C) Constitution of India, Art. 311 — Disciplinary action for alleged intentional absence — Extraordinary leave granted to the delinquent for the period held nullified the basis of the charge. (Para 6)
Cases Referred: Chronological Paras
AIR 1972 SC 2083 = (1971) 2 SCWR 813

AIR 1969 SC 1302 = 1969 Lab IC 153= 5

A. C. Lakshmanachar, for Petitioner;
K. Subrahmanya Reddy, for Respondent.

ORDER:— This application by the petitioner, a Chowkidar at Station Health Organisation, Golconda, under Art. 226 of the Constitution of India, is to quash the Order No. 4565/P/M-3 dated 3-8-1973

JS/LS/D961/75/TVN

passed by the Assistant Director of Medical Services, Headquarters, Andhra (Indep) Sub-Area, Secunderabad, the respondent herein, withholding his increment for one year, on several grounds.

2. Mr. A. Lakshmanachar, the learned counsel for the petitioner, contends that the impugned order is not a speaking order and it is violative of principles of natural justice as his client was not supplied with a copy of the report of the Enquiry Officer and copies of some other material documents in spite of his requesting for the same. He further urges that charge No. 2 relating to the unauthorised absence of the petitioner from duty from 16th May to 25th May, 1973 is not sustainable in view of the fact that extraordinary leave has been granted by the concerned authority on 18-6-1973 itself and in any event, the first charge relating to misbehaviour of the petitioner on 16th May, 1973 is in conflict with charge No. 2 and therefore, the impugned order must be quashed.

3. The claim of the petitioner is resisted by the learned Standing Counsel for the Central Government contending inter alia that a copy of the report of the Enquiry Officer need not be given to the petitioner, as the respondent has followed the procedure prescribed under Rule 15 (3) of the Central Civil Services (Classification, Control and Appeal) Rules, 1965, and no second notice relating to the proposed punishment need be given. He states that the impugned order is not violative of principles of natural justice nor it is laconic and the respondent is empowered and also justified in passing the impugned order and there is no conflict between the two charges and the second charge also is maintainable as the granting of extraordinary leave for the period does not prevent the disciplinary authority from framing the charge No. 2 and passing the impugned order.

4. In order to appreciate the respective contentions of the parties, it is not only profitable but necessary to notice the two main charges framed by the Enquiry Officer against the petitioner as indicated in page 4 of the counter-affidavit and they read thus:—

"ANNEXURE-I"

Statement of articles of Charge framed against Sri G. Papaiah, Chowkidar S. H. O. Golconda.

That the said Shri G. Papaiah, Chowkidar while functioning as Chowkidar in S. H. O. Golconda, behaved in a manner prejudicial to the Government Servants Conduct Rules on 16th May, 1973 at 12-00 hours while reporting for duty.

"ANNEXURE-II"

The individual in spite of his assurance that he was joining duty on 16-5-

1973 and having been put on duty, did not come for duty."

The Enquiry Officer, after examining a number of witnesses and documents, submitted his findings, conclusions and recommendations in his report dated 21-7-1973. He gave salient findings and summary of his enquiry in the report and arrived at the following conclusions and made recommendations as follows:—

(1) No. MES 410323 Civ. Chowkidar Sri G. Papaiah of S. H. O. Golconda has been found guilty of all the charges framed against him.

(2) In addition, his character and personality (as pointed descriptively in summary) has taken a turn towards indiscipline, lacking devotion to duty, developing imaginary fear thus prejudicing himself to all his superiors and firmly believing in violence also.

(3) It is recommended that he be given some suitable documentary punishment for records and given a final warning to rectify himself of all the weak and bad points."

The respondent, who is the disciplinary authority, has passed the impugned order on 3-8-1973 which reads thus:

"After a careful examination of the disciplinary case of Civilian Chowkidar of S. H. O. Golconda Shri G. Papaiah, the undersigned is satisfied that the said Sri G. Papaiah is guilty of the charges levelled against him vide charge-sheet dated 18th June, 1973.

2. Now, therefore, the undersigned being the appointing authority and authority empowered to award penalty do hereby order that the said Sri G. Papaiah is awarded the punishment of withholding his increment for one year. I, further direct that this withholding of increment will have the effect of postponing his future increments on expiry of the period for which his increment is withheld."

From a perusal of the impugned order, it is clear that the disciplinary authority did not accept the recommendation of the Enquiry Officer to award "suitable documentary punishment for records" and give "a final warning to rectify himself of all the weak and bad points". But instead, the disciplinary authority has withheld the increment of the petitioner for one year and such withholding of the increment will have the effect of postponing his future increments on expiry of the period for which his increment is withheld. The disciplinary authority, while passing an order imposing a penalty on a Government servant, is exercising quasi-judicial powers. The quasi-judicial orders must be speaking orders. The disciplinary authority must apply its mind to the entire facts and circumstances and record valid and justifiable reasons or grounds

in support of its conclusion. See *State of Punjab v. Bankhtawar Singh* (AIR 1972 SC 2083). The impugned order imposing the penalty of withholding the increment of the petitioner for one year and also directing the postponement of his future increments is not an administrative or executive order but it is a quasi-judicial order and therefore, must be a speaking one. On a perusal of the impugned order, it does not appear to be a speaking one. The contention of the respondent's counsel that the respondent has accepted the report of the Enquiry Officer in toto and, therefore, he did not give any reasons, cannot be acceded to. As pointed out earlier, the Enquiry Officer had recommended the awarding of only documentary punishment for records and a final warning but the respondent has awarded the punishment of withholding the petitioner's increment for one year and also directed that this withholding of increment should have the effect of postponing his future increments on expiry of the period for which his increment is withheld. He did not give any reasons why he did not accept the recommendation of the Enquiry Officer or in support of his decision to award the aforesaid punishment. The submission of the learned Standing Counsel for the Central Government that the disciplinary authority has satisfied itself that the petitioner was guilty of the charges levelled against him and, therefore, there is no illegality or want of jurisdiction justifying the interference of this Court, is also devoid of any merit. The satisfaction of the disciplinary authority about the guilt or otherwise of the Government servant for the charges levelled against him must be an objective but not subjective satisfaction. On a reading of the impugned order, I am satisfied that the respondent has not applied his mind to the entire material facts and circumstances of the case in arriving at a conclusion about the truth or otherwise of the charges levelled against the petitioner. I do not also find any force in the further submission of the respondent's counsel that the impugned order has been passed by a Military Officer and the punishment is not severe. In fact, the impugned order has been passed by the Assistant Director of Medical Services, Headquarters, Andhra (Indep) Sub-Area, Secunderabad. Irrespective of the fact whether the order has been passed by a Military Officer or a civilian authority, it must be in accordance with law as it affects the rights of a citizen.

5. I shall now advert to the question relating to the violation of principles of natural justice. In paragraph 9 of the Writ Petition, the petitioner has stated that he was not given an opportunity to engage a counsel and submit his case pro-

perly and when he asked for copies of the proceedings they were refused. In the counter filed on behalf of the respondent this averment in paragraph 9 of the Writ Petition has not been controverted. On a consideration of the facts and circumstances, I am satisfied that this is a fit case where a copy of the Enquiry Officer's report must have been supplied to the petitioner in the interests of justice. The petitioner must be given a reasonable opportunity to meet the case of the department relating to the charges levelled against him and in the circumstances of the case, the report of the Enquiry Officer is really essential for the petitioner to establish his defence version. See *State of Maharashtra v. B. A. Joshi* (AIR 1969 SC 1302). From the averment in paragraph No. 9 of the writ petition and in view of the fact that there is no specific denial of this averment in the counter of the respondent, I must conclude that a copy of the Enquiry Officer's report, though requested for, was not supplied to the petitioner. Hence, I hold that the impugned order is also violative of principles of natural justice.

6. This brings me to examine the question whether charge No. 2 relating to the absence of the petitioner from duty for the period commencing from 16th May, 1973 and ending with 25th May 1973 is maintainable. Admittedly the Major, Officer Commanding, by his Order No. SHO/125/A/93 dated 18-6-1973, granted ten days' E.O.L. from 16th May, 1973 to 25th May, 1973 (both days inclusive) to the petitioner to regularise his intentional absence for the period. I am unable to agree with the learned counsel for the respondent that notwithstanding the grant of the extraordinary leave to the petitioner, he can be proceeded against for his absence from duty for that period. Whether it is an extraordinary leave, ordinary leave, leave on pay, leave on half pay, medical leave or casual leave, nonetheless it is a leave. The kind of nature of leave is not material but the substance of the matter is that the petitioner was granted leave. When once leave is granted to a public servant, in respect of a particular period, it must be considered that he is permitted to absent himself from duty for that period. In such a case, it is not permissible or open to the employer or any other authority to proceed against the public servant for absents from duty for the same period and punish him. The employer, either private or public cannot blow hot and cold. The authorities should have refused to grant leave of any kind to the petitioner and then proceeded to punish him after due and proper enquiry and after affording reasonable opportunity to him. When once leave has been granted, it cannot be said

that the petitioner had absented himself from duty and thereby made himself liable to be punished. Hence, the second charge relating to the absence of the petitioner from duty from 16th May, 1973 to 25th May, 1973, both days inclusive, is not sustainable. I may add that the very order granting extraordinary leaves states that such leave has been granted to regularise the petitioner's intentional absence for the period. The very purpose of granting the leave being to regularise the petitioner's intentional absence, it is not open to the respondent to initiate any proceedings against the petitioner for his absence from duty for that period. Judged from any angle, the second charge must be quashed as it is not sustainable.

7. The further submission of the petitioner's counsel that charge No. 1 is in conflict with charge No. 2 and it must also fall to the ground, need not be gone into, although I feel that there is considerable force in that submission.

8. For all the reasons stated above, the impugned order must be and is hereby quashed in respect of stoppage of increment only. The other part of the order relating to his transfer shall stand. The Writ Petition is allowed with costs. Advocate's fee Rs. 100.

Petition partly allowed.

AIR 1976 ANDHRA PRADESH 77

SAMBASIVA RAO, Ag. C. J. AND
RAGHUVIR, J.

M. Narasimha Reddy and others, Appellants v. M. Boosamma, Respondent.

L. P. A. No. 33 of 1975, D/- 27-2-1975.*

(A) Hindu Marriage Act (1955), S. 13 (1-A) — Divorce — Mere existence of circumstances entitling relief does not automatically result in dissolution of the marriage — Decree on a petition filed for the purpose necessary — In the absence of such a decree marital relationship held continued — Wife entitled to claim partition as heir of her husband since dead, (Hindu Succession Act (1956), S. 8) — (Judgment in A. S. No. 220 of 1971, D/- 17-10-1974 (Andh. Pra.) by Venkatrama Sastry, J. Affirmed.) (Para 2)

(B) Hindu Marriage Act (1955), Ss. 10 and 13 — Judicial separation does not end the marital relationship — Decree of divorce under S. 13 necessary. (Judgment in A. S. No. 220 of 1971, D/- 17-10-1974 (Andh. Pra.) by Venkatrama Sastry, J. Affirmed.) (Para 3)

*(Against judgment and decree of High Court, in A. S. No. 220 of 1971, D/- 17-10-1974.)

JS/LS/D963/75/TVN

P. Rama Rao and A. Krishnaiah, for Appellants; J. Eswara Prasad, for Respondent.

SAMBASIVA RAO, Ag. C. J.:— Though the judgment of Venkatrama Sastry J. which is sought to be appealed against, is an affirming one, Sri P. Rama Rao, learned counsel for the appellants-defendants raises many points in support of the appeal.

2. Firstly, he argues that the plaintiff-respondent who filed the suit for partition as the heir of her husband, had lost the status of the wife, and so, she could not claim a share. That is on the ground that on 28th of July, 1962, a decree for judicial separation was passed at the instance of the husband against the respondent. She was provided maintenance at the rate of Rs. 200 per month. In execution of this decree for maintenance, she even applied for arrest of the husband. Without anything more happening, he died in the year 1967 and she filed the suit for partition in 1968. Sri Rama Rao maintains that all the requirements of sub-section (1-A) of Section 13 of the Hindu Marriage Act, 1955 have existed in this case, since there was a decree for judicial separation and there is no evidence of resumption of cohabitation between the spouses for a period of two years or upwards after passing of the decree. So, it is contended that it must be deemed that a dissolution of marriage has occurred under Section 13. It is not possible to accept this contention because dissolution or divorce can be granted only under a decree of the court. Sub-section (1-A) provides only a ground for applying for dissolution of marriage. If the circumstances enumerated in that sub-section existed, then either party to a marriage can apply for dissolution. There was no such application in this case, much less a decree. Therefore, it cannot be said that there was a dissolution of marriage, thereby the plaintiff-respondent losing the status as wife.

3. It is then submitted that even judicial separation has the effect of depriving the plaintiff-respondent of the status of wife. Once again, in our opinion, it is an untenable agreement. If such were the intention of the legislature, there could not have been separate provisions for judicial separation and divorce. In fact, if sub-section (1-A) of Section 13 is read, it is quite manifest that the Act postulates resumption of marital relations between the spouses even after a decree for judicial separation has been passed. If a resumption has taken place, then the judicial separation comes to an end. If it does not, then it provides a ground for application by either party to a marriage for divorce. This clearly leads to the con-

clusion that judicial separation does not put an end to the marital status of the party, with the result, the plaintiff-respondent continues to enjoy the status of the wife.

4. The third contention is that the husband had left a will bequeathing all his properties to the defendants-appellants. On a thorough examination of the evidence, our learned brother agreed with the trial court in holding that the will was not proved. We have no reason to disagree with that conclusion.

5. The last submission is about the movables. It is complained that the learned Judge has not considered the question of movables. Obviously, it was not pressed before the learned Judge for the reason that a Commissioner was appointed to take an inventory of all the movables. He prepared an inventory. Ex. A-13 of the movables and only a share of such movables as mentioned in Ex. A-13 was given to the plaintiff-respondent by the trial court. In regard to the jewels, the Commissioner was prevented from making an inventory of the articles in the iron safe. So, the trial court drew an adverse inference that the jewels mentioned in the 'C' Schedule to the plaint were also existing. In view of the circumstances stated above, we think the defendants-appellants did not press their case in regard to movables.

6. Thus, we find no substance in any of the contentions raised by Mr. Rama Rao. The Letters Patent Appeal is dismissed.

Appeal dismissed.

AIR 1976 ANDHRA PRADESH 78

MADHAVA RAO, J.

T. Shivalal and others, Petitioners v. Balaram and others, Respondents.

Civil Revn. Petn. No. 350 of 1974, D/- 12-2-1975.*

(A) Civil P. C. (1968), O. 7, R. 10 (1), O. 41, R. 22, O. 41-A, C. 43, Rr. 1 (a) and 2 — Provisions of Orders 41 and 41-A also apply to appeals filed under O. 43 — Respondent if aggrieved may file cross-objections under R. 22 of O. 41.

In a suit for declaration and injunction, the suit land was valued at Re. 1 per square yard. The defendant objected to the valuation and contended that it was Rs. 30 per square yard. The trial court tried this issue first and valuing the land at Rs. 10 per square yard, returned the plaint for presentation to proper court having pecuniary jurisdiction. Plaintiff

* (To revise order of Chief Judge, City Civil Court, Hyderabad, D/- 19-10-1973.)

appealed against the order returning the plaint under O. 43, R. 1 (a). The defendant filed cross-objections contending that the trial court's valuation at Rs. 10 per square yard was low and that it ought to have been valued at Rs. 30.

Held, that although the defendant aggrieved by the trial Court order valuing the suit land at Rs. 10 could file cross-objections in that regard, the order appealed against by the plaintiff being one returning the plaint for presentation to proper Court of pecuniary jurisdiction, the defendant was not entitled to file, in such appeal, cross-objections concerning the matter of valuation. (Paras 6 to 8)

(B) Civil P. C. (1908), S. 115 and O. 7, R. 10 — Revision against appellate order confirming order under O. 7, R. 10 returning the plaint to proper court — Question of proper court-fee not being in issue, S. 11 (3) of the Andhra Court Fees and Suits Valuation Act held was not attracted. (Andhra Court Fees and Suits Valuation Act (7 of 1956), S. 11 (3)).

(Para 9)

Prabhakar Rao Kulkarni, for Petitioners; Upendralal Waghay, for Respondents Nos. 1 to 6, 7 and 8 to 10, 11, 12 and 14 to 17.

ORDER:— The point raised in this revision petition is whether cross-objections can be preferred in a C. M. A. filed under the Order 43, Rule 1 (a), C.P.C. The lower Appellate Court held that cross-objections cannot be preferred in such an appeal and rejected the memorandum of cross-objections filed in C. M. A. No. 131 of 1973.

2. The learned counsel for the petitioner submits that the cross-objections are maintainable.

3. To appreciate the above contention, a few facts are necessary to be stated. The petitioners are the defendants. The respondents-plaintiffs filed a suit for declaration and injunction against the petitioners-defendants. They valued the suit land at Re. 1 per square yard. The defendants took objection to that valuation in their written statement and stated that the market value of the suit land is Rs. 30 per square yard.

4. The trial Court, i.e. the 2nd Assistant Judge, City Civil Court, Hyderabad, framed issue No. 4, viz., 'whether the court-fee paid is not sufficient and whether this Court has no pecuniary jurisdiction to try the suit?' The trial Court first took up this issue and recorded the evidence and came to the conclusion that the suit property has to be valued at the rate of Rs. 10 per square yard and if this value is adopted, the Court has no jurisdiction and the court-fee paid is not sufficient. In view of the matter, the 2nd Assistant Judge, by his order dated 16th

July, 1973 returned the plaint under Order 7, Rule 10, C.P.C. for presentation before the proper Court. The plaintiffs, aggrieved by this order, preferred C. M. A. No. 131 of 1973 in the Court of the Chief Judge, City Civil Court, Hyderabad. In that C. M. A. the defendants filed cross-objections S. R. No. 9910/73. In the cross-objections, the valuation as fixed by the 2nd Assistant Judge and consequently the sufficiency of the court-fee paid by the plaintiffs were attacked on the ground that the fixation of the value of the suit property at Rs. 10 by the Assistant Judge was not correct and it must be at the rate of Rs. 30 per square yard. At the S. R. stage, the office took up the objection that the cross-objections are not maintainable. Therefore, the appellate Court by its order dated 19th October, 1973, agreed with the office objection and rejected the cross-objections. The ground stated in the order was that the appeal was filed under Order 43, Rule 1 (a), C.P.C. The appeals preferred under Order 43, C. P. C. are independent of the appeals preferred under Order 41, C.P.C. and therefore the provisions of Order 41, Rule 22, C.P.C. are not applicable to the appeals filed under Order 43, C.P.C.

5. The learned counsel for the petitioners contended that the lower Court erred in holding that the provisions of Order 41, C.P.C. are not applicable to the appeals filed under Order 43 of the Civil Procedure Code. He referred to Order 43, Rule 2 which specifically refers to the application of the rules under Order 41 and Order 41-A, C.P.C. Order 43, Rule 2, C.P.C. reads thus:—

"The rules of Order 41 and of Order 41-A shall apply, so far as may be, to appeals from the orders specified in Rule 1 and other orders of any Civil Court from which an appeal to the High Court is allowed under any provision of law:

Provided that in the case of appeals against interlocutory orders made prior to decree, the Court which passed the order appealed from shall not send the records of the case unless an order has been made for stay of further proceedings in that Court."

6. It is thus clear that all the rules under Orders 41 and 41-A, C.P.C., are made applicable as far as possible to appeals from the orders specified in R. 1 of Order 43. To this extent the order of lower Court is wrong. But it has to be seen whether Order 41, Rule 22, C.P.C. would apply in the instant case.

7. In the case on hand, the Assistant Judge, while deciding the value of the suit property, fixed the rate at Rs. 10 per square yard. By filing the appeal, the plaintiffs want to challenge the fixation

of the value at Rs. 10 per square yard and contend that the value is only Re. 1 per square yard and the lower Court was not justified in putting the value of the land at Rs. 10 per square yard. The defendants filed cross-objections to the effect that the fixation of the value of the suit land by the Assistant Judge, at Rs. 10 per square yard is not correct and, in fact it must be fixed at Rs. 30 per square yard. Thus, the plaintiffs as well as the defendants want to attack the finding of the Assistant Judge. When it is open to the plaintiffs to attack the finding of the Assistant Judge that the rate fixed by him is not correct, it is equally open to the defendants to contend that the value fixed by the Asst. Judge is too low and it must be fixed at the rate of Rs. 30 per square yard. Thus the defendants under Order 41, Rule 22, C.P.C. can attack the finding of the trial Court with regard to the fixation of the rate. Therefore, the only point to be considered is, whether the cross-objections as such could be filed or not. It is contended by the learned counsel for the respondents that cross-objections could be filed only when a right to appeal accrues to the party and in the instant case the right of appeal has not accrued to the defendants as the plaint was only returned and hence, they could not file an appeal against an order returning the plaint to be presented in a proper Court.

8. To find out who could file an appeal against the order returning the plaint, the relevant provision in the Civil Procedure Code is Order 43, Rule 1 (a) which reads as under:

"1. An appeal shall lie from the following orders under the provisions of Section 104, namely:—

(a) an order under Rule 10 of Order VII returning a plaint to be presented to the proper Court."

Order VII, Rule 10 is in the following terms:

"Rule 10 (1) The plaint shall at any stage of the suit be returned to be presented to the Court in which the suit should have been instituted.

(2) On returning a plaint the Judge shall endorse thereon the date of its presentation and return, the name of the party presenting it, and a brief statement of the reasons for returning it."

Thus, Order 43, Rule 1 (a), C.P.C. provides that an appeal can be preferred against an order returning the plaint. Further, there is nothing mentioned in clause (a) that only the plaintiff can file an appeal against the order returning the plaint. Therefore, even the defendant, if he is aggrieved by the order of returning the plaint, is entitled to file the appeal. But the point in this case is, whether the peti-

tioners, who are the defendants, can file cross-objections in the appellate Court in the appeal preferred by the plaintiffs against the order returning the plaint. As stated earlier, either party can prefer an appeal against an order returning the plaint. The plaintiffs preferred the appeal since they were aggrieved by the order returning the plaint. The petitioners herein, i.e. the defendants in the suit, are not aggrieved by the order returning the plaint for being presented in the sub-Court. The petitioners are only aggrieved with regard to the fixation of the market value of the suit property. To put it differently, the defendants have no grievance against the order returning the plaint. They are only aggrieved with regard to that portion of the order fixing the value of the suit land at Rs. 10 per square yard instead of at Rs. 30 per square yard as alleged by them. Thus they have no cause to file an appeal against the final order returning the plaint for being presented in the proper court. When no appeal could be filed, no cross-objections could be preferred. Therefore, it could not be said that the lower Court erred in holding that the petitioners herein could not as such file cross-objections. But, undoubtedly, the defendants are at liberty to contend before the appellate Court in the appeal preferred by the plaintiffs that the value of the suit land ought to have been fixed at Rs. 30 per square yard on the basis of the evidence on record as stated earlier.

9. The learned counsel for the petitioner defendants further contended that apart from pressing into service Order 41, Rule 22, C.P.C. it is open to the petitioners to file an application under Section 11 (3) of the Andhra Court Fees and Suits Valuation Act, 1956, bringing to the notice of the appellate Court the insufficiency of the court-fee paid and praying for determination of the correct court-fee payable. Therefore, if for any reason the cross-objections are not maintainable it is submitted that the cross-objections may be treated as an application filed under Section 11 (3) (a) of the Andhra Court Fees and Suits Valuation Act. This contention was not raised before the appellate Court and is raised for the first time in this revision. The learned counsel for the respondents contended that it is open to the defendants to raise this point before the proper Court in which the plaint would be presented. Further it is contended that there is no order passed by the lower court regarding the court-fee payable on the plaint. Here the point involved is not as to under which provision of law the court-fee has to be paid. In the absence of any such order the provisions of Section 11 (3) of the Court Fee Act could not be attracted.

general words viz. "all other encumbrances" follow specific words such as "any trust, obligation, mortgage, charge, lien" and secondly the specific words that precede the general words speak of types of encumbrances having a common genus and therefore the general words "all other encumbrances" occurring in the first part of sub-section (2) will have to be construed ejusdem generis and as such the said phrase will include only such encumbrances that partake the nature of the types of encumbrances specified earlier. Thus the question is whether the notifications under Section 4 and Section 6 of the Land Acquisition Act create such an encumbrance on the property which partakes the nature of any trust, obligation, mortgage, charge or lien? In other words, the encumbrance must be of such a nature that upon enforcement thereof the liability thereunder is satisfied, that is to say the liability to meet beneficial interest under a trust or the liability arising under an obligation or a mortgage or charge or lien is satisfied and we do not think that by reason of issuance of the notifications in question any encumbrance of this nature is created on the property in question. The notifications under Sections 4 and 6 of the Land Acquisition Act do not create any liability which is required to be satisfied from out of the property to which the said notifications relate and, therefore, in our view, the notifications cannot be regarded as creating any encumbrance falling within the phrase "all other incumbrances" occurring in sub-section (2) of Section 4. It is true that by reason of the notifications the land in question is subjected to the liability of being compulsorily acquired under the provisions of the Land Acquisition Act but that is not the liability contemplated by the phrase "all other incumbrances" occurring in sub-section (2) of Section 4. In our view, the matter cannot fall under the second part of sub-section (2). It is true that by reason of the notifications the right to use the property after making improvements therein is to a limited extent affected in view of clause seventhly of Section 24 of the Land Acquisition Act, but the restriction on the use of the property in that manner is not the restriction on the use thereof by reason of any direction of the Court in the nature of attachment, injunction, decree or order. In this view of the matter, it is difficult to accept Mr. Dalal's contention that the land in question has vested in the Central Government or the National Textile Corporation freed from the effect of the two notifications issued under Section 4 and Section 6 of the Land Acquisition Act by reason of Section 3 read with Section 4 (2) of the Act 57 of 1974.

10. Mr. Dalal, however, urged that the phrase "all other incumbrances" occurring in Section 4 (2) of the said Act ought not to be construed by adopting the doctrine of ejusdem generis and if it was not so construed the phrase would have a wider meaning and the notifications in question should be regarded as creating an encumbrance falling within Section 4 (2) of the Act. We are not inclined to accept this submission of Mr. Dalal, for, both the requirements are satisfied for applying the rule of ejusdem generis but even if the phrase "all other incumbrances" occurring in sub-section (2) of Section 4 were to be given a wide meaning by not confining it to types of encumbrances indicated earlier, still it is difficult to accept contention of Mr. Dalal that the notifications in question constitute or create an encumbrance on the land in question. Mr. Dalal urged that in that event any burden or obstruction or impediment that is imposed upon the full rights of the owner to deal with or dispose of his land in any manner he likes and which would continue to attach or run with the land would amount to an encumbrance on the land and he pointed out that it cannot be disputed that the issuance of notifications in question has the effect of diminishing the value of the property by pegging the price thereof to the market value as on the date of issuance of the notification under Sec. 4 of the Act and further the notifications in question have subjected the land to a liability of being acquired under the provisions of the Land Acquisition Act and since this liability of being acquired would run with the land that would be an essential characteristic of an encumbrance and therefore the notifications in question should be regarded as creating an encumbrance or amounting to an encumbrance on the land in question. In support of his contention he relied upon two passages in Salmond on Jurisprudence, 12th Edition. At page 241 under the sub-heading 'Rights in re propria and rights in re aliena' the learned author has stated thus:

"Rights may be divided into two kinds, distinguished by the civilians as *Jura in re propria* and *jura in re aliena*. The latter may also be conveniently termed encumbrances, if we use that term in its widest permissible sense. A right in re aliena or encumbrance is one which limits or derogates from some more general right belonging to some other person in respect of the same subject-matter. All others are *jura in re propria*." At page 242 the learned author has observed as follows:

"It is essential to an encumbrance that it should, in the technical language

of our law, run with the right encumbered by it. In other words, the dominant and the servient rights are necessarily concurrent. By this it is meant that an encumbrance must follow the encumbered right into the hands of new owners, so that a change of ownership will not free the right from the burden imposed upon it. If this is not so, — if the right is transferable free from the burden — there is no true encumbrance."

There could be no dispute with the statements of law contained in the aforesaid two passages but the first passage merely brings out the distinction between two types of rights, namely rights in re propria and rights in re aliena while in the second passage the learned author has indicated that one essential characteristic of an encumbrance is that it must run with the right encumbered by it; in other words, the burden or liability must run with the right encumbered by it so that a change of ownership will not free the right from the burden imposed upon it. It is thus clear that all that has been stated in the second passage quoted above is that a burden or liability attaching to any property must run with the property in order that the same should be called an encumbrance but that does not mean that every burden or liability which runs with the property must be an encumbrance. It is well settled that the question whether a particular burden or a liability which attaches to the property will amount to an encumbrance thereon or not will depend upon the facts and circumstances of each case. For instance, a lease of property which is contracted to be sold may or may not be an encumbrance depending upon whether the vendor has covenanted to give vacant possession and it will be an encumbrance if vacant possession is agreed to be given but not otherwise. Therefore, every burden or liability that runs with the land would not be an encumbrance. Take the case of a sick textile undertaking whose assets and properties are to vest in the Central Government and thereafter in the National Textile Corporation under this very Act 57 of 1974. Suppose among the several assets belonging to it is one open plot of land in respect whereof a building lease for a period of 99 years has been granted and a construction consisting of several tenements has been put up by the lessee and tenements have been let out; then surely it would be preposterous to suggest that under Section 3 read with Section 4 (2), the plot of land would vest in the Central Government freed from the burden of the building, its tenements and tenants; presumably only the reversion in the plot of land would vest in the Central Government. Conversely, if one of such assets happens to be a leasehold property

it would be futile to suggest that after such leasehold vests in the Central Government under Section 3, the Central Government under Section 4 (2) is freed from the liability to pay the rent to the landlord in respect of such leasehold property and it cannot be disputed that the liability to pay the rent to the landlord is a liability that runs with the property which is the subject-matter of the lease. In other words, it will not be possible to accept the contention of Mr. Dalal that because under two notifications issued under Sections 4 and 6 of the Land Acquisition Act a liability of being compulsorily acquired gets attached to the land in question or so to say such liability runs with that land the two notifications should be regarded as creating an encumbrance over the land falling within Section 4 (2) of the Act. In our view, though by reason of the two notifications, a burden is cast upon the land in question in that the land is subjected to the liability of being compulsorily acquired under the provisions of the Land Acquisition Act, such burden or liability would not fall within the expression 'encumbrance' under sub-section (2) of Section 4.

11. There is yet another aspect of the matter which will have a bearing on the question under consideration. The sole object or the intention of making a provision like sub-section (2) of Section 4 of the Act appears to be that all property of the sick textile undertaking should vest in the Central Government freed and discharged from encumbrances. In other words, whatever encumbrances that might be subsisting on the property should no longer bind the Central Government or the Textile Corporation which should be free to deal with it thereafter as it likes and if that be the real object or intention of sub-section (2) of Section 4, then clearly the liability of being acquired that gets attached to the land by reason of the issuance of the notifications under the Land Acquisition Act was never intended to be covered by the expression 'all other incumbrances' occurring in sub-section (2) of Section 4. Assuming that this land got vested in the Central Government and thereafter in the National Textile Corporation under Section 3 read with Section 4 (2) freed from the aforesaid burden or liability of being acquired, it was not disputed before us by Mr. Dalal that it was open to the appropriate Government immediately thereafter to acquire that very land by issuing fresh notification under Section 4 and Section 6 of the Land Acquisition Act and we do not see any hurdle in the appropriate Government acquiring the very land after the same got so vested in the National Textile Corporation under Section 3 of the Act. If,

therefore, after the property had vested in the National Textile Corporation the same could be acquired by appropriate Government we fail to understand as to what purpose could be achieved by holding that the earlier notifications issued under the Land Acquisition Act created an 'encumbrance' which the National Textile Corporation got rid of under sub-section (2) of Section 4 of the Act No. 57 of 1974. Looking at the question from this angle, we are of the view that the phrase 'all other incumbrances' occurring in sub-section (2) of Section 4 cannot include any such burden or liability to which the land is subjected by reason of issuance of notifications under Section 4 or Section 6, of the Land Acquisition Act.

12. In this view of the matter it is clear to us that the provisions of Section 4 (2) of the Act cannot be availed of by the appellants before us for the purpose of contending that the Notifications in question have ceased to be effective qua the land in question and, therefore, the contention of Mr. Dalal must fail.

13. As regards the other contention we do not agree that the learned Judge was in error in rejecting the application of the original petitioner to lead oral evidence in support of its case that the purported acquisition was by way of colourable exercise of power or mala fide. Initially an application was made for permission to lead oral evidence in support of that plea on 16-7-1969 but the type of evidence that was offered at that time was the evidence of an expert which would have been in the nature of opinion evidence. The learned Judge, therefore, by his order dated 16-7-1969 declined to give permission to the original petitioner to lead that type of evidence. Admittedly even that type of evidence was not ready with the original petitioner and an adjournment was sought which was refused. Thereafter the hearing of the case proceeded and at the conclusion of the hearing the petitioner desired to have a further opportunity to settle the matter with the Municipal authorities and therefore the learned Judge reserved his judgment with a view to give the petitioner time to negotiate a settlement. When the matter was placed on board for judgment on 11-8-1969 another application was made seeking permission to lead oral evidence of persons who would depose to the area required by Municipal schools constructed during the relevant period between the two notifications i.e. between 1961 and 1964 in order to show that having regard to such area which was regarded as sufficient the present case was one of colourable exercise of power. The learned Judge rejected that application as in his view the hearing of the case had been

concluded and he had reserved the judgment only to enable the petitioner to negotiate a settlement with the municipal authorities which it desired to do and as such the petitioner was not entitled to make a second request for leading oral evidence. The learned Judge has also noted in his judgment that this type of case had not been even made out by the petitioner in the petition showing the area occupied by municipal schools during the relevant period i.e. between 1961 and 1964. He, therefore, rejected that request and proceeded to deliver his judgment. In the circumstances mentioned by the learned Judge we do not think that he has wrongly rejected the prayer made by the original petitioner to lead oral evidence in the case. In the absence of any material on record the learned Judge took the view that the petitioner had failed to establish that it was a case of colourable exercise of power and/or that the purported acquisition was mala fide and we are of the view that the finding of the learned Judge in that behalf is correct.

14. In the result, the appeal fails and is dismissed with costs. The attorneys for the respondents are at liberty to withdraw the sum of Rs. 500/- deposited by the appellants as security for costs.

Appeal dismissed.

AIR 1976 BOMBAY 35

(AT NAGPUR)

LALIT, J.

Sitaram Shobharam and another,
Petitioners v. Nandram Chunilal, Respondent.

Special Civil Appln. No. 676 of 1971.
D/- 4-8-1975.*

(A) C. P. and Berar Letting of Houses and Rent Control Order (1949), Clause 13 — A's application for permission to terminate B's tenancy — C and D were alleged to be B's sub-tenants — C and D claiming to be tenant and sub-tenant — Rent Controller found C and D to be tenants — No prejudice caused to them, when they had led evidence on all points — Permission to terminate tenancy granted — Relief had to be in consonance with the findings. (Para 3)

(B) C. P. and Berar Letting of Houses and Rent Control Order (1949), Clause 13 (3) (vi) — Bona fide need — Landlord requiring shop premises on ground floor for running Kirana shops and two rooms in first floor for accommodating adatiyas —

*(Appln. for quashing order passed by Resident Deputy Collector, Amravati, D/- 3-10-1970).

LS/LS/E487/75/SSG

Landlord purchasing house property for running kirana business — Sales tax paid by landlord about Rs. 8,000/- and his business turnover was about Rs. 30,00,000 — Requirements of landlord were held to be bona fide. (Para 5)

(C) C. P. and Berar Letting of Houses and Rent Control Order (1949), Clause 13 (3) (vi) — Bona fide need — Findings of Rent Controller that landlord needs suit premises bona fide and that tenants were habitual defaulters in payment of rent, are findings of fact — They cannot be interfered with, by High Court under Article 227 of Constitution. (Constitution of India, Art. 227). (Paras 6, 7)

A. P. Deshpande, for Petitioners;
J. N. Chandurkar, for Respondent.

ORDER:— Respondent No. 1 is the owner of the municipal houses Nos. 9/913, 9/914 and 9/915 situate within Amraoti Municipal limits. The petitioners are in occupation of the Municipal House No. 9/913. The Municipal House No. 9/913 consists of shop premises on the ground floor and three other rooms in the same building. Two rooms are on the first floor and one room is situate on the second floor. Respondent No. 1 made an application in the Court of the Rent Controller, Amraoti for permission to terminate the tenancy on four grounds. In that application it was alleged that respondent No. 2 was the tenant and he had sub-let the premises to the petitioners and also to respondent No. 3. Respondent No. 1 claimed that he was entitled to get possession of the entire property on the ground that it was sub-let by respondent No. 2 to the petitioners and respondent No. 3 under clause 13 (3) (iii) of the C. P. and Berar Letting of Houses and Rent Control Order, 1949 (hereinafter called the Rent Control Order); the other grounds on which the tenancy was sought to be terminated were that the house required essential repairs, that the petitioner was a habitual defaulter in payment of rent and that respondent No. 1 bona fide required the premises for opening a kirana shop. Respondent No. 2 had made similar application for permission to terminate the tenancy of the tenants in the adjoining shop premises in the same building. The property in their possession was Municipal House Nos. 9/914 and 9/915. The Rent Controller, Amraoti, granted permission to respondent No. 1 to terminate the tenancy on the ground of bona fide requirement, essential repairs and also on the ground of habitual arrears in the payment of rent. The prayer of respondent No. 1 for permission to terminate the tenancy on the ground of sub-tenancy was rejected. The cases of the other two tenants in Municipal Houses Nos. 9/914 and 9/915 were

tried along with the case of the present petitioners and in those cases also respondent No. 1 was given permission to terminate the tenancy of the tenants in those two cases.

2. Against the order made by the Rent Controller, the petitioners filed an appeal being R. A. No. 329/71 (2)/67-68 of Amraoti. The learned Resident Deputy Collector, Amraoti, who heard the matter found that respondent No. 1 was entitled to terminate the tenancy on the grounds of bona fide requirement, essential repairs and habitual arrears in the payment of rent. He confirmed the findings made by the rent Controller that there was no sub-letting and that respondent No. 1 was not entitled to terminate the tenancy on that ground. As a consequence of these findings, he dismissed the appeal filed by the petitioners. The petitioners have now filed this writ petition to challenge the order made by the Resident Deputy Collector.

3. Mr. Deshpande, the learned advocate for the petitioner, sought to challenge all the findings recorded by the authorities against his clients. He submitted that it was not proved that the house required essential repairs and submitted that the repairs were not of such a nature as to require the petitioners to give possession. He also challenged the finding about the bona fide requirement of respondent No. 1 and contended that it was not established that respondent No. 1 required the shop premises for the purposes of opening a kirana shop. He also submitted that the claim of respondent No. 1 that the two shops on the ground were required for the adativas was not established. Lastly, he also challenged the finding that his clients were in habitual arrears of payment of rent. Before I go to these three points which were advanced by Mr. Deshpande I must also take note of one submission made by Mr. Deshpande, that the original application was based on the allegation that only respondent No. 2 was the tenant and the petitioners were his sub-tenants. He contended that in the original application respondent No. 1 sought permission to terminate the tenancy of respondent No. 2 and it was never the case of respondent No. 1 that the petitioners were his tenants. It is therefore, submitted by Mr. Deshpande that the relief which is being given to respondent No. 1 about the permission to terminate the tenancy of the petitioners was a relief which could not be given on the original application. Mr. Deshpande argued that the relief which is given to the respondent is in variance with the pleadings in the application. It is not possible for me to accert this submission of Mr. Deshpande. It is

true that the original case of respondent No. 1 was that respondent No. 2 was a tenant and he had sub-let the premises to the petitioners. It was the case of the petitioners that they were the tenants. They denied the sub-tenancy and that case has been established. The findings now are that the petitioners are the tenants. Now, if those are the findings the relief naturally has to be in consonance with those findings. No prejudice has been caused to the petitioners as they had led evidence with regard to the points of bona fide requirement, essential repairs and habitual arrears in the payment of rent. The permission to terminate the tenancy has been granted. When the petitioners had the opportunity to cross-examine the witnesses of respondent No. 1 (sic). It is not the case where the petitioners have been mis-led or in any way prejudiced. Since the parties were at issue about the main ground on the basis of which permission was sought, there is no merit in the submission of Mr. Deshpande.

4. Then Mr. Deshpande has challenged the finding that respondent No. 1 required the entire house for carrying out essential repairs. Now the finding in this behalf is that the entire portion required repairs and the repairs have to be made to the back portion from the bottom to the top. In fact when the matter was pending before the Resident Deputy Collector, he took cognizance of the fact that the landlord has filed photos to show that even the shops on the ground floor had fallen down on account of recent rains. The Resident Deputy Collector found that it was necessary that even the tenants in the shop premises would be required to vacate the premises as the house required essential repairs. The Resident Deputy Collector took into consideration this additional evidence and found that the entire building required re-construction. As that finding is supported by evidence, there is no reason why that finding should be set aside in the present writ petition. I, therefore, confirm the finding of the Resident Deputy Collector and that the entire house requires reconstruction on the ground of essential repairs.

5. The permission to terminate the tenancy was prayed on the ground of bona fide requirement of running a shop. Respondent No. 1 wants the shop premises in possession of the petitioners on the ground floor because he wants to run a kirana shop there. It is the case of respondent No. 1 that he requires two rooms on the first floor for accommodating the adativas who come to him on account of the business purposes. Respondent No. 1 has purchased this property on June 7, 1965 for a consideration of Rupees

17,000/-. He has purchased it as he wanted to run a kirana business in the suit property. Evidence has also come on record that the landlord of respondent has started proceedings against him in respect of the premises in his possession. These facts would clearly go to show that the requirement of respondent No. 1 is bona fide. Respondent No. 1 wants possession not only from the petitioners but from the occupants of the Municipal Houses Nos. 9/914 and 9/915 also. In fact he has got permission against those two tenants. It has come in evidence that the sales tax which respondent No. 1 pays is about Rs. 8,000/-. It is also the evidence that the turn over of respondent No. 1 in his business is about Rupees 30,00,000/-. These circumstances clearly support the finding that respondent No. 1 requires all the three shop premises on the ground floor. Thus the permission which is being granted to respondent No. 1 on the ground of bona fide requirement appears to be clearly justified.

6. Mr. Deshpande in this behalf argued that respondent No. 1 has already another shop in his occupation in the adjoining locality. He submitted that on account of the availability of this house, respondent No. 1 does not bona fide require the suit premises. The question whether another house is available and whether it was in a business locality has been considered by the two authorities below. Even after considering all this they have come to the conclusion that respondent No. 1 requires the suit premises, bona fide. That, in my opinion, is purely a finding of fact and it cannot be interfered with in this writ petition. Mr. Deshpande further wanted to argue that respondent No. 1 has already obtained possession from the tenants in Municipal Houses Nos. 9/914 and 9/915 and, therefore, submitted that the area of those two shops is sufficient for the purposes of opening a shop. It has to be stated that this fact has not been mentioned anywhere. It is not so stated in the present petition. Even assuming that respondent No. 1 has obtained possession from those two tenants, the findings given by both the authorities are that respondent No. 1 needs three shops for his bona fide requirement. Each shop is having an area of $6\frac{1}{2}' \times 16'9''$ the frontage being $6'3\frac{3}{4}''$. A person who is carrying on a large scale business having a turnover of Rs. 30,00,000/- would reasonably require three adjoining shops of the above said area. If respondent No. 1 gets all the three shops, he will have an area of about $19' \times 16'9''$. Thus the above findings of the two Courts below appear to be justified.

7. The last ground is about habitual arrears in the payment of rent. The

monthly rent of the premises is Rs. 40/-. It seems that the petitioners have paid rent occasionally in the following sums; Rs. 40, Rs. 17, Rs. 62 and Rs. 120/-. This clearly shows that the payments are irregular and the petitioners seem to be habitually in arrears of rent. A finding has been made that they are habitual defaulters in payment of rent. That finding has been made by both the Courts below. Such a finding cannot be interfered with in this writ petition. In the evidence also the petitioners have not given any explanation as to how the rent came to be paid in the above manner. Their only case was that the rent was payable every year. That part of the case has been rejected. In fact there is not a single instance where the payment has been made for the entire year. The findings made by the authorities in this behalf appear to be justified and on this count also respondent No. 1 is entitled to get permission to terminate the tenancy of the petitioners.

8. As all the findings made by the Resident Deputy Collector are confirmed, this petition deserves to be dismissed. The rule is discharged. However, in the circumstances of the case, there will be no order as to costs.

Petition dismissed.

AIR 1976 BOMBAY 38

(AT NAGPUR)

LALIT, J.

Dilipsingh, Appellant v. Dhaniram Naravandas and others, Respondents.

Second Appeal No. 309 of 1964. D/- 17-7-1975.*

(A) Evidence Act (1872), Sections 65 and 89 — Proof of document — Secondary evidence — Notice to produce, given to party in possession of original — Failure of party in possession to produce the document in original — Secondary evidence permissible. (Civil P. C. (1908), O. 11, R. 16).

Where a notice is given to a party to produce document in original in his possession when the evidence satisfactorily established that the party was in possession of document, in the event of failure of such party to produce the original, the party giving such notice is entitled to lead secondary evidence under Section 65 of the Evidence Act. In such circumstances, a presumption arises under Section 89 of the Evidence Act about the

execution of the document in respect of which such secondary evidence has been led. Such presumption arises in respect of attestation, execution and stamping being done in the manner required by law. AIR 1956 Bom 65, Rel. on. (Para 7)

Cases Referred: Chronological Paras
AIR 1956 Bom 65 = 57 Bom LR 918 7

P. G. Palshikar, for Appellant; V. R. Manohar, for Respondents Nos. 1 to 5.

JUDGMENT:— This second appeal arises out of regular Civil Suit No. 854 of 1961 filed by respondents Nos. 1 to 5. Respondent No. 5 is the mother of respondents Nos. 1 to 4 and respondent No. 6 is the father of respondents Nos. 1 to 4. Respondent No. 6 was original defendant No. 3. The present appellant was defendant No. 2 in the trial Court and respondent No. 7 in this appeal is original defendant No. 1. The dispute relates to plot No. 151/1 situate at mouza Nari, Nagpur. On 1-3-1937 one Sitaram Ragho Chawan acting for himself and as a guardian of his minor son Eknath made an agreement of sale in favour of original defendant No. 3 Naravandas in respect of 8 acres from field No. 151. Under that agreement an earnest amount of Rs. 200/- was paid by defendant No. 3 to Sitaram. The agreement was that the property should be sold for an amount of Rs. 2,500/- to defendant No. 3. On 19-4-1937 Sitaram acting for himself and his minor son made a sale deed in favour of Antu, the father of defendant No. 3 Naravandas. That sale deed was for a sum of Rs. 2,500 and the recitals in that sale deed show that the vendor acknowledged the receipt of Rs. 200/- under the agreement of sale made in favour of defendant No. 3 on 1-3-1937. Under this sale deed 8 acres of land from the field which was then numbered as field survey No. 151/1 was sold to Antu. The Isar-chitti dated 1-3-1937 is Exh. 34. The sale-deed in favour of Antu is Exh. 17. On 29-9-1954 defendant No. 3 Naravandas sold to defendant No. 1 by Exh. 31 field survey No. 151/1 measuring 8 acres. That sale-deed was for a sum of Rs. 4,150/-. Defendant No. 1 Abdul Rahim in his turn by Exh. 29 dated 4-4-1957 sold the same property field survey No. 151/1 to the present defendant No. 2 for a sum of Rs. 4,300/-. After the sale was made in favour of defendant No. 2 the present suit was filed by the four sons and the wife of Naravandas. They claimed that survey No. 151/1 was the property purchased by Antu on 19-4-1937. After the death of Antu, they along with defendant No. 3 are heirs of Antu. Defendant No. 3 Naravandas, therefore, had only 1/6th share in survey No. 151/1 and, therefore, the sale-deeds dated 29-9-1954 (Exh. 31) and 4-4-1957 (Exh. 29) are not binding on their 5/6th

* (Against order of V. S. Nirgude, Extra Asst. J., Nagpur in Civil Appeal No. 154 of 1963).

share in the property. The relief, therefore, claimed is for a declaration that the plaintiffs had 5/6th share in the suit field and they have consequently prayed for relief of possession.

2. Defendants Nos. 1 and 2 opposed the suit. Defendant No. 1 filed a written statement at Exh. 14 and written statement filed by defendant No. 2 was at Exh. 10. Defendant No. 3 Naravardas was ex parte. To summarise the contentions taken up on behalf of the defendants Nos. 1 and 2 it may be stated that their case was that the sale-deed of 19-4-1937 was really a transaction made by defendant No. 3 Naravandas. According to them in that sale-deed Antu was only a benamidar for defendant No. 3. Defendant No. 3 had purchased this property from out of his self-earnings in the name of his father. It was, therefore, contended that defendant No. 3 was competent to transfer full title to defendant No. 1 under the sale-deed dated 29-9-1954 and consequently defendant No. 1 had obtained full ownership under that sale-deed. The further contention was that sale-deed in favour of defendant No. 2 on 4-4-1957 also gave full ownership to defendant No. 2. It was, therefore, contended that the plaintiffs could not claim any share in the suit property. On account of the pleadings between the parties issues were framed by the learned trial Judge at Exh. 15. He found that the defendants established that the property purchased in the name of Antu on 19-4-1937 was really a purchase made by defendant No. 3, that field survey No. 151/1 was the self-acquired property of defendant 3. He found that the case of the plaintiffs that the property was of the ownership of Antu was not established. He accordingly held that the defendant No. 3 was competent to transfer the property to defendant No. 1 and, therefore, the sale-deeds in favour of defendants Nos. 1 and 2 should not be challenged by the present plaintiffs. Ultimately, he held that the plaintiffs were not entitled to get any share in the suit property. He accordingly dismissed the suit filed by the plaintiffs.

3. Against that decision, the plaintiffs filed Civil Appeal No. 154 of 1953. The learned Extra Assistant Judge, Nagpur, allowed that appeal and held that the property covered by the sale deed of 19-4-1937 was the property purchased by Antu. He also found that it was not the self-acquired property of defendant No. 3. He accordingly held that the plaintiffs were entitled to 5/6th share in the property. He therefore set aside the decree of the trial Court and gave a declaration that they were the owners of undivided 5/6th share in the suit field. He also directed defendants Nos. 1 and 2 to put

the plaintiffs in joint possession of their 5/6th share in the suit field. It is against that decree that the present decree has been filed.

4. The main question involved in this appeal is whether the property purchased under the sale deed Exh. 17 on 19-4-1937 was the property of Antu or whether it was the self-acquired property of defendant No. 3 Naravandas. The trial Court made a finding in favour of the defendants Nos. 1 and 2 mainly on account of recitals in a partition-deed at Exh. 35. That is a deed of partition to which defendant No. 3 Naravandas and his brother Davaram were parties. There are recitals in that partition deed to show that Davaram who is the uncle of present plaintiffs Nos. 1 to 4 accepted that field No. 151/1 and some other properties were the self-acquired properties of defendant No. 3. Relying on the recitals in this partition deed, the learned trial Judge found that the defendant established satisfactorily that the sale deed in the name of Antu was merely a benami transaction in favour of defendant No. 3 Naravandas. The other evidence on which the trial Court relied was a previous Isar-Chitti (Exh. 34) in the name of defendant No. 3. A further circumstance on which reliance was placed by the trial Court was that the present plaintiffs had never raised any dispute about the nature of the property. The trial Court found that a case of a joint family property was made by the plaintiffs for the first time when this transaction was made in favour of defendant No. 2. Relying on these and the other circumstances a finding was made by the trial Court that the defendants satisfactorily established that field survey No. 151/1 was the self-acquired property of defendant No. 3. That finding has been reversed by the learned Judge of the lower Appellate Court mainly because he found that the partition deed Exh. 35 was not admissible in evidence. He also found that the Isar-chitti Exh. 34 was also not properly proved and he, therefore, excluded these documents from consideration. So far as the partition deed is concerned the learned Judge of the lower appellate Court found that the original partition deed was not produced in the Court and the defendants Nos. 1 and 2 had only produced at Exh. 35 a certified copy of the partition deed. He felt that the secondary evidence of the partition deed, though admissible was not sufficient to prove the execution of the original partition. Therefore, he ultimately excluded the certified copy of the partition deed (Exh. 35) produced on behalf of the defendants Nos. 1 and 2. Alternatively he found that assuming the certified copy of the partition deed would

be taken into account, the recitals therein were not binding on the plaintiffs. He ultimately came to the conclusion that defendants Nos. 1 and 2 failed to establish that the sale-deed of 19-4-1937 in the name of Antu was really a benami transaction of defendant No. 3 Naravandas. Consequently, he allowed the appeal filed by the present plaintiffs.

5. It may appear that the question in the present case is only whether the sale deed of 19-4-1937 was a benami transaction or not. Apparently this may appear to be a question of fact. However, in the present case I feel that the decision given by the learned Extra Assistant Judge suffers from an infirmity namely, that he has excluded the certified copy of the partition deed. It also appears to me that he was in error in excluding the agreement of sale of 1-3-1937 from consideration. On account of the exclusion of this material document, the decision arrived at by the learned Extra Assistant Judge will not be binding on me.

6. Mr. Palshikar at first argued that the learned Extra Assistant Judge was not justified in excluding the Isar-chitti of 1-3-1937. That Isar-chitti is Exh. 34. This Isar-chitti is proved in the evidence by Ramaswami who was a witness of the present plaintiffs. It is true that the evidence given by this witness is to some extent hesitant. However, in his evidence he has clearly proved that Isar-chitti at Exh. 34. In para. No. 2 of his deposition he has clearly made a statement that the Isar-chitti was executed by Sitaram Chawan in his presence. In the immediately following sentence he stated that he did not remember who signed the Isar-chitti. However, he later on stated "It was executed in the name of Antu". In the further part of his evidence, the Isar-chitti was shown to him and the statement made by this witness was as follows:—

"One Isar-chitti is now shown to me. I cannot say if it is the same because I cannot read it without spectacles and it is matter of very old days. I have not brought my spectacles with me. The said Isar-chitti is now read over to me. It is the same which was scribed that time by Sitaram Chavan. I do not remember whether it was scribed in the name of Antu or his son Naravandas x x" Now, the learned trial Judge on hearing the parties held that this Isar-chitti was proved by the witness, Ramaswami. In the evidence quoted above, it appears to me that though this witness has given evidence which is to some extent inconsistent, he has nevertheless established the execution of the Isar-chitti. After the Isar-chitti was read out to him, he clearly stated that it was the same Isar-

chitti which was scribed by Sitaram Chavan. At one place in his evidence he has stated that the Isar-chitti was executed by Sitaram Chavan. It may be remembered that Ramaswami is a witness examined on behalf of the plaintiffs. In my opinion, his evidence clearly establishes the execution of the Isar-chitti Exh. 34. The learned Extra Assistant Judge found that the evidence of witness Ramaswami was not sufficient to prove the execution of the Isar-chitti because according to him the witness Ramaswami did not state that any of the persons who are alleged to have executed the document had put their signatures or thumb marks on the document in their presence. It is not possible for me to agree with this reasoning of the learned Extra Assistant Judge. The evidence of Ramaswami clearly proves the execution and, therefore, in my opinion the Isar-chitti Exh. 34 will have to be taken into account while considering the evidence.

7. The learned Extra Assistant Judge also rejected the certified copy of the partition deed (Exh. 35). That finding made by the learned Extra Assistant Judge also appears to be erroneous. It is to be stated that Exh. 35 was in possession of defendant No. 3. Defendant No. 3 is the father of present plaintiffs Nos. 1 to 4. The recitals in Exh. 35 itself show that the document was to remain in possession of defendant No. 3. During the pendency of the suit, defendants Nos. 1 and 2 gave a notice to defendant No. 3 to admit certain documents. One such document is the partition-deed. The application made by defendants Nos. 1 and 2 in this behalf was Exh. 29. A certified copy of this partition-deed was produced and defendants Nos. 1 and 2 gave another application as Exh. 30 wherein they gave a notice to defendant No. 3 to admit the certified copy of the partition-deed. However, defendant No. 3 neither produced the partition-deed nor gave any satisfactory reply to Ex. 30. Afterwards in the evidence defendants Nos. 1 and 2 led evidence about the certified copy of the partition deed. Arguments were heard and the learned trial Judge considered the question whether the certified copy of the partition-deed was to be admitted or not. He ultimately admitted the certified copy of the partition-deed at Exh. 35. In these circumstances it appears to me that defendant No. 3 who was in possession of the partition-deed having been called upon to produce that document and he having failed to produce the document, defendants Nos. 1 and 2 were clearly entitled to lead secondary evidence. Defendants Nos. 1 and 2 had also given a notice to defendant No. 3 to admit this document. In a decision of the Division Bench of this Court reported in Kashi Bai

v. Vinayak. (AIR 1956 Bom 65) it has been held that when such a notice is given to a party to produce the document and if the evidence satisfactorily shows that the party was in possession of the document, the party giving such a notice is entitled to lead secondary evidence under Section 65 of the Evidence Act. It is further held that in such circumstances a presumption arises under Section 89 of the Evidence Act about the execution of the document. Section 89 of the Evidence Act says that the Court shall presume that every document, called for and not produced after notice to produce, was attested, stamped and executed in the manner required by law. This decision is, in my opinion, clearly in favour of the present defendants Nos. 1 and 2 as a proper notice was given to defendant No. 3 to produce that document and he has failed to prove by producing it. The certified copy of the partition-deed produced by defendants Nos. 1 and 2 will be clearly admissible in evidence. That certified copy will prove not only the contents but the execution of the partition-deed. As such that certified copy is clearly admissible in evidence and the finding of the learned Extra Assistant Judge in that behalf cannot be accepted.

8. If Exh. 35 the certified copy of the partition-deed is to be considered in evidence, it appears to me that there are clear recitals in that partition-deed that survey No. 151/1 was the self-acquired property of defendant No. 3. It may be said that that was a partition between defendant No. 3 and his brother Davaram. There was some dispute about four items of property mentioned in para. 2 of that partition-deed. With regard to these four items, the case of Davaram was that they were the joint family properties whereas the defendant No. 3 Naravandas was claiming to be his self-acquired property. Ultimately Davaram accepted that these four properties in para. 2 were the self-acquired properties of defendant No. 3. It is to be noted that survey No. 151/1 is one of the four properties in para. 2. The division in the partition-deed further shows that these four properties having once been accepted as the exclusive properties of defendant No. 3 the remaining properties were partitioned between him and his brother Davaram. The remaining properties were equally divided between the two. In para. 13 of that partition-deed there are clear recitals to show that the value of the entire property which was available for partition was Rs. 10,000/- and the value of each equal share was estimated at Rs. 5,000/- and the two brothers were given equal share. It, therefore, is clear that in 1950, Naravandas defendant No. 3 and Dava-

ram had made a partition on the footing that Survey No. 151/1 was the self-acquired property of defendant No. 3. Such an admission by Davaram was clearly against his interest and the fact that he made such an admission and accepted that Survey No. 151/1 was the self-acquired property of defendant No. 3 would clearly be a strong evidence on which the defendants 1 and 2 would be entitled to rely. It may also be stated that in the four properties which were to be accepted as self-acquired properties of defendant No. 3 Naravandas the present plaintiffs would be entitled to get larger share as Davaram had accepted that they were not joint family properties. To this extent the admission given by Davaram about the four properties being advantageous to the present plaintiffs, the recitals in the partition-deed about Survey No. 151/1 would strengthen the case of defendants Nos. 1 and 2 to a substantial extent. In the nature of this partition, it would really be for the plaintiffs to give satisfactory evidence to explain the recitals in the partition-deed because it is now the case of the plaintiffs that these recitals are not correct. I may observe that none of the plaintiffs have gone in the witness box — neither they have examined defendant No. 3 or Davaram as their witness. Since the concerned properties were of the family of the plaintiffs it is legitimate to expect that the plaintiffs give some evidence to explain these recitals in the partition-deed. At any rate, plaintiff No. 5, the mother of plaintiffs Nos. 1 to 4 should have been examined to explain these recitals. This not having been done, the plaintiffs must suffer. On the basis of these recitals, defendants Nos. 1 and 2 have satisfactorily discharged the burden of showing that the sale in favour of Antu was a benami sale.

9. That conclusion is also strengthened by the fact that the original Isarchitti Exh. 34 was in the name of defendant No. 3. It may also be stated that when the property was first sold by defendant No. 3 to defendant No. 1, the present plaintiff never raised a dispute that Survey No. 151/1 was a joint family property. Even in the sale-deed made by defendant No. 3 in favour of defendant No. 1 on 29-9-1954 (Exh. 31) there are clear recitals that the property Survey No. 151/1 was the self-acquired property of defendants. On a consideration of this entire material, it appears to me that the finding given by the learned Extra Assistant Judge was clearly unsupportable. That finding could not have been arrived at on the present evidence once the partition-deed and the agreement of sale are accepted in evidence. I feel interference is called for in this second appeal. The inter-

ference is justified on account of the erroneous exclusion of material evidence from consideration. The effect of the failure on the part of the plaintiffs to examine plaintiff No. 5 or defendant No. 3 or Dayaram has not been taken into account. The recitals in the partition deed having been established it was for the plaintiffs to explain those recitals. None of the plaintiffs have gone into the witness box. On account of these circumstances, I feel that the finding made by the learned Extra Assistant Judge has to be set aside. As indicated above, on the consideration of the entire evidence, it appears to me that the finding made by the trial Court is correct. That finding will have to be restored. This appeal will have to be allowed and the plaintiffs' suit will have to be dismissed.

10. Second Appeal No. 309 of 1964 is allowed. The decree made by the Extra Assistant Judge, Nagpur, in Civil Appeal No. 154 of 1963 is set aside and the decree made by the trial Court in Civil Suit No. 854 of 1961 is restored. In the circumstances of the present case, there will be no order as to costs.

Appeal allowed.

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(AT NAGPUR)

LALIT AND DIGHE, JJ.

Dattatraya Hari Vaidya and others
(In Spl. Civil Appln. No. 1267 of 1969).
Petitioners v. Union of India and others,
Respondents.

Special Civil Appln. No. 1267 of 1969
with Spl. Civil Appln. No. 141 of 1970.
D/- 14-7-1975.

(A) Constitution of India, Art. 226 —
Mandamus — Delay — Seniority chal-
lenged after 13 years — Relief ought not
to be granted as it would be prejudicial
to many persons.

Although a petition under Art. 226 of the Constitution need not necessarily be thrown out on the question of delay alone but where the question involved is about the seniority in service, and the petitioner seeks to unsettle a seniority list which had existed and remained in operation for over 13 years, granting of relief would be prejudicial to a large number of persons who may not be parties.

(Paras 10, 12 and 13)

(B) Central Civil Services (Tem-
porary Services) Rules, 1949, Rr. 2 (b)
and 3 — Quasi permanency — Confirmation
in service — Attainment of quasi
permanent status is not condition prece-
dent. (Para 17)

DS/DS/E490/75/GCM

(C) Constitution of India, Art. 309 —
Civil Service — Confirmation — Orders
for confirmation can be passed with re-
trospective effect — Even though on date
of issuing of confirmation orders, the in-
cumbents are not working under the
jurisdiction of authority issuing confirma-
tion orders, such orders can be passed by
such authority relating to period during
which such persons were working under
it. (Paras 20 and 22)

In Spl. Civil Appln. No. 1267 of 1969:
V. A. Masodkar, for Petitioners; R. V.
Patil Hon. Asst. to Addl. Govt. Pleader,
for Respondents Nos. 1, 2 and 5; In Spl.
Civil Appln. No. 141 of 1970: V. R. Manohar,
for Petitioner; R. V. Patil Hon. Asst.
to Addl. Govt. Pleader, for Respondents
Nos. 1, 2 and 5.

LALIT, J.:— These two petitions concern a cadre of the Telephone Operators and some of the parties involved in the two petitions are identical. The questions involved in these two matters are of a common nature and with the consent of the advocates appearing on behalf of the parties in these two petitions, these two petitions were heard together. The learned Advocates also agreed that the pleadings and the documents in these two petitions be read together. In Special Civil Application No. 141 of 1970, the petitioner is one V. K. Sule. His allegation is that a competitive examination was held by the Post Master General, Central Circle, Nagpur, for the recruitment of Telephone Operators. That examination was held in 1951. He was selected for appointment as a Telephone Operator and by a letter dated May 20, 1952, he was informed that he was selected for the post in the Indore Engineering Division. He was also informed that on occurrence of a vacancy, he would receive a call from the Divisional Engineer, Telephones, Indore. For some time no vacancy was available and the Divisional Engineer, Telephone (hereinafter described as the D. E. T.) Indore, wrote a letter to the petitioner on July 30, 1952, whereby he was informed that his employment in the Indore Division was likely to take a very long time, and the petitioner was asked whether he was willing to be transferred to the list of the approved candidates for the unit at Jaipur Division. On August 4, 1952, the petitioner sent a letter expressing his willingness to be posted in Jaipur Division and requested that his name be transferred to the list of the approved candidates of Jaipur Division. In October, 1953, by an office order No. E. 63/521, an order of appointment was issued in favour of nine persons including the petitioner and the petitioner was appointed with effect from October 10, 1953. It is the allegation of the petitioner that

when his appointment was made in the Central Circle, there were four divisions, viz., Aimer, Jaipur, Indore and Nagpur. The recruiting authority under the Central Circle for the post of a Telephone Operator was the Post Master General, Nagpur; whereas the appointing authority for the post of a telephone operator was the Divisional Engineer of each Division. In 1953, for the purposes of administration, Rajasthan Circle came to be formed and the erstwhile Jaipur Division from the Central Circle was allotted to Rajasthan Circle.

2. The Director, Posts and Telegraphs, Jaipur, who was then the head of the Rajasthan Circle, issued a memo dated June 21, 1954. Under this memo the employees, who earlier belonged to the Central Circle and were at the material time working at Jaipur, were asked to give options as to whether they would opt for the Nagpur Division of the Central Circle, or whether they would like to continue in the newly formed Rajasthan Circle in its Jaipur Division. The petitioner says that he opted for the Nagpur Division of the Central Circle. The further allegation in the petition is that on December 1, 1955, the D. E. T., Jaipur, by his order transferred 10 Telephone Operators working in the Jaipur Division to the Nagpur Division of the Central Circle and in that order of transfer, it was stated that the order was being made "in the interest of service". The petitioner's grievance is that except one Shri V. K. Gaware who was at serial No. 1 in this order of December 1, 1955, all the other nine persons were junior to him in the cadre of the Telephone Operators. Respondents 6 to 13 are the employees who were amongst the ten persons transferred under the order of December 1, 1955. The case of the petitioner in respect of respondents 6 to 13 is that they were juniors to him both in the appointment and in confirmation.

3. The further grievance of the petitioner is that though he had opted for a transfer in the Nagpur Division and though he was senior to respondents 6 to 13, his transfer was made after the transfer in favour of respondents 6 to 13. The petitioner was actually transferred to the Nagpur Division of the Central Circle on February 6, 1957, and in pursuance of this transfer, he was posted in the Telephone Exchange at Amraoti, which is in the Nagpur Division of the Central Circle.

4. The case made out on behalf of the petitioner further is that the Director General, Posts and Telegraphs, issued a circular on January 5, 1962, wherein it was provided that if an official was allowed a transfer under Rule 38 of the

P. & T. Manual, Volume IV when he was due for confirmation in the post before the date of his actual transfer and the orders of his confirmation were not issued by that date for administrative reasons, there would be no objection for his confirmation in the unit from which he was transferred. According to the petitioner, on the strength of this circular, the petitioner was entitled to get confirmation in the Jaipur Division wherefrom he was transferred. Pursuant to this circular dated January 5, 1962, representations were sent by a number of employees and in pursuance of these representations and in view of the decisions of the Department, the D. E. T., Jaipur, after obtaining the due concurrence of the Director General, Posts and Telegraphs, issued an order dated February 8, 1968, whereby the petitioner and some 16 others came to be confirmed respectively. So far as the petitioner is concerned, he was confirmed as from September 1, 1954. The petitioner has also filed a schedule to show the dates of confirmation of all the respondents 6 to 26 in this petition. It is his case that respondents 6 to 13 were confirmed on September 1, 1954, but as he was senior to them in the Jaipur Division, he is entitled to get seniority over them in the Nagpur Division. So far as the other respondents are concerned, it is the case of the petitioner that their confirmations are subsequent to September 1, 1954, and on that ground he is entitled to get seniority over those respondents also.

5. According to the petitioner, he was first affected on account of the Divisional Seniority list of telephone operators (as on July 1, 1968) published by the D. E. T., Nagpur. It is his grievance that in this seniority list, he was placed even below the operators confirmed in the year 1957. His case is that his placement in the seniority list at a place disadvantageous to him was the result of erroneous view of the authorities that the date of the petitioner's transfer in the Nagpur Division was the only relevant date for fixing his seniority. It was taken as if he had entered in the Nagpur Division on February 6, 1957 only. The petitioner's grievance is that respondents 6 to 26 are not entitled to claim seniority over him as the seniority of the petitioner should be counted with reference to September 1, 1954 and not from February 6, 1957. When this Divisional Seniority List was published, the petitioner made a representation to the authorities. That representation was made on July 6, 1968, and it was addressed to respondent No. 1. It is the allegations of the petitioner that as he did not get redressed, he made a further representation to respondent No. 5 on August 1, 1968. Respondent No. 5, by his order dated August 3, 1968, informed

the petitioner that his case had been referred to the P. & T. Directorate and further communication be awaited. According to the petitioner, no steps were taken further on his representation. However, without adjudicating the objections raised by the petitioner the P. M. G., Maharashtra, Bombay (respondent No. 2) issued an order on November 25, 1969 selecting amongst others respondents 6 to 26 to the post of Lower Selection Grade Monitors. This is a promotional post. Under this order of November 25, 1969, respondents 6 to 26 were directed to be posted in these promotional posts. According to the petitioner, this order of promotion, which is Annexure M to the petition, is illegal and has the effect of superseding the rights of the petitioner on an erroneous construction based on the seniority of the respective respondents. The petitioner addressed a telegram on December 9, 1969 to the Director General, Posts and Telegraphs, New Delhi and contended that the promotions under the order of November 25, 1969 were illegal. As the petitioner's grievances were not redressed, the present petition had been filed on February 11, 1970.

6. The substance of the grievances of the petitioner as made out in the petition is that the petitioner was senior to respondents 6 to 26 as he was confirmed with effect from September 1, 1954. His case is that respondents 6 to 13 were allotted to the Jaipur Division along with him and in this Division he was senior to them. After formation of the Rajasthan Circle, options were called from such of the employees of the Jaipur Division, who desired to go to the Nagpur Division and the petitioner had opted for the Nagpur Division. Though he was senior to respondents 6 to 13, first order of transfer was made only in favour of respondents 6 to 13, whereas the petitioner was transferred on February 6, 1957. The other grievance of the petitioner is that the transfer of respondents 6 to 13 was shown to be one "in the interest of service", whereas it was shown that the transfer of the petitioner was a transfer "at his request". The petitioner's case is that on account of these differences in the treatment which was given to him and respondents 6 to 13 on the other hand, he has lost the benefit of his seniority over respondents 6 to 13 in the Jaipur Division. It is submitted that on account of this difference in the treatment, respondents 6 to 13 continued to enjoy the advantage of their confirmation on September 1, 1954, whereas the petitioner is being treated as a new entrant on February 6, 1957 in the Nagpur Division and, as such, he is shown junior to respondents 6 to 13. It is the case of the petitioner that the order show-

ing the transfer of respondents 6 to 13 is a colourable order and in fact it is not a transfer in the "interest of service". He, therefore, submits that respondents 6 to 13 should be shown in the gradation list as persons junior to him. The second grievance of the petitioner is that though it is (shown) that his transfer was one at his request, in fact he was entitled to get the same treatment as was given to respondents 6 to 13 and his transfer should also have been treated as one "in the interest of service". He was, therefore, entitled to be treated as an employee confirmed on September 1, 1954 and was entitled to get seniority consequently. His case is that if he is entitled to get advantage of confirmation on September 1, 1954, respondents 14 to 26 are his juniors and, as such, he is entitled to the placement in a Division Seniority list above them. On account of the placement which the petitioner claimed in the Divisional Seniority List, the ultimate submission made on behalf of the petitioner is that the petitioner was entitled to be considered for the promotional post and promotions made in favour of respondents 6 to 26 are in supersession of the rights of the petitioner. These are the main grounds on the basis of which this petition has been filed. So far as the concerned employees are concerned, no return has been filed before us. A return has been filed on behalf of respondents 1, 2 and 5 alone.

7. In the return on behalf of respondents 1, 2 and 5, it is stated that after the formation of Rajasthan Circle it was decided that the officials, who had their homes in one Division but were working in another Division, should be repatriated to their home unit against the vacancies reserved for direct recruitment. This was to be done without detriment to the reservation made for the Scheduled Castes and Scheduled Tribes. This repatriation was agreed to be done under the provisions of Rule 38 of the Posts and Telegraphs Manual, Volume IV. Accordingly, the petitioner had given an option for the Nagpur Division and he joined the Nagpur Division on February 6, 1957. This transfer was under Rule 38 of the Posts and Telegraphs Manual, Volume IV. The requests of respondents 6 to 13 had also been granted on compassionate grounds by the Posts and Telegraphs Directorate and their transfers to the Nagpur Division were treated "as on administrative grounds in the interest of service." It is contended that there is a distinction between a transfer made "in the interest of service", and one made purely at "the request" and cost of the official under the provisions of Rule 38 of the Posts and Telegraphs Manual, Volume IV. In the former case, the official does not lose his past service or seni-

ority, while in the latter case, the official's seniority in the new Division is fixed under the provisions of Rule 33 of the said Manual. Respondents 6 to 13 were transferred to the Nagpur Division "in the interest of service" and, therefore, their previous service in the Jaipur Division was correctly taken into account, while fixing their seniority. On the contrary, the petitioner having been transferred under Rule 38, he had to lose his previous service for determining his seniority in the Nagpur Division. The further contention is that in view of R 38, the petitioner had to be placed below all the permanent officials as if he had joined the Nagpur Division on February 6, 1957. On this footing, respondents 6 to 25 were entitled to get seniority over the petitioner. It is also stated in the return that respondent No. 26 though not senior to the petitioner, was selected for promotion against the quota reserved for the officials belonging to the Scheduled Tribes. In substance the return goes to show that the transfer of respondents 3 to 13 was "in the interest of service" and, as such, they were entitled to get the advantage of their service in the Jaipur Division, whereas the transfer of the petitioner was a transfer under Rule 38 and, as such, the petitioner could not take advantage of his previous service in the Jaipur Division, and though he was confirmed in the Jaipur Division with effect from September 1, 1954, he would have to be treated as a fresh recruit in the Nagpur Division as from February 6, 1957, which is the date of his transfer.

8. Mr. Manohar, the learned Advocate for the petitioner argued that the order of transfer in favour of respondents 6 to 13 was not really one "in the interest of service." He submits that it is an order passed only to show special favour to respondents 6 to 13. He submits that respondents 6 to 13 and the petitioner were similarly placed as the employees in the Jaipur Division as such, the petitioner was entitled to get a treatment similar to the one given to respondents 6 to 13. His grievance is that if respondents 6 to 13 could be transferred "in the interest of service," his client was also entitled to get transferred on similar terms. His alternative submission is that since respondents 6 to 13 have not in fact been transferred "in the interest of service", and as a matter of fact their transfer is a transfer "at their request." It is further the submission of Mr. Manohar that Rule 38 of the Posts and Telegraphs Manual would apply to respondents 6 to 13 as well and as the petitioner was senior to respondents 6 to 13 in the Jaipur Division, he was entitled to get similar treatment. He has also attacked the order of

transfer on the ground that as the petitioner was senior to respondents 6 to 13, he was entitled to get transferred first. The further submission made by Mr. Manohar is that as the petitioner was confirmed on September 1, 1954, he was entitled to get the seniority over respondents 6 to 26 on the basis of this order of confirmation.

9. In this petition the real question, therefore, is as to what is the nature of the transfer of the petitioner. The central crux of this petition is as to how the orders of transfer in favour of the petitioner and respondents 6 to 13 should be viewed. The petitioner cannot succeed in this petition unless he successfully challenges the order of transfer of respondents 6 to 13 and also his own order of transfer. So far as respondents 14 to 26 are concerned, it is necessary for the petitioner to establish that when he came to the Nagpur Division on February 6, 1957, he was entitled to get the benefit of his previous service in the Jaipur Division. The petitioner, ever since he came to the Nagpur Division, has been shown to be a person who has come on account of a transfer made under Rule 38. It is admitted that if the petitioner's transfer is viewed as one under Rule 38, he would not be in a position to claim seniority over respondents 14 to 26. It is also not disputed that if the transfer of respondents 6 to 13 is viewed as a transfer "in the interest of service", respondents 6 to 13 would be entitled to claim seniority over the petitioner notwithstanding his seniority over them in the Jaipur Division. It is, therefore, clear that no effective relief can be given to the petitioner unless he is in a position to challenge these orders of transfer of 1955 and 1957.

10. Now, we feel that the challenge to these orders made in February 1970 is clearly a belated challenge. The grievance in respect of one order seems to be made before us after about 15 years when the order of transfer of respondents 6 to 13 was passed in 1955. So far as the transfer of the petitioner is concerned, the dispute has been made after nearly 13 years. Such a petition prima facie is grossly delayed and in a petition under Article 226 of the Constitution, it will not be possible for us to grant relief to the petitioner at such a late stage. It is true that a petition under Article 226 of the Constitution may not necessarily be thrown out on the ground of delay alone. However, the question involved in this petition is about the seniority of the petitioner over respondents 6 to 26. The petitioner now seeks to unsettle a state of affairs which existed for the last many years. Granting relief to the petitioner would be prejudicial to a large number

of persons, who are not parties to the present petition. A dispute about a transfer order has to be raised at an early stage. The petitioner cannot be permitted to unsettle a seniority list which has existed and remained in operation for over 13 years.

11. At one stage Mr. Manohar, the learned advocate for the petitioner, submitted that the cause of action in favour of the present petitioner arose only when respondents 6 to 26 were promoted to the post of Lower Selection Grade Monitors. Mr. Manohar contended that the real grievance now is on account of the order of promotion dated November 25, 1969, and therefore, the petition is well within time. It is not possible for us to accept this submission of Mr. Manohar. The order of promotion depends upon the basic fact of the seniority of the petitioner over respondents 6 to 26. If respondents 6 to 26 are senior to the petitioner, it is not possible for the petitioner to make a claim that he was entitled to be considered for the promotion. It is admitted that on the existing seniority, the promotion orders are correct. It follows that the dispute about promotions cannot be decided unless the transfer orders of 1955 and 1957 are altered or set aside. The dispute about promotions is, therefore, a belated dispute.

12. It appears from the record that the petitioner has been making representations about his transfer orders for quite sometime. We have before us a representation made by the petitioner to the Director General Posts and Telegraphs (Annexure J). That is a representation dated July 6, 1968. The body of that representation itself shows that the petitioner had previously made representations on January 22, 1956 and December 6, 1958. We also have before us a representation made by the petitioner on August 1, 1968 to the Divisional Engineer Telegraphs, Nagpur Telegraphs Engineering Division, Nagpur, and in the body of that representation we get a reference to the previous representation made by the petitioner against the Divisional Gradation lists of 1958 and 1963. Those two representations are dated December 20, 1958 and November 11, 1963. These circumstances clearly show that right since 1958, the petitioner has been shown as a junior to respondents 6 to 26 in the Gradation list and he has been making representations right from 1956. As we have already indicated that the main dispute involved in this case is about the seniority, we must conclude that the grievance which the petitioner was making by representations right from 1956, cannot now be entertained in a petition filed in 1970. Considered from this point of view, we feel that it will not be

worthwhile to entertain the petition on account of delay.

13. We may, however, observe that the question about the nature of the transfer orders is being considered in the accompanying petition in Special Civil Application No. 1267 of 1969. There also the finding which we propose to make would be against the case made out by the present petitioner. However, we rest our decision in Special Civil Application No. 141 of 1970 mainly on the ground of delay and dismiss the petition.

14. Now, turning to the facts in Special Civil Application No. 1267 of 1969, the petitioners and respondents 6 to 14, belong to a cadre known as the cadre of Telephone Operators. At the time of the petition, the petitioners were working under the authority of the Divisional Engineer, Phones, Nagpur, (hereinafter called the D. E. T.). In 1951, there was an examination for the recruitment in the cadre of the telephone operators. That examination was held by the Post Master General of the then Central Circle. The Central Circle consisted of four Divisions including the divisions of Jaipur and Nagpur. The petitioners claim that they had secured a higher place than respondents Nos. 6 to 14 in the said examination. The petitioners opted for the Nagpur Division and were employed there as telephone operators. Respondents 6 to 14 could not be employed in the Nagpur Division as candidates who had secured places higher than respondents 6 to 14 had opted for the Nagpur and other Divisions. It is the case of the petitioners that their dates of appointment in the Nagpur Division were earlier than the respective dates of respondents 6 to 14 in the Jaipur Division. On that count, it is alleged that all the petitioners were senior to all the respondents in the cadre. It is also further alleged that at the time when respondents 6 to 14 actually received their order of appointment, a new Circle called Rajasthan Circle was formed and the Jaipur Division was attached to that Circle. This Rajasthan Circle came to be formed on October 1, 1953. According to the petitioners, when respondents 6 to 14 were absorbed in the Jaipur Division, they joined in that Division on the specific understanding that their allotment to the Jaipur Division was final and no application for transfer could be entertained on the ground that their original choice was for some other division. The petition goes on to allege that in spite of this understanding, respondents 6 to 14 started making requests for their transfer to the Nagpur Division and ultimately they were transferred on December 3, 1955 to the Nagpur Division. It is the case of the petitioners that these transfers of respondents 6 to 14 were "at their own re-

quest." It is the case of the petitioners that at the time when these transfers were made, the respondents had not even attained the status of "quasi permanent servants." They were temporary servants and after the transfer on December 3, 1955, when they were absorbed in the Nagpur Division, they were shown in the gradation list as persons junior to the petitioners. In the gradation list the serial numbers of respondents 6 to 14 were from 225 onwards and the petitioners were at higher positions. The petitioners further allege that the transfer of respondents 6 to 14 was under Rule 38 of Chapter II of the Posts and Telegraphs Manual, Volume IV and the respondents could not get places above those occupied by the petitioners. When respondents 6 to 14 were working in the Nagpur Division, they were confirmed in that Division as from March 1, 1958. The actual orders for confirmation were passed sometime in 1960 by the appointing authority. According to the petitioners, they were all confirmed in the Nagpur Division before March 1, 1958 and on account of this previous confirmation also they were entitled to have seniority over respondents 6 to 14. According to the petitioners, in the gradation list all throughout the petitioners were shown as senior employees of the Nagpur Division. However, some time in the month of August 1968, the petitioners notice a communication that respondents 6 to 14 were confirmed with effect from September 1, 1954. All the petitioners were confirmed between the period March 1, 1955 to March 1, 1958. The petitioners' case is that respondents 6 to 14 were confirmed with effect from September 1, 1954 under an order passed by the Divisional Engineer, Telephones, Nagpur, on July 31, 1968. On account of this order dated July 31st 1968 (Annexure VIII) the gradation list for the Nagpur Division came to be revised and in the gradation list of telephone operators as on July 1, 1968, respondents 6 to 14 were shown as persons senior to the present petitioners. This revised gradation list is Annexure 11 in this petition. On the basis of this revised gradation list, recruitment to the promotional posts of Lower Selection Grade Monitors was made and the grievance of the petitioners is that in these posts respondents 6 to 14 were wrongly promoted ignoring the claims of the petitioners. The petitioners claim that in fact they are senior to respondents 6 to 14. They are, therefore, entitled to be shown at higher places in the seniority and the gradation list and they are also entitled to be considered for the promotional posts in preference to respondents 6 to 14. The petitioners have, therefore, challenged in this petition the three orders. These orders

are (i) the order of July 31, 1968 passed by the D. E. T., Nagpur (Annexure VIII), (ii) revised gradation list as on July 1, 1968 showing respondents 6 to 14 as persons senior to the petitioner (Annexure II) and (iii) the promotion order (Annexure XII) dated November 25, 1969.

15. In the reply on behalf of respondents it is not disputed that in 1951 there was an examination in which the petitioners stood higher above respondents 6 to 14. It is also not disputed that the respondents joined their service in the Jaipur Division after the petitioners had joined in the Nagpur Division. However, it is contended that the petitioners were confirmed in 1968, in the Jaipur Division with effect from September 1, 1954. It is claimed that on account of this confirmation, respondents 6 to 14 are entitled to claim seniority over the petitioners as all the petitioners have been confirmed after September 1, 1954. It is also contended that the transfer of respondents 6 to 14 to the Nagpur Division was a transfer "in the interest of service" and, as such, respondents 6 to 14 were entitled to get advantage of their past service in the Jaipur Division. It is denied that the transfer of respondents 6 to 14 to the Nagpur Division was under Rule 38 of Chapter II of the P. & T. Manual, Volume IV. It was, therefore, contended that as the seniority is to be fixed with reference to the date of permanent appointment, respondents 6 to 14 were rightly shown senior to the petitioners and the act of revising the gradation list for the Nagpur Division was perfectly legal. As respondents 6 to 14 in the revised gradation list became senior persons, they were rightly considered for the promotional posts in supersession of the alleged claims made on behalf of the petitioners.

16. In this petition Mr. Masodkar, the learned advocate for the petitioners, has firstly challenged the order of confirmation in favour of respondents 6 to 14. He submits that respondents 6 to 14 could not be given confirmation with effect from September 1, 1954. There are different grounds on the basis of which this confirmation of the respondents is challenged.

17. The first ground to challenge this confirmation is raised on the allegation that on the alleged date of confirmation, i.e. September 1, 1954, respondents 6 to 14 were not even "quasi permanent servants". It is the submission of Mr. Masodkar that unless respondents 6 to 14 could claim the status of quasi permanent servants, they are not entitled to get confirmation in the Jaipur Division. Mr. Masodkar has relied on the definition of "quasi permanent service" in Rule 2 (b)

of the Central Civil Services (Temporary Services) Rules, 1949. The "quasi-permanent service" is defined as:

".....temporary service commencing from the date on which a declaration issued under Rule 3 takes effect and consisting of periods of duty and leave (other than extraordinary leave) after that date." Rule 3 says—

"A Government servant shall be deemed to be in quasi-permanent service—

(i) if he has been in continuous Government service for more than three years, and

(ii) if the appointing authority, being satisfied as to his suitability in respect of age, qualifications, work and character for employment in a quasi-permanent capacity, has issued a declaration to that effect xxxxx."

Relying on these provisions, Mr. Masodkar submits that in the Jaipur Division respondents 6 to 14 had not completed three years service before September 1, 1954. It is, therefore, argued that they were not even entitled to get the status of quasi-permanent servants. The further argument of Mr. Masodkar is that if respondents 6 to 14 could not be styled even as quasi-permanent servants, they could hardly be confirmed on September 1, 1954. It appears that the submission of Mr. Masodkar is that one could not be a permanent servant unless he first attained the status of a quasi permanent servant. It is not possible for us to accept this submission made by Mr. Masodkar. Rule 3 of the Central Civil Services (Temporary Service) Rules, 1949, no doubt defines what a quasi permanent service is but it does not follow that one cannot be confirmed unless he first qualifies to be a quasi-permanent servant. It is not a matter of legal requirement flowing from the provisions of these rules that respondents 6 to 14 could not be confirmed on September 1, 1954 only on the ground that they had not completed three years of service. Mr. Masodkar has not been able to show us any rule which specifically lays down the qualifications or the requirements for confirmation in permanent service. Unless we get such a rule it is not possible to infer merely from the definition of "quasi-permanent service" that in all cases a person has to put in three years of service before he could be appointed as confirmed servant. In fact from the list (Annexure 1) attached to this petition, it is apparent that some of the petitioners themselves have been confirmed in service before they put in three years of service. We must, therefore, reject this argument made by Mr. Masodkar.

18. The second argument of Mr. Masodkar is that the order of confirma-

tion made by the D. E. T., Nagpur, on July 31, 1968, is not really an independent order. Mr. Masodkar has argued that this was an order passed by the D. E. T., Nagpur, only on the dictates of the D. E. T., Jaipur and for this reason, Mr. Masodkar submits that this order is vitiated. We must observe that we must reject this contention. All that the order of July 31, 1968 says is—

"In accordance with D. E. T. Jaipur Dn. Jaipur (Rajasthan Circle) Memo No. E 263/Seniority of T.Os./136 dated 8-2-1968 x x x x x x"

It does not follow from this that the order which the D. E. T., Nagpur, made is merely at the dictates of the D. E. T. Jaipur. This order has really taken into account the fact that the D. E. T., Jaipur, has made an order on February 8, 1968 granting confirmation to respondents 6 to 14 with effect from September 1, 1954, and the effect of that order confirmation has been only taken into account for revising the individual orders of confirmation of respondents 6 to 14 in the Nagpur Division. The challenge on this ground must also, therefore, fail.

19. The order of confirmation is challenged on the further ground that respondents 6 to 14 were already confirmed in the Nagpur Division as from March 1, 1958, and as they were already confirmed servants in the Nagpur Division as from March 1, 1958, there could not be any revision of the date of this confirmation. It has to be stated that respondents 6 to 14 had never accepted March 1, 1958 as the relevant date of their confirmation. They had made representations and after their representations in the gradation list as corrected upto April 1, 1951, it was shown that their seniority was fixed as "provisional". The question of fixation of the seniority of respondents 6 to 14 and similar officers was pending. Ultimately a decision was taken on February 8, 1968 by the D. E. T., Jaipur granting confirmation to respondents 6 to 14 with effect from September 1, 1954 under his order dated February 8, 1968 and effect was given to it in the Nagpur Division. Since these facts are apparent from the record, we must reject the contention of Mr. Masodkar that this confirmation could not be revised.

20. Then Mr. Masodkar submits that the D. E. T., Jaipur could not in law make an order of confirmation on February 8, 1968, as on that date respondents 6 to 14 were not working under him. It is the submission of Mr. Masodkar that on the date when the order of confirmation was passed, respondents 6 to 14 were not subject to the jurisdiction of the D. E. T., Jaipur and, as such, the order of confirmation has no legal effect. It is not pos-

sible for us to accept this submission. It is true that the order is of February 8, 1958. However, the confirmation which is granted is with effect from September 1, 1954. It is not disputed that on that date respondents 6 to 14 were under the jurisdiction of the D. E. T., Jaipur. The return has been filed in which there are clear averments which go to show that in the Jaipur Circle there were permanent vacancies available on September 1, 1954, in which respondents 6 to 14 could be confirmed. If prompt orders were passed respondents 6 to 14 were entitled to get their confirmation on September 1, 1954 itself. On account of administrative delay such formal orders remained to be passed. The orders which could be passed on September 1, 1954, were passed subsequently on February 8, 1958. As the D. E. T., Jaipur, had the initial competence to pass these orders with reference to the material date September 1, 1954, we must reject the submission of Mr. Masodkar. It is not shown that on September 1, 1954, permanent posts were not available in the Jaipur Division.

21. In the petition, there is no specific challenge to the order of February 8, 1958, passed by the D. E. T., Jaipur. Though the D. E. T., Jaipur has been joined, as respondent No. 4 to this petition, there was never a specific challenge to this order. After the hearing of the petition proceeded for quite some time, Mr. Masodkar tendered as application for amending the petition seeking permission to challenge this order. We reject that application as it was obviously a delayed one.

22. The last ground on which the order of confirmation was challenged is that it has been passed after more than 13 years. We must reject this challenge also because the orders for confirmation can be passed with retrospective effect also. In a number of cases such formal order are passed after a considerable time. It has also to be noted that this order of confirmation has nowhere been challenged by the petitioners. As it is clearly established on the returns both on behalf of respondents 6 to 14 and also on behalf of the other respondents that on September 1, 1954, there were sanctioned posts available in the Jaipur Division such an order of confirmation, in our view, cannot be challenged.

23. It will, therefore, have to be taken as a final order and we must proceed in this petition on the footing that on September 1, 1954 respondents 6 to 14 were confirmed in the Jaipur Division.

24. Proceeding on that premise, we must make a reference to Rule 32-E of Chapter I in Volume IV of the P. & T. Manual. This rule deals with "Seniority" and the relevant part of the rule provides:

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"Subject to any special rules prescribed for any particular service, the seniority of an official in the cadre to which he belongs should be fixed according to the date of his permanent appointment to that cadre."

If September 1, 1954 is taken to be the valid date for the confirmation of respondents 6 to 14, it is not disputed that on that ground respondents 6 to 14 could be entitled to claim seniority over the petitioners. However, it is argued that this advantage of seniority was lost to respondents 6 to 14 on account of their transfer from the Jaipur Division to the Nagpur Division. It is not disputed that respondents 6 to 14 were transferred by the order dated December 1, 1955 by the D. E. T., Jaipur. In fact they took charge in the Nagpur Division on December 3, 1955 and their liens on their posts in the Jaipur Division were struck off. The main controversy between the parties is about the nature of these transfers. It is the case of the petitioners that this was a transfer "at the request" of respondents 6 to 14 and, as such, it was governed by Rule 38 of Chapter II of the P. & T. Manual, Vol. IV. It is the case of the petitioners that on account of this transfer under Rule 38, respondents 6 to 14 lost their advantage of their confirmation in the Jaipur Division on September 1, 1954 and they should be ranked below the petitioners in the gradation list in the Nagpur Division. The reply on behalf of respondents 6 to 14 is that though they were transferred under the order of December 1, 1955, that was not an order of transfer on their request. It is contended that they were transferred "in the interest of service" and, as such were entitled to claim advantage of their confirmation on September 1, 1954. It is not disputed at the Bar that if the transfer is one under Rule 38, respondents 6 to 14 will have to be placed below the petitioner. Once the order of confirmation on September 1, 1954 is held to be legal, it is equally not disputed that if the transfer is taken to be one as in the interest of service, the petitioners will not be in a position to make a grievance of the fact that respondents 6 to 14 are senior. In view of this controversy, it is necessary to find out what is the nature of this transfer. The relevant order of transfer is produced at Annexure IV in this petition. The introductory part of this order is—

"As per D. E. T., Jaipur Memo No. AE 8-1/CC/CS.II/338 dated 18-8-1955 the following transfers are ordered in the interest of service."

Under that the names of the respondents are shown as the persons who are transferred. The concluding portion of this order shows that respondents 6 to 14 were

entitled to get "T. A. advance, if required". On the face of it the order shows that it was made "in the interest of service". Mr. Masodkar, however, submits that the wording of the order is not conclusive and in the present case the reply also does not disclose the true facts which led to the transfers of respondents 6 to 14. It is true that the order by itself may not be conclusive in all cases and if the parties have filed affidavits or documents before us, we must take that material into account in order to find out what is the true nature of the transfer. The allegation made by the petitioners in this behalf is that though respondents 6 to 14 had gone to the Jaipur Division on the understanding that they would not ask for a transfer, they started making requests for their transfer to the Nagpur Division as soon as they went to Jaipur Division and it was on their request that the order of transfer was made on December 1, 1955. The substance of the allegations, therefore, on behalf of the petitioners is that this was a transfer on account of the "request of the respondents". In the return filed on behalf of respondents 6 to 14 in paragraph 10 it is denied that these respondents made request for their transfer to the Nagpur Division. It is stated that originally when respondents 6 to 14 appeared for the examination there was no Rajasthan Circle. The Jaipur Division was under the Central Circle. Subsequently the Jaipur Division was detached from the Central Circle and was attached to the Rajasthan Circle in October 1953. In view of this redistribution, respondents 6 to 13 were asked whether they would continue in the newly formed Rajasthan Circle or whether they would like to go to their own Circle. As the respondents were asked to give choice, respondents 6 to 14 expressed their desire to go to their home Circle and on account of these circumstances respondents 6 to 14 came to be transferred to the Nagpur Division. Respondents 6 to 14 had denied that they were transferred merely on account of their request. Respondents 1, 2 and 5 have also filed a return and in paragraph 8 of that return it is stated that no officials were debarred from making requests for transfer. It was, however, left to the heads of the Circles concerned to accede to such requests on the basis of availability of vacancies. It is further stated that the request of respondents 6 to 14 was granted on a compassionate ground and transfers to the Nagpur Division were treated as on administrative grounds "in the interest of service". This is the position of pleadings so far as Special Civil Application No. 1267 of 1969 is concerned. In the accompanying petition which we have disposed of, which was heard along with

this petition and where the advocate agreed that the documents and the pleadings may be taken into account for consideration of the other petition, we find, a slightly more elaborate story. In that application it was alleged by the petitioner Sule, who was himself a transferee from the Jaipur Division to the Nagpur Division like the present respondents 6 to 14, that in the Jaipur Division by a memorandum dated June 21, 1954, the Director, Posts and Telegraphs, Jaipur, had called for options from persons who belonged to the erstwhile Central Circle as to whether they would like to opt for the Nagpur Division, or would like to continue in the newly formed Rajasthan Circle in its Jaipur Division. In pursuance of this memo. Sule and also respondents 6 to 14 in this petition had given their options. In the return filed in the accompanying Special Civil Application No. 141 of 1970, it is stated that it was decided that the officials who had their homes in one Division and were working in the other Division should be repatriated to their own units against the vacancies reserved for direct recruitment. This was without detriment to the reservation made for the Scheduled Castes and the Scheduled Tribes. It is further stated that the requests of respondents 6 to 14 in the present case were granted on compassionate grounds and their transfer to the Nagpur Division was treated as on the administrative grounds "in the interest of service". On the basis of these pleadings, it was argued that the transfer of respondents 6 to 14 was not really in the interest of service. It was argued that the true reasons behind the transfer was the requests of respondents 6 to 14 and, therefore, the provisions of Rule 38 would be attracted. Reliance was also placed on Rule 37, which amongst other things says:

"xxxxxxx Transfers should not, however, be ordered except when advisable in the interests of the public service; xxx" It was argued that unless the transfer is made in the interest of public service, the transferee would not be entitled to get the benefit of his previous service and the circumstances in the present case show that respondents 6 to 14 were transferred on compassionate grounds. This, it was argued, was hardly in the interest of public interests.

25. Though superficially this argument may appear attractive, on a close scrutiny we must reject it. It has to be borne in mind that initially when the examination for recruitment was held in 1951, that examination was held by the P. M. G. of the Central Circle. The Jaipur Division was then attached to the Central Circle. Respondents 6 to 14 were

successful in this examinations and because the other candidates had opted for the other three divisions, they were asked to join in the Jaipur Division. A considerable time elapsed in correspondence before respondents 6 to 14 were appointed in the Jaipur Division. However, a new circle called the Rajasthan Circle was formed in the meanwhile and the Jaipur Division was attached to the Rajasthan Division. The recruitment was made on the basis of the examination held by the P. M. G. of the erstwhile Central Circle. On account of this development, it was felt that options be given to the interested persons to choose whether they would like to go back to the Central Circle or whether they would opt for the newly formed Rajasthan Circle. This contingency of the formation of the Rajasthan Circle was not earlier foreseen and on account of this new development, options were called. Respondents 6 to 14 gave options in pursuance of such a general office memorandum which called for such options. In these circumstances, it will be difficult to say that the transfer was made on account of request of respondents 6 to 14 as such. It has also to be noted that on account of the formation of the Rajasthan Circle, the former expectation of respondents 6 to 14 that they would get promotion in the erstwhile Central Circle, or that they would get transferred to other divisions of the Central Circle could not have materialised. These facts must have been taken into account while calling for such options. If in these circumstances, the superior authorities call for the options and in reply to that respondents 6 to 14 exercised their option and opted for the Nagpur Division, we feel that it is not possible on these facts to say that the transfer would be a transfer "at the request" of respondents 6 to 14.

26. Further the order on the face of it shows that it was "in the interest of service". The affidavits have been filed on behalf of respondents 1, 2 and 5 to say that it was treated on administrative grounds as transfers "in the interest of service". In fact before us the original memo of the Jaipur Division dated August 15, 1955 was also produced since there was a reference to it in the order of transfer. That order of transfer shows that respondents 6 to 14 and one Gaware were transferred from the Jaipur Division to the Nagpur Division. All these nine persons were transferred because they belonged to the Scheduled Castes. That itself could be one more consideration on the basis of which it can be said that it was a transfer "in the interest of service." In fact, we have made enquiries from the advocate appearing on behalf of respondents 1, 2 and 5, and it was stated before

us that the order of transfer of these nine persons was made because in the Nagpur Division nine posts for the Scheduled Castes were available. It also appears that only one other post for an ordinary candidate was available and in that post one Gwalbansi, who did not belong to the scheduled caste, was transferred. These facts clearly show that when permanent posts were available in the Nagpur Division, that fact was taken into account while deciding whether the transfer would be in the interest of service. All these facts in our opinion, clearly go to show that the transfer of respondents 6 to 14 were made in the interest of service as is stated in the order of Annexure XIV. If that be the position, then the result that would follow is that respondents 6 to 14 would be entitled to get advantage of their confirmation on September 1, 1954. In view of the facts which have been disclosed before us, we cannot hold that the transfers of respondents 6 to 14 would be governed under Rule 38 of Chapter II of the P. & T. Manual, Vol. IV. Rule 38 reads as under:—

"38 Transfer on one's own request.

(1) Transfers of officials when desired for their own convenience should not be discouraged if they can be made without injury to the rights of others. However, as a general rule, an official should not be transferred from one unit to another, either within the same Circle, or to another Circle unless he is permanent. As it is not possible to accommodate an official borne on one gradation list into another gradation list without injury to the other members in that gradation list such transfers should not ordinarily be allowed except by way of mutual exchange. Transfers by way of mutual exchange, if in themselves inherently unobjectionable, should be allowed, but in order to safeguard the rights of men borne in the gradation lists of both the offices, the official brought in should take the place in the new gradation list according to the date of his entry into the grade or the place vacated by the official with whom he exchanges appointment, whichever is the lower.

(2) When an official is transferred at his own request but without arranging for mutual exchange, he will rank junior in the gradation list of the new unit to all the officials of that unit who, on the date on which the transfer is ordered, are either permanent or quasi-permanent, irrespective of length of service, and also to those temporary officials borne on that date on the approved list for appointment in the new unit who have been appointed against regular vacancies.

(3) If the old and the new unit form parts of a wider unit for the purpose, of

promotion to a higher cadre, the transferee (whether by mutual exchange or otherwise) will retain his original seniority in the gradation list of the wider unit.

(4) A permanent official transferred from one unit to another will retain his lien in the old unit until he can be accommodated in the new unit according to his position in the new unit. He will not however have any claim to go back to his old unit even though he holds his lien there. A declaration to the effect that he accepts the seniority on transfer in accordance with this rule, and that he will not have any claim to go back to the old unit, should be obtained before an official is transferred under this rule. Any special privilege to which an official may be entitled by virtue of his position in the gradation list of the unit from which he is transferred will, ordinarily, be forfeited on his transfer to a new gradation list.

(5) The transfer of an official from one arm of service to another within or outside the Circle can be allowed only with the personal approval of the Head of the Circle or Heads of Circles concerned and subject to the following conditions:—

(a) the mode of recruitment to the post to which the official seeks transfer is the same for the post he is holding; and

(b) whenever additional qualifications are prescribed for appointment to a certain post i.e. minimum height, freedom from colour blindness, etc., for the post of Telephone Operators, the applicant should satisfy those conditions in all respects; whenever any training is required or prescribed for the post, the applicant must undergo that training satisfactorily and the period of such training must be covered by the official by taking leave due and permissible for the period."

Mr. Masodkar also contended that when respondents 6 to 14 were appointed in the Jaipur Division, those appointments were made on the express understanding that once allotted to a unit, no application for a change of a unit or for transfer from that unit could be entertained on the ground that the original choice of respondents 6 to 14 was for some other unit. Mr. Masodkar in this behalf has drawn our attention to paragraph 4 of Annexure III in his petition. That refers to the subject of recruitment examination held on 16-12-1951. It is true that paragraph 4 of that Annexure provides that an application for transfer would not be entertained on this ground. However, we have held already that the transfer of respondents 6 to 14 was not on account of application on their part as such. In view of our finding that the transfer of respondents 6 to 14 was made by the De-

partment 'in the interest of service' we fail to see how paragraph 4 of Annexure III can possibly apply in this case.

27. The result of the findings made by us is that when respondents 6 to 14 were transferred to the Nagpur Division it will have to be taken that their date of confirmation in that Division is September 1, 1954. On that footing obviously they would be senior to the present petitioners. If they are senior to the present petitioners, it is not disputed that in a promotional post, they would be entitled to claim preference over the present petitioners. On this footing, the challenge to the order of promotion dated November 25, 1969 must necessarily fail.

28. After hearing of the proceedings for a considerable time, Mr. Masodkar, on behalf of the petitioners, filed two applications. One application was for the amendment of the original petition. By the other application the petitioners sought permission to file additional affidavit with documents. At the time of the hearing we had indicated to Mr. Masodkar that we were not disposed to entertain those applications. However, we had not formally passed orders on those applications at that time. We hereby reject those two applications.

29. Consequently, the result is that we find no merit in both the Special Civil Applications Nos. 1267 of 1969 and 141 of 1970 and the challenge made on behalf of the petitioners in the respective petitions must fail.

30. The rule in both the above petitions is, therefore, discharged. The petitioners in both the petitions to pay the costs of the respective respondents.

Rule discharged.

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(NAGPUR BENCH)

LALIT J.

Shankarrao Amratrao Deshmukh, Applicant v. Gendalal Tunnvalal Bhoi, Opponent.

Civil Revn. Appln. No. 529 of 1971.
D/- 8-7-1975.*

(A) Provincial Small Cause Courts Act (1887), S. 23 — Suit involving questions of title — Suit for recovery of rent — Plaintiff having sale deed in his favour — Defendant tenant challenging title of plaintiff — No specific grounds invalidating the sale deed mentioned — Written statement merely disclosing that a dis-

*(To set aside order of P. N. Kotewar, Registrar Sm C. C. Nagpur in Civil Suit No. 2337 of 1970. D/- 6-11-1971).

LS/LS/E220/75/LGC

pute is pending between plaintiff and the Vendors — Held merely on account of that dispute it could not be said that in the suit there was a complicated dispute about title of property — Hence the Small Cause Court had jurisdiction to try the suit. (Para 3)

N. M. Dharaskar, for Applicant: G. J. Ghate, for Opponent.

ORDER:— The respondent filed a civil suit No. 2337 of 1970 in the Small Cause Court at Nagpur for the recovery of rent from the petitioner. The property in dispute is a house bearing No. 455 at Circle No. 6/8 Ward No. 12, Garudkhamb Road, Nagpur. The respondent claims to have purchased the property on December 11, 1968. The petitioner was a tenant in the property even before the respondent purchased the suit house. The claim for recovery of rent was in the sum of Rs. 95 and hence the suit was tried by the Registrar of the Small Causes Court. The petitioner filed his written statement at Ex. 12. He disputed the title of the respondent and contended that there was a litigation between the respondent and his vendors in which the sale-deed in favour of the respondent was being challenged. He also claimed that he had paid rent to the previous owners. On account of the pleadings, the issues were framed and the learned Registrar of the Small Causes found that the respondent proved that he was the landlord of the suit premises. He also found that the petitioner could not challenge the title of the respondent and the Court had jurisdiction to try the suit. He also found that the respondent was entitled to get a decree in the sum of Rs. 95/- against the petitioner. It is this decree which is now challenged by this revision application.

2. Mr. Dharaskar, the learned advocate for the petitioner, submits that in the present case the petitioner had challenged the title of the respondent in the suit and, therefore, the Court had no jurisdiction to try the suit as a Small Cause Suit. He also disputed the finding of the learned Registrar that the rent was paid by the petitioner to the respondent under a receipt which was at Ex. 19 in the trial Court.

3. In the written statement the petitioner has no doubt contended that the respondent has no title to the property. However, no reason has been ascribed as to why the sale-deed in favour of the respondent was being challenged. No specific grounds have been stated in the written statement which would go to invalidate the sale-deed in favour of the respondent. All that is stated in the written statement is that there is a dispute pending between the respondent and his vendors in a civil suit and Mr.

Dharaskar submits that on account of the pendency of this dispute, it is not clear whether the respondent has any title to the property or not. It is not possible for me to accept the submission of Mr. Dharaskar as the entire pleadings in the other suit are not before me. Besides, it is difficult to see how otherwise that would be relevant for the purposes of this suit. All that we get in the written statement filed by the petitioner is that a dispute is pending between the respondent and his vendors. Only on account of such a pleading, it is not possible for me to accept the submission of Mr. Dharaskar that the Small Cause Court would cease to have a jurisdiction to try the suit. Mr. Dharaskar then argues that at any rate there was in this suit a dispute about the title of the respondent and merely on account of this dispute the Small Cause Court would be deprived of its jurisdiction to try the suit. This contention also does not appeal to me. The respondent has got a sale-deed in his favour. In the written statement the sale-deed is not challenged on any specific ground. In fact, in the written statement no ground has been suggested to show how this sale-deed could be invalid. I, therefore, do not accept the submission of Mr. Dharaskar that in the suit there was a complicated dispute about the title of the property. As such, the Small Cause Court had the jurisdiction to try the suit. In the trial Court the respondent had produced a receipt at Ex. 19, which prima facie goes to show that the petitioner had paid rent to the respondent. Mr. Dharaskar argues that this rent receipt is not genuine. It is not necessary for me to go into the merits of this contention as I am otherwise satisfied that the Small Cause Court has got jurisdiction to deal with this suit. No other point was urged and the decree made against the petitioner otherwise appears to be correct.

4. The result is that, this petition will have to be dismissed. The rule is discharged. The petitioner will pay the costs of the respondent.

Petition dismissed.

AIR 1976 BOMBAY 53
(NAGPUR BENCH)

LALIT, J.

Anantkishore and others, Applicants
v. Lilabai and others, Opponents.

Civil Revn. Appln. No. 500 of 1971.
D/- 7-7-1975.*

*(Against order of R. B. Sule, 3rd and Extra Asst. J., Nagpur in Civil Appeal No. 34 of 1970. D/- 31-8-1971).

LS/LS/E488/75/HGP

(A) Provincial Insolvency Act (1920). S. 75 (1) — Who may appeal — "Any creditor" and "person aggrieved" — Who are.

An insolvency application filed by a creditor was subsequently withdrawn by him under Section 14. Bombay Provincial Insolvency Act without giving notice to other creditors as required by R. 25 (2) of the Bombay Provincial Insolvency Rules 1934. Those other creditors, therefore, preferred an appeal against the order of withdrawal of insolvency application. They had filed a deposit receipt and an affidavit to show that they were creditors on the basis of that deposit receipt. On challenging their locus standi and competency to file appeal.

Held that the deposit receipt and the affidavit was prima facie evidence that the appellants were creditors and also "aggrieved persons" on account of the passing of the order of withdrawal. They were therefore competent to file an appeal under Section 75 (1). (Para 5)

S. N. Kherdekar, for Applicants;
N. M. Dharaskar, for Opponents 1 to 5.

ORDER:— One Mohammad Ishaque had filed an insolvency application No. 3 of 1967 against the petitioners requesting the Court to adjudge the petitioners as insolvents. That application came to be dismissed for want of prosecution on December 22, 1967. On June 10, 1968, Raghubirdaval, the present respondent No. 6, made an application against the petitioners for getting them adjudicated as insolvents. That application was registered as Insolvency Application No. 6 of 1968. Even this insolvency application came to be withdrawn on March 25, 1970. Against that order of withdrawal respondents 1 to 5 filed a Miscellaneous Civil Appeal No. 34 of 1970 in the District Court at Nagpur. This appeal was heard and disposed of by the Third Extra Assistant Judge, Nagpur, on August 31, 1971. In this appeal it was the case of respondents 2 to 5 that they were the creditors of the petitioners under a deposit receipt. They claimed that they were desirous of joining to the insolvency application No. 6 of 1968. However, the petitioning creditor in that application (respondent No. 6) received a sum of Rs. 5,800/- from the petitioners and got the insolvency application (No. 6 of 1968) withdrawn without issuing notices to the other creditors. It was claimed that the order permitting the withdrawal of the original insolvency application No. 5 of 1968 was contrary to law and a prayer was made that the respondents 1 to 5 be permitted to join and continue the insolvency case No. 6 of 1968.

2. When the appeal was filed, three questions were raised by the learned Extra Assistant Judge. The main ques-

tions were (i) whether the appeal was competent; (ii) whether respondents 2 to 5 have locus standi to prefer that appeal, and (iii) whether the order of withdrawal was legal or not. The learned Assistant Judge held that the appeal at the instance of respondents 2 to 5 was maintainable under Section 75 of the Provincial Insolvency Act. It was also held that respondents 2 to 5 were persons who could claim to be the "persons aggrieved" by the decision about the withdrawal of the original application. The learned Assistant Judge, therefore, felt that respondents 2 to 5 had a locus standi to file an appeal. An affidavit was filed by respondents 2 to 5 before the learned Assistant Judge to show that respondents 2 to 5 were the creditors on the basis of a deposit receipt. The learned Assistant Judge held that there was prima facie evidence to show that respondents 2 to 5 were the creditors. He, therefore, allowed the appeal and set aside the order of withdrawal and remanded the matter back to the trial Court for proceeding further in accordance with law. The learned Assistant Judge held that when the withdrawal of the application was permitted under Section 14 of the Provincial Insolvency Act, no notice as required by the Rules under the Provincial Insolvency Act was given. He, therefore, found that the order of withdrawal was illegal. While making an order, he, however, observed that the question whether the debt claimed by respondents 2 to 5 was a subsisting or not, whether it was barred by time, and whether respondents 2 to 5 were in fact creditors of the petitioners, had to be decided by the trial Court. It is against that order that the present revision application was filed.

3. Mr. Kherdekar, the learned Advocate for the petitioners has argued that the appeal preferred by respondents 2 to 5 was not competent. He submits that respondents 2 to 5 were not parties to the original application No. 6 of 1968, and as such, they had no locus standi to file an appeal. It is difficult to accept this submission. Section 75 (i) of the Provincial Insolvency Act provides:

"The debtor, any creditor, the receiver or any other person aggrieved by a decision come to or an order made in the exercise of insolvency jurisdiction by a Court subordinate to a District Court may appeal to the District Court. xxxxx."

It is, therefore, clear that if respondents 2 to 5 can be said to be the persons "aggrieved" by the decision about the withdrawal they have a locus standi to file this appeal. They are also competent to file an appeal if they can show that they are the creditors. Respondents 2 to 5 have filed a deposit receipt and an affidavit to show that they were the creditors on the

basis of this deposit receipt. The learned Assistant Judge felt that this was prima facie evidence of the fact that respondents 2 to 5 were the creditors. On this prima facie material he found that respondents 2 to 5 had a right of an appeal under Section 75 (i) of the Provincial Insolvency Act. It has to be stated that if respondents 2 to 5 ultimately show that they are the creditors of the petitioners they would clearly be the persons who would be "aggrieved" on account of the withdrawal of the insolvency application No. 6 of 1968. Considered from these two points of view, I am satisfied that respondents 2 to 5 were competent to file an appeal in the District Court. The appeal was, therefore, rightly entertained by the learned Assistant Judge.

4. It also appears that no notice was issued before the insolvency application No. 6 of 1968 was allowed to be withdrawn. Under the Bombay Provincial Insolvency Rules framed in 1934, a notice under Rule XXV (2) is required to be issued in suitable newspapers in English or the regional language and if the Court so directs, in the Bombay Government Gazette in respect of an application for withdrawal under Section 14 of the Bombay Provincial Insolvency Act. Such a provision is salutary as the persons who may otherwise be interested in the insolvency proceedings should be afforded an opportunity to appear before the Court if such a withdrawal is likely to affect their interests. It is not disputed that such a notice was not given. On account of the failure to give such a notice, the order of withdrawal seems to be clearly illegal. The learned Assistant Judge found that as the notice was not given, the order of withdrawal was required to be set aside. I entirely agree with the finding made by the learned Assistant Judge in this behalf.

5. Mr. Kherdekar at one stage argued that the question as to whether the order of withdrawal was legal or not should not be decided at this stage. He submitted that respondents 2 to 5 should first of all show satisfactorily that they are the creditors competent to make an application for getting themselves impleaded under Section 16 of the Provincial Insolvency Act and unless that question is decided the order of withdrawal could not be set aside. It is not possible for me to accept this submission of Mr. Kherdekar. As the required notice is not given, the order of withdrawal is clearly illegal. That order has, therefore, to be set aside. No prejudice is caused to the petitioners as under the order of the learned Assistant Judge the question as to whether respondents 2 to 5 are creditors or not has yet to be considered by the trial Court. In view of the entire

circumstances in the present case, I feel that there is no merit in this revision application and the same is dismissed.

6. As the case is an old case, I direct that the trial Court will dispose of this case expeditiously. The record be sent to the trial Court within one week.

7. The rule is discharged. The petitioners will pay the costs of respondents 1 to 5.

Rule discharged.

AIR 1976 BOMBAY 55
(AT NAGPUR)

DHARMADHIKARI AND LALIT, JJ.

Mukhtyarbegum, Petitioner v. The Commissioner, Nagpur Division, Nagpur and others, Respondents.

Special Civil Appln. No. 473 of 1970.
D/- 1-7-1975.

(A) Land Acquisition Act (1894), S. 4 — Notification under — Land sought to be acquired stated to be three acres out of certain survey number without giving description — Notification also stating that plan of land sought to be acquired was available for inspection in office of Land Acquisition Officer — Notification cannot be said to suffer from vagueness when land was properly specified and identified on plan. (Para 2)

(B) Land Acquisition Act (1894), S. 4 — Acquisition of land for extension of gaathan — Decision of Government as suitability of certain land is final and cannot be challenged.

Although the acquisition proceedings were initiated on account of the resolution of the Gram Panchayat to acquire land for the extension of the gaathan, it is for the Government to decide which land is most suited for the acquisition and the decision of the State Government in this behalf would be final. The fact that the Gram Panchayat had suggested acquisition of some particular land cannot mean that the petitioner's land chosen by the Government for acquisition is not best suited for that purpose. (Para 3)

(C) Land Acquisition Act (1894), Section 5-A (2) — Enquiry under — Reasonable opportunity of hearing objections.

Where the petitioner was given due notice of the proposed acquisition, and he filed written statement in support of his objections, and after the examination of his witnesses a spot inspection was made when the petitioner's brother was present and in the report of the Land Acquisition Officer all the objections raised by the petitioner were considered and thereafter the impugned notification under

LS/LS/E484/75/KSB

Section 6 was issued, the petitioner cannot make a grievance that a proper opportunity of hearing was not given to him. 1970 Mah LJ Note 25, Dist.

(Paras 5, 6)

Cases Referred : Chronological Paras

(1975) Spl. Civil Appln. No. 216 of 1968.

D/- 5-3-1975 (Bom) 5

(1974) Spl. Civil Appln. No. 506 of 1968.

D/- 22-11-1974 (Bom) 5

(1970) Mah LJ (Note) 25 6

J. N. Chandurkar, for Petitioner;
M. G. Raikarne, Asst. Govt. Pleader, for Respondents.

LALIT, J.:— The petitioner in this petition has challenged the notification dated September 18, 1968 under Section 4 of the Land Acquisition Act. The petitioner owns land bearing S. No. 13 situate at village Kondari. The two villages mouza Kondari and mouza Kondri Miira Wakan adjoin each other. The present Gaathan for the two villages has a total area of 13 acres 22 gunthas. Village Kondari has a Gaathan of 7 acres 17 gunthas and in village Mouza Kondri Miira the Gaathan extends over an area of 6 acres 5 gunthas. The notification under Section 4 of the Act proposed an acquisition from S. No. 13 belonging to the petitioner to the extent of an area of 3 acres and 11 gunthas. The purpose of acquisition of the said land was for extension of gaathan of village Kondari. A resolution was made by the Gram Panchayat of village Kondari and Village Kondri Majira Wakan whereby it was resolved that on account of floods in the year 1961, some houses in the village were inundated and, therefore, it was necessary to acquire an area of 5 acres from 'E' class land. In pursuance of this resolution, the aforesaid notification under Section 4 was issued. The petitioner was given a notice of this acquisition and she filed objections challenging the proposed acquisition. The grounds taken up to contest the acquisition were mainly that there was other 'E' class land available to the extent of about 800 acres and it was not necessary to acquire the land of the petitioner. The other objection was that the land belonging to the petitioner was not suitable for the purposes of extension of the gaathan as a nalla was flowing from the northern side of the petitioner's land. The petitioner also contended that the Gram Panchayat had proposed the acquisition of another land bearing S. No. 36, which showed that the petitioner's land was not suitable for the purposes of acquisition. When the petitioner filed the objection, the petitioner was represented through an advocate. On behalf of the petitioner three witnesses were examined in support of her objection. On January 21, 1969, the L. A. O./S. D. O., made an order that a spot inspection will be made on

February 5, 1969. The land was in fact inspected on February 1, 1969 when the brother of the petitioner was present. After this spot inspection, the L. A. O./S. D. O. made an order that the case be reported to the Commissioner, Nagpur Division. Subsequently the notification under Section 6 came to be issued. After the notification under Section 6 was issued, the petitioner has challenged this notification.

2. Mr. Chandurkar, the learned advocate for the petitioner, has canvassed that the notification under Section 4 suffers from vagueness. Mr. Chandurkar has invited our attention to the Schedule attached to this notification. He submits that in the Schedule, the description of the land proposed to be acquired has not been given. It is his contention that all that the Schedule says is that an approximate area of 3 acres 11 gunthas from S. No. 13 was proposed to be acquired. Relying on this description, Mr. Chandurkar argues that as the notification under Section 4 fails to properly specify and describe the exact property which was proposed to be acquired, the notification under Section 4 suffers from vagueness. It is not possible for us to accept this contention of Mr. Chandurkar. In the notification issued under Section 4, there is a clear mention that a plan of the lands proposed to be acquired was available for inspection at the office of the Land Acquisition Officer. A portion of the land which was proposed to be acquired was clearly delineated in this plan and the petitioner was given a full opportunity to find out as to which portion of S. No. 13 was notified for acquisition. Even if the notification under Section 4 does not give the description of the area of 3 acres and 11 gunthas, in view of the plan which was made available as for inspection, we feel that the land was properly specified and identified. As such it is not possible for us to accept this submission of Mr. Chandurkar that the notification under Section 4 was vague.

3. Mr. Chandurkar has then argued that the land which was sought to be acquired was not the best suited land for the purposes of extension of Gaathan. He submits that when the Gram Panchayat made by resolution, it resolved that another land bearing S. No. 36 should be acquired. It is not possible to accept even this submission of Mr. Chandurkar. It may be that the Gram Panchayat had resolved that S. No. 36 should be acquired. But the ultimate enquiry with regard to the proposed acquisition is to be made by the State Government. It may be that the acquisition proceedings were initiated on account of the resolution of the Gram Panchayat. However,

for the purposes of the land acquisition Act, it is for the Government to decide which land is most suited for the acquisition and the decision of the State Government in this behalf would be final. The State Government in the present case on making an enquiry, has found that the land of the petitioner was best suited for the purposes of extension of gaathan. We cannot, therefore, accept the submission of Mr. Chandurkar in this behalf.

4. Mr. Chandurkar has then canvassed a submission that there was abundant other land available for the purposes of acquisition. He submits that nearly 800 acres of 'E' class land was available and the acquisition of the land of the petitioner was not, therefore, justified. It is not possible for us to agree with this contention of Mr. Chandurkar. In the enquiry under Section 5-A the question about the availability of the other land was taken into account. On this question the petitioner had led evidence and on a consideration of the evidence it has been found that no other suitable land was available. From the return which has been filed on behalf of the respondents, it appears that a spot inspection of the site was made by the Land Acquisition Officer and the Deputy Engineer also inspected the site and submitted a report. The question as to whether the other land was available was also considered and it was found that it was on a hilly track and, as such, was not suited for the purposes of extension of the gaathan. Since all the relevant factors were taken into account, and the objections in this behalf were properly considered under Section 5-A of the Land Acquisition Act, we must reject the submission of Mr. Chandurkar.

5. Lastly, Mr. Chandurkar has argued that the petitioner was not given an opportunity of hearing as is required under Section 5-A of the Land Acquisition Act. Mr. Chandurkar has particularly relied on sub-section (2) of Section 5-A, which is to this effect:

"(2) Every objection under sub-section (i) shall be made to the Collector, or to the Land Acquisition Officer, where he has published a notification under sub-section (1) of Section 4, in writing, and the Collector or, as the case may be the Land Acquisition Officer shall give the objector an opportunity of being heard either in person or by pleader and shall, after hearing all such objections and after making such further inquiry, if any, as he thinks necessary, either make a report in respect of the land which has been notified under Section 4 of sub-section (i), or make different reports in respect of different parcels of such land....."

Mr. Chandurkar argues that in the present case it was necessary to hear the

arguments on behalf of the petitioner after the evidence was led by the parties. The grievance of Mr. Chandurkar is that after the local inspection it was necessary for the Land Acquisition Officer to personally hear the arguments which could be advanced on behalf of the petitioner. In this context it has to be stated that no such opportunity was ever asked for on behalf of the petitioner. The petitioner was given a due notice of the proposed acquisition. The petitioner filed a written statement in support of the objection. The petitioner even examined three witnesses. After the evidence was recorded, the site was inspected and at the time of the inspection, the brother of the petitioner was present. On these facts it appears to us that proper opportunity was given to the petitioner to show cause against the proposed acquisition. In the report of the Land Acquisition Officer, under Section 5-A, all the points on the basis of which the petitioner wanted to resist the acquisition, were considered and after a consideration of these aspects, the notification under Section 6 was issued. In the context of those facts, it does not appear to us that the petitioner can make any grievance that a proper opportunity was not given. Mr. Chandurkar has relied on two unreported decisions of this Court. They are in Special Civil Appln. No. 506 of 1968 decided on 22-11-1974 (Bom) and in Special Civil Appln. No. 216 of 1968 decided on 5-3-1975 (Bom). In these two decisions the facts were quite distinct. In those cases the parties who objected to the acquisition had not led any evidence. In the case with which we are dealing, we find that the petitioner had appeared through an advocate and had examined three witnesses in support of her objection. As such, the above two decisions are clearly distinguishable.

6. Mr. Chandurkar has also relied on another unreported decision in *Pradymna v. State*, (1970 Mah LJ Note 25). There also it is not clear whether the objector had led evidence in the enquiry under Section 5-A. As in the present case the petitioner has examined witnesses, this decision will not apply. In the present case we are satisfied that due and reasonable opportunity has been given to the petitioner to show cause against the acquisition and he was properly heard as required under Sec. 5-A (2) of the Land Acquisition Act. The proceedings, therefore, do not suffer from any infirmity.

7. There is no illegality in the acquisition and we do not see any reason to interfere in this case.

8. In the result, the petition is dismissed. The rule is discharged. How-

ever, in the circumstances of the case, there will be no order as to costs.

Rule discharged.

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(AT NAGPUR)

CHANDURKAR AND LALIT, JJ.

Watsalabai and others, Appellants v. Babutai and others, Respondents.

Misc. Civil Appln. No. 12 of 1972. D/- 17-4-1975.*

(A) Constitution of India, Art. 133 (1) (as amended in 1972) — Constitution (Thirtieth Amendment) Act (1972), S. 3 (2) — Leave to appeal to Supreme Court — Decree of trial Court reversed in appeal — Claim involved was more than twenty thousand rupees — Application under Article 133 (1) (a) filed before the amendment — Application placed for consideration before High Court after the amendment — Effect of amendment — In view of Section 3 (2) of Amendment Act no right of appeal is now available on account of the existence of the claim of more than twenty thousand rupees — Hence application held liable to be rejected.

On the date when the application for leave to appeal to Supreme Court was filed, the law relating to an appeal to the Supreme Court was governed by Art. 133 and under the old provisions of Art. 133 (1) an automatic right of appeal was available in a case where the subject-matter of the dispute was over twenty thousand rupees and where the High Court had varied the decree passed by the trial Court. But after the Constitution (Thirtieth Amendment) Act, 1972, there is no right of appeal on account of the claim in a litigation which is worth more than twenty thousand rupees. The right of appeal is now available only if the High Court certifies that the case involves a substantial question of law of general importance which, in the opinion of the High Court needs to be decided by the Supreme Court. That is the only test on the basis of which a right of appeal is now available under Article 133 (2), and in view of the clear provisions of sub-section (2) of Section 3 of the Amendment Act it is clear that hereafter no appeal is permissible on account of the fact that it involves merely a monetary claim worth more than Rs. 20,000/-.

(Paras 5, 6, 9)

* (Praying for leave to Appeal to Supreme Court against judgment passed by Chandurkar and Gagne, JJ. in F. A. No. 52 of 1962. D/- 23-7-1971).

The right of appeal is a substantive right and normally such a right cannot be affected on account of the subsequent legislation. However, even a right of appeal can be affected or taken away if there is an express provision in an amending statute. The provisions of S. 3 (2) of the Constitution (Thirtieth Amendment) Act, 1972, clearly show that there is an express intention to take away such a right. These provisions clearly lay down that no other right of appeal is available except as provided by Section 2 of the Amendment Act. By these provisions the Legislature has clearly evidenced its intention to affect the right of appeal which would be available in a case where the claim involved in the appeal to the Supreme Court is over twenty thousand rupees. (1973) 75 Pun LR (D) 251. Rel. on. (Paras 9, 10)

(B) Constitution of India, Art. 133 (1) (as amended by Act of 1972) — Application for leave to appeal to Supreme Court — Substantial question of law of general importance — Question whether the respondents are the legitimate sons of the appellant is essentially a question of fact — Application rejected. (Para 11)

Cases Referred: Chronological Paras (1973) 75 Pun LR (D) 251 10

S. N. Kherdekar, for Appellants; C. P. Kalele, for Respondents.

LALIT, J.:— One Wamanrao Ingle was possessed of considerable property. He filed Special Civil Suit No. 6-A of 1958 in the Court of the Civil Judge, Senior Division, Amravati. This suit was mainly for a declaration that the respondents Nos. 2 to 5 were not his legitimate sons. He also asked for other consequential reliefs which would have flowed from a declaration of illegitimacy. During the pendency of this suit, the respondent Nos. 2 to 5 in their turn filed another suit against Wamanrao and others for partition. They claimed to be the legitimate sons of Wamanrao and claimed that the properties involved in that suit were joint family properties. In the capacity of the sons of Wamanrao they claimed shares in the joint family properties. In their suit their allegation was that there were a number of alienations made by Wamanrao to various defendants which were not supported by legal necessity. Some of the transactions were also challenged as being not supported by any consideration. These suits were disposed of by the Civil Judge, Senior Division, Amravati by a common judgment. Special Civil Suit No. 6-A of 1958 which was filed by Wamanrao was decreed, whereas Special Civil Suit No 11 of 1960 which was filed by the respondents Nos. 2 to 5 came to be dismissed. The common finding in these two suits was the respondents Nos. 2 to 5

were not the legitimate sons of Wamanrao, and consequent on this finding it was held in Special Civil Suit No. 6-A of 1958 that Wamanrao was entitled to a declaration prayed for by him in that suit. The suit for partition by the respondents Nos. 2 to 5 came to be dismissed as it was found that they had no title to the joint family properties on account of the finding of legitimacy going against them.

2. Against these decrees two first appeals were filed in this Court. First Appeal No. 52 of 1962 was filed against the decree in Special Civil Suit No. 6-A of 1958 whereas First Appeal No. 6 of 1964 was directed against the decision in Special Civil Suit No. 11 of 1960. These two appeals came up for hearing before a Bench of this Court and were disposed of on 23-7-1971. It was found by the Division Bench of this Court that the respondents Nos. 2 to 5 were the legitimate sons of Wamanrao. On account of this finding, Special Civil Suit No. 6-A of 1958 which was filed by Wamanrao came to be dismissed and the appeal filed in that behalf i.e. First Appeal No. 52 of 1962 was allowed. Consequent upon the finding about legitimacy the Division Bench felt that it was necessary to decide the other issues involved in Special Civil Suit No. 11 of 1960. The Division Bench, therefore, made an order of remand. In that suit, the Division Bench set aside the finding on issues Nos. 5 and 6 which were framed in the trial Court and held that the properties involved in that suit were joint family properties. It also felt that it was necessary to record findings with regard to some of the transactions made in favour of the defendants Nos. 7, 8, 9, 22 and 23 in Special Civil Suit No. 11 of 1960. It, therefore, remanded the matter to the trial Court for a decision in respect of those transfers.

3. After the matter was remanded to the trial Court, the transaction of the defendant No. 22 was not challenged. The learned trial Judge framed two issues and those issues were:

"(1) Whether the defendants Nos. 7, 8, 9 and 23 prove that the transfers in favour of the defendants Nos. 7, 8, 9 and 23 were for legal necessity?

(2) Whether the plaintiffs prove that the transfers in favour of the defendants Nos. 7, 8, 9 and 23 were without consideration?"

On account of those two issues there was a further trial in the Court of the Civil Judge, Senior Division, Amravati, and ultimately on 30-4-1973 findings were recorded by him against the defendants Nos. 7, 8, 9 and 23. These findings were certified to this Court and the Division Bench by its judgment dated 18th/26th September 1974, confirmed those findings.

and accordingly passed a decree in consonance with the previous judgment of the High Court and the findings recorded after the remand.

4. Misc. Civil Appln. No. 12 of 1972 is an application asking for a certificate for leave to appeal to the Supreme Court against the judgment in First Appeal No. 52 of 1962. This application was filed on 18-9-1971. Rule was issued on this application and the respondents to that application have filed their replies. Even before the findings were given in First Appeal No. 6 of 1964, another leave application was filed with a prayer for a certificate of fitness for appeal to the Supreme Court and that application was Misc. Civil Application No. 13 of 1972. An application for amendment has now been made and that application for amendment is placed for hearing along with the two other applications. We allow the applications for amendment and thereby Misc. Civil Application No. 13 of 1972 will stand amended. Misc. Civil Application No. 12 of 1972 is for final hearing for consideration of the question as to whether a certificate should be granted under Article 133(1) of the Constitution. Misc. Civil Application No. 13 of 1972 is only for admission whether rule in that application should be given or not. Since the questions involved in those two applications are of a common nature we propose to dispose of both the applications by a common order.

5. Both these applications were filed on 18-9-1971. In these applications the averment is that the decrees passed by the trial Court have been reversed and the claim involved in both these applications is more than twenty thousand rupees. It was, therefore, prayed that certificates of fitness could be issued under Art. 133(1) (a) of the Constitution of India, as it stood before 27-2-1973. Now, it is true that these applications were made before the passing of the Constitution (Thirtieth Amendment) Act, 1972. On the date when these applications were filed, the law relating to an appeal to the Supreme Court in civil matters was governed by Art. 133 of the Constitution, and under Art. 133(1) (a) there was a right of appeal in a case where

"the amount or value of the subject-matter of the dispute in the Court of first instance and still in dispute on appeal was and is not less than twenty thousand rupees."

It is not disputed that the claim involved in the case in the trial Court was above twenty thousand rupees. That was the claim in the appeal also, and if a certificate were to be given before the Constitution (Thirtieth Amendment) Act, 1972 was passed the claim in the appeal to the

Supreme Court would have been over rupees twenty thousand. The judgment of the trial Court was varied and as such there was a judgment of reversal and on that ground under the old Article 133 (1) (a) there was clearly a right of appeal available to the applicants.

6. However, the situation was changed on account of the passing of the Constitution (Thirtieth Amendment) Act, 1972. This amendment came into force on 27-2-1973. Section 2 of this Amendment Act provides for the substitution of the old Article 133 (1) of the Constitution and on account of this substitution, Article 133 (1) now reads:

"An appeal shall lie to the Supreme Court from any judgment, decree or final order in a civil proceeding of a High Court in the territory of India if the High Court certifies—

(a) that the case involves a substantial question of law of general importance; and

(b) that in the opinion of the High Court the said question needs to be decided by the Supreme Court."

It is, therefore, clear that after the amendment, there is a right of appeal only when the High Court certifies that the case involves a substantial question of law of general importance and that question in the opinion of the High Court is such as needs to be decided by the Supreme Court. It is clear that after 27-2-1973 there is no right of appeal on account of the fact that the subject-matter of the dispute is worth more than twenty thousand rupees. That right of appeal flowing on account of the claim being over twenty thousand rupees is no more available after the amendment of Art. 133 (1). On account of the substitution of Art. 133 (1) it is not possible for the High Court to give a certificate that the proposed appeal to the Supreme Court involves a claim of more than twenty thousand rupees. It must, therefore, follow that after the Constitution (Thirtieth Amendment) Act, 1972, there is no right of appeal on account of the claim in a litigation which is worth more than twenty thousand rupees.

7. However, Mr. S. N. Kherdekar, learned advocate for the applicants, argues that in the present case the appeal was decided by the High Court before the Constitution (Thirtieth Amendment) Act, 1972, was passed. He also submits that the application for leave to appeal was filed on 18-9-1972 and that application is still pending. He submits that since the application was made before the Constitution (Thirtieth Amendment) Act, 1972, was passed, the law which will be applicable to the present case will be the old Article 133 (1). He submits that under

the old provisions of Article 133 (1) an automatic right of appeal was available in a case where the subject-matter of the dispute was over twenty thousand rupees and where the High Court had varied the decree passed by the trial Court. Mr. Kherdekar submits that in both these applications the decrees were reversed, and since the claim is of more than twenty thousand rupees, the requirements of the old Article 133 (1) are satisfied and as such it is obligatory on us to issue a certificate of fitness. It is not possible for us to accept this submission of Mr. Kherdekar. Though both these applications for leave to appeal to the Supreme Court were filed before Art. 133 (1) of the Constitution was amended, it has to be noted that no certificate has been issued under Article 133 (1) before the Constitution (Thirtieth Amendment) Act, 1972 was passed. Today in fact these applications are placed before us for consideration of the question as to whether a certificate should be given or not. Section 3 (1) of the Constitution (Thirtieth Amendment) Act, 1972, provides:

"Nothing in this Act shall affect—

(a) any appeal under sub-clause (a) or sub-clause (b) or sub-clause (c) of clause (1) of Article 133 of the Constitution which immediately before the commencement of this Act was pending before the Supreme Court; or

(b) any appeal preferred on or after the commencement of this Act against any judgment, decree or final order in a civil proceeding of a High Court by virtue of a certificate given by the High Court before the commencement of this Act under sub-clause (a) or sub-clause (b) or sub-clause (c) of clause (1) of Article 133; and every such appeal may be heard and disposed of or, as the case may be, entertained, heard and disposed of by the Supreme Court as if this Act had not been passed."

This section shows that the application of the Amendment Act is excluded in two cases, namely, (i) a case where an appeal is already pending under Article 133 (1) when the Amendment Act came into force; or (ii) where a certificate of fitness is already given under Article 133 (1) before the Amendment Act but an appeal is filed after that Act comes into force. It is only in these two eventualities that the application of the Amendment Act is excluded, and it is provided that a pending appeal can be disposed of or an appeal can be filed on the strength of a certificate already issued as if the Amendment Act had not been passed. It must be stated that in the two matters with which we have to deal none of these facts exists.

8. Whether there is still a right of appeal can also be gathered from the effect of sub-s. (2) of S. 3 of the Constitu-

tion (Thirtieth Amendment) Act, 1972. This sub-section provides:

"Subject to the provisions of sub-section (1), no appeal shall lie to the Supreme Court under clause (1) of Art. 133 of the Constitution from any judgment, decree or final order arising out of a suit or other civil proceeding which was instituted or commenced in any Court before the commencement of this Act unless such appeal satisfies the provisions of that clause as amended by this Act." The effect of sub-section (2) of Section 3, in our opinion is clear and explicit. It provides that after the commencement of the Constitution (Thirtieth Amendment) Act, 1972, no appeal shall lie to the Supreme Court under Article 133 (1) of the Constitution unless such appeal satisfies the provision of clause (1) of Article 133 as amended by the Amendment Act. A reading of this sub-section clearly shows that the only appeal which is permissible to be filed hereafter is one which satisfies the provisions of Article 133 (1) of the Constitution as it stands amended after 27-2-1973. There is no other appeal available under Article 133 (1) after the amendment Act which came into force on 27-2-1972. Article 133 (1) as now amended does not provide for a right of appeal in a case where the claim involved in the appeal to the Supreme Court is over Rs. 20,000/-. The right of appeal is now available only if the High Court certifies that the case involves a substantial question of law of general importance which, in the opinion of the High Court needs to be decided by the Supreme Court. That is the only test on the basis of which a right of appeal is now available under Article 133 (1), and in view of the clear provisions of sub-section (2) of Section 3 of the Amendment Act it is clear to us that hereafter no appeal is permissible on account of the fact that it involves merely a monetary claim worth more than Rs. 20,000/-.

9. Mr. Kherdekar, however, argues that the right of appeal exists to the petitioner on account of the fact that the application for leave to appeal was filed even before the Amendment Act came into force. He submits that the right of appeal is a substantive right and such a right cannot be affected on account of the subsequent legislation. Normally this would be the position. However even a right of appeal can be affected or taken away if there is an express provision in an amending statute. The provisions of Section 3 (2) of the Constitution (Thirtieth Amendment) Act, 1972, clearly show that there is an express intention to take away such a right. These provisions clearly lay down that no other right of appeal is available except as provided by Section 2 of the Amendment Act. By these provi-

sions the Legislature has clearly evidenced its intention to affect the right to appeal which would be available in a case where the claim involved in the appeal to the Supreme Court is over twenty thousand rupees. We must reject this submission.

10. The view which we have taken is supported by a decision of the Division Bench of the Delhi High Court which is reported in *Smt. Abnash Kaur v. Lord Krishna Sugar Mills Ltd.*, ((1973) 75 Pun LR (D) 251). There also the Delhi High Court has held that sub-section (2) of Section 3 of the Amendment Act creates an absolute bar to an appeal to the Supreme Court unless the appeal satisfies the provisions of clause (1) of Article 133 of the Constitution as amended by the Amendment Act. Since we hold that there is no right of appeal now available on account of the existence of the claim of more than twenty thousand rupees, these two applications will have to be rejected.

11. Mr. Kherdekar alternatively tried to submit that the case involves a substantial question of law and, therefore, we should grant a certificate even under the amended Article 133 (1). He submits that the case involved a substantial question of general importance which needs to be decided by the Supreme Court. It is not possible for us to accept this submission. The question whether the respondents Nos. 2 to 5 are the legitimate sons of Wamanrao is essentially a question of fact. It may be that while dealing with the question the Court was required to consider the provision of Section 112 of the Evidence Act. Even there whether at the relevant time there was access or not is a question of fact. It is, therefore, not possible to accede to the request of Mr. Kherdekar on this alternative ground.

12. The result is that the rule in Misc. Civil Application No. 12 of 1972 will be discharged. However, in the circumstances of the case there will be no order as to costs in that case. So far as Misc. Civil Application No. 13 of 1972 is concerned, it is rejected.

Application dismissed.

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(NAGPUR BENCH)
MASODKAR, J.

Naravansa Dharamchandsa, Petitioner
v. Laxman Motiram and another, Respondents.

Civil Application No. 1607 of 1971, D/-
19-3-1975.

KS/LS/E139/75/VBB

(A) T. P. Act (1882), S. 76. Cls. (a) and (e) — Mortgage with possession of agricultural land in Vidarbha Region — Tenancy legislation to grant greater protection (including proprietorship) to lessees of agricultural lands on the anvil, at the time of mortgage — Mortgagee as per deed, required to cultivate land himself and appropriate crops towards interest — Provision for redemption of property on tender of principal — Mortgagee leasing out property instead of cultivating it himself — Rights of lessee — Lease held not prudent act of management on part of mortgagee within S. 76 (a) but destructive of rights of mortgagor — Lessee held not deemed tenant and entitled to statutory ownership under tenancy legislation — (Bombay Tenancy and Agricultural Lands (Vidarbha Region) Act (99 of 1958), S. 6).

The petitioner mortgaged his agricultural land in Vidarbha Region on 24-9-1957, at a time when the tenancy legislation granting greater protection and even proprietorship to lessees of such land was being contemplated. According to the terms of the mortgage, the mortgagee was to be placed in possession for 3 years, viz: 1958-1961, and was to appropriate the crops towards interest. He was not to pay any rent or premium till the amount advanced was repaid. The amount advanced was to carry interest. The mortgagee after appropriating the crops for 3 years, was to accept the principal amount if tendered. A period of 5 years was available to the mortgagors to pay back the amount after the expiry of 3 years. Then there was a term regarding foreclosure. The mortgagee after taking possession, instead of cultivating it himself, purported to induct the respondent on the mortgaged land as a tenant. The tenancy authorities held that the respondent would be 'deemed tenant' under S. 6 of the Bombay Tenancy and Agricultural Lands (Vidarbha Region) Act, 1958, and was therefore entitled to statutory ownership. The petitioner challenged those orders:

Held, that the mortgage deed was explicit and clear in that the mortgagee was bound to cultivate the mortgaged land himself and take the produce in consideration stated in the deed, and not to let it out to others. According to the intention of the mortgage deed, the mortgagee was to enjoy the property so that it would be always available for reverting back in real possession to the mortgagor upon redemption of the debt. It followed that mortgagee was bound by all equitable considerations, not to create situation that would make it impossible for mortgagor to resume it. Those express terms and obligations (under which possession was handed over in purely a fiduciary capacity) were significant because of the tenancy law contemplated to be passed

at the time of the mortgage. By those terms it would be implied that leases that take away the right to repossess the property or destroy the ownership or transfer it could not be intended as permissive by the parties to the deed.

(Para 8, 9)

Unless a deed expressly permits, particularly in view of the proposed provisions of the land legislations on the anvil which protect tenancies for a longer period and which confer statutory ownership on the tenants of agricultural lands, it would not be reasonable to imply authority to lease agricultural land in favour of mortgagee in possession.

(Para 17)

As the mortgagee was not authorised nor was entitled to induct respondent on the land, respondent's possession would be unauthorised and would not be that of "deemed tenant", so as to entitle him to proprietorship under the tenancy legislation. AIR 1964 SC 1320 Disting: AIR 1952 SC 205; AIR 1963 SC 42; AIR 1956 SC 305; AIR 1958 SC 183; AIR 1958 Bom 53; AIR 1966 SC 1721; AIR 1972 SC 637. Ref.

(Para 18)

Cases Referred: Chronological Paras
 AIR 1972 SC 637 = (1973) 3 SCR 198 26
 AIR 1966 SC 1721 = (1966) 3 SCR 676 22, 24
 AIR 1964 SC 1320 = 1962 Nag LJ 682 2, 3, 4, 19, 27
 AIR 1963 Bom 42 = 64 Bom LR 554 21, 26
 AIR 1958 SC 183 = 1958 SCR 986 22, 23, 25
 AIR 1958 Bom 53 = (1957) 59 Bom LR 684 21
 AIR 1956 SC 305 = 1956 SCR 1 22
 AIR 1952 SC 205 = 1952 SCR 775 21, 22, 24, 25

S. A. Jaiswal, for Petitioner; B. P. Jaiswal and A. M. Bapat, for Respondents (Nos. 1, 2).

ORDER:— The petitioner Naravansa is the owner of a small field Survey No. 112, area 7-Acres 34 Gunthas, of mouza Tondgaon. By a deed of mortgage, (hereinafter called the deed), of September 24, 1957, he purported to take a debt of Rs. 2,500/- for himself and his sons Shankarrao and Digraj, who was a minor, and under the terms set out in that document handed over the possession of the said field to the mortgagee Rambhau s/o Babuji Korde now represented by respondent No. 2 Pandurang, his son.

2. With regard to this property, certain facts are not in dispute. The mortgagee who took possession purported to induct respondent No. 1 Laxman on this land as a tenant since after the year 1958-59. The deed of mortgage is a written deed and was duly executed on Sep-

tember 24, 1957. Name of Laxman having appeared in the crop-statements, suo motu proceedings were initiated under the provisions of the Bombay Tenancy and Agricultural Lands (Vidarbha Region) Act, 1958 (hereafter also called the 1958 Act) to find out whether the statutory ownership could be conferred on Laxman. The tenancy authorities relying on the decision of the Supreme Court rendered in the case of Dahya Lala v. Rasul Mohamed, 1962 Nag LJ 682 = (AIR 1964 SC 1320) have concluded the matter against the present petitioner holding that Laxman would be the deemed tenant under Section 6 of the 1958 Act and therefore, entitled to statutory ownership. These orders are challenged by the present petition.

3. The submissions of the petitioner are that under the terms of the deed under which possession of agricultural land was parted, there was express intention disclosed that mortgagee was not to part with the possession and was required to take the crops himself and was bound to appropriate the same for a period of three years and thereafter again for a period of two years against the loan advances and was further bound to redeliver the possession to the mortgagor on redemption. It is urged that the terms of the deed have to be understood in the light of the law that governs the relationship of mortgagor and mortgagee as well as the implicit consequences available under the provisions of any other law regarding the tenancies of agricultural lands. It was contended that the property being located in Berar, the relevant law regarding the leases would be initially the Berar Regulation of Agricultural Leases Act, 1951 followed by the Ordinance IV of 1957 which was made applicable on Sept. 21, 1957 and thereafter by the relevant provisions of the Bombay Tenancy and Agricultural Lands Act, 1958 which became the law on 31-12-1958. It was pointed out that by the scheme of these Acts it should be implied as a term of mortgage bond that the property shall not be dealt with by the mortgagee in possession in a manner which will make it impossible for the mortgagor to resume its possession after the redemption of the debt due under the deed. So construed, and on the plain wording of the bond, it is contended that the mortgagee was prohibited either expressly or impliedly from dealing with the property which will destroy the ownership right or, at any rate, right to repossess the property upon redemption and Laxman who was inducted in spite of such prohibition would be a mere trespasser qua the mortgagor. He could not, therefore, be said to be lawfully cultivating the land nor would be a lawful "deemed tenant" as contemplated

by Dahya Lala's case AIR 1964 SC 1320 decided by the Supreme Court. Reliance was also placed on the provisions of Section 76 (a) and Section 76 (e) of the T. P. Act, in support of these submissions.

4. As against this, both for the mortgagee and the person inducted by him, the learned counsel appearing took a stand that Dahya Lala's case AIR 1964 SC 1320 decided by the Supreme Court applied to the facts and circumstances of the present case too and hence Laxman was a "deemed tenant" and he would now be the owner under the Act. It was further contended that the construction of the deed would not show that it was impermissible for the mortgagee to let the land because that would be the adjunct or an incident of the right of a mortgagee in possession to enjoy the property by letting out the same under valid leases. If the activity was permissible, then Laxman would be cultivating the land lawfully and, therefore, a "deemed tenant". It was contended that the Legislation of the present kind regulating the relations of agricultural leases should be beneficially construed so as to confer the larger rights on the tenants. So construed, it is implicit that the provisions of Section 76 (a) or Section 76 (e) of the T. P. Act would not be a bar at all to the mortgagee to place Laxman in possession. The state of Law relied upon for the petitioner according to the respondents was of little assistance because here is a mortgagor who with open eyes hands over the possession of such land for the enjoyment of the other and in such arrangement, it is contended, it is implicit that the lease of the agricultural land was permissive mode of enjoyment. There is no reason either in principle or policy, according to these submissions to read a prohibition by implication. Logically, the submission proceeds that once it is possible to construe the deed even taking into account the land legislation, the activity of letting out of land by mortgagee in possession would be a lawful activity and Laxman would be in lawful possession of the land and as such, a deemed tenant. It would not be, the learned counsel submits an imprudent act on the part of the mortgagee to let the land to others and to get satisfied his pecuniary interests arising under the mortgage. It will also not be a case of destruction of the property in the possession of the mortgagee. If the Legislature thought that the persons lawfully on the land should be benefited, then it is not the function of the Court to interpret the provisions of the law which will take away the benefit conferred on the tenants.

5. Before considering the decisions on which respective parties had laid

much stress, it is to be observed that from the initial stage of litigation, for the present petitioner, the plea was raised that Laxman could not be deemed to be the tenant as the alleged lease was not at all legal. Laxman was examined as his own witness. He stated that he had not taken this field from Naravansa and that it was Rambhau who handed over possession to him in the year 1958-59. He also admitted that the present petitioner Naravansa had three sons. He admitted that he is not claiming any lease from Naravansa the present petitioner. He admitted that there had been a document of mortgage duly registered and he was present at that time; indeed he had witnessed it. He tried to deny the condition of the mortgage which was put to him to the effect that Rambhau was to cultivate the field for five years and was to return back the field to the owner after that period. He stated that under the mortgage it was agreed that till the monies were paid back, the cultivation should be of the mortgagee.

6. This amply establishes that Laxman was fully aware of the mortgage and purported to enter upon possession only through the mortgagee. The deed is duly registered and there is nothing to doubt about the terms under which the possession was handed over for a consideration of a loan of Rs. 2,500/- paid by the mortgagee. The mortgagors are Naravansa and his two sons out of whom one is a minor. Some of the terms of this deed which has been obviously executed after Ordinance No. IV of 1957 became applicable, are to the following effect. The mortgagors have placed the mortgagee in possession in the consideration described in the deed being Rs. 2,500/-. The possession to be taken after the standing crops were taken out on 31-1-1958. The mortgagee in consideration of the amount paid was to remain in possession for the years 1958-59, 1959-60 and 1960-61. In these years, mortgagee was to take the crops and appropriate the same towards interest. Mortgagee will not be bound to pay any rent or premium till the amount advanced was repaid and the amount advanced will carry interest thereon. (Emphasis provided)

7. Then follow the recital regarding the usual term that the principal advanced when tendered, the mortgagee was bound to accept. After this there are the recitals to the effect that the mortgagee after appropriating the crops for these three years would accept the principal amount if tendered under the terms of the mortgage. He was not bound to accept the principal amount prior to the period of three years. The mortgage

period is indicated and that is of three years. In case, if the principal amount is not paid at the end of these three years, the deed provides, that thereafter a period of five years would be available to the mortgagors to pay back the amount and according to law the mortgagee would continue to remain in possession. Then there is a term regarding the foreclosure.

8. The above are the virtual reproductions of the terms between the parties as contained in the deed itself. Firstly, that shows that the mortgagee who was placed in possession was enabled to appropriate the crops for the stated agricultural years of 1958-59, 1959-60 and 1960-61. Every care was taken therefore to express the intention that indicates that the mortgagee would cultivate the field and appropriate the product thereof towards the satisfaction of the liabilities under the mortgage. That itself postulates — and this is an important term — that the possession will be a cultivating possession of the mortgagee under the deed. In other words, the deed being express, unambiguous, clear, the intention is that the mortgagee in possession will not part the same in any other right because he is obliged to appropriate the crops and the produce of the land towards the mortgage liabilities. That obviously cannot be done without cultivating possession remaining with mortgagee. What mortgagors had done was to give up their right to take the crops for a stated period and instead had conferred that right in favour of the mortgagee to take the crops in lieu of, as stated earlier, the interest, by obliging themselves not to claim any rent or profit from the mortgagee. This paramount device thus is a limited transfer of proprietary right to enjoy and appropriate the produce of land the ownership of which remained unaffected in favour of the mortgagors.

9. However fragile may be the folds of the facile figuration of the term "intention" for the purpose of finding the same the language used by the parties only affords a firm foundation. The same has to be gathered from the terms of the document taken as a whole. Unless there are ambiguities, it would be impermissible to take aid of any other evidence to find out the intentions of the parties. Here the deed itself appears to be explicit and clear in that the mortgagee who was enabled to enter in possession and was permitted to appropriate the crops was bound to cultivate the land and take the produce in consideration stated in the deed. This positive injunction did not therefore permit paring away of the cultivation or possession in favour of any one else for that would be acting contrary to express obligation annexed to the

at such rate as would bring in the amount necessary to meet such expenses. Power for fixing the rate has been conferred upon the State Government which is a relevant factor to be taken into account. It eliminates the chance of fixing the rate arbitrarily. Therefore, Section 2 does not suffer from the vice of excessive delegation of the legislative powers even after the schedule fixing the maximum rate of toll has been repealed. (Para 26)

(D) Tolls Act (1851), S. 2 — Levy of Toll — Purpose to create a 'fund' for construction of future bridges in the State — Compensatory character of toll, not lost. AIR 1962 SC 1406 and AIR 1975 SC 583, Rel. on. (Para 30)

(E) Tolls Act (1851), S. 2 — Notification under, dated 21-10-1974 levying toll with regard to certain bridges at the rate of Rs. 3 per every bus loaded or unloaded — Not excessive or arbitrary. (Para 13)

(F) Tolls Act (1851), S. 2 — Notification under, dated 21-10-1974 levying tolls in respect of certain bridges — Signed by Deputy Secretary to Government by order of Governor and published in Calcutta Gazette — Notice in vernacular issued in names of collecting officers mentioning date fixed for actual collection of tax — Notification not bad. (Para 11)

Cases Referred: Chronological Paras

AIR 1975 SC 583 = 1975 Tax LR 1361	29
AIR 1975 SC 1007 = 1975 Tax LR 1523	24
AIR 1973 SC 1374 = (1973) 3 SCR 943	23
AIR 1967 SC 1895 = (1967) 3 SCR 557	22
AIR 1967 All 24 = 1967 All LJ 195	4, 14, 17
AIR 1966 Pat 462 = 1967 BLJR 254	4, 6
AIR 1965 SC 1107 = (1965) 2 SCR 477	17, 21
AIR 1962 SC 1406 = (1963) 1 SCR 491	6, 28
AIR 1958 SC 909 = 1959 SCR 427	19, 21

In C. R. No. 7105 of 1974:

Madan Mohan Saha, for Petitioner;
Paritosh Mukherjee, for Opposite Parties
Nos. 1 and 4.

In C. R. Nos. 7295 (W)-7296 (W) of 1975:
Arun Prakash Sircar, for Petitioner;
Paritosh Mukherjee, for Respondent.

In C. R. No. 3873 (W) of 1975:

Somnath Chatterjee and Samir Ghosh,
for Petitioners.

In C. R. No. 8335 (W) of 1974:

Madan Mohan Mallick, Rabilal Mitra,
for Petitioner; Dipankar Gupta, Standing
1976 Cal/3 II G-21

Counsel; G. N. Roy, Maloy Kumar Bose
and Suprakash Banerjee, for Respondents
in C. R. No. 7015 (W) of 1975 and C. R.
No. 3873 (W) of 1975.

Paritosh Mukherjee, for Respondents
in C. R. No. 8335 (W) of 1974.

ORDER:— The petitioners are the members of the Mindnapore District Bus Owners' Co-ordination Committee. They challenge a notification issued by the Public Works Department, Government of West Bengal dated 21st October, 1974 by which the tolls were levied with respect to seven bridges mentioned in the schedule to the said notification. A notice in vernacular has also been issued by respondents Nos. 2 and 3 stating that all machine driven vehicles driving from the Deshapran Sashmal Setu near Mindnapore and Rasulpur Bridge near Contai were required to pay bridge toll according to the schedule rates with effect from 1st December, 1974. The said seven bridges differ widely in their size, circumference and engineering skill. The cost of construction of those bridges or repairs thereof also widely varies. The cost of construction or repairs of each bridge has not been stated in the said notification and consequently the rates of toll that have been levied, have no correlation to the expenses incurred in the construction of each bridge or repairs thereof. It is stated by the petitioner in the petition that even a bus crosses one of the said bridges only once in one trip it would have to pay tolls at the rate of (one up and one down) Rs. 6 per day and the annual toll would come to Rs. 2,190 which is higher than annual road tax which an owner is required to pay for one single bus. According to the petitioners, the impugned notification is ultra vires of Section 2 of the Tolls Act as it has been made and published without any reference or consideration of the respective cost of construction as also the cost of repairs in respect of the said seven bridges. The said notification is also arbitrary and the tolls fixed are highly excessive, oppressive, unreasonable and are not based on consideration of the aforesaid cost of construction and repairs. Furthermore it has left the tolls to be levied by an unknown authority which is illegal and not valid. The petitioners being aggrieved moved this Court under Art. 226 of the Constitution and obtained the present Rule.

2. The other rules were also obtained by the bus owners of Arambagh and Birbhum challenging the levy tolls with regard to Dwarakeswar, Mayurakshi and Ajoy Bridges. It is unnecessary to state the facts of each individual case,

since common points of law arise in all the Writ Petitions. So my order in this Rule shall govern all these Writ Petitions.

3. An affidavit-in-opposition has been filed on behalf of the respondents and affirmed by Suhrit Kr. Deb, Dy. Secretary, Public Works Department, Government of West Bengal wherein it is stated that the State Government has insufficient resources in the budget for catering to the needs of ever increasing public demand for bridging of numerous rivers throughout the State. Hence in order to mobilise additional resources, toll in respect of the seven bridges in question was introduced. The collection of toll from the said bridges is to be utilised for construction of new bridge in the State and the said collections have no relation to cost of construction and/or repair of the bridges from which the toll revenue is earned. In order to mobilise additional resources, a revolving fund known as "State Bridge Fund" has been created out of the revenues from tolls realised from some of the existing bridges. The progressive accumulation in the fund will be utilised for construction of more and more bridges in the State. This has no relation to the costs of construction or repairs to the respective bridges from which toll revenues are earned.

4. It is contended by the learned counsel, appearing on behalf of the petitioners that the impugned notification is (Contd. on Col. 2)

ultra vires Section 2 of the Tolls Act, 1851 as there being no mention of the costs of construction or repair of the respective bridges and the tolls imposed upon those bridges were not on consideration of the same toll for all the seven bridges is arbitrary, excessive and not based on or related to the costs of construction of the said bridges. In support of the contentions, reliance is placed upon a Bench decision of Patna High Court, Maheswari Singh v. State of Bihar, AIR 1966 Pat 462 and a single Bench decision of Allahabad High Court, Mohammad Ibrahim v. State of U. P., AIR 1967 Al 24.

5. The impugned notification reads as follows:—

No. 6-W (SBF), 24th October 1974.—Whereas the bridges named in column (2) of Part I of the schedule below were made and are, from time to time, repaired at the expenses of the Government of West Bengal;

Now, therefore, in exercise of the power conferred by Section 2 of the Indian Tolls Act, 1851 (Act 8 of 1851) the Governor is pleased hereby to direct that rates of tolls specified in Part II of the said schedule shall be levied on each of the aforesaid bridges and that the collection of tolls in respect of each such bridge shall be placed under the management of such officer as is specified in column (3) of part I of the said schedule against each bridge.

SCHEDULE

Part-I.

Serial No.	Name of bridge	Collection of tolls placed under management of
1	2	
1.	Mahananda Bridge, Siliguri, district Darjeeling.	Executive Engineer (P.W.D.), Darjeeling Division.
2.	Kaljani Bridge, Alipurduar, district Jalpaiguri.	Executive Engineer (P.W.D.), Alipurduar Construction Division.
3.	Mayurakshi Bridge, Sainthia, district Birbhum.	Executive Engineer (P.W.D.), Birbhum Division.
4.	Dwarakeswar Bridge, Bankura.	Executive Engineer, P. W. (Roads), Bankura Construction Division.
5.	Deshpuran Sashmal Setu (Cos-sye Bridge) Midnapore.	Executive Engineer (P. W. D.), Midnapore Division No. 1.
6.	Ajoy Bridge, Illambazar, District Birbhum.	Executive Engineer, P. W. (Roads), Birbhum Construction Division.
7.	Rasulpur Bridge, Bhaitgarh, district Midnapore.	Executive Engineer, P. W. (Roads), Midnapore Construction Division No. 1.

Part-II

Serial No. 1	Vehicles in respect of which toll is levied. 2	Rates of toll levied. 3 Rs.
1.	Every Car ...	2
	Extra for trailer loaded or unloaded ...	1
2.	Every bus loaded or unloaded ...	3
3.	Every lorry loaded or unloaded ...	4
	Extra for trailer loaded or unloaded ...	3
4.	Every tempo loaded or unloaded ...	2
5.	Every Motor-cycle ...	Re. 0.50

By order of the Governor,
S. K. DEB,

Dy. Secy. to the Govt. of
West Bengal.

Section 2 of the Tolls Act reads as follows:—

"The State Government may cause such rates of toll, as it thinks fit, to be levied upon any road or bridge which has been, or shall hereafter be made, or repaired at the expense of the Central or any State Government; and may place the collection of such tolls under the management of such persons as may appear to it proper; and all persons employed in the management and collection of such tolls shall be liable to the same responsibilities as would belong to them if employed in the collection of the land revenue."

6. In *Maheshwari Singh v. State of Bihar*, AIR 1966 Pat 462, Narasimham, C. J. observed that when the Act was passed in 1851, it may be reasonably inferred that the expression "tolls" in the Act was intended to convey the same meaning as was given to the expression in Britain, namely, a levy for the purpose of providing funds for the maintenance of roads and bridges and repayment of the loan (if any) taken for their construction. Thus by merely using the expression "tolls" and by further saying that the tolls shall be levied on roads and bridges made or repaired by the Government, the Legislature in Section 2 of the Act clearly laid down for the guidance of the Government the principle that the rate of levy should be such as to meet the cost of repair of the roads and bridges and also for liquidating actual expenses incurred in their construction within a reasonable time. The quid pro quo element which distinguishes fees from taxes is also implied in the expression "toll" and though it may not be a "fee" as ordinarily understood it will clearly come within the scope of a compensatory tax as pointed out by the majority judgment in the well known Rajasthan case of the Supreme Court in *The Automobile Transport (Rajasthan) Ltd. v. State of Rajasthan*, (1963) 1 SCF 491 = (AIR 1962 SC 1406).

7. Section 2 of the Tolls Act empowers the Government to cause levy of tolls upon any road or bridges which has

been made or shall, hereafter be made or repaired at the expenses of the Central or any State Government.

8. Therefore, in my view, it is not necessary for the State Government to state in the notification the actual costs of construction or repairs of each of the seven bridges mentioned in the said notification. Powers to levy tolls can be validly exercised under Section 2, for the purpose of creating "fund" for construction of new bridges and roads in future and maintenance of the existing roads and bridges.

9. The Division Bench of the Bihar High Court has nowhere laid down that without mentioning cost of the construction of a particular bridge no toll can be imposed upon that bridge.

10. It is contended that the impugned notification not having named the authority which is to impose the toll and not specified the date from which the imposition is to be effective, is bad and cannot be given effect to.

11. It appears from the impugned notification that in exercise of the powers conferred by Section 2 of Indian Tolls Act, the Governor directed that the rates of toll specified in Part II of the schedule shall be levied on each of the aforesaid bridges. The said notification was signed by the Deputy Secretary to the Government of West Bengal by order of the Governor. So the authority has been clearly stated in the notification. The notification was issued on the 8th of October, 1974 and it was published in the Calcutta Gazette extraordinary on 21st of October, 1974. So the imposition of tolls came into force when the said notification was made viz. on the 8th October, 1974. Under the second part of the said notification the collection of tolls in respect of each bridge was placed under the management of certain officers specified in column-3. The particulars complied the requirements of the second part of Section 2. Obviously, after the issuance of the said notification, it would take some time to set up the machineries for collecting the tolls. That is why a notice in vernacular was issued in names

of the collecting officers and 1st December, 1974, was fixed as the date when the actual collection of tolls with respect to seven bridges were to be made. So, in my view, there is no substance in the point raised by the petitioner.

12. It is urged that as the rate of toll is not correlated with the actual expenses incurred for the construction or repairs of a particular bridge, the levy of toll @ Rs. 3/- for every bus loaded or unloaded for each trip is excessive and arbitrary.

13. The power to levy toll under Section 2 of the Act is not restricted only upon the cost of construction or repairs of a particular bridge upon which the toll is sought to be levied. The imposition of toll however, must have a nexus either with the expenses already incurred or to be incurred for the maintenance and construction of roads and bridges in future. In the instant case it has been disclosed in affidavit-in-opposition that the State Government has insufficient resources in the budget for catering to the needs of ever increasing public demand for bridges on numerous rivers throughout the State. Hence in order to mobilise additional resources, toll in respect of the seven bridges in question was introduced. Users and owners of vehicles and public motor vehicles in particular stand on a different footing. They have direct relations to the bridges and they derive a special and direct benefit from them. So it is not unreasonable that they should make a special contribution to the construction and maintenance for the bridges over and above the annual rate of tax for plying the buses. Toll charged at the rate of Rs. 3/- per every bus loaded and unloaded cannot be said to be excessive or arbitrary.

14. My attention was drawn to the decision of Allahabad High Court in *Mohammad Ibrahim v. State of U. P.*, AIR 1967 All 24 at p. 26, wherein it is observed that since the object of the levy is to compensate the State Government for the monies spent on the repairs or construction of the bridges it is obvious that the levy has to be correlated to the expenses incurred for the construction of each of bridge. That observation was made in the context to repel the arguments of the petitioner that the impugned notification offended Article 14 of the Constitution on the ground that the classification of the bridges had been made therein according to their cost.

15. In my opinion, it is not necessary that the rate of toll must be correlated to the actual expenses of the construction or maintenance of a particular bridge upon which the toll is levied.

16. Mr. Chatterjee, appearing on behalf of the petitioner in Civil Rule

3873(W) of 1975, contended that the original Section 2 of the Act contained a schedule which prescribed a maximum rate of levy to be imposed under the said section but the said schedule having been repealed there was no guideline, principle and/or criterion for fixing and/or calculating the rate of levy. The rate of toll to be levied was left to the complete discretion of the executive authority without any guidance in the Act, as such Section 2 of the Act suffered from excessive delegation of legislative powers.

17. This identical point was raised before the Allahabad High Court in *Md. Ibrahim v. State of U. P.*, AIR 1967 All 24. Mathur, J., following the principle as laid down by the Supreme Court in *Corporation of Calcutta v. Liberty Cinema*, AIR 1965 SC 1107, observed, "Toll is well understood to be a charge or payment for the use of roads, bridges, market places and the like. It cannot be equated with a general tax. It is, if at all a tax, a compensatory tax for the use of certain facilities. From its very nature, the levy is for the purpose of compensating the Government for the expenses incurred in the construction or maintenance of the roads and bridges. The need of the State Government for compensating itself for the expenses incurred in the construction or maintenance of the roads and bridges is sufficient guidance to make the power to fix rates or tolls valid. Section 2 of the Indian Tolls Act, 1851, does not suffer from the vice of excessive delegation of legislative power and is not unconstitutional on that ground."

18. So, the question for consideration is, whether subsequent decisions of the Supreme Court have in any way altered or modified the principle as laid down in *Liberty Cinema's* case.

19. The leading decision on the subject of delegated legislation is *Pandit Banarasi Das Bhanot v. State of Madhya Pradesh*, AIR 1958 SC 909. In that case Section 6 (2) of the Berar Sales Tax Act, 1947, which empowered the State Government to amend the schedule to the Act providing for exemption from Sales Tax, was challenged on the ground of excessive delegation of legislative power. Venkatarama Aiyar, J., said:

"Now, the authorities are clear that it is not unconstitutional for the legislature to leave it to the executive to determine details relating to the work of taxation laws, such as the selection of persons on whom the tax is to be laid, the rates at which is to be charged in respect of different classes of goods, and the like."

20. It was further observed that the fixation of rates of tax being not an essential legislative function could be validly delegated to a non-legislative body but where it was delegated to such a

body, the legislature must provide guidance for such fixation.

21. In *Corporation of Calcutta v. Liberty Cinema*, AIR 1965 SC 1107, the validity of Section 548 (2) of the Calcutta Municipal Act, 1951, which empowered the Corporation to levy fees "at such rates as may from time to time to be fixed by the Corporation" was challenged on the ground of excessive delegation as it provided no guidance for the fixation of the amount. The Supreme Court held that Banarasi Das's case AIR 1958 SC 909 was an express authority for the proposition that the fixing of rate of tax may legitimately be left by a statute to a non-legislative authority, and there was no distinction in principle between delegating a power to fix rate of taxes to be charged on different classes of goods and a power to fix rates simpliciter. Accordingly, the Supreme Court held that Section 548 of the Calcutta Municipal Act was not void because it left it entirely to the Corporation to fix the amount of tax and gave no guidance in the matter. The Supreme Court found the guidance in the monetary needs of the Corporation for carrying out the functions and entrusted to it under the Act.

22. In *Devi Dass Gopal Krishnan v. State of Punjab*, AIR 1967 SC 1395, question arose whether Section 5 of the East Punjab General Sales Tax Act, 1948, which empowered the State Government to fix a Sales Tax at such rate as it thought fit was bad. The Supreme Court struck down the Section on the ground that the legislature did not lay down any policy or guidance to the Executive in the matter of fixation of rates. The Supreme Court observed that the needs of the State and the purposes of the Act would not provide sufficient guidance for the fixation of rates of tax. Subba Rao, C. J., observed that an over-burdened Legislature or controlled by a powerful Executive may unduly overstep the limits of delegation. It may not lay down any policy at all, it may declare its policy in vague and general terms; it may not set down any standard for the guidance of the Executive; it may confer an arbitrary power on the Executive to change or modifying the policy, the policy laid down by it without reserving for itself any control over subordinate legislation. This self-effacement of legislative power in favour of another agency either in whole or in part is beyond the permissible limits of delegation.

23. In *V. Nagappa v. Iron Ore Mines Cess Commissioner*, AIR 1973 SC 1374, the questions arose whether Section 2 of the Iron Mines Labour Welfare Cess Act suffered from vice of excessive delegation in as much as in the Section the Central Government was given a blanket power to fix the rate of excise duty. It was contended that the Section, while

leaving it to the Central Government to fix the rate and change it from time to time, has failed to give sufficient guidance to the Government in the matter of fixing the rate, nor has it indicated the basis for fixation or the relevant consideration to be taken into account for fixing the rate. The Supreme Court held that the Government was not given an uncontrolled discretion in the matter of fixing the rate of cess on iron ore. The necessary guidance for fixing the rate can be found in the amount of expenditure necessary for carrying out purposes of the Act.

24. In *N. K. Papiiah & Sons v. Excise Commissioner*, AIR 1975 SC 1007, the contention was raised before the Supreme Court that Section 22 of Karnataka Excise Act provides for delegation of the power to fix the rate of the excise duty to the Government by making Rules and since no guidance has been furnished to the Government by the Act for fixing the rate, there was abdication of essential legislative function by the legislature and therefore, the Section is bad. The Supreme Court held that the power to fix the rate of excise duty conferred by Section 22 of the Act is valid. The dilution of Parliamentary watchdogging of delegated legislature may be deplored but in the compulsions and complexities of modern life, cannot be helped.

25. Now tested in the light of the decisions referred to hereinabove, I am of opinion that the Act has furnished definite guidelines for the Government under Section 2 of the Act to fix the rate of toll to be levied.

26. In the preamble of the Act, it is stated, an Act enabling Government to levy tolls in public roads and bridges. So, the policy of the Act has clearly stated the purpose for which the tolls should be collected and spent. The guidance for fixing the rate can be found in the amount of expenditure for the purpose of repairs as well as for construction of future roads and bridges and the rate should be fixed at such rate as would bring in the amount necessary to meet such expenses. Power for fixing the rate has been conferred upon the State Government which is a relevant factor to be taken into account. It eliminates the chance of fixing the rate arbitrarily. Therefore, in my opinion, Section 2 of the Indian Tolls Act, 1851 does not suffer from the vice of excessive delegation of the legislative powers even after the schedule fixing the maximum rate of toll has been repealed.

27. It is strenuously argued that advance realisation of toll for the purpose of construction of bridges in future in other parts of the State cannot be said to be a compensatory tax, in reality it is a tax and it is being imposed without any authority of law.

28. In *Automobiles Transport Limited v. State of Rajasthan*, AIR 1962 SC 1406, the Supreme Court said that it would not be right to say that a tax is not compensatory because the precise or specific amount collected is not actually used for providing any facilities. A working test for deciding whether a tax is compensatory or not, is to enquire where the trades people are having the use of certain facilities for the better conduct of their business and paying not patently much more than what is required for providing the facilities. It would be impossible to judge the compensatory nature of a tax by a meticulous test and in the nature of things that cannot be done.

29. In *G. K. Krishnan v. State of Tamil Nadu*, AIR 1975 SC 583, the imposition of tax on contract carriages by the Government of Tamil Nadu from Rs. 30/- per seat/per quarter to Rs. 100/- per seat/per quarter was challenged on the ground that it offended Articles 14, 19 (g), 301 and 304 (b) of the Constitution. The Supreme Court held that the tax being compensatory could not operate as an unreasonable restriction upon the fundamental rights of the appellants to carry on their business, for, the very idea of the compensatory tax is service more or less, commensurate with the tax levied.

30. Toll is imposed only upon those persons who get benefit from using the bridges and not from others. It is true that the toll proceeds are not applied to meet the expenses already incurred or to maintain or repair the bridges, as disclosed in the affidavit-in-opposition filed on behalf of the State, but it does not lose its compensatory character for the purpose of creating a "fund" for construction of future bridges in the State because such purpose cannot be said to be a purpose for which the toll cannot be levied.

31. In the result, all the points raised by the petitioners fail. These Rules are discharged but there will be no order for cost. All interim orders are vacated.

Rules discharged.

AIR 1976 CALCUTTA 38

A. N. SEN, J.

Scientific Instruments Co. Ltd., Applicant v. Collector of Customs (Valuation Section) and another, Respondents.

Matter No. 478 of 1973, D/- 16-7-1975.

(A) Civil P. C. (1908), Order 41, Rule 22 — Remand on appeal — Direction to lower authority — Non-compliance with — Effect. (Customs Act (1962), Section 14 (1) (a) and (b)) — (Customs Valuation

HS/IS/D82/75/HGP

Rules (1963), Rule 5) — (Constitution of India, Article 226).

The Assistant Collector of Customs, while assessing the dealer had changed the basis of determination of assessable value of goods from Section 14 (1) (b) to Section 14 (1) (a) of the Customs Act. On dealer's appeal, the Appellate Collector allowed the appeal and remanded the matter with a direction that Section 14 (1) (b) should be applied. The Assistant Collector, however, passed the order holding that the determination should be on the basis of Section 14 (1) (a) and not of Section 14 (1) (b). On writ petition filed by the dealer.

Held that the Assistant Collector acted in excess of his jurisdiction and in violation of the order passed by the appellate authority. On remand, the Assistant Collector's jurisdiction and power were limited by the order of the appellate authority and it was his duty to comply with it. The said order being contrary to the directions of the appellate authority was illegal, unjustified and without jurisdiction. As the order was erroneous in law and apparent on the face of the order, the dealer was justified in invoking the jurisdiction of High Court without filing any appeal against the said order. (Para 9)

(B) Constitution of India, Article 226 — Delay — When is no bar.

Where there was no unusual delay in making the writ application, the fact that the period of time fixed for preferring an appeal had elapsed constitutes no bar to its maintainability of writ petition. It does not deprive the petitioner of his right to move the High Court in its writ jurisdiction. AIR 1961 SC 1506, Disting. (Para 10)

Cases Referred: Chronological Paras AIR 1961 SC 1506 = 1962) 1 SCR 753 8

Biswarup Gupta, for Applicant; T. K. Basu, for Respondents

ORDER:— The validity of certain orders passed by the Assistant Collector of Customs (Valuation Section), respondent No. 1 herein, forms the subject-matter of challenge of this writ petition.

2. The petitioner acts as the sole distributor in India of various foreign companies manufacturing scientific instruments. As such sole selling agent or distributor, the petitioner has to work for promoting in India the sale of the said products of its principals and the petitioner is also bound to handle the servicing contracts with the purchasers in India and has to keep stock of necessary parts for maintenance works. Wherever there is a warranty against defective workmanship and/or material, when the instrument is replaced by the principals abroad, the petitioner is also to handle

the installation and testing. The petitioner mainly deals in scientific instruments and the scientific instruments which are manufactured by the principals of the petitioner abroad and which are imported into India by the petitioner as the sole distributor or agent of the foreign principals in India are liable to Customs Duty. The petitioner has been carrying on its business for a number of years. In 1964 in the matter of assessment of duty payable by the petitioner on the goods imported, a dispute arose and the Assistant Collector of Customs, the respondent No. 1 herein, sought to disallow trade discount altogether and he changed the basis of determination of assessable value of the goods from Section 14 (1) (b) to Section 14 (1) (a) of the Customs Act, 1962 (hereinafter referred to as the Act). Against the said order of the Assistant Collector of Customs, the petitioner preferred an appeal, and in the appeal, the contention of the petitioner was accepted by the Appellate Collector who by his order dated 8-12-1965, allowed the appeal and directed that in the matter of determination of assessable value for computing the duty payable by the petitioner, Section 14 (1) (b) of the Act should be applied. On the basis of the order of the Appellate Authority, determination of the assessable value was being made in accordance with the provisions contained in Section 14 (1) (b) of the Act. On the 25th April, 1970, the Assistant Collector of Customs addressed a letter to the petitioner asking the petitioner to show cause why in the matter of determination of the assessable value Section 14 (1) (a) should not be applied and by the said letter the Assistant Collector of Customs held that according to him Section 14 (1) (a) was applicable and he also stated in the letter that the said letter should be treated as a demand for the amount of duty short levied and in terms of the proviso to Section 28 (1) of the Act. The petitioner sent a reply to the said letter of the Assistant Collector of Customs on the 3rd June, 1970, and in the said letter the petitioner dealt with the contentions raised in the letter of the 25th April, 1970, and the petitioner denied and disputed that there could be any change in the basis of the determination of the assessable value from Section 14 (1) (b) to Section 14 (1) (a) of the Act. On the 11th September, 1970, the Assistant Collector of Customs after considering the representations made by the petitioner, in his letter dated 3rd June, 1970, passed an order holding that Section 14 (1) (a) of the Act was applicable and determination of the assessable value should be on the basis of the provisions contained in Section 14 (1) (a) of the Act. In paragraph 5 of the order passed by the Assistant

Collector of Customs on the 11th September, 1970, he has held,

"* * * I have carefully considered the submissions made by you, written as well as oral. Whatever might be the circumstances for direct importation by third parties, the fact remains that because of such importations you ceased to be the sole importer of the agency products, you are not, therefore, eligible for assessment under Rule 5 (a) of the Customs Valuation Rules read with Section 14 (1) (b) of the Customs Act, 1962. The provisions of Section 14 (1) (a) take precedence over Section 14 (1) (b)."

Against the said order of the Assistant Collector of Customs (Valuation Section) the petitioner preferred an appeal on 9-11-1970. The said appeal filed by the petitioner was disposed of by the Appellate Collector on 12-1-1972. It is necessary to set out the order of the Appellate Collector of Customs.

"ORDER

S/Shri A. N. Banerjee and J. N. Roy, Advocates were heard on behalf of the appellant firm. They referred to their representation during the hearing before my predecessor that loading in the valuation has been done arbitrarily as the Valuation Rules provide a certain percentage of the discount which is set off against post importation charges. In no circumstances can the post importation charges be loaded in the value. Even if there is one or two solitary importations of the products, they hold sole agency in India and they get their discounts from their principals. The appellants, therefore, requested that this may be examined when the Valuation Rules provide for consideration for setting off the post importation charges a certain percentage of the discount should be allowed to them.

Besides above and what had been stated in the written appeal Shri Roy said that he had two more points to put up for my attention.

First, he referred to Section 14 (1) (a) of the Customs Act and stated for the purpose of valuation it is not only the place of importation but also the time of importation which is relevant and, therefore, any services rendered for which certain post importation charges are incurred the value of such services should not be loaded on; and secondly he referred me to the Customs Valuation Rules, 1963 and stated that he particularly refers to Rule 3 (a) where the word "Ordinarily" has been used with reference to sale or offered sale to buyers in India under competitive conditions. He said in the present case a few instances of direct sales were found by the Customs but such sales should be deemed to be sales under special circumstances, and not within the meaning of words "ordinarily sold or of-

ferred for sale etc." occurring in Rule 3 (a) of the Customs Valuation Rules. Further he said those direct sales were made under the Aid Licences and in terms of the conditions of the said Aid Licences to importers who have to directly negotiate by opening L/C and placing indents directly on the suppliers; that some such sales were made through Ford Foundation, Rockefeller Foundation and also W. H. O. that some purchases were made directly by Hospitals in India from the manufacturers themselves or under the Import Liberation Scheme; that in all such sales the manufacturers reserved the appellants' agency commission for the purpose of post importation services during the warranty period and that such agency commissions were remitted to the appellants in due course. He said that because the appellants are holding the agency the valuation should have been done in terms of Rule 5 of the Valuation Rules; that is only the services rendered prior to importation, such as, advertising correspondence, indenting etc., which only should be loaded and not the post importation service charges.

The appellants as per record are the Sole Managing Agents of the principal in India and are entrusted with after sales service in respect of imports made by them or by other organisations. In all fairness there should be a consideration for such after sale services which are rendered free in India. It is observed that this aspect was not examined by the Original Side before disallowing the agency discount to the appellants. The order in original is therefore annulled without prejudice to re-examination of merits and for determination as to what quantum of discount claim can be on account of after sales services or expenditure by the local sole agents.

Sd/- R. N. Shukla,
Appellate Collector of
Customs, Calcutta.

CAP 2108/70,
D/- 25-4-1972.
Copy to:

(1) The Scientific Instruments Co. Ltd., 6, Tej Bahadur Sapru Road, Allahabad-1.

(2) Shri J. N. Roy, Advocate,
32/1, Broad Street, Calcutta-19.

Sd/- Illegible 22-4-1972
for Appellate Collector of
Customs, Calcutta".

On the basis of the order passed by the Appellate Collector of Customs annulling the order of the Assistant Collector of Customs and remanding the matter to the Assistant Collector of Customs the Assistant Collector of Customs has passed an order holding that determination of the assessable value should be on the basis of Section 14 (1) (a) of the Act and not on

the basis of Section 14 (1) (b) and necessarily the petitioner was not entitled to any deduction. The final order was passed by the Assistant Collector of Customs on 5th March, 1973, and before passing the final order the Assistant Collector of Customs by his order dated the 3rd June, 1972, had directed and ordered that pending finalisation assessment would be made provisionally under Section 18 (1) of the Act read with Customs Provisional Assessment Regulations, 1963. It also appears that before passing the final order on the 5th March, 1973 the Assistant Collector of Customs sent a letter to the petitioner asking to show cause as to why on the basis of the statements contained in the said letter he should not pass a final order holding that Section 14 (1) (a) of the Act applied and Section 14 (1) (b) of the Act had no application. On the 12th January, 1973, a personal hearing was given by the Assistant Collector of Customs to the representatives of the petitioner, and as I have already noted, the Assistant Collector of Customs passed his final order on the 5th March, 1973. In this order the Assistant Collector of Customs has, inter alia, held.

"* * * In view of the above, I also do not find any necessity to consider the matter in the light of the orders of the Appellate Collector of Customs vide Order in Appeal No. 313/72 dated 12-1-1972, since I do not find any scope to apply the provisions of Section 14 (1) (b) of the Customs Act to this case. You are, therefore, advised to declare on all the Customs documents, the assessable values of your imports from your foreign principals, in accordance with the above decisions."

The Assistant Collector of Customs has also held that Section 14 (1) (a) of the Customs Act was applicable and has further held

"The suppression of these facts and changes has resulted in under-assessment of your imports from these suppliers. You are, therefore, requested to furnish immediately the relevant Bills of Entry with invoices and price lists to this office for scrutiny and pay the extra duty through the assessing groups concerned. While formal demand orders will be issued by the assessing groups in due course, this letter may be treated as a demand notice in respect of all the under-assessed consignments, in terms of proviso to Section 28 (1) of the Customs Act."

In this writ petition the validity of the order passed by the Assistant Collector of Customs on 25-4-1970, 11-9-1970, 3-6-1972, 2-12-1972 and 5-3-1973 have been questioned.

3. The real grievance of the petitioner, however, appears to be with regard to the final order passed by the Assistant Collector of Customs on 5-3-1973.

4. Mr. T. K. Basu, learned counsel appearing on behalf of the respondents, in my view, has rightly contended that the orders dated 25-4-1970 and 11-9-1970 cannot really be questioned in this writ proceeding, as the said orders have been merged in the order of the Appellate Collector of Customs dated 12-1-1972 and no appeal has indeed been preferred against the said order of the Appellate Collector of Customs. As I have already observed the real grievance of the petitioner in this petition is with regard to the final order of the Assistant Collector of Customs dated the 5th March, 1973

5. Mr. Biswarup Gupta learned counsel appearing in support of this application has raised before me the following three contentions:

(1) The proposed order dated 2-12-1972 and the final order dated 5-3-1973 must be considered to be bad as the said orders have been passed by the Assistant Collector of Customs in excess of his jurisdiction and in violation of the order of the Appellate Collector passed in appeal.

(2) The said two orders are also otherwise bad as Section 14 (1) (a) which has been sought to be applied by the Assistant Collector of Customs in the making the said two orders does not have any application to the facts and circumstances of this case and Section 14 (1) (b) has to be applied.

(3) The finding of the Tribunal in the final order that there has been a suppression of facts by the petitioner is perverse, unwarranted and was without any jurisdiction and the further order on the basis of suppression of facts directing the said letter to be treated as demand made in respect of all under-assessed consignments is necessarily bad and illegal.

6. In support of the first contention, namely, that the order is bad as the said order is not in compliance with the direction by the Appellate Authority, Mr. Gupta has argued that aggrieved by the order of the Assistant Collector of Customs who was seeking to apply Section 14 (1) (a) of the Act, the said appeal had been preferred by the petitioner. Mr. Gupta in this connection has drawn my attention to paragraphs 5 of the order dated 11-9-1970 passed by the Assistant Collector of Customs. I have already set out the said paragraph 5 and in the said paragraph the Assistant Collector of Customs has held that Section 14 (1) (a) will have application. The contention of Mr. Gupta is that subject-matter of the appeal before the Appellate Collector was the correctness of that decision. Mr. Gupta has contended that the appeal of the petitioner was allowed and the said order was annulled by the Appellate Authority and the Appellate Collector sent the matter

back with the direction that the Assistant Collector would determine as to what quantum of discount claimed can be allowed on account of after-sale service or expenditure by the petitioner. It is the contention of Mr. Gupta that the effect of the order of the Appellate Authority, therefore, clearly is to hold that the Assistant Collector of Customs was not right in applying the provisions contained in Section 14 (1) (a) of the Act and that Section 14 (1) (b) should be applied and the Assistant Collector of Customs had to determine the quantum of discount to be allowed to the petitioner by applying the provisions of Section 14 (1) (b). Mr. Gupta argues that in view of the said order passed by the Appellate Authority the Assistant Collector of Customs had really no jurisdiction to hold that Section 14 (1) (a) was applicable and the observation of the Assistant Collector of Customs in his order dated 5th of March, 1973, to the effect—

"In view of the above, I also do not find any necessity to consider the matter in the light of the orders of the Appellate Collector of Customs vide Order in Appeal No. 313/72 dated 12-1-1972" are clearly unwarranted, unjustified and improper. It is the contention of Mr. Gupta that the Assistant Collector was hearing the matter on remand and his power and jurisdiction had in fact been limited by the directions contained in the order of the Appellate Authority and he was bound to carry out the same. In not complying with the order of the Appellate Authority Mr. Gupta contends that the Assistant Commissioner has not only acted illegally and improperly but has acted in excess of his jurisdiction. Mr. Gupta contends the impugned orders must, therefore, be considered to be illegal and without jurisdiction and they are in any event erroneous and the error is apparent on the face of the record.

7. Mr. Gupta has next argued that Section 14 (1) (a) can have no application to the facts and circumstances of this case and Section 14 (1) (b) has to be applied and the same has been applied all through. In this connection Mr. Gupta has referred to Section 14 of the Customs Act, 1962, Section 14 may be set out:

"14. Valuation of goods for purposes of assessment.

(1) For the purposes of the Indian Tariff Act, 1934, (32 of 1934) or any other law for the time being in force whereunder a duty of customs is chargeable on any goods by reference to their value, the value of such goods shall be deemed to be—

(a) the price at which such or like goods are ordinarily sold, or offered for sale, for delivery at the time and place of importation or exportation, as the case may be, in the course of interna-

tional trade, where the seller and the buyer have no interest in the business of each other and the price is the sole consideration for the sale or offer for sale;

Provided that in the case of imported goods, such price shall be calculated with reference to the rate of exchange as in force on the relevant date referred to in sub-section (1) of Section 15.

(b) Where such price is not ascertainable, the nearest ascertainable equivalent thereof determined in accordance with the rules made in this behalf.

(2) Notwithstanding anything contained in sub-section (1), if the Central Government is satisfied that it is necessary or expedient so to do it may, by notification in the Official Gazette, fix tariff values for any class of imported goods or export goods, having regard to the trend of value of such or like goods, and where any such tariff values are fixed, the duty shall be chargeable with reference to such tariff value."

Mr. Gupta has also referred to Customs Valuation Rules, 1963 and in particular to R. 5 thereof which is in the following terms:

"5. (a) Where any goods are imported by or through a sole agent, distributor or indenter appointed for the whole of India or any region thereof, the expenses ordinarily incurred by him in that capacity together with the expenses ordinarily incurred by his regional agents, distributors or indentors, if any, in that capacity shall be included while determining the value of the imported goods.

(b) Where any goods are imported by a branch or subsidiary of the exporter, the provisions of sub-rule (a) shall apply as if the importation had been made by a sole agent.

Explanation. — In this rule, 'subsidiary' has the same meaning as in Section 4 of the Companies Act, 1956."

Relying on the aforesaid provisions Mr. Gupta contends that Section 14 (1) (a) can have no application, as the other sales on which the Assistant Collector of Customs sought to rely are not cases of ordinary sales in course of international trade and the requirements of Section 14 (1) (a) are, therefore, clearly not satisfied. Mr. Gupta has finally contended that the finding of the Assistant Collector of Customs that there has been suppression is clearly unwarranted, unjustified and perverse and indeed there are no materials for coming to that finding. It is his argument that the entire facts and circumstances had always been there before the authorities concerned at the time of the assessments. He has commented that the said finding has been deliberately arrived at to circumvent the provision relating to limitation of the period of six months and to come within the period of limitation of

five years in terms of the provisions contained in Section 28 (1) of the Customs Act. Mr. Gupta contends that in any event the Assistant Collector of Customs in the proceeding on remand had no authority or jurisdiction to go into the question as his jurisdiction was limited to the order earlier passed by him and subsequently set aside on appeal and remanded back to him to be decided on the basis of the decision of the Appellate Authority. Mr. Gupta submits that in that view of the matter and in any view of the matter, the Assistant Collector of Customs had no jurisdiction or authority to direct that the said letter should be treated as a demand notice in respect of the under-assessed consignments. It is the submission of Mr. Gupta that there is no question of any suppression of facts and there is no question of any under assessment of the earlier consignments and necessarily there can be no question of any demand in terms of the provisions contained in Section 28 (1) of the Customs Act.

8. Mr. T. K. Basu, learned counsel appearing on behalf of the authorities has contended before me that the effect of the order of the Appellate Collector of Customs is to reopen the entire proceedings before the Assistant Collector of Customs without any limitation and the entire matter was at large before the Assistant Collector of Customs when it came back to him on remand by virtue of the order made by the Appellate Collector of Customs. He has argued that the words used in the order of the Appellate Collector to the effect "without prejudice to re-examination of merits and for determination as to what quantum of discount claim can be on account of after sales service or expenditure by the local sole agents" go to indicate that the Appellate Authority has not come to any decision as to the applicability to either Section 14 (1) (a) or 14 (1) (b) of the Act and the Appellate Authority has also not come to any decision that the petitioner was entitled to any discount claim and all these matters were to be decided de novo by the Assistant Collector of Customs while adjudicating upon the matter on remand. Mr. Basu argues that as the entire matter was at large before the Assistant Collector of Customs without any limitation as to his power or jurisdiction by the order of remand, he was perfectly competent to come to his own conclusions on a proper consideration of all the materials which were there before him. Mr. Basu, therefore, argues that there has been no violation of the order of the Appellate Authority and the order passed by the Assistant Collector of Customs is in compliance with the order passed by the Appellate Authority. Mr. Basu has next contended

that as the Assistant Collector of Customs was free to decide the matter on the materials before him and the entire matter was at large before him, the Assistant Collector of Customs on a consideration of all the facts and circumstances has come to the conclusion that Section 14 (1) (a) applies, as the requirements of the said Section are all satisfied. It is the argument of Mr. Basu that this finding of the Assistant Collector of Customs that the requirements of Section 14 (1) (a) are satisfied is indeed a finding of fact and in this jurisdiction this Court should not interfere with the said finding of the Assistant Collector of Customs. Mr. Basu has further argued that the determination of the value for the purpose of assessment involves an enquiry into the various questions of fact and those questions are indeed all disputed questions and in this jurisdiction the Court should not really enter into the merits of controversy of such valuation. Mr. Basu has next argued that in view of the finding of the Assistant Collector of Customs, he was perfectly justified in holding that in the case of earlier consignments there has been an under-assessment. Mr. Basu has finally contended that as the Act provides for an appeal against the order of the Assistant Collector of Customs and as on earlier occasions the petitioner had in fact preferred appeals against the orders of the Assistant Collector of Customs, there is no justification on the part of the petitioner in not following the normal remedy of preferring an appeal against the order of the Assistant Collector to the Appellate Authority in terms of the provisions of the Act and in invoking the jurisdiction of this Court under Article 226 of the Constitution. Mr. Basu has further argued that the petitioner by his own wilful act has deprived himself of the right to prefer an appeal to the appellate authority in terms of the provisions contained in the Act, as he allowed the period of three months fixed for preferring an appeal to expire and the petitioner has not offered any explanation for the delay and for not preferring an appeal. Mr. Basu has submitted that this petition was presented after the expiry of the period of three months and the petitioner who by his own laches has deprived himself of the right to prefer an appeal conferred on him under the Act is not entitled to invoke the jurisdiction of this Court in this proceeding. In this connection Mr. Basu has referred to the decision of the Supreme Court in the case of A. V. Venkateswaran, Collector of Customs, Bombay v. Ramchand Sobhraj Wadhvani, reported in AIR 1961 SC 1506.

9. In the instant case, the Assistant Collector of Customs in making the said order has acted in excess of his jurisdiction and in violation of the order

passed by the appellate authority. It was the clear duty of the Assistant Collector of Customs in deciding the matter remanded to him by the appellate authority to act in compliance with the order of the appellate authority. To my mind, the effect of the order of the appellate authority clearly is to direct the Assistant Collector of Customs to proceed to determine the value for the purpose of assessment of duty in accordance with the provisions contained in Section 14 (1) (b) of the Act. It is to be noted that in the order of the Assistant Collector of Customs from which the petitioner preferred the appeal to the Appellate Authority, the Assistant Collector of Customs had held that Section 14 (1) (a) of the Act was applicable and he proceeded to determine the value by applying the provisions contained in Section 14 (1) (a) of the Act. The grievance of the petitioner in the appeal before the appellate authority, therefore, clearly was that Section 14 (1) (a) of the Act had no application and the Assistant Collector of Customs had erred in holding that Section 14 (1) (a) of the Act applied and in applying the provisions of Section 14 (1) (a) in determining the value. The appeal filed by the petitioner was allowed and the order of the Assistant Collector of Customs was annulled. The effect of allowing the appeal and annulling the order clearly indicates that the appellate authority was of the opinion that the view expressed by the Assistant Collector of Customs that Section 14 (1) (a) was applicable was erroneous and the Assistant Collector of Customs had erred in applying the provisions of Sec. 14 (1) (a) in determining the value. The further direction of the Appellate Authority while remanding the matter back to the Assistant Collector after annulling the order to re-examine on merits and to determine as to what quantum of discount claimed can be allowed on account of after-sales service or expenditure by the local sole agents, clearly indicates, to my mind, that the Appellate Authority directed the Assistant Collector of Customs to consider the assessment on merits by applying the provisions of Section 14 (1) (b) of the Act and by giving necessary allowance to the petitioner in respect of the petitioner's claims for discount for after-sales service or expenditure. I am unable to accept the contention of Mr. Basu that as a result of the order of the Appellate Authority the entire matter before the Assistant Collector of Customs was at large and he was free to decide the case in his own way and also to decide that Section 14 (1) (a) was applicable and not Section 14 (1) (b). When the matter came back to the Assistant Collector of Customs on remand by the Appellate Authority, his jurisdiction and power were undoubtedly limited by the order of the Appellate Au-

thority and it was his duty to act in deciding the matter sent back to him on remand in compliance with the order of the Appellate Authority. In the instant case, he has clearly acted contrary to the decision of the Appellate Authority which had sent the matter back to him for adjudication in the light of its decision which was binding on the Assistant Collector of Customs. The power and jurisdiction of the Assistant Collector of Customs in deciding the matter on remand to him by the Appellate Authority were clearly restricted by the order of the Appellate Authority. In seeking to pass the proposed order dated 2-12-1972 and in passing the final order dated 5-3-1973 the Assistant Collector of Customs had clearly acted in violation of the order of the Appellate Authority. The said orders are contrary to the directions of the Appellate Authority and the said orders are, therefore, illegal, unjustified and without jurisdiction. In that view of this and on this ground alone the said orders cannot stand.

10. In the instant case, there has been no unusual delay in making the present application. The fact that the period of time fixed for preferring an appeal has elapsed constitutes no bar to the maintainability of the present application and does not deprive the petitioner of this right to move this Court in this jurisdiction. The decision of the Supreme Court relied on by Mr. Basu is not of any assistance in the facts and circumstances of this case. In the instant case the validity of the order is questioned mainly on the ground of lack of jurisdiction. It is to be noted that against the earlier order of the Assistant Collector of Customs the petitioner had appealed to the Appellate Collector and the Appellate Collector had allowed the appeal and remanded the matter back to the Assistant Collector of Customs. The principal grievance is that the Assistant Collector of Customs had violated the order of the Appellate Authority and had acted illegally and without jurisdiction in passing the impugned order without complying with the directions of the Appellate Authority and the order is erroneous in law on the face of it. As in the instant case the order is clearly bad for lack of proper jurisdiction and as the order is erroneous in law and the error is apparent on the face of the order, the petitioner was justified in invoking the jurisdiction of this Court without filing any appeal against the said order.

11. In view of my finding on the first question it does not indeed become necessary to decide the other contentions by Mr. Gupta. I am, however, inclined to the view that there appears to be considerable force in the contention of Mr. Gupta that in the facts and circumstan-

ces of this case Section 14 (1) (b) is indeed applicable in determining the value. I, however, do not consider it necessary to decide this question finally. I also wish to observe that the finding of the Assistant Collector of Customs that there has been suppression of facts by the petitioner in respect of the earlier consignments is clearly unwarranted and unjustified. As the entire order is being set aside and quashed it does not become necessary for me to deal with this aspect at any length.

12. In the result the petition succeeds. The rule is made absolute, in so far as the orders dated 2-12-1972 and 5-3-1973 are concerned. The said orders are hereby quashed. So far as the order dated 3-6-1972 is concerned making provisional assessment under Section 18 (1) read with Customs Provisional Assessment Regulation, 1963, I do not think it will be proper to interfere with the said order in this proceeding. The earlier orders complained of, as I have already noted, cannot be quashed as the said orders merged in the order of the Appellate Authority dated 12-1-1972 and the order of the Appellate Authority is not challenged in this proceeding and is indeed relied on in this proceeding. The orders dated 2-12-1972 and 5-3-1973, are therefore, quashed and the authorities concerned are restrained from giving any effect to the said orders and/or acting in terms of the said orders. The Assistant Collector of Customs is directed to proceed to determine the value in accordance with law in compliance with the order passed by the Appellate Authority. There will be no order as to costs. There will be a stay of operation of this order for a period of four weeks and during the said period of stay interim order will continue.

Rule made absolute.

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SABYASACHI LUKHARJI, J.

Dinesh Chandra Banerjee and others,
Applicants v. Corporation of Calcutta and
others, Opposite Parties.

Matter No. 428 of 1968, D/- 15-5-1975.

(A) Calcutta Municipalities Act (33 of 1951), Sections 378, 379, 380 read with Schedule 16, Rule 51 — Revised building application form as approved by Corporation on 25-3-1968 — Particulars required to be furnished by licensed building surveyor — Corporation is within its rights to ask for these particulars.

Reading the provisions of Sections 378 to 380 together it is clear that the Corporation is within its rights to ask for these particulars.

GS/HS/C545/75/JHS

nation has the power to specify the particulars as indicated to be filled in in the application for sanction of a building plan. It is true that by the revised building application form as approved by the Corporation on 25-3-1968 read with the schedule annexed to the form a new obligation has been imposed to give certain particulars in the plan for sanction but these obligations are really enforcement of additional particulars and for the verification of the correctness of additional particulars under Rule 51 (1), under sub-rule (2) of Rule 51 the other particulars have been required to be given and the fact that these are required to be given in the application to ensure that these are correct particulars by verification of the licensed building surveyor, does not impose any additional duties on the licensed building surveyor which the Corporation was not competent to impose by virtue of powers under Secs. 378 to 380. (Para 4)

ORDER:— This is an application by seven petitioners who are Licensed Building Surveyors, in their representative capacity against the Corporation of Calcutta under Article 226 of the Constitution. The petitioners challenge the letter dated 31st May, 1968, issued by the City Architect, Corporation of Calcutta. By the said letter the Licensed Building Surveyors were informed, inter alia, as follows:

"The following system for the improvement of working in the plan section of the City Architect's department as has been approved by the Corporation at its meeting held on 25-3-1968 will be given effect to on and from 26-6-1968 forenoon. The revised building application form as approved by the Corporation referred above would be available from the office of the City Architect free of charge between the normal office hours."

2. I will refer to the relevant application form that was in practice before the introduction of the new system and the new application form with additional particulars that are required to be filled in by the impugned letter. Before I do that, it is necessary to refer to the relevant provisions of the Calcutta Municipal Act. The relevant provisions of the said Act are Sections 378 to 380 which are to the following effect:

"378. (1) The Commissioner may from time to time, in accordance with such rules as may be made by the Corporation, grant to any person he thinks fit a license to act as a licensed building surveyor for the purposes of this Chapter.

(2) The Corporation may prescribe the qualifications to be required of persons to whom licenses may be granted under sub-section (1) in respect of the several classes of buildings.

(3) Every such license shall be for a renewable period of three years.

379. (1) The Corporation may make rules for the guidance of licensed building surveyors, and a copy of all such rules, for the time being in force, shall be written on the back of every license granted under Section 378.

(2) the Corporation may from time to time prescribe a scale of fees of licensed building surveyors in respect of any class of buildings, to be made applicable in the absence of a written contract to the contrary.

380. The Commissioner may decline to accept any plan, elevation or section, submitted with any application for permission to erect a new building, unless such plan, elevation or section has been prepared by, and bears the signature of, a licensed building surveyor."

It is also relevant to refer to Rule 532 which is to the following effect:

"532. (1) The State Government may, on the recommendation of the Corporation, by rules alter, add to or cancel any part of, or any rule contained in, any Schedule except Schedule I.

(2) All references in this Act to any schedule which may be amended under this section shall be construed as references to such schedule as for the time being so amended."

Rule 51 of Schedule XVI inter alia provides as follows:

"51. (1) Every application made under Rule 50 shall be written on a printed form (to be supplied by the Commissioner free of charge) and shall state the position of the site, the number assigned to it in the assessment-book and its dimensions, the description of the building and its dimensions, and such other particulars as may be prescribed by the Commissioner.

(2) The site plan sent with such an application shall be drawn to a scale of not less than one-fiftieth of an inch to the foot, shall be sent in triplicate, and shall show—

(a)	*	*	*	*
(b)	*	*	*	*
(c)	*	*	*	*
(d)	*	*	*	*
(e)	*	*	*	*
(f)	*	*	*	*
(g)	*	*	*	*
(h)	*	*	*	*
(i)	*	*	*	*
(j)	*	*	*	*
(k)	*	*	*	*

(1) such other particulars as may be prescribed by the Corporation."

3. The old application form before the impugned system was introduced, a copy whereof is at page 23 of the petition, had to be signed by the owner and

had to give certain specifications and it had to be supported by site plan and such plan had to be signed by the Licensed Building Surveyor. In the new application form certain certificates are required to be procured from various departments, for example, Chief Valuer and Surveyor, Calcutta Corporation, Chief Valuer & Surveyor, Calcutta Improvement Trust, Executive Engineer, Water Works, Calcutta Corporation, Borough Engr., Calcutta Corporation, Executive Engineer, Drainage Department, Calcutta Corporation, Indian Posts and Telegraphs Department (including Telephones), Government of India, Calcutta Electric Supply Corporation Ltd., Oriental Gas Co. Ltd., Director of Fire Services, Government of West Bengal, Commissioner for the Port of Calcutta, Garrison Engineer, Fort William, Commissioner of Police, Theatre Inspector, Corporation of Calcutta and it is enjoined that the Licensed Building Surveyor should particularly see the references are filled in properly. The application form, however, even under the new system is required to be signed by the owner only. But in the schedule annexed to the application form, there are certain particulars which are required to be given and these particulars are required to be signed both by the owner and Licensed Building Surveyor. Thereafter, certain declarations have to be given, for example, that no inflammable material for roofs and external walls have been used, that all brick walls shall be properly bounded and these statements are required to be specified as correct that there is no misrepresentation. These particulars are required to be signed both by the owner and the building surveyor.

4. It was contended on behalf of the applicants that the particulars which were required to be furnished by the annexure to the application for sanction were really imposition of duties upon the licensed building surveyors and not merely specification of more particulars required to be given to the plan or to the application. It was, therefore, submitted that the Corporation of Calcutta has no right or authority or power under Sections 378 to 380 of the Calcutta Municipal Act, 1951, as well as Rules 50 and 51 of Schedule XVI to impose additional duties on the buildings surveyors without rules being framed under Section 532 of the Act. It was submitted that Section 380 made it clear that plans were different from the application forms. Reading the provisions of Sections 378 to 380 together, it appears to me that the Corporation has the power to specify the particulars as indicated to be filled in in the application for sanction of a building plan. It is true that a new obligation has been imposed to give certain particulars in the plan for sanction but these obligations are really enforcement

of additional particulars and for the verification of the correctness of additional particulars under Rule 51 (1) under sub-rule (2) of Rule 51 the other particulars have been required to be given and the fact that these are required to be given in the application to ensure that these are correct particulars by verification of the licensed building surveyor, does not, in my opinion, impose any additional duties which the Corporation was not competent to impose by virtue of powers under Sections 378 to 380 of the Act. In the aforesaid view of the matter, I am of the opinion that the impugned letter was not beyond the power of the Corporation or ultra vires the powers of the Corporation of Calcutta.

5. In the premises, this application fails and is accordingly dismissed. There will be no order as to cost of this application. Interim order is vacated. There will be a stay of operation of this order for six weeks.

Application dismissed.

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R. BHATTACHARYA, J.

State of West Bengal, Appellant v. Iswar Damodar Jew and others, Respondents.

Second Appeal No. 743 of 1966. D/- 20-11-1975.

(A) West Bengal Estates Acquisition Act (1 of 1954), Section 6 (1) (i) — Word 'obligation' in expression "or other legal obligation" — Meaning — Word does not contemplate moral duty — Simple ownership of land by Deity without any legal obligation — Exemption from assessment cannot be obtained.

The word 'obligation' implies not a moral duty but a legal duty which can be enforced by law and which is imposed upon a person by an outside agency or by a third party in respect of the subject-matter. The word used in clause (i) of sub-section (1) of Section 6 of the Act does not mean a simple moral duty based upon ethical conception. There can be no doubt that the person referred to in that clause must be a person who must be under legal obligation while holding the land in khas. Consequently a simple ownership of the land being vested in the Deity by virtue of purchase without any legal obligation for his holding such land for a purpose which must be either charitable or religious or both will not be the ground for exemption from assessment of rent. (Para 10)

(B) Words and Phrases — 'Obligation' — Meaning.

LS/LS/E435/75/GGM

The word "obligation" means a duty, the bond of legal necessity which binds together two or more determinate individuals. It is limited to legal duties arising out of special personal relationship existing, whether by reason of a contract or a tort, or otherwise, between two or more individual persons. (Para 10)

(C) West Bengal Estates Acquisition Act (1 of 1954), Sections 44, 45-A, 45 and 5-A — Finally published record of rights — Lands belonging to Deity recorded as non-assessable — Revenue Officer empowered under Section 45 can correct entries and assess rent. (Paras 11 and 12)

Bhabanath Dutta and Gouri Prasad Mukherjee, for Appellant; B. B. Giri and Satya Narayan Roy, for Respondent; S. C. Das Gupta, Amicus Curiae.

JUDGMENT:— This second appeal is by the State of West Bengal, the defendant in the original suit against the judgment and the decree of the Additional Subordinate Judge, Midnapore in the first appeal setting aside the judgment and the decree of the trial Court of the Munsif at Ghatal and decreeing the suit of the plaintiff-respondent Sri Sri Iswar Damodar Jew which was dismissed on contest by the trial Court.

2. The allegations made in the plaint may be stated in brief. The plaintiff Sri Sri Iswar Damodar Jew was the family Deity of Sarat Chandra Pramanik. During his lifetime Sarat Chandra Pramanik was the shebait of the Deity. The suit properties, several plots of land mentioned in Schedule to the plaint were purchased by the Deity, Sri Sri Iswar Damodar Jew with the money of the Deity's fund created by the said Sarat Chandra as shebait from one Satish Chandra Chattopadhyay by a registered deed of sale dated the 30th Baisak, 1354 B. S. The said properties have always been treated as absolute debutter properties and the usufructs of the suit lands are being used for the religious performance and sheba puja of the said Deity. At first the settlement department assessed no rent for the suit lands treating them as absolute debutter properties, but subsequently assessed rents for the suit lands behind the back of the plaintiff's shebait Bankim Chandra Pramanik and others who are the heirs of the previous shebait Sarat Chandra Pramanik. It has been alleged in the plaint by the shebait representing the Deity that the entries regarding the assessment of rent for the suit lands are wrong as the properties are absolute debutter properties not assessable according to the provisions of the West Bengal Estates Acquisition Act, 1954. As the Tahsildar of the State threatened that he would realise rent, the present suit has been filed after service of notice under

Section 80 of the Code of Civil Procedure praying for a declaration that the suit properties are absolute debutter properties and that the State is not entitled to realise any rent in respect of the said properties which are exempted from assessment of rent. There is also a prayer for a permanent injunction restraining the defendant-State from realising rent relating to the suit properties and from issuing any certificate for any realisation of rent.

3. Amongst several pleas, the State represented by the Additional Collector, Midnapore has stated in the written statement that it is incorrect to state that the disputed properties were purchased by the Deity, that the same are the absolute debutter properties and that the disputed properties are entitled to be exempted from payment of rent under the West Bengal Estates Acquisition Act. The statement that the assessment of rent was made without the knowledge of the plaintiff has been challenged. The right, title, interest and possession of the plaintiff in the suit land have been disputed. In short, the defence case is that the properties are not debutter and that the assessment of rent has been correctly and legally made.

4. The trial Court held that the suit properties were not acquired by the Deity with his own money and that they were not debutter properties. According to the learned Munsif, the usufructs of the suits lands were partly used in sheba puja of the Deity and partly enjoyed by the shebait for their personal benefit. In view of this finding, the learned Munsif held that the plaintiff could not take advantage of the exemption from payment of rent. The suit was, therefore, dismissed. Against that dismissal of the suit, an appeal was taken before the District Judge, Midnapore and the same was disposed of by the Additional Subordinate Judge in favour of the plaintiff-appellant. The learned Subordinate Judge held that the correction of the finally published records of rights prepared during the revisional settlement operation by assessment of rent of the suit properties, was illegal as there is no such provision for correction of records or assessment of rent after the final publication of the record of rights in the West Bengal Estates Acquisition Act. It has been held that the properties being debutter are not liable to assessment according to the provisions of West Bengal Estates Acquisition Act. The present appeal has been directed against the decision of the appellate court below.

5. I have heard Mr. Dutta, the learned Advocate appearing on behalf of the appellant and Mr. Giri, the learned Advocate for the respondent. I have also heard Mr. S. Dasgupta, Ex-Government

pleader who is kind enough to act as amicus curiae and discussed the points of law involved in this appeal.

6. It has been first contended from the side of the appellant that the finding of the appellate court below that the suit properties are debutter belonging to the Deity is without evidence and based upon illegal and unwarranted presumptions. The decision is bad for non-consideration of material and relevant evidence and misreading of the documentary evidence. Mr. Giri has challenged the contention. From the judgment of the trial court, it appears that the learned Munsif discussed all relevant evidence on record including the recitals in the kobala relating to the disputed properties as also several papers of accounts and rent receipts exhibited in this case. He discussed the evidence both oral and documentary at long length and according to him, the previous shebait Sarat Chandra Pramanik purchased the properties not treating the same belonging to the Deity, but in fact, the usufructs of the properties were used for the sheba puja of the Deity as well as for the personal benefit of the shebait. He has not been able to accept the papers of account as quite reliable. Accordingly, the learned Munsif has held that the claim for exemption from assessment of rent in the instant case cannot be allowed. The learned Subordinate Judge is of the view that the plaintiff should not have been called upon to adduce evidence when there is the presumption in favour of the plaintiff arising out of the finally published khatian showing that the suit property was debutter properties not assessable for rent. The presumption is more active and the plaintiff was not bound to adduce evidence in support of the presumption and even if any evidence was adduced, that should not have been considered specially in view of the fact that no evidence had been adduced on the side of the defendant to show that the foundation of the finally published record of right, though subsequently illegally corrected, had no foundation.

7. In this case the plaintiff is Sri Sri Iswar Thakur Damodar Jew represented by eight shebait. The specific case in the plaint is that Sarat Chandra Pramanik, the previous shebait contributed moneys and created a fund belonging to the Deity and that with the money out of the fund of the Deity, the said Deity Sri Sri Iswar Damodar Jew Thakur purchased the suit properties as his own absolute debutter properties. It has been further stated that the properties were being managed as such by spending the usufruct of the properties exclusively for the religious performance and sheba puja of the Deity. Next it has been alleged that in the finally published R. S.

record the properties were shown as debutter properties but subsequently for unknown reasons rent has been assessed in the recent settlement operation. An entry has been made to that effect without making any enquiry to the knowledge of the shebait. It has been alleged that the said assessment is without jurisdiction and not binding upon the plaintiff Deity. On these substantial allegations it has been prayed for a decree to declare that the suit properties are absolute debutter properties of the Deity and that they are exempted from assessment of rent according to the West Bengal Estates Acquisition Act. When a suit is brought by the plaintiff on certain allegations for any relief, it is for the plaintiff to prove the relevant allegations to obtain such relief. If the plaintiff wants to rely upon the presumption arising out of any finally published record of rights, he is at liberty to do it. Certainly the primary onus rests upon the defendants to rebut that presumption and if the plaintiff adduces no evidence in support of the presumption and if no evidence is forthcoming from the defendant to refute or challenge the presumption, in that case the plaintiff can claim relief on the basis of the presumption alone. But, if the plaintiff adduces evidence either oral or documentary, in support of the presumption arising out of the settlement record and if the Court disbelieves the evidence of the plaintiff and rejects the evidence as to the basis or foundation of presumption from the settlement record and if it is found that there is no foundation for the statement in the record of right, the Court, in my view, is entitled to hold that the foundation of the presumption on which the plaintiff relies is absent and that the statement in the record of right is without foundation and unacceptable. This finding may be arrived at even if the defendant does not adduce any evidence. When the evidence is adduced by the plaintiff, the Court must consider its value or genuineness, no matter whether there is any presumption in law arising out of any settlement record or not. The finding will depend on evidence and circumstances. In the present case, the plaintiff produced documentary evidence including relevant kobala, certain rent receipts and some papers of accounts. He also adduced oral evidence. On consideration of these pieces of evidence the learned Munsif held that on construction of the documents as also from other pieces of evidence, it had not been proved that the properties in question were purchased by the Deity with his own fund. It has also been held that the usufructs of the lands were partly used for the sheba puja of the Deity and partly for the personal interest of the shebait. The papers of

account have not been found to be quite genuine. The learned Subordinate Judge on the other hand did not consider the material oral evidence. He did not pay his proper attention to the papers of accounts submitted by the plaintiff in this case and exhibited. It appears further that he did not properly and correctly read the kobala and the settlement record. Practically speaking his view appears to be that as there is no evidence on the side of the defendant to challenge the presumption arising out of the settlement record regarding the debutter character of the properties, the plaintiff should not have been called upon to adduce evidence and therefore he means to say that other evidence should not have been considered. In this connexion bearing in mind the specific case of the plaintiff, the kobala (Ext. 7) is to be looked into. Here Sarat Chandra Pramanik the shebait of Sri Sri Damodar Thakur Jew has been shown as the purchaser. Except the description of the purchaser as shebait of the Deity, there is no indication anywhere in any part of the recital of the document that the Deity was in fact the purchaser or that any part of the money belonging to the Deity was received by the seller as consideration. There is no indication even that the property was in any way connected with the sheba puja or any religious ceremony of the Deity. On perusal of the contents of the document, it is found that the recitals are addressed personally to Sarat Chandra Pramanik and not to the Deity. The property will be inherited by Sarat's heirs. The evidence further shows that after purchase Sarat Chandra paid rent to the landlord, but the name of the Deity was not recorded in the Sherista of the landlord. In the settlement records (Exts. A and A-1) the name of Sarat Chandra Pramanik, the shebait of Sri Sri Damodar Thakur Jew has been stated to be in possession as a tenant. It is significant to note that Sri Sri Damodar Thakur Jew has not been described as the tenant in possession.

8. Another relevant document exhibited in this case is Ext. B, the certified copy of the judgment of debutter proceedings dated 31-5-1957 relating to the khatians connected with the suit properties. The order passed is dated 4-6-1957. The order sheet shows that Bankim Chandra Pramanik, one of the shebaites representing the Deity in the present suit appeared before the Revenue Officer in the proceeding on behalf of his father Sarat Chandra Pramanik, the shebait of Sri Sri Iswar Damodar Thakur Jew. None appeared on behalf of the State. The matter was heard *ex parte*. On consideration of the materials, the Officer held that it was a case where the properties were purchased using the name of the Deity and

not a case of dedication in favour of the Deity. It was held that it was not a case of 'true or absolute debutter properties' and in this view of the finding it was held that exemption from assessment of rent would not apply. From this document it is clear that in the proceedings before the Revenue Officer for assessment of rent, the shebait was given an opportunity to be heard and in fact Bankim Chandra Pramanik, one of the shebaites in the present suit was present on behalf of his father, the previous shebait. The story that the enquiry was made in the proceeding for assessment of rent without the knowledge of the shebait is clearly untenable. This has not been denied in this case at the time of hearing. On consideration of the material exhibits already referred to, I should hold that the learned Subordinate Judge not only failed to consider the relevant documentary evidence, but also misread the kobala and the settlement records (Exts. A and A-1) as also the certified copy of the debutter proceedings. Due to the failure of necessary consideration and for misreading the documentary evidence, the finding of the learned Addl. Subordinate Judge that the suit properties are debtors are not correct and the same is liable to be set aside being without evidence and on the basis of illegal and irrelevant assumptions. I should hold that the suit properties are not debutter and that they do not belong to the Deity as alleged in the plaint.

9. The next question of law which arises for consideration is whether the corrections made by the Revenue Officer in the settlement records by assessment of rent in respect of the disputed lands are legal and according to the provision of the West Bengal Estates Acquisition Act. Assuming that the disputed lands are debutter lands belonging to the Deity, a pertinent question arises whether the lands belonging to Him can be exempted from assessment of rent according to the West Bengal Estates Acquisition Act. In this connexion let us first of all look to Section 6 of the said Act. It speaks about the right of intermediary to retain certain lands. There is no dispute in the present case that the shebait of the Deity has retained the land under Section 6. Sub-section (2) of Section 6 of the Act as quoted below will be relevant.

"(2) An intermediary who is entitled to retain possession of any land under sub-section (1) shall be deemed to hold such land directly under the State from the date of vesting as a tenant, subject to such terms and conditions as may be prescribed and subject to payment of such rent as may be determined under the provisions of this Act and as entered in the record of rights finally published under Chapter V except that no rent shall

be payable for land referred to in cl. (h) or (i):—

Provided that
For the purpose of deciding whether in the present case the plaintiff can claim exemptions from assessment of rent for the suit lands, we are to consider cl. (i) of sub-section (1) of Section 6 of the Act. The said clause reads as follows:—

"(i) Where the intermediary is a Corporation or an institution established exclusively for a religious or a charitable purpose or both, or is a person holding under a trust or an endowment or other legal obligation exclusively for a purpose which is charitable or religious or both—land held in khas by such Corporation or institution, or person for such purpose including land held by any person not being a tenant, by leave or licence of such Corporation or institution or person."

10. When the Deity has started the present action for a declaration that the suit properties being debutter and belonging to Him cannot be assessed for rent but should be exempted from assessment of rent according to the provisions of the West Bengal Estates Acquisition Act, the plaintiff is to prove how he can claim exemption. It is admitted by the learned lawyers appearing before me on both the sides that clause (i) of sub-section (1) of Section 6 of the Act is applicable to see whether the suit lands are assessable. The question, therefore, is "Can the Deity claim exemptions from assessment of rent simply because the properties in question belong to Him"? Mr. Giri, the learned Advocate for the respondent has admitted quite frankly and there can be no doubt that the Deity, if an intermediary, cannot be a Corporation. It is also admitted by Mr. Giri that the plaintiff-Deity is not institution established exclusively for a religious or a charitable purpose or both. It is not a case of a person holding under a trust or endowment exclusively for a purpose which is charitable or religious or both. It is not the case of the plaintiff that it is a case of trust or endowment. Mr. Giri also does not rely upon this part of clause (i). Mr. Giri's contention is that the Deity is a person holding the disputed lands under a legal obligation exclusively for a purpose which is charitable or religious or both and on this part of clause (i) according to Mr. Giri, the plaintiff-Deity can claim exemption from assessment of rent. Both Mr. Dasgupta and Mr. Dutta opposed the contention of Mr. Giri. First of all the plaintiff case is that the Deity has purchased the suit lands with his own fund and therefore, he is the proprietor of the properties. The Deity has acquired the property as absolute owner by virtue of pur-

chase without any condition, duty or any obligation. The suit lands are the absolute properties of the Deity and as such the Deity possesses the lands. 'Obligation' means a binding duty as per agreement or contract implied or express. The word according to Osborn's the Concise Law Dictionary, 4th Edn. means "a duty; the bond of legal necessity which binds together two or more determinate individuals. It is limited to legal duties arising out of special personal relationship existing, whether by reason of a contract or a tort, or otherwise, between two or more individual persons". The word 'obligation' implies not a moral duty but a legal duty which can be enforced by law and which is imposed upon a person by an outside agency or a third party in respect of the subject-matter. The word used in clause (i) of sub-section (1) of Section 6 of the Estates Acquisition Act does not mean a simple moral duty based upon ethical conception. It is quite clear from the reading of the said clause that the exemption from assessment of rent in respect of a land will be available in a case where a person holding the land in question in khas is under legal obligation and not moral as it has been clearly stated for a purpose which must be either charitable or religious or both. There can be no doubt that the person referred to in that clause must be a person who must be under such legal obligation while holding the land in khas. This clause has got to be read with reference to the pleading in the present case to see whether that is applicable here. The simple case of the Deity is that He has purchased the land with his own money and has been in possession of the land as absolute debutter properties and therefore, being the owner of the land the Deity is entitled to get exemption from assessment of rent. It is not the case of the plaintiff that he is a person holding under a trust or endowment or any other legal obligation exclusively for a purpose which is charitable or religious or both. Simple ownership of the land being vested in the Deity by virtue of purchase without any legal obligation for His holding such land for the purpose as mentioned will not be the ground for exemption from assessment of rent. In this view of the matter the benefit of clause (i) of sub-section (1) of Section 6 read with sub-section (2) cannot be availed of by the plaintiff.

11. Lastly, it has got to be considered whether the debutter proceedings started by the Revenue Officer for assessment of the suit lands were illegal in the absence of any provision in the West Bengal Estates Acquisition Act and whether the assessment in that enquiry proceedings was illegal. Section 42 of the Estates Acquisition Act gives authority to the Revenue Officer for determination of the

rent according to the principles mentioned therein. Section 42-A of the Act inserted by the West Bengal Act XIX of 1961 with retrospective effect says that if for any reason the rent payable in respect of any land retained by any intermediary has not been determined before the draft or final publication of the record of rights, then notwithstanding anything contained elsewhere in the Act the Revenue Officer may, at any time, after giving notice to the person concerned determine the rent in accordance with Sections 40, 41 and 42 and enter the rent so determined in the record of rights. Of course there is a provision for appeal against this order and the decision of the appellate authority would be final and the Revenue Officer shall, if necessary correct in accordance with such decision. The entry relating to the rent made by him in the record of rights under Section 44 of the Act relates to the draft and final publication of the record of rights. Sub-section (2a) of Section 44 clearly says that an Officer specially empowered by the State Government may on application within nine months or of his own motion within 21 years from the date of final publication of the record of rights or from the date of coming into force of the West Bengal Estates Acquisition (2nd Amendment) Ordinance, 1957 whichever is later, revise an entry in the record finally published in accordance with the provisions of sub-section (2) after giving the persons interested an opportunity of being heard and after recording reasons therefor. There are provisos but we are not concerned with them. This sub-section (2a) of Section 44 gives scope for revision of the record of rights finally published upon an application by a person aggrieved or in a proceeding started by the Officer concerned suo motu. In this connexion Sections 45 and 45-A of the Act should be considered. Section 45 is a provision which gives authority to a Revenue Officer specially empowered by the State Government for correction of the finally published record of rights relating to bona fide mistakes. Section 45-A gives authority to a Revenue Officer specially empowered by the State Government to correct an entry in the record of rights if it is necessary to do so in pursuance of an order under Section 5-A or on account of any amendment made in the provisions of the Act or the rules made thereunder.

12. Lastly we have the provision in sub-section (4) of Section 44 which runs as follows:—

"Every entry in the record of rights finally published under sub-section (2) including an entry revised under sub-section (2a) made under Section 42-A or corrected under Section 45 or Section 45-A shall, subject to any modification by an order on appeal under sub-section (3),

be presumed to be correct until it is proved by evidence to be incorrect."

Ext. B is the order of the Revenue Officer passed in the debutter proceedings in case No. 5 dated 31-5-1957. The order was passed on 4-6-1957. It was a suo motu proceeding. Notices were given to the parties concerned. Bankim Chandra Pramanik, one of the shebaitis in the present case appeared. But none appeared on behalf of the State of West Bengal. It was held by the Revenue Officer concerned that the suit properties were not absolute debutter properties and the lands were found to be assessable under Section 42 of the Estates Acquisition Act. It was held that no exemption under sub-section (2) of Section 6 of the Act would be allowed and ultimately, admittedly, the rents were fixed. There is no such evidence to prove that the Officer who held the proceedings or assessed the rent was not duly authorised by the State Govt. in that behalf. Such authority has not been challenged. In view of the provisions of the Act just mentioned hereinbefore, I should hold that the assessment of rent and the debutter proceeding referred to in Ext. B are quite legal and that the Revenue Officer duly empowered by the State Government can legally assess rent in respect of the lands which are recorded as non-assessable in the finally published record of rights and may also correct the finally published records accordingly. After due corrections according to law, the presumption of correctness of the corrected records of rights shall be there until it is proved by evidence to be incorrect. The view of the learned Subordinate Judge below that there was no provision for correction of the record of rights and assessment of rent after the final publication of record cannot be held to be correct and he was wrong in holding that there was presumption of correctness in the finally published records of rights. The corrected records of rights, however, had presumption of correctness.

13. No other point has been raised before me and I find that the judgment of the learned first appellate court is erroneous due to perverse finding of fact arrived at on account of non-consideration of material evidence and misreading of the evidence already on record and also for misconstruction of provision of law. The said judgment and the decree passed thereon are liable to be set aside.

14. In the result the appeal succeeds and the judgment and the decree of the learned Subordinate Judge are hereby set aside. The plaintiff having failed to prove the plaint case, the suit has been rightly dismissed by the trial court. The trial Court's decision is hereby upheld. I, however, pass no order as to costs in this appeal.

15. Before I leave this matter, I must express my gratitude for the assistance rendered by the learned lawyers of both the sides and particularly I am thankful to Mr. Dasgupta for acting as *amicus curiae*.

Appeal allowed.

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R. BHATTACHARYA, J.

Samsuddin Mia, Petitioner v. Munsi Adal Alim and another, Opposite Parties.

Civil Revn. No. 3395 of 1974, D/- 17-9-1975.

(A) Provincial Small Cause Courts Act (1887), Section 17 (1) Proviso — Compliance of — What amounts to — Whether application for and obtaining of, prior permission for furnishing security if essential to maintainability of application for setting aside *ex parte* decree — (Civil P. C. (1908), Order 9, Rule 13).

There is nothing indicated in Section 17 that the Court shall not accept an application for setting aside *ex parte* decree without any security being furnished by the defendant according to the order or specifications given by the Court previous to presentation of such application. It has not been stated in the proviso to Section 17 (1) that an application for furnishing security should be in writing. That application may be in writing or verbal. According to the proviso, the defendant is to deposit money or to furnish security but it is not for the court to reject mechanically any application as soon as it is presented without any security. AIR 1964 Andh Pra 544, Rel. on. (Paras 4, 5)

Where the petitioner filed registration receipt showing furnishing of security in favour of court for decretal amount along with his application under Order 9, Rule 13, Civil P. C. for setting aside *ex parte* decree and stated that fact in his application and the court registered it on the same day without raising any objection and directed the petitioner to file requisites for service of notice on other side.

Held that there was the substantial compliance with Sec. 17 (1) by the defendant and that after registering the application and accepting the security already offered, the court acted illegally in rejecting the application by holding that it acted wrongly in registering it. The Court had jurisdiction and judicial discretion to accept tentatively a security furnished by the applicant without obtaining approval from the Court subject, of course, to the objection of the opposite party and also to his furnishing such other security as

would be directed by the Court later on to its satisfaction. (Para 6)

(B) Provincial Small Cause Courts Act (1887), Section 25 read with Section 7 — Revision — Order of Small Cause Court — Revision application under Section 115, Civil P. C. — Not maintainable — But High Court can convert it as one under Section 25 of the Act and deal with it — (Civil P. C. (1908) Section 115).

The High Court can *suo motu* consider the validity or legality of the order of the trial court under Section 25 of the Provincial Small Cause Courts Act even in the absence of any application of a party to the litigation. AIR 1959 Ker 329, Relied on. (Para 7)

(C) Interpretation of Statutes — Letters of the law — Not to be strictly applied — The sense carried by the letters and which appears to be reasonable for the sense it carried must be accepted — Meaningless or unsubstantial technicalities should be ignored. (Para 4)

Cases Referred: Chronological Paras
AIR 1964 Andh Pra 544 = (1964) 2 Andh
WR 275 5

AIR 1959 Ker 329 = ILR (1957) Ker 920 7

Md. Sadeque Hossain, for Petitioner;
Mukul Gopal Mukherjee, for Opposite Parties.

ORDER:— This revisional application has been filed by the defendant-opposite party against the order of a Subordinate Judge at Birbhum in the Small Cause Court jurisdiction dismissing an application under Order 9, Rule 13 of the Code of Civil Procedure filed by him for setting aside an *ex parte* decree passed against him.

2. The admitted facts relevant for this application may be stated in short. An S. C. C. Suit was filed by the opposite party-plaintiffs Abdul Alim and Sk. Ziauddin against the present petitioner, Samsuddin Mia for realisation of arrears of rent and the defendant appeared to contest and filed written statement challenging the claim of the plaintiffs. On the date fixed for hearing, as the defendant was not present, an *ex parte* decree was passed to the tune of Rs. 608.88 NP. including costs of the suit. The defendant, thereafter, filed a petition under Order 9, Rule 13 of the Code of Civil Procedure for setting aside the *ex parte* decree alleging that he had sufficient reasons for non-appearance on the date of hearing and along with that application, he filed a receipt granted by the local Registration office showing that he had executed a security bond in favour of the Court of the Subordinate Judge to the extent of Rs. 608.88 NP. relating to some properties registered on the very day when the said application was filed. Besides it was stated in the

petition under Order 9, Rule 13 that as a security for payment of the decretal dues the petitioner had executed and registered, a security bond in favour of the Court as would be evidenced by the receipt filed. It was prayed in the petition that in view of the statements made in the petition, the S. C. C. Suit might be restored by setting aside the ex parte decree. The application was filed on 30-3-1974. On that very day the application was registered as Miscellaneous Case No. 17 of 1974 and the petitioner was directed to take steps for service upon the opposite party by 10-4-1974. On 10-4-1974 the petitioner filed requisites and there was a direction for issue of the notices upon the opposite parties fixing 10-5-1974 for return and order. The opposite parties appeared and filed objection and the opposite parties raised objection that the application was not maintainable and should be rejected on the ground that the proviso to sub-section (1) of Section 17 of the Provincial Small Cause Courts Act was not complied with. The contention of the opposite party was that as the defendant did not obtain an order from the Court as to the nature of the security bond to be executed by him upon a previous application in the absence of any deposit of cash money, the Court had no right to register the case and proceed with the application. The court below heard the learned Advocates of both the parties and without going into the merits of the case on the question of law, has held that in the absence of any deposit of decretal amount and unless permission of the Court is obtained to furnish security, the defendant cannot file an application under Order 9, Rule 13, C. P. Code and that such application even if filed or registered, would be invalid. It appears that the learned Subordinate Judge acting within the jurisdiction of the Small Cause Court was of the view that the Court had no power to entertain an application for setting aside the decree unless order is given for furnishing security and such security is furnished by the party as would be accepted by the Court. As in the present case the defendant did not file an application for permission for furnishing security and did not file any security with previous approval of the Court, the defendant was not entitled to get any relief.

3. I have heard Mr. Hossen, the learned Advocate for the petitioner and Mr. Mukherjee, the learned Advocate appearing on behalf of the opposite parties. The main question before me is whether there was substantial compliance of the proviso to Section 17 (1) of the Provincial Small Cause Courts Act by the defendant when an application was filed for setting aside an ex parte decree. Mr. Mukherjee's contention is that according to the proviso to sub-section (1) of Section 17 of the Pro-

vincial Small Cause Courts Act, the first requisite for the defendant for filing an application for setting aside the ex parte decree is to deposit the decretal amount in cash along with the application or the defendant may, without depositing cash, file a petition for setting aside the ex parte decree, but before that he is to file an application in writing for obtaining permission to file security to the extent of the decretal amount and furnish such security for the safety of the decretal dues as would be directed by the Court. Upon furnishing such security earlier or at best with the filing of such security, the defendant could be entitled to file an application for setting aside the ex parte decree.

4. Before I proceed to consider the question of law raised, I quote the relevant portion of Section 17 (1) of the Provincial Small Cause Courts Act:—

"17. Application of the Code of Civil Procedure—

(1) The procedure prescribed in the Code of Civil Procedure, 1908 (5 of 1908), shall, save in so far as is otherwise provided by that Code or by this Act, be the procedure followed in a Court of Small Causes in all suits cognizable by it and in all proceedings arising out of such suits:

Provided that an applicant for an order to set aside a decree passed ex parte or for a review of judgment shall, at the time of presenting his application either deposit in the Court the amount due from him under the decree or in pursuance of the judgment, or give such security for the performance of the decree or compliance with the judgment as the Court may, on a previous application made by him in this behalf, have directed."

The proviso to sub-section (1) of Section 17 says that in case a defendant wants to file any application for setting aside an ex parte decree, it is for him either to deposit the amount under the ex parte decree at the time of presentation of the application or at the time of presentation of his application, he is to give such security for the performance of the decree or compliance with the judgment as would be directed by the Court on previous application in this respect. There is no doubt in my view that it is mandatory on the part of the judgment-debtor while filing an application for setting aside the ex parte decree to deposit the decretal amount in cash if the circumstances so permit or the defendant may choose to furnish security for the compliance of the decree and judgment after obtaining permission therefor from the Court, upon an application to be made before the filing of the petition for setting aside the ex parte decree. According to the proviso it is no doubt that the defendant is to deposit the amount as mentioned or furnish

the security as stated at the time when the application is presented in Court. Mr. Mukherjee's contention is that unless there is an application in writing previous to the filing of the application for setting aside the decree, for permission to furnish security and unless such permission is granted by the Court, the defendant has no right to furnish security according to his wish and file the application and if the defendant does so, the Court is bound to reject that application. In construing a provision contained in the enactment of the country, the Courts should read the law with open and liberal mind and reasonably interpret the same so that it may be practically applied to cases. After all the law is not a stony mould or a rigid formula that the facts which do not fit in with the mould or do not come under the formula, should be rejected. The letters of the law cannot be strictly applied, but the sense carried by the letters and which appears to be reasonable for the sense it carries must be accepted. We are to see whether there has been substantial compliance with the law. Meaningless or unsubstantial technicalities should be ignored. In the proviso to subsection (1) of Section 17 as quoted above, it is stated that the defendant for furnishing security should comply with the direction in respect of such security as would be granted upon a previous application. In this proviso it has not been stated that such application should be in writing. The application may be in writing or verbal. The intention of the Legislature for the inclusion of the proviso is quite clear. It was meant for safeguarding the interest of the plaintiff who has already obtained an ex parte decree so that the decree or judgment may be complied with by the defendant in case the application for setting aside the ex parte decree fails. This safeguard is meant to prevent harassment and frivolous applications by the defendant, delay in the processes of the Court and any attempt to defeat the decree already passed.

5. In the present case there is no doubt that the application was filed within time and not on the last day of limitation. It is undisputed that along with the application under Order 9, Rule 13, C. P. Code, the defendant filed a registration receipt showing that before the filing of the application he had already executed a security bond in favour of the Court passing the decree covering the decretal amount. The petitioner also stated in the application that the registration receipt showing execution of the security bond was filed with it and prayed at the same time that the decree might be set aside. The order sheet of the Court shows that on the very day of presentation of the application, the Court registered the application as the Miscellaneous Case and the

defendant was directed to file requisites for service of notice upon the other side. Clearly, therefore, it was brought to the notice of the Court that a security bond was executed by the defendant to the extent of decretal dues and thereafter, the Court accepted the application for consideration. The said application was not rejected or not found non-maintainable for want of deposit of decretal money or sufficient and satisfactory security. In the present circumstances, therefore, I have no doubt that the Court accepted the application of the defendant and also the execution of the security bond as evidenced by the registration receipt attached to the application, may be tentatively. This acceptance was within the jurisdiction of the Court and not contrary to law. There is nothing indicated in Section 17 that the court shall not accept any application without any security being furnished by the defendant according to the order or specifications given by the Court previous to such presentation of the application. According to the proviso, the defendant is to deposit money or to furnish security but it is not for the court to reject mechanically any application as soon as it is presented without any security. There may be cases where application for furnishing security is filed before the presentation of an application for setting aside of an ex parte decree, but for some reason or other, no order is passed by the court on that application within the period of limitation prescribed for representation of an application for setting aside the decree. It does not mean that the defendant shall not be entitled to file any such application unless there is the order this way or that upon an application for furnishing security in place of deposit of cash money. There may also be cases where application for setting aside the decree is filed along with the petition for allowing to furnish security to the extent of decretal dues but within the period of limitation no order is passed. It should be remembered that due to the laches or fault of the court no litigant should suffer and at the same time the court will see that there has been a substantial compliance with law by the litigant. Unimportant technicalities should not prevent the court from doing proper and substantial justice to the litigant. To give an instance of substantial compliance with Section 17 (1) of the Provincial Small Cause Courts Act, I may refer to the decision in the case of P. Venkataratnam v. M. Agastheeswara Rao appearing in AIR 1964 Andh. Pra. 544. In that case a draft bond was filed along with the petition for setting aside the ex parte decree of an S. C. C. Suit. The Court ordered for testing the bond. No bond previously approved by the Court was filed at the time of presentation of the petition for setting aside the

decree. The High Court in the circumstances held that the Court below allowed the petitioner to furnish security and that Section 17 (1) was sufficiently complied with. It may further be noted that in this case the view of this Court was that the application for furnishing security mentioned in Section 17 (1) does not contemplate filing of written application. The application may be oral.

6. The petitioner before me, as I have already stated, filed the registration receipt showing furnishing of security in favour of the court. The application was registered. No objection was raised by the Court. But, on the other hand notice was served upon the opposite parties. It is quite clear that the defendant acted with all his bona fides and the Court accepted the security offered to the court. The defendant was made to believe that his application was accepted. Had there been summary rejection of the application for restoration of the suit for want of money deposit or security, then certainly on the very next day the defendant could have taken necessary steps to deposit cash money if necessary. But that opportunity was lost to him as the application was accepted by the Court. From the facts and circumstances, I have no manner of doubt that there was substantial compliance with Section 17 (1) of the Provincial Small Cause Courts Act by the defendant and that after registering the Miscellaneous Case, on acceptance of the security already offered, the court acted illegally in rejecting the application as it did by holding that it acted wrongly in registering the miscellaneous case. The Court had jurisdiction and judicial discretion to accept tentatively a security furnished by the applicant without obtaining approval from the Court subject, of course, to the objection of the opposite party and also to his furnishing such other security as would be directed by the Court later on to its satisfaction. The Court could, after the objection filed by the opposite parties, consider whether the security furnished was sufficient or whether it would direct the defendant to furnish other suitable securities to its satisfaction. If the security already furnished was found sufficient, the court ought to have gone into the merits to see whether the application for setting aside the ex parte decree was to succeed or fail. In case the defendant was to furnish other securities and if in spite of sufficient opportunity to the defendant for furnishing such security, the order was not complied with, then the court could have been justified to reject the application under Order 9, Rule 13 of the C. P. Code. In my opinion, the court below not only acted illegally, without jurisdiction and with material irregularity but also caused great injustice to the defendant.

7. Mr. Mukherjee has further contended that the present application under Section 115 of the C. P. Code against the order passed by the Small Cause Court below rejecting the application under Order 9, Rule 13 should be rejected as not maintainable in view of Section 25 of the Small Cause Courts Act read with Section 7 of the C. P. Code according to which Section 115 of the Code does not extend to courts constituted under the Provincial Small Cause Courts Act, 1887. The present revisional application has been directed against the order of the S. C. Court and as such no revisional application lie under Section 115 of the C. P. Code. But, this will not prevent this Court from dealing with the present revisional application which can be converted to one under Section 25 of the Provincial Small Cause Courts Act and I treat the same as such. The High Court can suo motu consider the validity or legality of the order of the trial court under Section 25 of the Provincial Small Cause Courts Act even in the absence of any application of a party to the litigation. In this connexion reference may be made to the case of Ramunni v. Govindan reported in AIR 1959 Ker 329 = ILR (1957) Ker 920. The second objection raised by Mr. Mukherjee also fails.

8. In the result, the revisional application succeeds and the order complained against is hereby set aside. The Miscellaneous Case No. 17 of 1974 be sent back to the court below to be disposed of and dealt with according to law and as indicated above. The Rule is hereby made absolute. I pass no order as to costs in the facts and circumstances.

Rule made absolute.

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MURARI MOHAN DUTT AND RAM
KRISHNA SHARMA, JJ.

Premendu Bhusan Mondal, Plaintiff-
Appellant v. Sripati Ranjan Chakravarty,
Defendant-Respondent.

A. F. O. D. No. 439 of 1969, D/- 2-9-1975.

(A) Limitation Act (1963), Article 65 — Suit for possession of a house on basis of title and not on prior possession and dispossession — Art. 65 applies and period of limitation of 12 years starts from date when defendant's possession became adverse. (Para 5)

(B) Limitation Act (1963), Art. 65 — Adverse possession — Person in unauthorised possession admitting title of true owner — His possession cannot be adverse to true owner but should be

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deemed on his behalf.

(Paras 5, 6)

(C) Limitation Act (1963), Art. 65 — House standing in name of plaintiffs vendors in Municipal register and after purchase plaintiff getting his name mutated — Taking of electric connection in disputed house and paying its municipal tax by defendant does not go to prove his adverse possession.

(Para 7)

(D) Limitation Act (1963), Article 65 — Suit for possession — Mere trespass for any length of time if good defence.

A squatter or trespasser, who does not set up a claim of right cannot plead adverse possession and no length of mere squatting possession is a good defence in a suit for possession by the true owner. AIR 1963 SC 454 and AIR 1957 Trav-Co 14, Rel. on.

(Para 9)

Cases Referred: Chronological Paras
AIR 1963 SC 454 = (1963) 2 SCJ 140 9
AIR 1957 Trav-Co 14 = ILR (1956) Trav-Co 452 9
1865 Beng LR (Supp. Vol.) 182 = 3 Suth WR 73 (FB) 9

Hrishikesh Ganguly, for Appellant;
Panchanan Pal and Miss Jyotsna Das,
for Respondent.

M. M. DUTT, J.:— This appeal is at the instance of the plaintiff and it arises out of a suit for declaration of title, recovery of possession and mesne profits.

2. The disputed house belonged to one Hiru Sheikh. He died in 1948 leaving behind him his four sons and two daughters. The heirs of Hiru Sheikh, namely, Abdul Latif, Abdul Gani and others were living in the disputed house being premises No. 4, R. N. Chatterjee Lane, Baranagar. There was a communal riot in or about March, 1950, and they had to leave the disputed house and take shelter in village Badra, in the interior part of the district of 24-Parganas. Taking advantage of their absence, the defendant who is a refugee from East Pakistan, occupied the disputed house which was lying vacant. The plaintiff purchased the disputed house from Abdul Latif and others on May 29, 1964, by a registered sale deed. He mutated his name in the Municipal Register and paid taxes. The plaintiff requested the defendant to vacate the disputed house, but the defendant, though he assured the plaintiff that he would vacate the same, did not ultimately do so. In the circumstances, the plaintiff instituted the suit for the reliefs aforesaid.

3. The main defence of the defendant is that he has acquired title to the disputed house by adverse possession for a period of over twelve years. He came to the disputed house in March, 1950 and since then he has been in uninterrupted possession thereof. It is contended by

him that the suit is barred by limitation and adverse possession.

4. The learned Subordinate Judge, 5th Court, Alipore, came to the finding that the defendant had acquired title to the disputed house by adverse possession. Upon the said finding, the learned Subordinate Judge dismissed the suit. Hence this appeal.

5. The only question that is involved in this appeal is, whether the defendant has acquired title to the disputed house by adverse possession. On the allegations made in the plaint, it is clear that Article 65 of the Limitation Act, 1963, applies to the case. The plaintiff has brought the suit for possession of the disputed house basing his claim on title and not on prior possession and dispossession. The period of limitation as prescribed by Article 65 is twelve years from the date when the possession of the defendant becomes adverse to the plaintiff. The learned Subordinate Judge has also held and, in our opinion, rightly that Article 65 applies. In the written statement, it is the positive case of the defendant and it is also his evidence that within 4 or 5 months of his coming into possession of the disputed house, he wanted to purchase the same. There is some negotiation in the matter, but as Abdul Gani, one of the sons of Hiru Sheikh proposed to get the deed of sale registered by false personation of some of the vendors who were then living in East Pakistan and unable to come to Calcutta for the purpose of registration, the defendant did not agree. It thus appears that the defendant admitted the title of the plaintiff's vendors after he came to occupy the disputed house. In our view, when a person in unauthorised occupation admits the title of the true owner his possession of the property will not be adverse to the true owner.

6. It is also the plaintiff's case that after his purchase of the disputed house he contacted the defendant several times and requested him to vacate the same, and before his purchase his vendors on some occasions contacted the defendant and demanded vacant possession from him. But each time the defendant assured them and the plaintiff that he would vacate the disputed house as soon as he would get alternative accommodation from the Government by way of rehabilitation. P. W. 3 Priyabrata Dasgupta who was the Secretary of the Refugee Committee and P. W. 4 Sushil Kumar Mukherjee have corroborated the plaintiff's case. The learned Subordinate Judge has not believed the evidence of P. W. 3, because he lent some money to the defendant. He has (sic) (not?) placed reliance on the evidence of P. W. 4 as he had intimacy with P. W. 1 Samsuddin, one of the sons of Hiru. In our opinion, on these grounds, the evidence of P. Ws.

3 and 4 cannot be rejected. P. W. 1 Samsuddin has stated in his evidence that when they came back from Badra they found the defendant in possession of the disputed house. He asked him to vacate the house in or about 1955/1956, but the defendant told them to wait as he was a refugee and would get loan from the Rehabilitation Department. We do not also find any reason to disbelieve Samsuddin. It has been already stated, that when a person in unauthorised occupation admits the title of the true owner his possession of the property is not adverse to the true owner, but it should be deemed to be on his behalf.

7. The defendant, however, sought to prove adverse possession by certain facts. One Dhiren Chatterjee was the Chairman of the Baranagar Municipality. It is the evidence of the defendant that in January, 1951, Abdul Gani came and requested him to go to the house of Dhiren Chatterjee. Dhiren Chatterjee threatened the defendant and asked him to vacate, but he told Dhiren Chatterjee that he was in forcible occupation and would never vacate the disputed house. In the first instance, we are not prepared to believe the statement of the defendant, for according to D. W. 1 Hirendra Nath Chatterjee, who is the brother of Dhiren, his brother arranged vacant houses for refugees and the 'para people' helped the defendant and his family to occupy the disputed house. D. Ws. 2 and 3 also categorically stated that Dhiren Babu arranged for the rehabilitation of refugees. In view of the said evidence of the witnesses examined on behalf of the defendant, it is difficult to believe that Dhiren Chatterjee would ask the defendant to vacate the disputed house. Secondly, there is no evidence that the said statement was made by the defendant to Dhiren Chatterjee in the presence of Abdul Gani or any of the vendors of the plaintiff. Even assuming that the defendant refused to vacate the disputed house when asked by Dhiren Chatterjee, that would be no evidence of adverse possession or assertion of hostile title against the plaintiff or his vendors. Dhiren Chatterjee had nothing to do with the disputed house nor was he an agent of the plaintiff's vendors. The defendant placed reliance on the fact of taking electric connection in the disputed house and payment by him of the Municipal tax. In our view, taking of electric connection or payment of Municipal tax does not go to prove adverse possession of the defendant. The house stood in the name of the plaintiff's vendors in the Municipal Register and after the purchase of the same, the plaintiff mutated his name. The defendant, therefore, paid taxes to the Municipality in the name of the plaintiff's vendors and, thereafter, in

the name of the plaintiff. In any event, he was liable to pay occupiers' share of the tax. The recording of the defendant's name in the revisional record-of-rights as in forcible possession of the disputed house since 1356 B. S. corresponding to 1950 also does not help the defendant. There can be no doubt that there is a presumption of correctness of the entries in the record-of-rights, but that is liable to be rebutted on evidence. In 1950 the defendant admitted the title of the plaintiff's vendors and till the recording of his name in the revisional record-of-rights in 1955/56, there is nothing to show that he possessed the disputed house adversely to the owners.

8. One fact is significant to be noticed. The plaintiff's lawyer by his letter dated December 4, 1964, demanded possession of the disputed house from the defendant. The said letter was replied to by the defendant's lawyer by his letter dated December 17, 1964. In that letter, no hostile title was asserted on behalf of the defendant in the disputed house. It was also not claimed in that letter that the defendant had been in possession of the disputed house in his own right. On the contrary, it was alleged that some manipulation, forgery and false personation had been made in regard to the execution of the deed of sale in favour of the plaintiff. It was requested that a full and comprehensive list of the vendors should be given to the defendant whereupon he would give a full and detailed reply. By this letter, the defendant impliedly admitted the title of the plaintiff's vendors, but it was alleged that the plaintiff got the sale deed executed by manipulation, forgery and false personation. In the next letter of the defendant's lawyer dated January 15, 1965, it was also alleged that the plaintiff's sale deed was tainted with forgery etc. A similar allegation has been made in the written statement. These allegations which have not been proved would, in our view, go against the defendant's case of adverse possession of the disputed house. By these allegations, it was sought to be contended by the defendant that as the plaintiff's sale deed was not genuine no title of his vendors in the disputed house passed to the plaintiff.

9. The vendors of the plaintiff made an application to the Sub-Divisional Officer, 24 Parganas for getting back possession of the disputed house from the defendant. In paragraph 12 of the written statement, the defendant has averred that his possession of the disputed house until alternative accommodation under the law, was confirmed by the S. D. O. and the Collector. This shows that the defendant had no animus to set up a claim of right in respect of the disputed house. He

was a refugee from East Pakistan and he occupied the disputed house finding the same vacant. There is truth in the plaintiff's case that the defendant assured the vendors of the plaintiff that he would give up possession after he was given alternative accommodation by the Government. A squatter or trespasser, who does not set up a claim of right cannot plead adverse possession and no length of mere squatting possession is a good defence in a suit for possession by the true owner. See *Watson v. The Government*, 1865 Beng LR (Supp. Vol.) 182 at p. 196 (FB); *Suraj Ahir v. Prithinath Singh*, (1963) 2 SCJ 140 = (AIR 1963 SC 454); *Moosan Aidravassu v. Mani*, AIR 1957 Trav-Co 14. The learned Subordinate Judge seems to have been influenced by the facts that the defendant had been in the disputed house for more than twelve years and that he had taken electric connection and had been paying tax of the disputed house to the Municipality. Those facts, as stated above, do not at all support the defendant's case of adverse possession. In these circumstances, we are unable to uphold the judgment and decree of the learned Subordinate Judge dismissing the suit. In our view, the plaintiff's suit should have been decreed.

10. For the reasons aforesaid, the judgment and decree of the learned Subordinate Judge are set aside and the suit is decreed with cost. The plaintiff's title to the disputed house as described in the Schedule to the plaint, is declared. The defendant is directed to vacate and deliver vacant and peaceful possession of the disputed house to the plaintiff on or before February 29, 1976. In default, the plaintiff will be entitled to get vacant possession of the disputed house in execution of the decree. The plaintiff will be entitled to mesne profits which will be ascertained by the Court below in accordance with the provision of Order 20, Rule 12, of the Code of Civil Procedure.

11. The appeal is allowed, but in view of the facts and circumstances of the case, there will be no order for costs.

SHARMA, J.:— I agree.

Appeal allowed.

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SALIL KUMAR DATTA, J.

Netai Chandra Ghosh, Petitioner v. Gour Mohan Ghosh and others, Opposite Parties.

C. R. No. 2473 of 1974, D/- 22-8-1975.

(A) Civil P. C. (1908), Order 6, Rule 17 — Amendment when can be allowed — Suit against co-sharer for declaration of joint title and possession — Inclusion of prayer for mandatory injunction for de-

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molition of structures made during suit, by way of amendment — Permissibility — (Specific Relief Act (1953), Section 39).

Where there is bona fide contention between the parties to be established in the trial and the relief by way of mandatory injunction is a necessary issue in controversy in the suit on the face of the allegations in the plaint which are denied by the defendant, amendment can be allowed.

A co-sharer defendant cannot use the property in his possession in such manner as to interfere with the plaintiff's enjoyment of his portion of the joint property on the basis of some amicable arrangement as alleged by making constructions during suit. Therefore in a suit against co-sharer for declaration of joint title and possession, inclusion, by amendment, of a prayer for mandatory injunction for demolition of structures made during suit is permissible. AIR 1914 Cal 362, Rel. on.

(Para 5)

(B) Civil P. C. (1908), Or. 6 R. 17

— Order refusing to allow amendment

— Whether Court can revise the order at subsequent stage of suit by taking cognizance of events subsequent to suit.

The Court certainly has the power to allow at appropriate stage, in revision of its earlier order, amendment, if it is necessary for adjudication of the matters in controversy provided such amendment does not change the nature and character of the suit and otherwise causes no prejudice to the defence and the defendant is given opportunity to meet the case of the plaintiff. There is no impediment as to the Court's taking cognizance of subsequent events after the institution of the suit if it is necessary inter alia for preserving the rights of the parties and to serve the ends of justice and also to shorten litigation. (Paras 6, 7)

Cases Referred: Chronological Paras
AIR 1973 Cal 448 = 77 Cal WN 997 7
AIR 1914 Cal 362 = ILR 41 Cal 436 5

Tapas Chandra Roy and Aloke Chakraborty, for Petitioner; K. M. Pal and M. Banerjee, for Opposite Parties.

ORDER:— This Rule was obtained by the defendant No. 1 against orders allowing an amendment of the plaint. The plaintiff instituted Title Suit No. 95 of 1971 in the Court of the First Munsif, Basirhat, against defendant No. 1, the petitioner before me, and others for a declaration of joint title and possession in respect of the suit property. There was also a prayer for permanent injunction restraining the petitioner from raising any structure disturbing the joint possession of the plaintiff in the suit property. The case was that the plaintiff and the defendant No. 1 had been in separate possession of different portions of the building in the suit property. The defendant

No. 1 was making preparation for raising a structure in the adjacent vacant land which, if made, would cause serious inconvenience to the plaintiff's enjoyment of the property in his possession. The defence was that the parties were in possession of separate portions of the property by amicable arrangement and the alleged constructions were well within the portion of the defendant and would cause no injury to the plaintiff.

2. The plaintiff's petition for temporary injunction restraining the defendant from making constructions was rejected by the learned Munsif but was allowed on appeal. The defendant No. 1 obtained a Rule against the order and this Court disposed of the Rule giving certain directions. The defendant No. 1 was granted leave to complete the construction of the roof of the newly constructed room only, to plaster its walls and to take electric connection therein all at his risk and without any right to claim any equity for such constructions in the suit or in a partition suit, if instituted. The plaintiff was further given leave to amend the plaint praying for a decree for partition and the defendant was further restrained by an order of injunction from demolishing or changing the character of the existing structures. This order was passed on May 29, 1972.

3. The plaintiff on receipt of the records by the trial Court filed an application on May 3, 1973 for amendment of the plaint by insertion of the usual prayers for partition and also for mandatory order upon the defendant for dismantling structures alleged to have been made by the defendant after High Court's order and restoring them to the original condition. The learned Munsif allowed the application in respect of the prayer for partition but rejected the prayer for mandatory order by order dated June 8, 1973.

4. Thereafter the plaintiff filed a petition on February 26, 1974, for reconsideration of the order of June 8, 1972, in respect of the prayer for mandatory order. The learned Munsif for considering this petition appointed a commissioner who filed his report and was examined on May 29, 1974 in connection with the acceptance of the report. After hearing the learned Advocates and the report and evidence of the commissioner, the learned Munsif invoked his inherent power to secure justice and allowed the application for insertion of the prayer for mandatory injunction and the petition of May 3, 1973 was made part of the plaint while the defendant No. 1 was also given leave to file additional written statement. This order passed on June 21, 1974 is the subject-matter of the present Rule. It may be mentioned here that on May 31, 1974 the petitioner filed another applica-

tion praying for withdrawal of the prayer for partition which was allowed on the same date i.e., on May 31, 1974. In respect of the petition of February 26, 1974, as already stated, the Court allowed the prayer for mandatory order.

5. Mr. Tapas Roy, learned Advocate appearing for the petitioner, has submitted that the prayer for mandatory order is not maintainable when the suit is one for a declaration of joint title and possession as every co-sharer has the right to build in the portion in his possession by amicable arrangement. This is undoubtedly so. But as it was observed in *Israil v. Shamser Rahman*, ILR 41 Cal 436 = (AIR 1914 Cal 362), the mere circumstance that one co-sharer has taken possession of a portion of joint property does not entitle the other co-sharers to claim joint possession as such sole occupation by one co-sharer does not necessarily constitute ouster of other co-owners. At the same time, it does not follow that because a co-owner is, with the express or tacit consent of his co-sharers, in sole occupation of the joint property he is entitled to change the nature of that possession or to use the property in a mode different from that in which it was previously used. The defendant accordingly cannot use the property in his possession in such manner as to interfere with the plaintiff's enjoyment of his portion of the joint property on the basis of some amicable arrangement as alleged. At this stage we are only to note that there is a bona fide contention between the parties to be established in the trial and the relief by way of mandatory injunction is a necessary issue in controversy in the suit on the face of the allegations in the plaint which are denied by the defendant No. 1.

6. Mr. Roy next submitted that after disallowing the same prayer earlier the Court was not competent to revise the order at a subsequent stage of the suit in the purported exercise of powers under Section 151. It is not possible to accept the contention of Mr. Roy as broadly put by him. The Court certainly has the power to allow at appropriate stage, in revision of its earlier order amendment, if it is necessary for adjudication of the matters in controversy provided such amendment does not change the nature and character of the suit and otherwise causes no prejudice to the defence and the defendant is given opportunity to meet the case of the plaintiff. In this case the amendment was allowed on contest and the learned Munsif has given opportunity to the defendant No. 1 to file additional written statement against the allegations for mandatory order while the question will be decided in the trial on the evidence on record and as may be adduced by the parties.

7. As to the Court's taking cognizance of subsequent events after the institution of the suit there is no impediment in respect thereof, if it is necessary *inter alia* for preserving the rights of the parties and to serve the ends of justice and also to shorten litigation. The authorities on this point have been considered by me in *Tinkari Das v. Jamunabala Debi*, 77 Cal WN 997 = (AIR 1973 Cal 448) and accordingly this contention of Mr. Roy also cannot succeed.

8. For all these reasons this Rule fails and is discharged. There will be no order for costs.

9. Let the records be sent down at once.

Rule discharged.

AIR 1976 CALCUTTA 60

RAMENDRA MOHAN DATTA, J.

Shyam Sunder Swaika, Petitioner v. Ganga Vishnu Swaika and others. Respondents.

Partition and Administration Suit No. 191 of 1972, D/- 11-8-1975.

(A) Arbitration Act (1940), Section 8 — Arbitration agreement — Intention of parties not to supply vacancy of Umpire — Application of legal representatives of one of the parties for appointment of another Umpire in place of existing Umpire held not maintainable.

Where the arbitration agreement signifies the intention of the parties to the effect that — (i) the vacancy of the arbitrators or of the Umpire would not be supplied; (ii) the only person who could act as an Umpire with summary powers to decide the dispute, would be nominated by the chosen arbitrators and if vacancy would be caused in respect of such an Umpire, the same would not be supplied unless agreed by the parties; (iii) the reference to the arbitration would have to be completed within the stipulated time or within such time as might be extended with the consent of the parties and if the same would not be completed then the reference would come to an end; the application of legal representatives of one of the parties for revocation of authority of such an Umpire and appointment of another person in his place was held not maintainable. AIR 1971 SC 2298, Dist.

(Paras 13, 16)

Cases Referred: Chronological Paras
AIR 1971 SC 2298 = (1971) 2 SCR 564 14

ORDER:— Disputes and differences having arisen in the family of the Swaikas, on or about May 4, 1972 a partition and administration suit being Suit no. 191 of 1972 (*Shyam Sunder Swaika v. Ganga Vishnu Swaika and others*) was instituted.

IS/JS/D476/75/SGK

On the very same date an interlocutory application for appointment of a receiver was moved before this Court on behalf of the plaintiff. In course of hearing it was felt that there was every likelihood of a protracted litigation whereby the family would suffer irreparable loss and prejudice, if the suit was allowed to be proceeded. There were several businesses involved besides movable and immovable properties.

2. At the intervention of the respective lawyers it was thought that the disputes and differences might be solved by referring the subject-matter of the disputes involved in the suit, to the arbitration of two persons in whom both sides held implicit faith and confidence. The parties agreed and the application was adjourned. Accordingly, by a joint petition made on or about May 31, 1973, the subject-matter of the disputes in this partition and administration suit, were ordered to be referred to the arbitration of P. D. Dabrial and Raja Ram. Bhiwaniwala.

3. The relevant paragraphs of the said joint petition are as follows:—

"8. Your petitioners have agreed to refer the aforesaid disputes to the joint arbitration of Sri Pra-hudayal Dabrial of No. 7-C, Middleton Street, Calcutta and Sri Rajaram Bhiwaniwala of No. 3, Gonenka Lane, Calcutta with summary powers to dispose of the reference, and with power to appoint an umpire, within a fortnight from the date of order to be passed herein. It is also agreed that in case of any difference between the said arbitrators the matter shall be referred to the Umpire to be appointed herein. The Umpire shall have summary powers to dispose of the reference within 15 days from the date of reference to him.

9. Your petitioners have further agreed and hereby undertake not to proceed with any pending proceedings in any court or to institute any fresh proceedings in any court in respect of any matter which are the subject-matter of the reference until further orders of Court.

10. The parties have been advised to make the present petition with a view to settle the disputes between the parties within a short time by arbitration. It has however been agreed between the parties that if the arbitration is not completed within the time stipulated the reference to arbitration would stand superseded and the pending application of the plaintiff will come up in the list for disposal by this Hon'ble Court."

4. Both the lawyers as also the parties were convinced that the matter could be completed within a fortnight from the date of the order with such summary powers as were given to the arbitrators. A provision was also made that the Umpire was to dispose of the refer-

ence within 15 days from the date of reference before him and he also would have similar summary powers in that regard. Paragraph 10 of the joint petition made it clear that the parties intended that the disputes and differences would be settled within a very short time by such arbitration. A provision has also been made therein that in case, for any reason, the arbitration could not be completed within the time stipulated then the reference to arbitration would stand superseded and the pending application of the plaintiff in the suit would come up in the list for disposal.

5. It follows that the parties agreed to stay their hands for a maximum period of about a month or so, so that the arbitration could be completed within that time. The joint arbitrators appointed one S. D. Kanoria as the Umpire in terms of the arbitration agreement between the parties.

6. Curiously enough, it appears that in spite of two extensions made in the month of June and in August, 1973, the joint arbitrators could not make any effective progress in the matter and on or about August 31, 1973, they having differed, the disputes and differences were referred to the said Umpire. Since then, from time to time various extensions were asked for by and with consent of the parties until it was finally extended by an order of court dated June 7, 1974, by a period of four months from that date. Even then practically nothing was done and the time was allowed to expire.

7. Thereafter on March 27, 1975, Ganga Vishnu Swaika the defendant No. 1 died and in June 1975, the present application was made by the defendant No. 4, Bijoy Kumar Swaika, inter alia, for an order that the death of Ganga Vishnu Swaika the defendant No. 1 and of Smt. Badami Devi Swaika the defendant No. 10 be recorded and for bringing in their heirs on record and for necessary amendment of the cause title and body of the plaint and for consequential directions in connection thereto. The petitioner also prayed for revocation of the authority of the said umpire and for appointment of one Girin Saha, F. C. A. or such other person to act as umpire in the place and stead of the said B. D. Kanoria. A further direction was asked for directing the said umpire to make his award within such time as to this court might deem fit and proper.

8. Under those circumstances, it has to be considered whether the petitioner is entitled to any order on this application or not.

9. Regarding prayer (a) of the Summons there could hardly be any objection and, accordingly, an order is made as prayed except that the amendments

are to be carried into effect within a fortnight from the date of signing of this order with direction to the department to act on a signed copy of the minutes. In that connection it is further ordered that the writ of summons do issue and be accepted by the Sheriff if lodged with him within a fortnight from the date of its issue, for effecting service thereof on Smt. Shakuntala Chirimar and in that regard also the Sheriff and all parties do act on a signed copy of the minutes.

10. The question before me is whether in the facts and circumstances of this case, the arbitration reference should be allowed to be proceeded with or not by making fresh appointment of the umpire as prayed for.

11. On behalf of the plaintiff Shyam Sunder Swaika, another application has been made in which the plaintiff has prayed, inter alia, for an order that the reference to the arbitration under the order dated May 31, 1973, be superseded, for discharge of the undertaking given by the petitioners by the said joint petition and for direction for hearing of the said application for the appointment of receiver. Both the aforesaid applications have been heard together.

12. I have already referred to the relevant paragraphs from which the intention of the parties could be easily gathered. The parties have undoubtedly huge properties which have to be divided into two lots. There are businesses yielding profits as also properties which are yielding huge income and which are extremely valuable.

13. In this background, the parties named their arbitrators in their arbitration agreement. Those two arbitrators were family relations and the parties had complete faith in them. They had undoubtedly complete faith in the said two arbitrators that the said arbitrators would appoint such an umpire who would be the best person to decide the disputes of the parties with summary powers if such occasion would arise. To my mind, the language of the said paragraphs would signify that the parties intended that the vacancy, if there would be any, of the arbitrators or of the umpire, as the case may be, would not be supplied. The only person who could act as umpire with such summary powers would be nominated by the chosen arbitrators and if vacancy would be caused in respect of such umpire the same would not be supplied unless agreed to by and between the parties. The language used in the said paragraphs in the said joint petition also signifies that the reference to arbitration would have to be completed within the stipulated time or within such time as might be extended by and with the con-

sent of the parties and if the same would not be completed then the reference would come to an end.

14. My attention has been drawn to the case of *M/s. Prabhat General Agencies v. Union of India*, reported in AIR 1971 SC 2298. In that case the disputes and differences were agreed to be referred to the arbitration of the Judicial Commissioner, Himachal Pradesh. The contract was entered into with the Union of India. Disputes having arisen, the appellant requested the Government to refer the dispute to the arbitration of the Judicial Commissioner, Himachal Pradesh. The Government having declined, the appellant made an application under Section 20 of the Arbitration Act. An order was made and disputes were referred to the arbitration of the said Judicial Commissioner, Himachal Pradesh. The Judicial Commissioner declined to act as arbitrator. Thereafter by another application an order was prayed for the appointment of some other person as an arbitrator in the place and stead of the Judicial Commissioner, Himachal Pradesh. The Government opposed such a prayer. The application was dismissed. The appellant went up in revision to the Judicial Commissioner, Himachal Pradesh. The revision petition was dismissed. The question was whether the interpretation placed by the court below on the relevant provision in the arbitration agreement was correct. The Court took into consideration the surrounding circumstances connected with that case and held that the fact itself did not afford any indication that the parties to the agreement intended not to supply the vacancy if the Judicial Commissioner refused to act or was incapable of acting.

15. For all these reasons the appeals were allowed and the orders were set aside and the reference was remitted to the trial court for order to appoint new arbitrator in the place and stead of the Judicial Commissioner, Himachal Pradesh.

16. To my mind, the facts of the case before me are somewhat different from the facts before the Supreme Court. In this case the two arbitrators are named arbitrators. They had chosen such persons and gave them summary powers and such persons and/or their chosen nominee according to the joint petitioners, were the only persons who were competent to decide their family dispute in a summary manner and within a fortnight's time. According to the joint petitioners such arbitrators and/or umpire only could be able to complete the reference and make their award within a fortnight's time. It was quite clear that any outsider as such arbitrators or umpire might take a much longer time than a fortnight, even though

the summary powers would be given to him. There is clear indication in the joint petition that in case the arbitration could not be completed within the stipulated time the same would be put an end to and the suit would be proceeded with.

17. That being the position, to my mind, the petitioner Bajoy Kumar Swaika is not entitled to any order as prayed for in prayers (b) and (c) of the Master's Summons and accordingly, no order is passed on the said two prayers excepting prayer (a) thereof as indicated above. In the facts and circumstances of this case each party will pay and bear his or her own costs. Certified for counsel.

Application partly allowed.

AIR 1976 CALCUTTA 62

R. BHATTACHARYA, J.

Apurba Chandra Sen, Defendant-Appellant v. Kamal Kumar Dutta, Plaintiff-Respondent.

Second Appeal No. 295 of 1974, D/-6-8-1975.

(A) Succession Act (1925), Section 333 — Assent of executor — What constitutes — Registered deed not required.

For the assent referred to in Section 333 any registered deed is not required. It is not correct to say that the expression "the circumstances of the property require that it shall be transferred in a particular way" in Section 333 (1) means that house being immovable property required registration. The words do not mean registration and had there been any question of transfer by registered deed, there would have been no necessity to use the word "assent". Moreover, the executor is but a trustee for the legatee and he has no independent title to transfer to the legatee, the real owner requiring any registered deed of conveyance, which is again not necessary for the divesting of oneself of one's interest as an executor.

(Para 4)

Ranjit Kumar Banerjee and Abhijit Kumar Banerjee, for Appellant; Anil Kumar Sett and Bhaskar Ghose, for Respondent.

JUDGMENT:— This second appeal is by the defendant against the decision of the Additional District Judge in a Title Appeal, affirming the judgment and the decree passed in the original Title suit in the Court of Munsif at Alipore where the plaintiff-respondant obtained a decree for eviction of the defendant on the ground of reasonable requirement for the suit premises for his own use and occupation.

2. In the original suit the plaintiff, Kamal Kumar Dutta alleged that the defendant, Apurba Chandra Sen was a

LS/LS/E431/75/CWM

monthly tenant in respect of the suit premises under him. The suit premises is 16/1B, Prince Golan Mohammed Road which the plaintiff got as a legatee by virtue of a will executed by his mother, the owner of the said house and other ones. The plaintiff's mother bequeathed another house which is premises no. 51, Lansdowne Terrace to two other sons, Sudhir and Salil. The plaintiff an unmarried person was living in the said premises No. 51, Lansdowne Terrace belonging to Sudhir and Salil as their licensee occupying only one room. It has been further alleged that the plaintiff wants to be married, but for want of accommodation he cannot marry. There is ill feeling between the plaintiff and his brothers, the owners of the premises at Lansdowne Terrace and they want him to vacate the house. The suit premises is the only house of the plaintiff where he wants to shift for his own use and occupation in the first floor and for his business on the ground floor. The plaintiff served an ejectment notice upon the defendant but as the defendant did not vacate the suit premises, he filed the suit for eviction and mesne profits. The defendant appeared in the suit and filed written statement alleging that the plaintiff had no requirement as alleged either for his own use and occupation or for his business. The trial Court accepted the plaintiff's story of use and occupation of the first floor of the suit premises but he was not inclined to believe the allegation that the plaintiff required the ground floor for his business. The learned Munsif was inclined to allow a partial decree for the eviction of the defendant from the first floor of the suit premises, but as the defendant was not willing to the proposal for partial eviction, the learned Munsif allowed a decree for eviction from the entire suit premises. Against that decision, an appeal was preferred and the learned Additional District Judge also accepted the findings of the learned Munsif and dismissed the appeal.

3. I have heard Mr. Banerjee, the learned Advocate appearing on behalf of the appellant and Mr. Sett for the respondent. It has been contended by Mr. Banerjee for the appellant that in view of Section 333 of the Indian Succession Act as there is no evidence of assent of the executor, the specific bequest to the plaintiff has not been completed and that no perfect title to the suit property has been acquired by the plaintiff. Mr. Banerjee's argument is that in the absence of such assent of the executor and in the absence of a perfect title to the suit property, the plaintiff was not entitled to file the suit against the defendant. Mr. Banerjee has contended that for the assent of the executors for the passing of the complete title to the legatee, a registered

document of transfer ought to have been executed by the executors named in the will and without that registered document, no valid title could come to the plaintiff. It has been argued that although one of the executors has been examined in this case by the plaintiff, the said executor has not in his evidence stated that the executors had given assent to the bequest made in favour of the plaintiff.

4. Section 333 says that the assent of the executor to a specific bequest shall be sufficient to divest oneself of one's interest as executor therein and to transfer the subject of the bequest to the legatee unless "the nature or circumstances of the property requires that it shall be transferred in a particular way". In subsec. (2) it has been further stated that the assent may be verbal and it may be either express or implied from the conduct of the executor. Mr. Sett has argued that nowhere in Indian Succession Act or in any other Act is there any provision suggesting that for assent of the executor, registered deed is necessary. In this connexion my attention has been drawn to Section 335 of the Indian Succession Act. In the present case, there is no dispute that the mother of the plaintiff had several houses and by her will she gave away different houses to different sons. The suit premises was given to the plaintiff and the evidence is that after the death of the plaintiff's mother, the brothers of the plaintiff wanted the latter to vacate their house where he was staying as a licensee. There are four executors who took the probate and one of them Saritbindu Ghosh gave evidence in favour of the plaintiff. His clear evidence is that by virtue of the will the plaintiff has acquired the suit premises. He has further stated that Sudhir and Salil have also acquired the house at 51, Lansdowne Terrace. Certain orders have been marked exhibits in this case which show that the executors filed a petition in connexion with the will before the Court of the District Delicate (sic) for recording the administration of the estate left by the testatrix Sushila Bala Dutta and also for recording due satisfaction of the respective legatees. The said Order No. 13 dated 4-5-1966 also shows that the executors wanted to be released from further obligations to administer the estate. The Order No. 14 dated 6-5-1966 evidences that the legatees under the will prayed that the executors may be discharged from all liabilities and that they may be allowed to enjoy the legacies in terms of the will. From Order No. 16 dated 21-5-1966 we also get that inventory was filed. From the evidence of P. W. 1 declaring that the plaintiff had already acquired the suit premises read along with the orders already mentioned and further coupled with the evidence that the plaintiff got the suit premises

recorded in his own name in the Corporation of Calcutta as the owner within the knowledge of the executors and without their objection in any manner, it must be held that the executors gave their assent as required under Section 333 of the Indian Succession Act. In sub-section (2) of that section it is also stated that the assent may be verbal and it may also be either express or implied from the conduct of the executor. In the instant case the facts and circumstances clearly indicate that the executors gave assent and the legatees started enjoying the properties as given in the will with full title and that there was nothing else to be administered. The executors prayed for being discharged from their duties as there was nothing left to be administered and the legatees gave their consent before the Court. Nowhere has it been indicated that for assent referred to in Section 333 of the Indian Succession Act, any registered deed is required. On the contrary the assent may be express or implied appearing from the conduct of the parties and the facts and circumstances. No specific law or statute has been brought to my notice which says that any registered deed is to be executed for the assent of the executor mentioned in Section 333 of the Indian Succession Act. I cannot accept the contention of Mr. Banerjee as indicated above. The argument that "the circumstances of the property require that it shall be transferred in a particular way" in Section 333 (1) means that house being immovable property required registration is not acceptable as the words do not mean registration and had there been any question of transfer by registered deed, there would have been no necessity to use the word "assent". Moreover, the executor is but a trustee for the legatee and he has no independent title to transfer to the legatee, the real owner requiring any registered deed of conveyance, which is again not necessary for the divesting of one self of one's interest as an executor.

5. No other question of law has been urged before me. This is a case of requirement of the plaintiff for his own use and occupation and both the courts below have accepted that the plaintiff requires the first floor of the suit premises for his own use and occupation. There has been no challenge about this fact in this second appeal. It has also been found by the courts below that the plaintiff's plea of requirement of the ground floor for his business has been unacceptable. Before the trial court the defendant did not want that there should be any decree of partial eviction from the first floor of the suit premises and therefore, he did not agree to any decree for partial eviction. In the circumstance the trial court

allowed a full decree in respect of the entire suit premises for eviction of the defendant therefrom and for mesne profits. In the first appeal there was no canvass for partial eviction from the side of the appellant. Before this Court also there was no prayer for partial eviction. The question of partial eviction, therefore, cannot be considered.

6. There is, however, one prayer from the side of the appellant for consideration of the 'changed circumstances' as they are called by the appellant, to see if the decree for eviction can be maintained. It has been alleged by the appellant through a petition supported by his affidavit filed in Court on 27-6-1975 that he has come to know from one Gour Gopal Dutta that the plaintiff-respondent is now residing in a tenanted house. The prayer on behalf of the appellant is that when the plaintiff is now residing in a tenanted house without any discomfort, this Court should consider this changed circumstance and set aside the decree for ejectment passed on ground of reasonable requirement of the plaintiff's own use and occupation. In reply to the petition filed by the appellant Gour Gopal Dutta referred to by the appellant in his petition has sworn an affidavit saying that he never said to the appellant that the opposite party was residing in any tenanted house. Another affidavit has been filed on the side of the respondent-plaintiff. One Ranjit Kumar Nag has stated on oath that he is an intimate friend of Anil Dutta, the eldest brother of the plaintiff, that he has permitted the plaintiff with the consent of his mother who is the owner of premises No. 46-A/1, S. N. Roy Road, Behala, to occupy two rooms on the ground floor of that house and a narrow passage adjacent thereto as a licensee. The allegation of the plaintiff's occupying any tenanted house subsequent to the decree passed by the trial court, is clearly unacceptable. The plaintiff has been given accommodation as a licensee as a matter of grace during the pendency of the suit. The stay of the plaintiff in another's house practically on charity is not only precarious but uncertain and risky. This changed circumstance will, rather, prove that the plaintiff's requirement of the suit premises for his own use and occupation is an utter necessity. The changed circumstances as alleged by the appellant cannot be considered here to reopen the decision of the trial court on merit. This is not a case wherein the merits of the case will be reconsidered specially when the allegation of the appellant is denied. In this case there is no doubt that the allegation of the appellant is unacceptable. The petition of the appellant for reconsideration of the merits of the case is rejected.

7. In view of my findings above the appeal is dismissed with costs. The appellant is allowed time to vacate the premises till the end of October, 1975 as prayed for.

8. Let the lower court records be sent down as early as possible.

9. Mr. Banerjee for the appellant prays for leave to appeal under the Letters Patent but I find no ground for the leave. It is refused.

Appeal dismissed.

AIR 1976 CALCUTTA 65

A. N. SEN, J.

Sk. Mohammed Jainal, Petitioner v. 2nd Land Acquisition Collector, Calcutta and others, Respondents.

Matter No. 107 of 1975, D/- 24-7-1975.

(A) Calcutta Improvement Act (5 of 1911), Sections 43 and 45 — Non-compliance with — Notification under Section 49 — Effect.

Where the State Government has duly sanctioned the scheme and the sanction of the Scheme has been duly published in terms of the provisions contained in Section 49 the said publication of the sanction is conclusive evidence that the scheme has been duly framed and sanctioned. (Para 10)

(B) Calcutta Improvement Act (5 of 1911), Sections 78-A, 78-B — The withdrawal of the levy of betterment fees from the scheme does not make the scheme illegal. (Para 10)

(C) Constitution of India, Article 226 — Disputed question of fact — High Court would not go into. (Para 11)

Cases Referred: Chronological Paras

(1975) Matter No. 264 of 1966, D/- 4-3-1975 (Cal) 6, 10, 11, 12
(1972) Civil Revn. Nos. 4110 and 4111 of 1964, D/- 1-12-1972 (Cal) 5, 10, 11, 12
AIR 1957 Cal 578 5, 10

Dutt, for Petitioner; Choudhary, for Calcutta Improvement Trust.

ORDER:— The validity of Scheme No. 103 of the Trustees for the Improvement of Calcutta forms essentially and basically the subject matter of challenge in this proceeding. The petitioner claims to carry on business of packing box manufacturing at premises No. 8/C, Free School Street, now known and numbered as 8/C, Mirza Galib Street, Calcutta, under licence issued by the Corporation of Calcutta and the petitioner has stated that he pays occupier's share of taxes of the said premises. The petitioner has also

stated that he pays rent to the lessee of the premises. The petitioner however did not produce any receipted bill of the Corporation or any rent receipt along with the petition. The petitioner has annexed to his affidavit-in-reply a copy of his trade licence of 1960 and produced in course of hearing trade licence for the years 1963 to 1972-73. On the basis of the said scheme, which was sanctioned sometime in 1964, premises No. 8/C, Free School Street of which the petitioner claims to be an occupier, has been acquired. It is the case of the petitioner that the petitioner came to know of the said scheme and the acquisition of the said property from the police officer who came to his shop room on the 25th March, 1975 and prior to that date the petitioner had no knowledge of the said scheme or the acquisition of the said property on the basis of the said scheme.

2. The petitioner filed this petition under Article 226 of the Constitution on the 29th March, 1975, and obtained a rule and also an order of injunction restraining the respondents from taking further action on the basis of the said scheme. Thereafter the petitioner made an application for amendment of the petition. It was stated by the learned Counsel appearing in support of this application that by the proposed amendments no new grounds are sought to be introduced but the proposed amendments were indeed necessary for elaborating the grounds already taken in the petition and by the proposed amendments certain additional new materials and facts were sought to be incorporated. The said application for amendment was contested by the respondents and it was contended that the said application was indeed mala fide and was made for the purpose of delaying the hearing of the proceeding. I directed the said application for amendment to be heard along with the petition. The said application for amendment has also been heard along with the petition. I had allowed Mr. Dutt, the learned Counsel for the petitioner, to make his submissions on the basis of the statements contained in the proposed amendments. I have not treated the application for amendment separately and I have not made any separate order on the said application for amendment, as in my view a separate order in the said application for amendment would have delayed the hearing of this matter and on behalf of the Authorities it was urged before me that the matter was indeed very urgent. I also felt that if I were to allow the said amendments by a formal order, it would be necessary for me to allow the parties concerned to file further affidavits with regard to the amended petition and in such a case the matter would undoubtedly be delayed and the question of continu-

ance of the interim order under such circumstances had to be considered. Under these circumstances I thought it best that I would hear the application for amendment along with the main petition and after hearing the parties if I thought that it would be necessary to pass any separate and formal order on the application for amendment I would do so. As I have already observed I allowed Mr. Dutt the learned Counsel who argued the matter on behalf of the petitioner, to make his submissions on the basis of the proposed amendments in the amendment application, as if the said amendments had been allowed.

3. Mr. Dutt, learned Counsel appearing on behalf of the petitioner, has raised three principal contentions:

(i) The entire scheme is mala fide and is not in public interest.

(ii) The Scheme had been framed in violation of the statutory provisions particularly in violation of the provisions contained in Section 43 and Section 45 of the Calcutta Improvement Act and the scheme is also otherwise illegal.

(iii) Framing of the scheme and the sanction of the scheme by the appropriate authorities were done without any application of mind and have further been done in colourable exercise of their powers.

4. On the question of mala fide Mr. Dutt has argued that the facts and circumstances of the case go to indicate that the scheme had been framed at the instance of one Mr. N. L. Dalmia, who happens to be the owner of No. 13 Lindsay Street and had constructed a multi-storeyed building there and the scheme is not for any public purpose or for any public benefit. In support of this contention Mr. Dutt has drawn my attention to the statements made in paragraphs 3 and 4 of the petition and he has pointed out that the suggestions for the scheme had in fact come from Mr. Dalmia. According to Mr. Dutt, this goes to show mala fides on part of the Authority concerned.

5. Mr. Dutt has next contended that the statutory requirements of Sections 43 and 45 of the Calcutta Improvement Act have not been complied with. It is the contention of Mr. Dutt that it is for the authorities to satisfy the Court that the said requirements have in fact been fulfilled. Mr. Dutt has however fairly stated that in view of the provisions contained in Section 49 (2) of the Act he cannot urge that the scheme becomes illegal for non-compliance of the requirements of the statute, as under the provisions contained in Section 49 of the Calcutta Improvement Act, the publication of the notification of the sanction by the State Government will be conclusive evidence

that the scheme has been duly framed and sanctioned and in the instant case it is not disputed that the said sanction of the State Government has been duly published. Mr. Dutt has however argued that if in fact it be established that the requirements of Sections 43 and 45 have not been complied with, then the sanction will be a colourable exercise of the power and will indeed be mala fide. It is the contention of Mr. Dutt that colourable exercise of the power and the mala fides on the part of the Authorities concerned will vitiate the scheme and the entire proceedings in respect thereof. Mr. Dutt has also argued that the scheme should be considered to be illegal, as in the scheme there is a provision with regard to levy of betterment fees and it is the argument of Mr. Dutt that levy of betterment fees provided under Section 78 (a) of the Calcutta Improvement Act, 1911, has been held to be illegal and ultra vires by a Division Bench of this Court in the case of Chandra Sekhar Mullik v. Calcutta Improvement Trust, (Civil Revn. Nos. 4110 and 4111 of 1964; judgment delivered on 1-12-1972 (Cal)). Mr. Dutt unfortunately, however was not in a position to make available to me a copy of the judgment or to have the judgment produced in course of hearing. Mr. Dutt in this connection also referred to the decision of the Division Bench in the case of Nanda Kumar Banerjee v. Board of Trustees for the Improvement of Calcutta, reported in AIR 1957 Cal 578. On the basis of the aforesaid contentions Mr. Dutt has submitted that the rule in the instant case should be made absolute.

6. On behalf of the Calcutta Improvement Trust, Mr. Chaudhuri, learned Counsel, has submitted before me that there is no substance in any of the contentions raised by Mr. Dutt. He has argued that there are indeed no proper averments in the petition to found a case of mala fides. It is his argument that the suggestion of the improvement emanated from a particular person does not make the action of the authorities mala fide. He has drawn my attention to the further statements in the said report mentioned in paragraph 3 of the petition and has pointed out that the Chairman himself had inspected the site. Mr. Chaudhuri has argued that there cannot be any doubt that the scheme in question is for public purpose. Mr. Chaudhuri has next contended that all the formalities required under the law have been duly complied with. In this connection Mr. Chaudhuri made available to me the relevant records and also cited the judgment delivered by me on the 4th March, 1975, in matter No. 264 of 1966 (F. K. Sheikh v. State of West Bengal) in which I had occasion to consider the legality and the validity of this very scheme. Mr. Chaudhuri has sub-

mitted that while dealing with that case, all available records were placed before the Court which I had considered and on a consideration of the records I had held that the requirements had been duly complied with. Mr. Chaudhuri has argued that in the instant case on identical grounds similar contentions have been raised and he is producing before me the very same records. It is his submission that following the earlier decision I should hold in the instant case that the requirements have in fact been complied with. Mr. Chaudhuri also argues that in the instant case it is not in dispute that the necessary notification under Section 49 (1) has been published and the said notification is conclusive evidence under Section 49 (2) that the scheme has been duly framed and sanctioned. It is his argument that as the notification as provided in Section 49 (1) has been duly published, the Court must hold by virtue of the provisions contained in Section 49 (2) that the scheme has been duly framed and sanctioned. Mr. Chaudhuri argues that there is no substance in the contention that the framing of the scheme or according sanction thereto by the State Government has been done in any colourable exercise of the powers conferred on the authority concerned. It is the argument of Mr. Chaudhuri that widening of the Lindsay Street is a crying need of the city and all necessary formalities have been duly complied with by the authorities concerned and the Government on a proper consideration had accorded its sanction, and therefore, there cannot be any question of any colourable exercise of the powers by any of the authorities. Mr. Chaudhuri has further argued that the levy of betterment fees has been subsequently withdrawn. It is the argument of Mr. Chaudhuri that the levy of betterment fees is clearly severable from all other parts of the scheme and as the said levy of betterment fees is now withdrawn, there cannot be any question of any illegality with regard to the scheme by virtue of any provision in the scheme as to levy of betterment fees. Mr. Chaudhuri has further argued that in the petition or in the amended petition no point has been taken that the scheme is bad and illegal as it included the provision with regard to levy of betterment fees. Mr. Chaudhuri has further argued that levy of betterment fees by itself is not illegal or unconstitutional. Mr. Chaudhuri has also contended before me that the present petition is clearly mala fide and has been made after a lapse of 10 years and should not be entertained. He has argued that the facts and circumstances of this case clearly go to indicate that the petitioner had knowledge of the scheme years ago, as the petitioner had raised an objection before the authorities with regard to the

scheme as early as 1963. Mr. Chaudhuri has contended that the submission of the petitioner that the petitioner did not make any representation and the rubber stamp in the objection filed before the authority is not the rubber stamp of the petitioner should not indeed be entertained by this court and according to Mr. Chaudhuri in any event the said contention of the petitioner clearly raises a disputed question of fact which in this jurisdiction cannot be properly investigated into and enquired into by the Court.

7. Mr. Roy Chaudhuri, learned Counsel appearing on behalf of the Land Acquisition Collector has mainly adopted the submissions made by Mr. Chaudhuri. He has however argued that the petition should fail on the ground of delay. He has also commented that no argument has been advanced by Mr. Dutt as to any violation of the provisions of the Land Acquisition Act.

8. I have to observe that though one of the main grounds taken in the petition was that the scheme in the absence of any provision for making arrangements for the rehousing of the petitioner must be considered to be bad has not been argued or pressed at the hearing by Mr. Dutt. As I have already noted Mr. Dutt rested his arguments on the main ground that the scheme is mala fide and that the scheme had been framed and sanctioned in colourable exercise of the powers of the authorities concerned. As I have already noted, Mr. Dutt has argued at length with reference to the provisions contained in the statute about the necessary formalities required to be complied with in properly framing the scheme; but in view of the provisions contained in Section 49 of the Act, Mr. Dutt has mainly based his submission on the broad ground that the entire scheme is mala fide and has been done in colourable exercise of the powers of the Authorities concerned.

9. In the facts and circumstances I have no hesitation in rejecting the contention of Mr. Dutt that the framing of the scheme has been done mala fide. In my opinion there are no proper averments in the petition to found a case of mala fides. The mere fact that a suggestion has been made by somebody does not make the act of the authorities concerned mala fide. There cannot be any doubt, in my opinion, that the widening of the Lindsay Street from the Free School Street side is of general public interest. I have therefore, no hesitation in rejecting the contention of Mr. Dutt that the authorities acted mala fide in framing the scheme and that the scheme is not for any public interest.

10. In the case of F. K. Sheikh v. State of West Bengal, (Matter No. 264 of

1966 (Cal)). I had occasion to consider whether the statutory formalities with regard to the scheme have been complied with or not. On a consideration of the relevant records I was satisfied that the relevant formalities of law have been duly complied with. In the instant case, the said records were produced before me. Following the decision in the case of F. K. Sheikh and on the basis of the records I have no hesitation in coming to the conclusion that the statutory requirements for properly framing the scheme have duly been complied with and the scheme has been duly framed. I have to observe that in the instant case it is not in dispute that the State Government has duly sanctioned the scheme and the sanction of the scheme has been duly published in terms of the provisions contained in Section 49 of the Act. To my mind, the said publication of the sanction is conclusive evidence that the scheme has been duly framed and sanctioned. As I have already observed, the necessary requirements have in fact been duly complied with and scheme is essentially for a public purpose and the authorities have not acted mala fide in the matter of framing the scheme and on the basis of the aforesaid findings I have no hesitation in rejecting the contention of Mr. Dutt that the scheme must be considered to be bad as the authorities must be considered to have framed the scheme and accorded sanction without any application of their minds in colourable exercise of their powers. I have to observe that the scheme cannot be considered to be bad as the scheme contained the provision with regard to levy of betterment fees. There is no allegation in the petition and also in the proposed amended petition that the scheme is illegal as the scheme contained a provision with regard to levy of betterment fees and levy of betterment fees is ultra vires the powers of the authorities concerned. In the absence of any such averment or allegation in the petition or in the petition for proposed amendments, it is not open to the petitioner to raise this contention. There is also no allegation in the petition that withdrawal of levy of betterment fees was without the sanction of the Government. There is also nothing to indicate that sanction of the Government was necessary. To my mind the withdrawal of the levy of betterment fees from the scheme does not make the scheme illegal. The decision of the Division Bench in the case of Nanda Kumar Banerjee v. Board of Trustees for the Improvement of Calcutta, reported in AIR 1957 Cal 578 (579) is no authority for the proposition that inclusion of the levy of betterment fee in a scheme makes the scheme illegal. The said decision lays down that sub-section (1) of Section 78-A of the Calcutta Improvement Act goes

no further than to provide for the charging of a betterment fee in respect of land which in the opinion of the Board, will increase in value as a result of the execution of the scheme. The said decision further lays down that no question of computing the fee under sub-section (2) or levying the fee can however arise till the stage indicated by Section 78-B (1) has been reached. In the instant case it is to be noted that the proposal to levy betterment fees has indeed been withdrawn. As I have already noted, Mr. Dutt referred to the unreported decision of the Division Bench in Civil Revn. Nos. 4110 and 4111 of 1964 (Chandra Sekhar Mullick v. Board of Trustees for the Improvement of Calcutta) judgment of which, it was stated by Mr. Dutt, was delivered on 1-12-1972 (Cal). Unfortunately Mr. Dutt was not in a position to cite the said decision as the judgment could not be produced. I am, therefore, not in a position to deal with the said decision. Even if it be the effect of the said decision to declare Ss. 78-A and 78-B of the Calcutta Improvement Act ultra vires, on which question I express no opinion as I am unable to, without considering the judgment, I am of the opinion that the said decision cannot have any effect on the validity of the scheme or otherwise. As I have already observed no such case has been made in the petition or in the petition containing the proposed amendments. In the absence of any averment made by the petitioner, the petitioner, in my opinion, is not entitled to urge this question at the hearing.

11. There seems to be considerable force in the argument of the respondent that the petition should not be entertained on the ground of delay. It is the definite case of the Board made in the affidavit of its Chairman that the petitioner had full knowledge of the scheme and its proceedings and the petitioner had in fact made representations as early as 26th July, 1963. The fact of making such representations by the petitioner has been denied by the petitioner in the affidavit in reply. The said question, therefore, is a disputed question of fact. Without going into the merits of the said question and trying to decide the same on this application, to my mind, it is clearly inconceivable and incredible that the petitioner would not know of the scheme or of the proceedings, if the petitioner had in fact been residing and carrying on his business in the particular premises for all these years. It is indeed unfortunate that the scheme, which is a very old one and for implementation of which large amounts of money have been spent by way of compensation to the parties entitled to the same is being held up and has remained held up for such a long

time. As I observed in the case of F. K. Sheikh, Matter No. 264 of 1966, D/- 4-3-1975 (Cal) the authorities concerned to a great extent are not wholly free from blame for this delay. It appears that the persons interested in delaying the implementation of the scheme are taking all kinds of actions to see that the scheme is not implemented for serving their own interest. I am, therefore, of the opinion that there is no merit in this application. I have already held that so far as the ground of mala fides urged, there are no proper averments and the facts and circumstances clearly go to indicate that the authorities concerned have not at all acted in any mala fide manner in the matter of framing the scheme and in implementing the said scheme. I wish to observe that a copy of the plan has been exhibited on behalf of the petitioner to raise a contention that the premises in question are not really required for the purpose of widening the street. I am unable to accept this contention. It is quite clear that the authorities concerned had duly applied their minds as to the requirements and the government on being satisfied had given the necessary sanction. I have also held on a consideration of the relevant records which were produced that the requirement of the statute had in fact been complied with. The same view has also been expressed by me in the case of F. K. Sheikh. I have also found that there are no materials which can go to indicate that there has been any colourable exercise of the powers on the part of the authorities concerned or that they have acted mala fide in the matter. So far as the ground urged on the question of inclusion of betterment fee in the scheme and the subsequent withdrawal of the said levy, I am clearly of the opinion that in the absence of proper averments in the petition and also in the proposed amendments, the petitioner is not entitled to urge that ground and in my view in any event there is no substance in that contention.

12. To my mind the present case appears to be largely covered by my decision in the case of F. K. Sheikh v. State of West Bengal, in Matter No. 264 of 1966 wherein I delivered judgment on 4th March, 1975 (Cal).

13. The Rule is therefore discharged. The petition is dismissed. All interim orders will stand vacated. There will however be no order as to costs. Stay is orally asked for and it is refused.

Petition dismissed.

AIR 1976 CALCUTTA 69

SALIL KUMAR HAZRA, J.

Sm. Mira Devi Chowhan, Petitioner
v. Arun Kumar Mustaphy, Respondent.

Suit No. 172 of 1974, D/- 10-7-1975.

(A) Civil P. C. (1908), Order 9, Rule 13 — Sufficient cause — Counsel (Supreme Court Advocate) of defendant knowing fully that the suit was in the peremptory list of hearing as liquidated claim, not appearing on date of hearing merely thinking that it will not be called due to its number on the list without making any further enquiries — Held there was no sufficient cause for setting aside ex parte decree and restoring the suit. Case law discussed. (Para 18)

Cases Referred: Chronological Paras

AIR 1973 Cal 54	17
AIR 1961 Cal 534 = 65 Cal WN 535	11
AIR 1931 Cal 298 = 34 Cal WN 1119	13
AIR 1929 Lah 69 = 110 Ind Cas 444	12
AIR 1915 Cal 539 = 19 Cal WN 25	15
(1908) 10 Bom LR 904	15
(1878) 9 Ch D 1 = 47 LJ Ch 542	13

R. L. Tarafdar, for Petitioner; Gour Roy Chowdhury, for Respondent.

ORDER:— This is an application by the defendant Arun Kumar Mustaphy to set aside the ex parte decree dated May 20, 1975. The decree was for Rs. 1,140/- with interest and cost passed by this Court in a suit for money lent and advanced by the plaintiff Smt. Mira Devi Chowhan to the defendant.

2. The case of the plaintiff is that on August 28, 1971, the defendant borrowed from the plaintiff Rs. 1,000/- for the purpose of his business and agreed to repay the same within 90 days from the date of the loan. As a security for due repayment of the loan, a hundi was executed in favour of the plaintiff. The hundi was drawn by the defendant Arun Kumar Mustaphy for Leather Export Union. Arun Kumar Mustaphy himself accepted the hundi. Further case of the plaintiff is that the defendant Arun Kumar Mustaphy held himself out as the sole proprietor of the business carried under the name and style of Leather Export Union. The defendant Arun Kumar Mustaphy filed his written statement. His defence, inter alia, is that he did not execute the Hundi in his personal capacity and he is not personally liable as his father is the sole proprietor of the firm "Leather Export Union."

3. This suit appeared in the peremptory list for hearing before this court on May 16, 1975, marked as liquidated claim. Thereafter the suit again appeared in the peremptory list on May 19, 1975 as liquidated claim. The Suit appeared

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on May 20, 1975, in the peremptory list again as liquidated claim. Nobody appeared for the defendant on any of the days when the suit appeared in the peremptory list. On May 20, 1975, the suit was called on for hearing. As no one appeared for the defendant on any of the days and the counsel for the plaintiff submitted that there is no real defence to the suit, I heard the suit. The plaintiff proved his claim and ex parte decree was passed on that day.

4. This notice of motion has been taken out on behalf of the defendant on June 5, 1975, by his Supreme Court Advocate Mr. R. L. Tarafdar for setting aside the said ex parte decree. The petitioner Arun Kumar Mustaphy, states in his petition affirmed on May 27, 1975, that he never held out to be a sole proprietor of the business "Leather Export Union". He is a mere agent of his father Amulya Gati Mustaphy who is the sole proprietor of the business. So he did not borrow any sum of money from the plaintiff for his own business nor incur any liability to repay the money to the plaintiff. In the petition, there is no denial that its defendant did not execute the hundi. There is also no denial that he did not accept the same.

5. The case of the petitioner as stated in his petition is further as follows:

On May 19, 1975, the Supreme Court Advocate for the petitioner Mr. R. L. Tarafdar after coming to court came to know on perusal of the daily cause list that the suit suddenly appeared on that day in the peremptory list under liquidated claim. Then he wrote a post-card to the petitioner informing him about the appearance of the suit in the daily cause list and "he was under the impression that until several part-heard suits at the top of the list were heard, the above suit will not be taken up for hearing". On May 20, 1975, Mr. Tarafdar came to Court to find out the condition of the list of cases and found that the suit appeared in the list in the same position as in the previous day and "did not think it necessary to mention the above suit for adjournment on the ground that he could not contact his client until that day." Then it is stated that Mr. Tarafdar "was under the wrong impression that the above suit and other suits appearing above the same would not be taken up for hearing until the hearing of the part-heard suits concluded." The case of the petitioner is that on May 24, 1975 he was surprised to receive a letter written by the plaintiff informing him that the suit was decreed ex parte on May 20, 1975 in the absence of the petitioner and his Advocate. It is further stated by the petitioner that daily cause list of May 20,

1975 will reveal that besides the part-heard suits aforesaid there were other several suits above the instant suit which have been decreed ex parte. Then the petitioner states "Mr. R. L. Tarafdar expresses his regret for his wrong expectation about the hearing of the said suit". On the above grounds the petitioner prays to set aside the ex parte decree.

6. This petition has been made under Order 9, Rule 13 of the Code of Civil Procedure. The relevant portion of Order 9, Rule 13, of the Code for setting aside decree ex parte against the defendant is as follows:

"In any case in which a decree is passed ex parte against the defendant he can apply to the court by which the decree was passed for an order to set it aside, and if he satisfies the court or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the court shall make an order setting aside the decree against him upon such terms."

7. The word "appearing" in this rule means appearance by the defendant or by his Advocate or lawyer for conducting the case. In the instant case on the date the suit was called on for hearing, namely, on May 20, 1975, neither the defendant nor his Supreme Court Advocate appeared. The defendant is represented by his Supreme Court Advocate Mr. R. L. Tarafdar to conduct the suit. He did not appear nor his clerk nor anybody on his behalf appeared on any day when the suit appeared in the peremptory list.

8. Now, the question is whether the defendant was prevented by any sufficient cause from appearing when the suit was called on for hearing. What is a sufficient cause is a question of fact and has to be determined under the facts and circumstances of each case.

9. On the facts stated in the petition before me, the question arises whether non-appearance of the Supreme Court Advocate for the petitioner by reason of his thinking that the suit will not be heard is a sufficient cause. Is it such a cause for which the petitioner can say that his lawyer was prevented from appearing in court? The Supreme Court Advocate for the petitioner saw the daily list and knew that the suit was appearing in the peremptory list for hearing. But he did not appear in court on any of the days when the suit appeared in the list. The petitioner says that he thought that the suit will not be heard and, therefore, he did not appear in court on the day when the decree was passed. Is this thinking of the Supreme Court Advocate for the petitioner a sufficient cause for which the petitioner can say that he was prevented from appearing in court?

10. I asked the learned Supreme Court Advocate for the petitioner to satisfy that this is a sufficient cause for which I can set aside the ex parte decree. Mr. R. L. Tarafdar, the learned Supreme Court Advocate for the petitioner placed before me three decisions and I shall now deal with them.

11. First, he placed before me a decision of this Court in the case of Suresh Chandra Banerjee v. United Bank of India, 65 Cal WN 535 = (AIR 1961 Cal 534). In that case what happened was that a preliminary decree was passed in a mortgage suit on contest. No payment was made by the mortgagor defendant within the time allowed under the preliminary decree. Thereafter, the mortgagee decree-holder applied for a final decree, but no notice was served on the defendant mortgagor or his lawyer that the decree-holder will apply for final decree. Preliminary decree was made final ex parte. The judgment-debtors applied for setting aside the final decree. F. N. Mookerjee, J., delivering the judgment of the court in that case observed:—

"..... the defendant is entitled to have the final mortgage decree, made ex parte or in his absence, as aforesaid set aside by showing that he was prevented from appearing at the hearing of the plaintiff's application for the same because of his want of knowledge thereof in circumstances which would make it sufficient cause for such non-appearance within the meaning of Order IX, Rule 13 of the Code of Civil Procedure which would in the light and upon the authority of the said decisions obviously apply to the case."

Thus, in 65 Cal WN 535 although the plaintiff was the holder of preliminary decree but he did not give notice to the defendant mortgagor that final decree would be passed. In view of the law on the matter as stated by the learned Judges the defendant was entitled to the service of notice in some form before the preliminary decree was made final. Therefore, the defendant mortgagor in that case could very well say that he was prevented from appearing at the hearing of the application for final decree because he did not receive the notice which he was entitled to get from the plaintiff. In my view the facts of the instant case before me are entirely different. Here, the suit appeared in the list for hearing for several days. The Supreme Court Advocate for defendant saw the list and knew that the suit appeared in the peremptory list, yet he did not appear in court when the suit was called for hearing. There is no question of preventing him from appearing in court by the plaintiff without serving any notice as was the case in 65 Cal WN 535.

12. Mr. Tarafdar next cited the judgment of Tek Chand, J., in the case of Fazal Ilahi v. Muhammad Ismail Khan, (AIR 1929 Lah 69). In the Lahore case, the pleader of the plaintiff by mistake noted a date in his diary as the date of hearing of the suit which was not the correct date. This mistake did not occur to him when the suit was called for hearing and the suit was dismissed in default. An application was made to set aside the dismissal and the pleader concerned appeared as witness and stated on oath that he had by mistake noted in his diary a wrong date and owing to the mistake he or his client did not appear at the hearing. The learned Subordinate Judge who heard the matter was of opinion that mistake of a counsel can under no circumstances be sufficient cause for restoring the suit dismissed for default and he rejected the application. On appeal, Tek Chand, J., did not accept the view of the learned Subordinate Judge and held:

"I am of opinion that in this case the mistake of the plaintiff was a bona fide one and it constitutes sufficient cause for restoring the case."

In my view, the facts of the Lahore case are entirely different, because in the instant case the Supreme Court Advocate for the petitioner knew that the suit was in the peremptory list, but still he did not appear thinking that it will not be called.

13. The last case cited by Mr. Tarafdar is a decision of this Court in Karali Charan Sarma v. Apurba Krishna Bajpayi, 34 Cal WN 1119 = (AIR 1931 Cal 298). In that case appeal was presented some days too late. The question arose whether on the facts of that case sufficient cause has been shown by the petitioner for extension of time under Section 5 of the Limitation Act 1908 for admission of the appeal. The matter came up before a Bench consisting of Graham and Mitter, JJ. Graham, J., was of the view (page 1122 of Cal WN) = (at P. 299 of AIR) that to accede to an application made in the circumstances of the case would result in encouraging litigants in the mistaken idea that there is no obligation upon them to show a reasonable degree of diligence in filing the appeal and that it is open to them to postpone taking action to the last possible moment. Mitter, J., took a contrary view. In his opinion there is sufficient cause for extending the time and condoning the delay. In his judgment at p. 1123 (of Cal WN) = (at p. 300 of AIR), Mitter J., referred to the English case of Burgoine v. Taylor, (1878) 9 Ch D 1. In that English case Sir George Jessel, M. R. made certain observations. These observations are relied on before me by Mr. Tarafdar in the course of his argument. So, I am quoting the same here:

"We think that the order asked for by the defendant ought to be made. Solicitors cannot, any more than other men, conduct their business without sometimes making slips; and where a solicitor watches the list, and happens to miss the case, in consequence of which it is taken in his absence, it is in accordance with justice and with the course of practice to restore to action to the paper, on the terms of the party in default paying the costs of the day, which include all costs thrown away by reason of the trial becoming abortive."

It may be noted that due to the difference of the view of Graham and Mitter JJ. the matter was referred to Suhrawardy, J. and the learned Judge extended the time under Section 5 of the Limitation Act for filing the appeal and agreed with Mitter, J. In my view extension of time under Section 5 of the Limitation Act was granted under entirely different circumstance to the appellant in that case. The observation of Sir George Jessel, M. R. in that English decision deserves the highest respect; but my difficulty in following the same in the instant case is that I have before me entirely different facts. In the English case *Burgoine vs. Taylor*, (1878) 9 Ch D 1 the defendant was not represented at the trial of an action, because his solicitor was ignorant of the fact that, in pursuance of an order of the Lord Chancellor, the action had, with others, been transferred from one Judge of the Chancery Division to another, and had therefore only watched the list before the former Judge. As defendant did not appear judgment was given for the plaintiff. In the motion to set aside that judgment, the defendant's solicitor filed an affidavit where he said "The order for such transfer was unknown and unnoticed by me, the duty of watching the lists of causes for trial having been instructed to the clerk in my office who should attend to such matters, and the order for which transfer being unobserved by the clerk the list of causes in Vice-Chancellor Malins' Courts was alone watched, and this cause appears therein to stand fifty-seven below the causes for trial on the 18th inst. No steps were taken for instructing counsel to appear for the Defendant".

14. The observation of Sir George Jessel M. R. was made under the said context. Even in the observation of Sir George Jessel, M. R. it appears: "where a solicitor watches a case and happens to miss the same". But, here the Supreme Court Advocate did not miss the case in the list, but he did notice it and yet he did not appear, because he thought that the suit will not be called.

15. Mr. Gour Roy Choudhury, the learned counsel for the plaintiff invited

my attention to the decision of the Court of Appeal in the case of *Charu Chandra Ghose v. Chandi Charan Ray Chowdhury*, 19 Cal WN 25 = (AIR 1915 Cal 539). In that appeal one of the questions was whether there was sufficient cause for non-appearance within the meaning of Order 9 Rule 9 of the Code of Civil Procedure. At page 27 of the judgment reference was made to the case of *Ismail Ibrahim v. Jan Mahomed*, (1908) 10 Bom. LR 904; and the court of appeal observed:

"In this case it was laid down that where a party has not been taken un-awares and where he was under no compulsion to leave the Court, nor could assign any weighty cause for his absence, he took the risk of the case being called on in his absence and could not be said to have established sufficient cause for his absence within the meaning of the Code."

16. Mr. Roy Chowdhury relied very much on the above observation and submitted that if Mr. Tarafdar knowing that the suit was in the peremptory list did not appear, it must be said that he took a risk in that matter and, therefore, there is no sufficient cause for his non-appearance. I think there is great force in the submission of Mr. Roy Chowdhury on this point under the facts of this case also.

17. Mr. Roy Chowdhury then cited a decision of SC Deb. J. in AIR 1973 Cal 54; *Phul Chand Ranila v. Ballabhadras Agarwal*. The judgment in that case supports the contention of Mr. Roy Chowdhury, because, the learned Judge in that case refused to set aside an order dismissing a suit for default of appearance of the plaintiff on the ground that the solicitor's clerk failed to notice the suit in the list and did not inform his master that the suit was going to be heard on that day. With regard to this decision I must say that the matter came up on appeal and the appeal Bench consisted of A. N. Sen, J. and myself and we took a contrary view and held that there was sufficient cause for restoring the suit when there was bona fide mistake of the clerk of the attorney who failed to notice that the suit appeared in the peremptory list and as such did not inform his master about it. In that case, the solicitor who relied upon his clerk did not know that the suit appeared in the list. Therefore, the facts of that case are also distinguishable from the facts of the instant case.

18. Under the facts and circumstances of the instant case I cannot constrain myself in holding that the petitioner has made out a sufficient cause for his non-appearance. This is not a case of mistake of the learned Supreme Court Advocate. But this is a case of mis-judgment by the Supreme Court Advocate

for the petitioner as to the length of time that particular cases in the list will take on that day. It is his mere thinking that the matter will not be called or for hearing. He did not make any attempt to ascertain the duration of the cases which appeared prior to the instant suit in the list. He did not ascertain whether the list will be called and the short matters in the list will be taken up first. The suits in the list were called on several times. Yet, nobody appeared for the petitioner. There was nothing to prevent the learned Supreme Court Advocate from appearing in court, when the suit was called on for hearing.

19. So, in my view, the petitioner has not been able to satisfy the court that he was prevented by sufficient cause from appearing when the suit was called on for hearing.

20. However, I am very much sympathetic for the petitioner and I would have liked to set aside the ex parte decree and restore the hearing of the suit if I could do so. So I asked Mr. Roy Chowdhury, the learned counsel for the plaintiff whether he would agree to the ex parte decree being set aside, if I order that the petitioner would deposit with the solicitor for the plaintiff a sum of Rupees 1,140/- for which the decree was passed to be held by him free from lien subject to the further orders of the court. I must record here that Mr. Roy Chowdhury on instructions from his client stated that he would agree to the restoration of the suit provided the decretal amount is deposited with his solicitor. Then I asked Mr. Tarafdar whether his client would agree to deposit the sum of Rs. 1,140/- with the solicitor for the plaintiff. I indicated to him that even if I accept his view that there is sufficient cause for non-appearance I would not have set aside the ex parte decree and restore the suit for hearing without a conditional order that the petitioner must deposit the decretal amount with the solicitor for the plaintiff. But Mr. Tarafdar under instructions from the petitioner who was present in court said that his client would not agree to deposit the amount. In view of the above matter, I have no other alternative but to dismiss the petition with costs.

Petition dismissed.

AIR 1976 CALCUTTA 73

SABYASACHI MUKHARJI, J.

Rajputana Trading Co. (P) Ltd., Petitioner v. Rawatmal Bhairudan, Respondent.

Suit No. 2964 of 1968, D/- 9-1-1975.

(A) West Bengal Premises Tenancy Act (12 of 1956), Section 17 (2) — "Any dispute as to amount of rent" — If covers dispute as to validity of rental deposits made by tenant with Rent Controller.

The phrase "any dispute as to the amount of rent" used in the sub-section is very wide and there is nothing in the different clauses or sub-sections of the section to limit the phrase to dispute as to the rate of rent alone. The word "any" shows that all disputes legally permissible in respect of the liability to pay the amount of rent claimed by the landlord will come under the sub-section. Sub-sec. (1) intended to give protection to tenants against eviction envisages "tenant" in the wider sense viz., one with his contractual tenancy over but is still deemed by the Act to be tenant and disputes in respect of such tenant are contemplated by sub-section (2). Moreover if the sub-section (2) is taken to deal only with dispute as to rate of rent any amount claimed rightly or wrongly by the landlord will have to be paid by the tenant to escape eviction without any opportunity for him to dispute that amount. This will mean an unfair advantage to the landlord unwarranted by the Act. Further Cl. (b) of the sub-section requires the court to determine the rate of rent and actual amount deposited in court. With these two so treated separately they cannot be taken to be synonymous. Thus disputes as to validity and propriety of deposits made by the tenant with the Rent Controller are covered by the sub-section. Case law discussed.

(Paras 6, 8 and 9)

(B) West Bengal Premises Tenancy Act (12 of 1956), Section 17 (2) — Application under — Deposit of admitted rental arrears not made simultaneously or before application — If and to what extent application not maintainable — (High Court Rules and Orders — Calcutta High Court (Original Side) Rules, Vol. 1 Chap. 24, Rule 42-C — Evidence Act (1872), Section 115).

When a tenant making an application under sub-section (2) does not deposit prior to or along with the application the admitted rental arrears but does so within one month of the service of the summons of the eviction suit (the time stipulated by sub-section (1) for such deposit) though there is not strict compliance with the sub-section and Rule 42-C of the Rules

of the Original Side of the High Court Vol. 1, Chapter 24 there is substantial compliance. Therefore his application is maintainable. (1972) 76 Cal WN 862, Referred. (Para 11)

The maintainability of the application cannot however be questioned on such ground when the application is being heard on remand made in appeal. It should have been raised in the appeal which would have defeated the remand order itself. (Para 11)

Cases Referred: Chronological Paras

AIR 1973 Cal 248	10
(1972) 76 Cal WN 862 = 1972 Rent CR 903	11
1969 Rent CJ 913 = 1969 Rent CR 861 (SC)	7
(1964) 68 Cal WN 179	10
(1960) 64 Cal WN 157 = ILR (1958) 2 Cal 247	10
(1960) 64 Cal WN 438	15
(1960) 64 Cal WN 763 = 1960 Cal LJ 1561	15
AIR 1959 Madh Pra 181 = 1958 Jab LJ 349	11
AIR 1954 Pat 326 = 1954 BLJR 170	11
AIR 1951 Cal 316 = (1950) 54 Cal WN 926	11
(1945) 49 Cal WN 308	12
(1930) 34 Cal WN 941	11
AIR 1928 Bom 201 = 30 Bom LR 570	11
AIR 1928 Cal 777 = 33 Cal WN 126 (FB)	11
AIR 1916 All 213 = 35 Ind Cas 571	11
AIR 1916 Cal 77 = 20 Cal WN 584	11
(1905) 2 Cal LJ 403	11
(1905) 2 Cal LJ 408 = 9 Cal WN 1703	11
ILR (1884) 8 Bom 535	11

ORDER:— This is an application under Section 17 (2) of the West Bengal Premises Tenancy Act, 1956 (hereinafter referred to as the said Act). On the 19th of November, 1968, the Rajputana Trading Co. (P) Ltd. (hereinafter referred to as the landlord) instituted a suit against Rawatmal Bhairudan, a firm (hereinafter referred to as the tenant). The plaintiff in the suit asks for a decree for possession of the demised premises being Shop-room No. 9 at premises No. 12, Armenian Street, Calcutta which is also known as 10/1, Portuguese Church Street, and claims a decree for Rs. 9,740.72 P. for arrears of rent and certain other interest and mesne profit. The landlord, inter alia, contends that the tenant had failed and neglected to tender and/or pay rent in respect of the demised premises since February, 1965 to one Sree T. K. Ghose, who was then the Receiver appointed in respect of the said premises in another suit.

2. It is the case of the plaintiff that the rent from 1st February, 1965 to 30th of September, 1968, being 44 months had remained unpaid and on that account the plaintiff was entitled to Rs. 9,740.72.

The plaintiff states that by a notice dated 1st of August, 1968, the landlord had determined the tenancy of the tenant and therefore claims mesne profit from the 1st of October, 1968 to 31st of October, 1968 @ Rs. 1,770/-. On service of the Writ of Summons the tenant made an application on the 4th of February, 1969, stating that the Writ of Summons had been served on the tenant on the 6th of January, 1969 and contended that the plaintiff had duly paid and/or deposited the rent for the months claimed except for the months of July, 1968, December, 1968 and January, 1969. The tenant accordingly made an application under Section 17 (2) of the said Act for leave to deposit the rents for the months of July and December, 1968, together with interest and the rent for the month of January, 1969, with the Registrar, Original Side, High Court. The tenant also prayed for leave to deposit the rent for the months subsequent to January, 1969, in the office of the Rent Controller during the pendency of the suit.

3. In this connection it would be relevant to refer to the provisions of sub-sections (1) and (2) of Section 17 of the said Act. The said sub-sections are as follows:

"Sec. 17. When a tenant can get the benefit of protection against eviction—

(1) On a suit or proceeding being instituted by the landlord on any of the grounds referred to in Section 13, the tenant shall, subject to the provisions of sub-section (2), within one month of the service of the writ of summons on him or where he appears in the suit or proceeding without the writ of summons being served on him within one month of his appearance deposit in Court or with the Controller or pay to the landlord an amount calculated at the rate of rent at which it was last paid, for the period for which the tenant may have made default including the period subsequent thereto upto the end of the month previous to that in which the deposit or payment is made together with interest on such amount calculated at the rate of eight and one-third per cent per annum from the date when any such amount was payable upto the date of deposit, and shall thereafter continue to deposit or pay, month by month by the 15th of each succeeding month a sum equivalent to the rent at that rate.

(2) If in any suit or proceeding referred to in sub-section (1), there is any dispute as to the amount of rent payable by the tenant, the tenant shall, within the time specified in sub-section (1) deposit in Court the amount admitted by him to be due from him together with an application to the Court for determination

of the rent payable. No such deposit shall be accepted unless it is accompanied by an application for determination of the rent payable. On receipt of such application, the Court shall —

(a) having regard to the rate at which rent was last paid, and the period for which default may have been made, by the tenant, make, as soon as possible within a period not exceeding one year, a preliminary order, pending final decision of the dispute, specifying the amount, if any, due from the tenant and thereupon the tenant shall within one month of the date of such preliminary order, deposit in court or pay to the landlord the amount so specified in the preliminary order; and

(b) having regard to the provisions of this Act, make as soon after the preliminary order as possible, a final order determining the rate of rent and the amount to be deposited in Court or paid to the landlord and either fixing the time within which the amount shall be deposited or paid or as the case may be, directing that the amount already deposited or paid be adjusted in such manner and within such time as may be specified in the order.

2-A. Notwithstanding anything contained in sub-section (1) or sub-section (2) on the application of the tenant, the Court, may, by order—

(a) extend the time specified in sub-section (1) or sub-section (2) for the deposit or payment of any amount referred to therein.

(b) having regard to the circumstances of the tenant as also of the landlord and the total sum inclusive of interest required to be deposited or paid under sub-section (1) on account of default in the payment of rent, permit the tenant to deposit or pay such sum in such instalments and by such dates as the Court may fix:

Provided that where payment is permitted by instalments, such sum shall include all amounts calculated at the rate of rent for the period of default including the period subsequent thereto upto the end of the month previous to that in which the order under this sub-section is to be made with interest on any such amount calculated at the rate specified in sub-section (1) from the date when such amount was payable upto the date of such order.

2B. No application for extension of time for the deposit or payment of any amount under clause (a) of sub-section (2-A) shall be entertained unless it is made before the expiry of the time specified therefor in sub-section (1) or sub-section (2) and no application for permission to pay in instalment under clause (b) of sub-section (2-A) shall be entertained

unless it is made before the expiry of the time specified in sub-section (1) for the deposit or payment of the amount due on account of default in the payment of rent."

4. For the purpose of implementing the deposit rules of the Original Side of this Court have been framed and these are contained in Chapter XXIV of Vol. I of the Rules of the Original Side, which came into effect in July/August, 1967, The said Rules are Rule 42-A, Rule 42-B and Rule 42-C. These Rules are in the following terms:

Rule 42-A. A deposit under Section 17 (1) of the West Bengal Premises Tenancy Act shall be made upon the requisition in writing in Form No. 7 to the Registrar with such variations of the said Form No. 7 as may be necessary in view of the provisions contained in Section 17 (1) of the West Bengal Premises Tenancy Act, 1956.

Rule 42-B. Notice of a deposit made under Section 17 of the West Bengal Premises Tenancy Act, 1956, shall be issued by the Registrar and shall contain particulars of the deposit as furnished by the person making the deposit under Section 17 (1) of the West Bengal Premises Tenancy Act, 1956. Such notice shall be served forthwith on the plaintiff in the manner prescribed for service of notice by the defendant or his attorney and shall be filed with an affidavit of service thereof.

Rule 42-C. If there is any dispute as to the amount of rent payable by the tenant, the tenant shall within the time specified in Section 17 (1) of the West Bengal Premises Tenancy Act, 1956, upon a requisition in writing in Form No. 7 with such variations as are appropriate in view of the provisions of sub-sections (1) and (2) of Section 17 of the said Act deposit the amount admitted by him to be due from him together with an application by the tenant for determination of the amount of rent payable by him. Upon the deposit being made, the Registrar shall make an endorsement to that effect on the back sheet of the application and thereafter the Registrar shall issue a notice to the parties intimating them that the application will be placed before the Judge-in-Chambers on the date mentioned in the notice for necessary orders.

5. The application was made on the 4th of February, 1969. In that application A. N. Sen, J., gave leave to the tenant to deposit the rent for the months of July and December, 1968, along with interest and for the month of January, 1969, with the Registrar, Original Side of this Court. The said deposits were made on the next day, that is to say, on the 5th of February, 1969. It has to be borne in mind that the said deposits were made

within the time stipulated under Section 17 (2) of the West Bengal Premises Tenancy Act, 1956. Thereafter, the application finally came up for hearing before K. L. Roy, J., on the 7th August, 1969. The learned Judge made an order directing the tenant to deposit in court within six weeks from date of the said order the arrears of rent for the period from April 1965 to November 1968 with the exception of rent for the month of July, 1968, together with interest thereon as provided in Section 17 (2) of the Act. The tenant was given liberty to withdraw the amount deposited by him with the Rent Controller for the aforesaid period. The said order also directed that in default of the tenant depositing the said amounts within the time mentioned, the tenant's application would stand dismissed with costs. The said order was made without prejudice to the rights and contentions of the parties. The tenant preferred an appeal from the said order and the appeal was disposed of by a judgment of this court on the 17th September, 1971, wherein the Division Bench allowed the appeal, set aside the order passed by the learned Judge and directed that the application be heard and disposed of in accordance with law in the light of the observations made in the Judgment of the Division Bench and the case was remanded back to the court of first instance to be decided on merits. The application has thus come up for hearing before me. At an earlier stage of this application it appears, it was directed that the question as to what amount, if any, is liable to be deposited as arrears of rent from February, 1965 to January, 1969, was directed to be decided on evidence and the parties were directed to disclose the documents for the aforesaid purpose.

6. Three questions, therefore, require consideration by me, viz., (a) what amount, if any, is liable to be deposited as arrears of rent from February, 1965 to January, 1969, (b) is the present dispute covered by sub-section (1) of Section 17 of the said Act and (c) whether the application is maintainable. Though there is dispute as to the validity of the deposits or payments made from February, 1965, onwards, it appears that the claims for rent prior to the month of October, 1965, being beyond the period of three years from the date of filing of the suit are barred by Article 52 of the Limitation Act, 1963, and as such are not legally recoverable. In the premises, if the tenant is liable to pay or to deposit any amount then the liability would be from November, 1965 onwards. It is the case of the tenant that for the months of February and March, 1965, the tenant has paid the rents in this case to the Corporation of Calcutta for the claim of the occupier's share of taxes which by the term of the

tenancy, the landlord was obliged to pay, which, the landlord having failed, the Corporation had demanded from the tenant. As I have mentioned before, I am concerned in this case with the demised premises being room number 9 of ground floor of No. 12, Armenian Street which is also known as 10/1, Portuguese Church Street, Calcutta. The tenant had been a monthly tenant of the said premises for the last 60 years. The rent payable by the tenant was Rs. 221.38 P. according to English Calendar month and the said rent was inclusive of occupier's share of corporation taxes in respect of the said premises. By the terms of the tenancy there was no date fixed for payment of rent but used to be collected or paid sometime after the first week of the succeeding month. The first question that requires consideration in this case, is, whether the dispute as to the validity and propriety of the deposits made to the Rent Controller is a dispute covered by the terms of Section 17 (2) of the said Act. I have set out hereinbefore the terms of the section. The said Section 17 (2) was amended by the West Bengal Premises Tenancy Amendment Act, 1959, and prior thereto sub-section (2) of Section 17 was in the following terms:—

"If in a suit or proceeding referred to in sub-section (1) there is any dispute as to the amount of rent payable by the tenant, the court shall determine, having regard to the provisions of the Act, the amount to be deposited or paid to the landlord by the tenant in accordance with the provisions of sub-section (1)."

7. Counsel for the landlord contended that by the terms of the present sub-section (2) of Section 17 the only dispute that could be agitated under this provision was a dispute as to the rate of rent payable by the tenant. Counsel urged that the validity of the deposits, right to recover the deposits or the propriety of deposits were not disputes which were contemplated by the terms of sub-section (2) of Section 17 as it stood after the amendment. Counsel urged that sub-section (1) of Section 17 dealt with liabilities of three types, liability for payment of contractual rent, liability of the tenant to pay the rent for the post-termination period which might be called statutory rent and the liability to pay rent subsequent to the institution of the suit. In that background it was the submission of counsel for the landlord that it was only with respect of the rate of rent payable as distinguished from the other disputes regarding quantum of rent to be paid, was provided by sub-section (2) of Section 17 as it stood at present. Counsel, in this connection, laid emphasis on the expression "in accordance with the provisions of sub-section (1)" in the sub-section (2)

of Section 17 at it stood prior to the amendment of the Act in 1959. Counsel submitted that the expression "in accordance with the provision of sub-section (1)" in sub-section (2) of Section 17 prior to its amendment might have covered the disputes apart from the dispute as to the rate of rent. But in 1959 the legislature had expressly omitted the expression 'in accordance with the provisions of sub-section (1)' in the subsequent amendment and that provision was not there in sub-section (2) of Section 17 as it stood to-day. Counsel also drew my attention to sub-clause (b) of sub-section (2) of Section 17 and submitted that when the sub-section enjoined the court to determine the amount to be deposited in court, that would be the amount that would be payable after determining the rate of rent and adjusting the same against the amount admitted to be the rate of rent payable by the tenant. It was in this connection, the counsel submitted, the last two lines of sub-clause (b) of Section 17 (2) were significant. In this connection reliance was placed on a decision of the Supreme Court in the case of *M. M. Chawala v. J. S. Sethi*, Rent CJ 1969 p. 913 (SC). I shall deal with the said decision later.

8. I am, however, unable to accept the contentions advanced by counsel on behalf of the landlord about the jurisdiction of the court to determine the amount of rent to be paid by the tenant. In my opinion, the expression in sub-section (2) of Section 17 'any dispute as to the amount of rent' is of the widest amplitude and there is nothing in the different clauses or in any of the sub-sections to circumscribe the expression to only the dispute as to the rate of rent. The expression used is 'any dispute as to the amount of rent'. The expression is not 'any dispute as to the amount of the rate of rent'. Furthermore, the adverb 'any' is indicative of the fact that all disputes which can be legally raised as regards the liability to pay the amount of rent claimed by landlord comes within the ambit of sub-section (2) of Section 17. In this connection, it may be relevant to refer to the fact that sub-section (1) of Section 17 is a provision meant to give certain benefits to the tenants against eviction and the expression 'tenant' will mean a tenant in terms of Section 2 (h) of the Act. A tenant whose contractual tenancy has come to an end but who is still considered by the terms of the Act to be a tenant and liable to pay rent, it is the tenant in that wider sense who is contemplated by sub-sec. (1) of Section 17 and it is the disputes in respect of that tenant that the sub-section (2) of Section 17 covers. The reason why I am unable to accept the contentions advanced on behalf of the landlord on the construction of the section are as follows:

(1) The use of the expression 'any' in conjunction with the expression dispute as to the amount of rent in contradistinction to the expression dispute as to the rate of rent.

(2) If the construction advanced by or on behalf of the landlord in this case is accepted, then the moment a landlord claims certain amount of money from a tenant, either rightly or wrongly, the tenant would be liable to pay the amount in order to protect himself from eviction without having an opportunity of raising the dispute apart from the dispute over the rate of rent; that will lead to unfair advantage in favour of the landlord, which, in my opinion, is unwarranted by the scheme of the Act.

(3) Provisions in clause (b) of sub-section (2) of Section 17 enjoin the court to determine two things, that is to say, the rate of rent and the actual amount to be deposited in court. Therefore, these two factors cannot, in my opinion, be treated as synonymous when the legislature has treated them separately.

9. For these reasons on the construction of the provisions of the section, I am of the opinion that a dispute of the present type is covered by sub-section (2) of Section 17 of the Act.

10. But quite apart from the aforesaid consideration, there are other difficulties in accepting the contention advanced on behalf of the landlord in this connection. In the case of *Gujarat Printing Press v. Naraindas Jewraj*, (1960) 64 Cal WN 157 it was held that under Section 17 (2) of the Act the court would determine the amount to be paid under sub-section (1) which amount had to be deposited within a reasonable time and that dispute was not only limited to a dispute as to the rate of rent. It must, however, be observed that the said decision was given in respect of the provisions prior to its amendment in 1959. But the reasoning of the said decision, in my opinion, is applicable to the language used in the present section which is the same as to the disputed amount of rent payable. It appears that the said decision was again followed in the case of *Mahananda Dutta & Co. (P) Ltd. v. Uma Charan Law*, (1964) 68 Cal WN 179. There was a dispute relating to the amount payable under Section 17 (1) of the Act. The court held that Section 17 (2) would be attracted and, accordingly, the order striking out the written statement was without jurisdiction inasmuch as no order under Section 17 (2) was made. This decision was given under the provisions of Section 17 (2) prior to its amendment. In the instant case from the order of *K. L. Roy, J.*, as mentioned hereinbefore an appeal was taken to the Division Bench and the deci-

sion of the Division Bench is reported in AIR 1973 Cal 248. Ghose, J., delivering the judgment of the Division Bench observed in paragraph 28 of the judgment at page 252 of the report that a dispute under sub-section (2) of Section 17 might be any dispute which touched the controversy with regard to the rate or amount of rent in arrear. The learned Judge noted that the dispute in the present case was not about the rate of rent. What was the amount of rent in arrear was disputed. The learned Judge thereupon dealt with the contention raised on behalf of the landlord and noted that it was contended that the validity of the deposit of rent for the aforesaid period from April, 1965, to November, 1969, except July and December, 1968, was not a dispute within the meaning of Section 17 (2). Reliance was placed before the Division Bench on an unreported judgment of Ghose, J., sitting singly. The Division Bench observed that that was a case of first impression and no authority had been cited before the learned Judge at that time. But in view of the observations of the Division Bench in the case of Mahananda Dutta v. Uma Charan Law, (1964) 68 Cal WN 179 Ghose, J., observed that the reasoning of the said judgment stood to reason. If the deposits of rent for certain periods with the Rent Controller were valid deposits, the amount of rent in arrear would be less by the total sum validly deposited. The court observed that the question of validity of deposits would be a dispute within the meaning of the said sub-section. Therefore, two questions arise in this respect. Firstly, there is a decision under the new Act of the Division Bench which is binding on me. Secondly this case has been remanded to me to be decided in the light of the observations given by the Division Bench. If the Division Bench has held that this dispute is covered by the terms of Section 17 (2) of the said Act rejecting the contention urged in the appeal, in my opinion, it is not open for me to hold that this present dispute is not covered by Section 17 (2) of the Act. This point, it appears to me, was specifically raised and was also specifically held, and in the light of the observations regarding the same I have to determine the present controversy. Therefore, in my opinion, I am not free to ignore these observations of the Division Bench. But quite apart from the same as mentioned hereinbefore I am in respectful agreement with the reasoning of the Division Bench. I am of the opinion that the present dispute is covered by Section 17 (2) of the Act. Counsel, however, contended that the decision of the Supreme Court which was not placed before the Division Bench took a contrary view. In my opinion that is not a fact. The Supreme Court was concerned with the Delhi Rent Control

Act, 1958 and the Supreme Court was dealing with Section 15 (3) of the said Act. It is significant that under the Delhi Rent Act a proceeding for recovery of rent did not lie before the Controller. It lay before the Civil Court. The Controller was authorised to try a proceeding for ejectment or for determination of standard rent or for determination of fair rent. The controversy before the Supreme Court was really whether the expression 'a dispute as to the amount of rent payable by the tenant' meant the standard rent or the fair rent. The Supreme Court was not concerned to decide whether the dispute as to the amount of rent payable by the tenant under sub-section (3) of Section 15 came within its ambit and could not be a dispute apart from the rate of rent. In the aforesaid view of the matter I am of the opinion that counsel for the landlord is not entitled to draw much support from the said observations of the Supreme Court in the instant case. In the aforesaid view of the matter on the construction of the section and in view of the observations of the Division Bench of our Court, which has remanded the case back to me, I am of the opinion, that this contentions urged on behalf of the landlord cannot be accepted and the present dispute is covered by the terms of Section 17 (2). The first contention, therefore, in opposition to this application, fails.

11. The second contention is that the application is not maintainable in view of the fact that there was no deposit made along with the application or prior to the making of the application in terms of Section 17 (2). My attention was drawn to the rules of the High Court and it was urged that there was non-compliance with it. This contention raises several aspects. First, the question is, whether there should be strict compliance or substantial compliance. It is true that there has not been strict compliance with the provisions of Section 17 (2), so far as the deposit of money is concerned, that is to say, the amount admitted to be in default for July and December, 1968, and January, 1969, was not deposited prior to or along with the application. Under our rules a requisition had to be made to the Registrar for acceptance of the money and thereafter the application was to be made. But in this case counsel for the landlord drew my attention to a decision in the case of Sri Sarada Sangha v. Asoka Sen-gupta, (1972) 76 Cal WN 862 where it was held that the application under Section 17 (2) of the Act for determination of the rent payable by the tenant should be accompanied by the deposit of the amount admitted by him to be due from him and if no such deposit of the amount was made, the application for determination of the rent was not maintainable. It was

further held that the tenant must deposit the amount in court within the time specified in Section 17 (1) of the Act. But in the instant case the amount was deposited within the time because writ of summons was served on the 6th January, 1969 and the amount was deposited by the 5th February, 1969. Therefore, the amount had been deposited within the time contemplated under sub-section (1) of Section 17 of the Act. It is true that the application had been made to the court which is not necessary and the application was not competent really when the court ordered the deposit to be made and the application in my opinion became effective from the 5th February, 1969. Therefore, even though there has not been strict compliance with the rules as contemplated by the provisions of the rules of the High Court and also under Section 17 (2) of the Act there has been substantial compliance; the tenant has deposited the amount. Therefore, in my opinion this application was maintainable. The next question is whether this question is barred by the principles of constructive res judicata or not. Counsel for the tenant contended that it was barred by the principles of constructive res judicata and drew my attention to several decisions, namely in the case of Kaluram v. Mehtab Bai, AIR 1959 Madh Pra 181; in the case of Chunilal v. Habib Ali, AIR 1916 All 213; in the case of Dattu v. Kasai, ILR (1884) 8 Bom 535 and in the case of Ansar Ali Jemadar v. C. E. Grey, (1905) 2 Cal LJ 403 and in the case of Tituram Mukherji v. C. Chen, (1905) 2 Cal LJ 408. He also drew my attention to the commentaries of Mulla's Civil Procedure. Counsel for the landlord, however, drew my attention to the decisions in the case of Kartick Chandra Das v. Satya Nidhi Ghosal, AIR 1916 Cal 77, in the case of Balaram v. Mangta Dass, (1930) 34 Cal WN 941; in the case of Lingo Raoji Kulkarni v. Secretary of State, AIR 1928 Bom 201; in the case of Sashi Kumar Banerjee v. Mrs. D. J. Hill, AIR 1951 Cal 316; in the case of Turini Charan Bhattacharya v. Kedar Nath Haladar, 33 Cal WN 126 = (AIR 1928 Cal 777) (FB) and in the case of Kanhaiya Singh v. Bhagwat Singh, AIR 1954 Pat 326. It was contended on behalf of the landlord that unless a point had been raised and was necessary to be raised, there could not be any question of constructive res judicata in a proceeding like this and furthermore, in a case where the case had been remanded on merits to be tried, there could not be any question of constructive res judicata. It was further urged that the application was not maintainable by the provisions of the Act, it was not a question whether the party was entitled to raise a contention or not. The court was debarred from allowing an application if the law did not permit it to do

so. In the view I have taken it is not necessary for me to decide this contention. But I am inclined to take this opinion that when this contention could have been raised before the appeal court and this contention not having been raised, which would have defeated an order of remand, in my opinion the landlord is not entitled at this stage to raise this contention.

12. This being the position, the next question which arises in this case, is whether the deposits were validly made as mentioned hereinbefore. Though the landlord was challenging the validity of the deposits from February, 1965. I am really concerned with the validity of the deposits from November, 1965. On this aspect counsel for the landlord took three points, namely, the deposit for the month of April, 1965, had not been validly made; therefore, all subsequent deposits were invalid; according to him prior to the deposit for the month of April, 1965, there was no valid tender to the landlord and as such the deposit to the Rent Controller was invalid. He secondly, contended that after the discharge of the receiver Sree T. K. Ghosh in September, 1965, rent had been deposited with the Rent Controller in the name of Sree T. K. Ghose in spite of the knowledge and/or without enquiring as to who the receiver was and who the landlord was. In the premises, the said deposits subsequent to the discharge of the receiver were invalid. He lastly contended that there were false or incorrect statements in the application for the deposits to the Rent Controller, and as such the said deposits were invalid. The first question, therefore, is whether the deposit for the month of April, 1965, was validly made. This question as I mentioned hereinbefore is dependent upon whether there was valid tender prior to the deposit. In this case as there was no time fixed when the rent was to be paid under Section 4 of the Act, rent had to be paid within the 15th of the following month. The question, is, whether there was a valid tender prior to the 15th of May for the month of April, 1965. There is conflicting oral testimony on this point. The witness on behalf of the tenant Surana came to the box and stated that for the months of Feb. and March the amount of rent had to be paid to the Corporation in lieu of the occupier's share for which according to Surana the Corporation had threatened to levy execution though there is no evidence of actual service of any distress warrant. He stated further that he thereafter asked the durwan Mithailal of the landlord whether he would accept the rent for the month of April. There is, however, a good deal of contradictions as to when he asked Mithailal as to the acceptance of rent for the month of April. But Surana did say that he ten-

dered the rent to the manager of the landlord Mr. Patodia as also to Mithailal and having been refused by them, prior to the 15th May, the same was sent by money order. The money order which is Ext. 4 has been tendered in this case. It does not, however, contain any date but there is a date as to when the money order was refused, that is to say, the postal endorsement containing the date 21st May, 1965. The receipt for the money order has not been produced. It is the evidence of Surana as well as Rajmal Sarogi who deposed on behalf of the tenant that there was a search for this money-order receipt but it could not be obtained. The question, is, whether from this evidence it can be said that the tender was made prior to the 15th May. Counsel for the landlord contended very forcefully and in my opinion it is not without justification that there is a good deal of contradictions in the evidence of Surana on this point. But we have the following documentary evidence in this case, namely, Ext. 4 which is the money order receipt coming back indicating the refusal at least on the 21st May, 1965, but when the money was sent, there is no evidence. Then there is an entry being Ext. 14 (a) in the cash book which has been sought to be proved by Rajmal Sarogi. Counsel for the landlord submitted that this entry had not been proved. It was contended that the entries in the books of account could only be corroborative evidence. But there being no independent evidence, this corroborative evidence by itself was of no use. It was also urged that there was no evidence that these books of account were kept in the usual course of business. Reliance in this connection was placed on a decision in the case of Paramananda Pandit v. Deb Narayan Pandey, (1945) 49 Cal WN 308. Looking at the entry in the books of account which is Ext. 14 (a) it appears to me that it is unlikely that this was manufactured for the purpose of this case. Firstly this entry had not been disclosed before but it was disclosed at the last stage and during the hearing of this application. But the entry in the books of account, the location of that entry and the nature of the book do not suggest that this was not made contemporaneously. The book contained other entries which do suggest that this was the regular book of the tenant concerned. Indeed, apart from the general suggestion that the entry was not correct, no suggestion about the book not being genuine was made to the witness. Reading the entirety of the evidence of Rajmal it appears to me that the said entry has been proved though Rajmal's evidence on this point that he went and deposited and sent the money order is in slight contradiction to the evidence of Surana on this point. But hav-

ing regard to this nature of Ext. 14 (a) and having regard to the fact that I am of the opinion that the said entry was made more or less contemporaneously and refusal which is borne out by Ext. 4 and the statements in Ext. 5 and Ext. A, being the application and the challan which recorded that there was a tender prior to the deposit to the Rent Controller, and the fact that Patodia did not come to give evidence, who was the manager of the firm, in my opinion, it has to be accepted that the tender of the rent for the month of April was made prior to the 15th May, 1965. If that is the position, then the deposit made thereafter within the 30th May, 1965, was valid and as such it cannot be said that the subsequent deposits were invalidly made. This contention, therefore, urged on behalf of the landlord is also rejected.

13. The next contention urged on behalf of the landlord was that after the discharge of the Receiver deposits had been made in the name of the Receiver. The Receiver was discharged by an order of A. N. Sen, J. on the 22nd September, 1967. The said order is Ext. B. Though the order was passed on the 22nd September, 1967 the order was drawn up much later. It appears that it was drawn up on March, 1968. The order enjoined, inter alia, that the Receiver should inform the tenants that he was no longer acting as the Receiver. It is, therefore, to be presumed that he must have complied with this order. But there is a notice by the Receiver which was sought to be proved. Ext. I in which the signature of Mr. T. K. Ghosh, Receiver in suit no. 1133 of 1959 was proved. So far as the contents of the notice, Ext. I, are concerned, there is a good deal of substance in the contention on behalf of the tenant that the same have not been proved. Mithailal who gave evidence was not capable of saying whether that was a copy of the original notice as Mithailal did not know English. There is furthermore no evidence that this notice or copy of the said notice or any notice either was actually served on the tenants or on the present applicant.

14. On behalf of the landlord it was sought to be argued that the tenant had notice of the discharge of the Receiver by the fact that extensive repairs had been made of the premises. There is no evidence that extensive repairs had been made by the landlord. If the repairs had been made on behalf of the landlord then, of course, expenses must have been incurred for this purpose. No books of account or documents had been produced to indicate that any such expenses had been so incurred. In my opinion, the true fact seems to be that Mr.

speaks of the auction purchaser being required to produce, within 15 days of the intimation of the acceptance of the bid, a treasury challan in respect of the balance of the money; this time may, however, be extended for a period not exceeding 15 days. Sub-rule (12) speaks of the procedure for adjusting the compensation payable to the auction purchaser in respect of a verified claim. It was in accordance with this provision that Alam Chand had sought for not only his 10 per cent. earnest money being so adjusted but also the balance, to the extent he held a verified claim. Sub-rule (13) speaks of an intimation being sent to the auction purchaser calling upon him to deposit the balance in cash after adjusting the verified claim which according to both the sub-rules may be his own claim or by associating the claims of other persons with his in this regard. In the light of these three sub-rules if sub-rule (14) is read the idea will clearly emerge that if there is default in the matter of complying with any or all of the above provisions to the extent they applied the initial deposit made by the auction purchasers under sub-rule (8) (which has not been said as very material) "shall be liable to forfeiture" and he "shall not have any claim to the property". Ismail, J., with respect, rightly came to the conclusion that regarding these two-fold consequences contemplated by sub-rule (14) in the event of default by the purchaser, it is only the forfeiture of the 10 per cent. earnest money which requires further action on the part of the official concerned; the sub-rule does not read: "shall be forfeited"; it only provides that it "shall be liable to forfeiture." Whatever this may be (on which aspect it is needless for me to pronounce any opinion) the question that falls for decision in this case is whether in the events that happened Alam Chand had any claim to the property. If he had none then there was no further need, legally speaking, to cancel any interest in the property or the auction sale itself. It is this important aspect which appears to have been missed while the impugned orders were passed. Reliance appears to have been made on certain notices, which need not be detailed here, being issued to the heirs of the deceased Alam Chand after his death as to why the auction sale should not be cancelled and 10 per cent. be forfeited. Such action would have been necessary in the matter of forfeiting 10 per cent. but, if Alam Chand did not have any claim to the property, then it was plainly wrong to talk of the need for cancelling the auction sale in his favour. It is worth repeating that compliance with the conditions imposed by sub-rules (11) to (13) alone could enable him his right as auction purchaser to fructify; the purchase became a nullity when these conditions

were not complied with. Without even drawing an exact parallel between the Act, the C. P. C. and the present rules, it may be useful to refer to the observations of Ghulam Hasan, J. while interpreting the relevant provisions of the C. P. C. in *Manilal Mohanlal Shah v. Sardar Sayed Ahmed Sayed Mahamad*, AIR 1954 SC 349 at pages 351 and 352:

"Having examined the language of the relevant rules and the judicial decisions bearing upon the subject we are of opinion that the provisions of the rules requiring the deposit of 25 per cent. of the purchase money immediately, on the person being declared as a purchaser and the payment of the balance within 15 days of the sale are mandatory and upon non-compliance with these provisions there is no sale at all. The rules do not contemplate that there can be any sale in favour of a purchaser without depositing 25 per cent. of the purchase money in the first instance and the balance within 15 days. When there is no sale within the contemplation of these rules, there can be no question of material irregularity in the conduct of the sale. Non-payment of the price on the part of the defaulting purchaser renders the sale proceedings as a complete nullity. The very fact that the court is bound to re-sell the property in the event of a default shows that the previous proceedings for sale are completely wiped out as if they do not exist in the eye of law."

7. The distinction that was sought to be drawn between the C. P. C. and the present rules is that acceptance of the bid by the Settlement Commissioner was necessary. But this distinction could be of no avail after Alam Chand's bid was accepted on 14-4-1958. Even apart from the above authority it seems to me quite clear on principle, as already explained, that when the auction sale itself was subject to the conditions of certain amounts having to be deposited within the prescribed time or adjustments being made in the manner laid down then the auction purchaser had no claim to the property and, consequently, no question of having to cancel the sale could possibly arise.

8. Though in a somewhat different context, the Supreme Court pointed out that the auction purchaser should have no claim to the property till the full price was paid (vide AIR 1965 SC 1994 paragraph 10; also AIR 1958 SC 289 on the same point). Shri Talwar, learned counsel for the respondents rightly points out that the above discussion was in the context of the auction-purchaser seeking to evict a tenant of the property; but on this ground the principle laid down in the above said decision cannot cease to have application because the Supreme Court

had held that the payment of full price was the sine qua non for acquiring title to the property purchased at such an auction. This is a consequence of sub-r. (14). This question, in my view, has to be answered in favour of the petitioner. An understanding of the above legal position alone is sufficient to give the relief which the petitioner seeks in this petition.

9. For the sake of completeness, however, I may refer to some of the facts which I have been able to gather from the above file which show that even independently, on the facts, the legal representatives of Alam Chand would not be entitled to the relief which they got under the impugned orders. It is seen from the file above referred to (the compensation file bearing No. P/Gurgaon/215421/2424 not being made available to me) that Alam Chand himself had filed an affidavit on 2-1-1958 (vide p. 4-F of the file) before the Settlement Officer stating about the property etc. that he had purchased mentioning therein that he had purchased a plot (this plot) at Faridabad for Rs. 8,050 but not specifically set out the amounts payable from the compensation pool or that he had executed a bond for payment of 10 per cent. deposit. After the acceptance of the bid of Alam Chand notice had been issued to him even on 14-4-1958 (p. 6-F of the file) to deposit the balance within a time prescribed by the rule. But this notice does not appear to have been served. A similar notice was issued on 2/3-6-1958 asking him to deposit the balance and the Administrator, Faridabad Development Board was requested to serve the same on him personally (p. 7-F of the file). Subsequently, on 18-1-1960, Alam Chand realised the whole claim in cash and the certificates (vide note on p. 8-F of the file). This was followed by an application by Alam Chand in Urdu (already mentioned) that he had realised the whole of the compensation amount on 18-1-1960. It also appears from the file that on 9-4-1960 Alam Chand was informed of the amount that he would have to deposit. He again appeared on 29-4-1960 (p. 2-N of the file) before the Assistant Settlement Officer and prayed for 20 days' time; (reference to this has already been made). This was followed on 29-8-1960 by a notice (p. 13-F of the file) to Alam Chand to present himself and there was also yet another notice issued to him on 25-1-1961/2-2-61 (p. 15-F of the file). These were the two notices which appear to have been sent to him before he had died on 13-4-1961. It is necessary to recall here that such notices were not necessary to merely cancel the sale; they were obviously sent to forfeit the 10 per cent.

10. To complete the narration of facts it may be noticed that notices were

sent subsequent to the death of Alam Chand also; the order cancelling the sale, forfeiting the deposit was made on 16-3-1962 (reference is to P. 6 of the note of the file).

11. It is also necessary to notice at this stage that on 30-5-1962 the property had been re-auctioned and was purchased by the petitioner for Rs. 12,500. He deposited the security amount and the balance sale price within the time; after confirmation, the sale certificate was also issued to him. On 9-7-1964 the authorised Chief Settlement Commissioner set aside (p. 43-F) the order dated 16-3-1962 which had been passed cancelling the auction sale in favour of Alam Chand and ordering forfeiture in respect of 10% the petitioner not being made a party to these proceedings.

12. The various notes in the said file by the officers who had dealt with this matter even subsequently in order to consider the order dated 9-7-1964 refusing even taking steps suo motu and the reasons for and against this course make interesting reading; it is not, however, necessary to refer to them. In the net result the petitioner's auction was set aside on the ground that the auction sale in favour of Alam Chand could not be set aside without notice to his legal representatives. I have said enough to point out that this view overlooks the consequence which has been provided by sub-rule (14) of Rule 90.

13. Shri P. N. Talwar made a very laboured attempt to sustain the impugned orders by urging that the various orders as required, by sub-rule (13) in particular, should have been passed — and Alam Chand should have been required to make up the deficiency in the matter provided for under sub-rule (13) and that when these things were not done the consequences stipulated by sub-rule (14) of Rule 90 could not follow. In other words, he urged that an express order setting aside the sale was a necessary legal act to terminate whatever interest Alam Chand had in the property but this argument appears to fly in the teeth of sub-rule (14) itself which says that when there is default in the matter of complying with the relevant conditions, Alam Chand had no claim to the property. There can be no doubt, in this case, that there was default because on 29-4-1960 even after Alam Chand secured 20 days' time to deposit the whole money he did not do so. Alam Chand had, therefore, no claim to the property.

14. In the result the impugned orders passed by Shri Sudarshan Aggarwal, (copy of which is Annexure 'B') and by Shri Rajni Kant (copy of which is Annexure 'A' to the Writ Petition) are both

quashed. It follows from this that the further orders, which were only consequential, by which the petitioner's sale was set aside would also automatically fall to the ground and the sale to the petitioner would stand restored.

15. In the view that only the heirs of Alam Chand are involved in this dispute I make no order as to costs.

16. File No. B/26/NH.III, to which I have referred in the course of the judgment will not be returned to the department until the appeal period is over or an appeal, if filed, is disposed of.

Petition allowed.

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V. S. DESHPANDE AND
YOGESHWAR DAYAL, JJ.

Miss Kumkum Khanna and others, Petitioners v. The Mother Aquinas, Principal, Jessus and Mary College, Chanakyapuri, New Delhi and another. Respondents.

Civil Writ No. 398 of 1975. D/- 19-8-1975.

(A) Constitution of India, Art. 226 — 'Any person or authority' — Principal of a private College affiliated to Delhi University is a public authority — Writ petition is maintainable against him in respect of exercise of his statutory power and discretion. (Delhi University Act (3 of 1922), S. 2 (a) and (d) and University Statutes and Ordinance).

Though the office of the Principal can exist outside a statute, it becomes a statutory office when the college is admitted to the privileges of the University. Even if the office of the Principal is not regarded statutory in the sense that it is created by a statute, it is a public office because the powers and duties of the Principal relate to a large section of the public, namely, the students of the college. There is no private or contractual relationship between the students and the Principal. (Para 12)

The Principal of a private College (Jessus and Mary College) recognised by and admitted to the privileges of the Delhi University is a person or authority (i.e., a public authority) within the meaning of Art. 226 of the Constitution and when he exercises his statutory duty, power and discretion under Ordinance VII framed under the Delhi University Act, his action is subject to mandamus and certiorari under Art. 226. Case law discussed. (Paras 12, 15)

(B) Delhi University Act (8 of 1922), Ss. 30 and 31 — Ordinances under Ordinance VII, Cl. 2 (9) (c) — Principal is bound to hear students before barring them from appearing at examination on ground of shortage in attendance at lectures — (Constitution of India, Art. 226 — Natural justice).

Clause 2 (9) (c) of Ordinance VII is made expressly for the benefit of students. They have, therefore, a right to seek its benefit by fulfilling its terms. Such a right cannot be denied to them merely because the Principal is not inclined to exercise his power. On the other hand, the Principal is under a duty to do so and he has to decide each case on its merits that is objectively. Natural justice requires that a premature decision should not be made on the merits of the case before hearing the student. The first stage is to give the hearing and it is the second stage to make observation about the merits of the case of the students. Hence the Principal of a College is bound to grant an opportunity to a student to show cause why he should not be prevented from appearing at his examination on ground of shortage of attendance before actually debarring him from appearing at the examination on such ground. AIR 1971 SC 40 and (1880) 5 AC 214, Foll. (Paras 16 to 18)

Held that the action of the Principal under Ordinance VII in detaining the petitioners and in not giving hearing before deciding that they were not entitled to exemption under Clause 2 (9) (c) was liable to be remedied by an order under Article 226 because the Principal acted in exercise of a statutory power in her public capacity. (Para 23)

(C) Constitution of India, Art. 226 — Fettering statutory discretion by administrative policy — Interference by High Court.

Where the Principal of the College had made it a rule of practice that only those medical certificates which were submitted contemporaneously in obtaining leave would be taken into consideration in granting exemption under Cl. 2 (9) (c) of Delhi University Ordinance:

Held that the Principal was not justified in fettering her discretion under clause 2 (9) (c) by following an administrative practice contrary to the terms of clause 2 (9) (c). She was therefore bound to consider all cases in which exemption was claimed under clause 2 (9) (c) at the end of the year and decide each case on its own merits in the light of such evidence as may be adduced by the students. Such evidence may include medical certificates which are produced for the first time at the end of the year. A fair construction of clause 2 (9) (c) of Ordinance VII would show that the Principal has to decide on the merits of each case objectively whether the benefit of exemption

thereunder should be given to a particular student. The hearing has to be given by the Principal to the students before deciding whether, after granting the exemption, if any, the student is short of attendance. 1 Halsbury's Laws of England 35, Para. 33, 4th Edn., Ref.

(Para 21)

Cases Referred: Chronological Paras

AIR 1975 SC 1331 = 1975-1 SCC 421 =	12
1975 Lab IC 881	12
AIR 1975 Andh Pra 35 = (1974) 1 Andh LT	14
192 (FB)	14
AIR 1974 All 1 = 1973 All LJ 855 (FB)	14
AIR 1973 SC 855 = (1973) 1 SCC 409 =	12
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AIR 1971 SC 40 = 1971 Lab IC 8	16
AIR 1970 SC 1039 = (1970) 3 SCR 266	22
AIR 1969 SC 1306 = (1969) 3 SCR 773	9
ILR (1969) Delhi 202	12
(1969) 2 QB 538 = (1969) 2 WLR 1418	10
AIR 1966 SC 875 = (1963) 3 SCR 767	22
(1965) 2 SCR 713 = 1965 Jab LJ 513	13
AIR 1964 SC 1680 = (1964) 3 SCR 55	13
1964 AC 40 = (1963) 2 WLR 935	16
1942 AC 561 = 111 LJ KB 398	14
1924-1 KB 171 = 93 LJ KB 390	10
(1980) 5 AC 214 = 49 LJ QB 577	16

M. C. Bhandare and G. L. Sanghi, Sr. Advocates with P. R. Mridul, Sr. Advocate and Smt. S. M. Bhandare, for Petitioners; Frank Anthony, Sr. Advocate with S. P. Aggarwal, P. C. Chandi, E. C. Aggarwal (for No. 1) and V. P. Chaudhry (for No. 2), for Respondents.

V. S. DESHPANDE, J.:— Is a writ petition maintainable against the Principal of a private college recognised by the University of Delhi in accordance with the Delhi University Act, 1922 and the Statutes and Ordinances framed thereunder? Is the Principal of such a college bound to grant an opportunity to a student to show cause why she should not be prevented from appearing at her examination on the ground of shortage of the required attendance before debarring her from such examination on such a ground? In exercising a statutory discretion to exclude periods of serious illness etc. in calculating the attendance of a student, is the principal justified in being guided by her own administrative policy? These questions arise in this and the connected writ petitions (Civil Writs 411, 465 to 470, 478 and 568 of 1975) in the following context.

2. The University of Delhi is established as a teaching and affiliating University by the Delhi University Act, 1922. Section 2 (a) of the Act defines a "college" to mean an institution maintained or admitted to its privileges by the Uni-

versity, Jesus & Mary College is a private college admitted to the privileges of the University. Section 2 (d) of the Act defines "Principal" to mean the Head of a College. Under Section 4 (2) (a) the University has the power to hold examinations and to grant degrees to persons who have pursued a course of study in the University or in any college. Under Sections 30 and 31 of the Act, the Executive Council of the University may make Ordinances subject to the provisions of the Act and the Statutes to provide, for inter alia, conduct of examinations and maintenance of discipline among students. Ordinance VII—Conditions for Admission to Examinations—provides that:

"Clause 1 (1). Subject as hereinafter provided, no member of the University shall be admitted to any examination for a degree of the University other than a post-graduate degree unless he has pursued a regular course of study as hereinafter prescribed for not less than three academic years."

"Clause 2 (1). No person shall be deemed to have pursued a regular course of study unless the Principal of his College..... is satisfied that the required conditions in respect of his instruction have been fulfilled."

"Clause 2 (2). The required conditions shall not be deemed to have been satisfied..... unless the candidate has attended not less than two-thirds of lectures, practicals and preceptorials/tutorials separately..... in each academic year." There are two exceptions to the above rule which are relevant here. Clause 2 (9) (a) provides that in calculating the total number of lectures delivered in the college for a particular course of study in an academic year, the number of lectures in each subject delivered during the period when a student was absent for the purpose of participating in extra-curricular activities at the instance of his college shall not be taken into account. Cl. 2 (9) (c) provides that "the Principal of a College may consider exceptionally hard cases of students who had fallen seriously ill or had met with an accident during the year disabling them from attending classes for a certain period, with a view to determine whether the lectures etc. delivered during the said period or a part thereof could be excluded for purposes of calculation of attendance of the year and decide each case on its own merits." Cl. 3 of Appendix II to Ordinance VII provides that a student who has attended not less than 40 per cent. of the lectures and tutorials separately in an academic year may be allowed to appear at the annual examination of the first or the second years of the graduate course at the discretion of the Principal but he shall be required to

make up the deficiency in the lectures and tutorials during the second and/or the third years. A candidate who has put in attendance of not less than 40 per cent. of the lectures and tutorials, separately in the third year shall be allowed to appear at the third year examination if by combining the attendance of the third year with the attendance of first and second years, he makes up two-thirds of attendance in all the subjects taken together separately in lectures and tutorials held during the three years. Ordinance X-A provides that on a motion made by or with the authority of the Vice-Chancellor, the Academic Council may, in exceptional cases, grant exemption to candidates from the operation of any of the Ordinances governing, inter alia, attendance at lectures of the examination of the candidates.

3. Thirty students of the Jessus and Mary College were prevented by the Principal from appearing at their examinations at the end of the academic year 1974-75 on the ground of shortage of attendance. They have filed this and the connected writ petitions against their Principal and the Delhi University for the setting aside of the detention orders alleging that they were not given the benefit of the provisions of clauses 2 (9) (a) and 2 (9) (c) of Ordinance VII. They also contend that before the Principal decided to detain them, an opportunity should have been given to them to show that they could claim the benefit of these provisions with the result that they would not be found to be short in attendance. They contend that such an opportunity was not given to them and this has vitiated the orders of detention. They also point out that the Principal has wrongly adopted an administrative practice of not considering medical certificates regarding illness of the students unless these medical certificates are submitted by the students contemporaneously with the illness along with application for leave. They contend that it is the illness and not the medical certificates which are only evidentiary that is the reason for which the benefit of clause 2 (9) (c) of Ordinance VII is to be given. They go further and say that proof of illness even without medical certificate should be considered by the Principal before deciding whether the benefit of clause 2 (9) (c) is to be given or not. The refusal of the Principal to exercise the discretion under clause 2 (9) (c) was vitiated by these irrelevant considerations being taken into account. The student petitioners prayed that the Principal be directed to permit them to appear for their examinations.

4. During the pendency of the writ petitions, the Court ordered that the

petitioners may be allowed to appear for their examinations provided that the publication of their results would be subject to the decision of the Court in respect of each petition.

5. The writ petitions are opposed by the Principal as also by the Delhi University. The Principal has replied to the petitioners' contentions as follows:—

(1) The procedure for giving the students the benefit of participation in extra-curricular activities under clause 2 (9) (a) was that the teacher in-charge was to report the absence of the student due to such participation to the lecturers concerned. Thereupon a note was made in the register by the lecturers that the student was granted leave or was considered on duty.

(2) The Principal denied that she was bound to give a hearing to the students before passing the detention orders. The shortage of attendance of the students was brought to their notice from time to time and particularly at the beginning of the third year. As the petitioners knew and were expected to know of the lectures and tutorials attended by them, the question of giving them a hearing by the Principal before declaring them short of attendance did not arise.

(3) The administrative practice adopted by the Principal that medical certificates should be submitted contemporaneously with the illness is sound. If the student is diligent, the production of such a medical certificate immediately after the illness should be always possible. Certificates produced late would not inspire confidence. The Principal, therefore, decided not to accept certificates which were produced after the end of the academic session.

(4) The Principal has actually given a hearing to those students who came to her to explain the causes of the shortage of their attendance. The decision is ultimately of the Principal and it has been given on good grounds and cannot be reviewed by this Court.

(5) No writ petition under Art. 226 of the Constitution can be maintained against the Principal of a private college as such a Principal is not a public authority.

6. Let us now consider seriatim the three questions which arise for decision as stated at the beginning of the judgment.

IS THE PRINCIPAL OF A PRIVATE COLLEGE A PUBLIC AUTHORITY?

7. The basic difference between a suit and a writ petition is that the right of the plaintiff is decided in the former while a relief based on the established right of the petitioner is given in the latter. A suit

lies against a private person the relief against whom is obtained under the rules of private law. Under Article 226 of the Constitution, a writ petition lies against "any person or authority, including in appropriate cases any Government". The meaning of the word "person" is coloured by the context. Firstly, it appears in the Constitution which is the basis of public law. Secondly, it is associated with the words "authority" and "Government". Thirdly, proof of private rights such as those based on contract or tort cannot be given by way of a writ petition which is confined to rights arising out of the public law and the public law remedies specified in Articles 32 and 226.

8. The remedy by way of mandamus is available against "any person, corporation, or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty" (1 Halsbury's Laws of England 111, paragraph 89, 4th Edition (Administrative Law) corresponding to 11 HLE 84, paragraph 159, 3rd Edition, which has been frequently referred to with approval by the Supreme Court).

9. In *Praga Tools Corporation v. C. V. Imanuel*, AIR 1969 SC 1306, the respondents had filed a writ petition against the appellant claiming a writ of order in the nature of mandamus against the appellant. The High Court held that the writ petition was not maintainable and the Supreme Court upheld the decision in paragraph 6 of the report in the following words:—

"The writ obviously was claimed against the company and not against the conciliation officer in respect of any public or statutory duty imposed on him by the Act..... it is well understood that a mandamus lies to secure the "performance of a public or statutory duty." The Court then stated the law in the words from Halsbury quoted above and observed:—

"It is, however, not necessary that the person or the authority on whom the statutory duty is imposed need be a public official or an official body. A mandamus can issue, for instance, to an official of a society to compel him to carry out the terms of the statute under or by which the society is constituted or governed and also to companies or corporations to carry out duties placed on them by the statutes authorising their undertakings. A mandamus would also lie against a company constituted by a statute for the purposes of fulfilling public responsibilities."

10. On the one hand, the use of the word "person" in Halsbury quoted above and in Article 226 of the Constitu-

tion does not mean a private person in his private capacity. For, a person is subject to mandamus only when he is required to do a public duty appertaining to his office. If the duty is of a public nature and if it appertains to an office, the office would also be of a public nature and its holder would be acting in a public capacity. The context of public law and the association of authority and Government with the word "person" suggests that a person must be acting in a public capacity as a holder of a public office and in the performance of a public duty before he can become the subject of a public law remedy like mandamus. Certiorari is also issued in relation to persons, bodies or tribunals having legal authority to determine questions affecting the rights of subjects and having the duty to act judicially (*R. v. Electricity Commrs.*, 1924-1 KB 171 at p. 250, per Atkin L. J. and H. M. Seervai, *Constitutional Law of India*, page 586, para. 16.20). Here also a person or a body of persons would be exercising a power of a public nature before it becomes subject to certiorari. As observed by Professor S. A. de Smith, commenting on the classic statement of law in *R. v. Electricity Commrs.*, "for this purpose, 'legal authority' generally means statutory authority. Neither certiorari nor prohibition will issue to a private arbitral body which derives its jurisdiction from contract, or to a voluntary association or domestic tribunal which derives its jurisdiction solely from the consent of its members". Professor Smith then goes on to say:—

"It would seem to follow that certiorari will issue to other non-statutory bodies (e.g. those established by royal charter) discharging comparable functions of a public nature. The proceedings of university disciplinary authorities not resting on a statutory basis are a marginal case, for their responsibilities are not so manifestly of a public nature; but in one recent case (*R. v. Aston University Senate*, ex parte Roffey, 1969-2 QD 538) it was assumed that they were reviewable by certiorari."

(*Judicial Review of Administrative Action*, 3rd Edition, page 341).

11. On the other hand, the use of the word "person" in the above statements of law in relation to mandamus and certiorari would show that the person or authority against whom these remedies are given need not be invariably created by a statute. Only a legal person can be created by a statute. But these writs can be issued against a natural person provided that he is exercising a public or a statutory power or doing a public or a statutory duty. The following observation of Professor S. A. de Smith makes this clear:—

"To be enforceable by mandamus a public duty does not necessarily have to be one imposed by statute. It may be sufficient for the duty to have been imposed by charter, common law, custom or even contract..... It is thought that if a domestic tribunal wrongfully declines jurisdiction in a particular case, mandamus will issue to it provided that its jurisdiction is regulated by statute, but not if its jurisdiction is based merely on contractual or other non-statutory foundations". (Judicial Review of Administrative Action, 3rd Edition, page 482).

It would appear, therefore, that a person though not created by a statute, would be exercising a statutory power or discharging a statutory duty if such a power is conferred or such a duty is imposed by a statute. The action of a person is statutory though the person is not created by a statute. It is in the light of this legal position that the question whether a writ of mandamus or certiorari would lie against the Principal has to be considered.

12. A private college may be formed and its principal may be appointed without attracting the applicability of public law. But when a college is admitted to the privileges of the University, it ceases to be an entirely private institution. It becomes the subject of statutory provisions and is regulated by it. The Academic Council is an authority of the University created by a statute. The power now conferred on the Principals of affiliated and constituent colleges by Ordinance VII was formerly exercised by the Academic Council. As pointed out in *Amir Jamia v. Desharath Raj*, ILR (1969) Delhi 202, education is essentially a State function. The very essence of a University is its universality and its public nature. The Delhi University is a teaching and an affiliating University. The colleges, whether private or Government, maintained by the University are, therefore, parts of the University. The Ordinances of the University are "law" as they are enacted in exercise of the power conferred by Sections 30 and 31 of the Delhi University Act (*Sukhdev Singh v. Bhagat Ram*, 1975-1 SCC 421 = (AIR 1975 SC 1331) and *Sirsi Municipality v. Cecelia Kom Francis Tellis*, 1973-1 SCC 409 = (AIR 1973 SC 855)). The power exercised or duty performed under Ordinance VII is, therefore, a statutory power and a statutory duty. Acting under Ordinance VII, therefore, the Principal is acting in a public capacity. Though the office of the Principal can exist outside a statute, it becomes a statutory office when the college is admitted to the privileges of the University. This is why such a college and its principal have been defined in clauses (a) and (d) of Section 2 of the Delhi University Act. Even if the office of the Principal is

not regarded statutory in the sense that it is created by a statute, it is a public office because the powers and duties of the Principal relate to a large section of the public, namely, the students of the college. There is no private or contractual relationship between the students and the Principal. The power of the Principal to enforce the requirement of two-thirds of attendance is given to her by Ordinance VII, that is, by a statutory provision. Similarly, the power to deny permission to students to appear at the examination on the ground of shortage of attendance is also a statutory power. For the same reason, the discretion of the Principal to give benefit to the students under clause 2 (9) (c) of Ordinance VII is also a statutory discretion. The exercise of these powers and the performance of these duties is, therefore, subject to mandamus and certiorari under Article 226 of the Constitution.

13. In *Vidya Ram Misra v. Managing Committee, Shri Jai Narain College*, (1972) 1 SCC 623 = (AIR 1972 SC 1450), the dismissal by the High Court of a writ petition filed by a lecturer against his college was upheld, inter alia, by the following observation in paragraph 13 of the report:—

"Besides, in order that the third exception to the general rule that no writ will lie to quash an order terminating a contract of service, albeit illegally, as stated in *S. R. Tewari v. District Board, Agra*, (1964) 3 SCR 55 = (AIR 1964 SC 1680), might apply, it is necessary that the order must be the order of a statutory body acting in breach of a mandatory obligation imposed by a statute. The college, or the Managing Committee in question, is not a statutory body and so the argument of Mr. Setalvad that the case in hand will fall under the third exception cannot be accepted. The contention of counsel that this Court has sub-silently sanctioned the issue of a writ under Article 226 to quash an order terminating services of a teacher passed by a college similarly situate in *Prabhakar Ramakrishna Jodh v. A. L. Pande*, (1965) 2 SCR 713, and, therefore, the fact that the college or the Managing Committee was not a statutory body was no hindrance to the High Court issuing the writ prayed for by the appellant has no merit as this Court expressly stated in the judgment that no such contention was raised in the High Court and so it cannot be allowed to be raised in this Court."

14. Two points are made in the above observation, namely, (1) the college or the Managing Committee is not a statutory body, and (2) the order terminating the contract of service was not an order of a statutory body acting in breach of

mandatory obligation imposed by a statute. There need be no dispute regarding the first observation. As we have stated above, a private college and its Managing Committee can exist outside a statute. They are not created by a statute and in that sense they are not statutory bodies. But if statutory powers and duties are conferred on them, then they will be acting under a statute. But the decision of the Supreme Court in Vidya Ram Misra's case (AIR 1972 SC 1450) was that the termination of the service of the lecturer Misra was not made in breach of a mandatory obligation imposed by a statute. In this respect, it is to be distinguished from the present case where the only authority or discretion possessed by the Principal is under Ordinance and, therefore, of a statutory nature. There is no question of it being of a contractual nature. The main thrust of the decision of the Supreme Court in Vidya Ram Misra's case was that the writ petition could not be maintained for the breach of a service contract. It is to be noted that even a suit for specific performance of a service contract could not be maintained. The rights of the petitioners in the present case are not based on contracts but on statutory provisions. In Vidya Ram Misra's case, the college was said to be not a statutory authority. In the present case, the Principal is a statutory authority in the sense that hers is a public office recognised and governed by the Delhi University Act, 1922 and Ordinance VII confers statutory powers on the holder of that office. The ratio of the decision in Vidya Ram Misra's case is limited by the particular facts of that case which are quite different from the facts of the present case. Private colleges admitted to the privileges of a statutory University were held to be amenable to the writ jurisdiction of the High Court in the following two recent Full Bench decisions after distinguishing the Supreme Court decision in Vidya Ram Misra's case, namely, (1) Vaish College (Society) Shamli v. Sri Lakshmi Narain, AIR 1974 All 1 (FB) and (2) Harijander Singh v. Selection Committee, Kakatiya Medical College, AIR 1975 Andh Pra 35 (FB). Therefore, in these respects, the present case is more analogous to Prabhakar Ramakrishna Jodh v. A. L. Pande, (1965) 2 SCR 713, in which the termination of the services of a lecturer by his college was held to have been in breach of the College Code which was "law" being Ordinances framed under the University of Saugar Act. The observation of the Supreme Court in Vidya Ram Misra's case has to be taken as a whole. With respect, it would not exclude the jurisdiction of this Court in the present case in dealing with the power and/or the discretion of the Principal governed by Ordinance VII. If

the Principal is shown to have acted contrary to the provisions of Ordinance VII, this Court would have power under Article 226 to deal with the action of the Principal because it would be action of a person holding the public office and acting in public capacity. A public office need not be created by a statute. Even if it is governed and regulated by a statute, it would be regarded as public.

"A public authority is a body, not necessarily a county council, municipal corporation or other local authority, which has public or statutory duties to perform, and which performs those duties and carries out its transactions for the benefit of the public and not for private profit..... A natural or individual person might, when acting in execution of a public duty, be a public authority..... In general, a public officer may be said to be one who discharges any duty in the discharge of which the public are interested." (30, Halsbury's Laws of England, 682 and 684, paragraphs 1317 and 1319, 3rd Edition). When a public officer is paid out of a fund provided by public, he is more clearly regarded as the holder of a public office. But it is the nature of the office and not the fund from which its salary comes which is the more important consideration. Even a director of a private limited company was held by the House of Lords to occupy a public office in *McMillan v. Guest*, (1942) AC 561.

15. On the first question, therefore, we hold that the Principal of Jesus and Mary College is a person or authority (i.e., a public authority) within the meaning of Article 226 of the Constitution and the writ petitions are maintainable in respect of the exercise of the statutory power and discretion and the performance of statutory duties by her.

NOTICE AND HEARING UNDER CL. 2 (9) (c) OF ORDINANCE VII:—

16. The rule established by *Ridge v. Baldwin*, (1964) AC 40, and applied in several decisions by the Supreme Court in India is that an administrative authority exercising a statutory power or performing statutory duties so as to act adversely to the rights and interests of a person must hear such person before acting against him. This rule applies whether the nature of the action is quasi-judicial or executive. It is the rights and the nature of the power or duties which would determine whether the administrative authority has to hear a person. If the administrative action is not going to have "civil consequences" or the administrative authority is to be guided by policy and not objective considerations, then a hearing may not be given (*Union of India v. Col. J. N. Sinha*, AIR 1971 SC 40). Did the petitioners in the present case have a right

to appear at the examination or to claim the benefit of clause 2 (9) (c) of Ordinance VII? It was contended for the Principal that the petitioners have no right to appear for the examination due to the shortage in their attendance and, therefore, they have no right to the benefit of clause 2 (9) (a) and equally they have no right to the benefit of clause 2 (9) (c) under which the Principal has got unfettered discretion to consider exceptional hard cases or not. She cannot be compelled to consider such cases. It is true that primarily clause 2 (9) (c) confers a power on the Principal. But firstly the power is to be exercised for the benefit of the students. Secondly, the Principal has also to decide each case on its own merits, that is, objectively. These two considerations imply that the Principal has a duty to exercise the power. She cannot refuse to exercise the power at her sweetwill. The law was long ago settled by the following dictum of Earl Cairns L.C. in *Julius v. Bishop of Oxford*, (1880) 5 AC 214:—

"here a power is deposited with a public officer for the purpose of being used for the benefit of persons who are specifically pointed out, and with regard to whom a definition is supplied by the Legislature of the conditions upon which they are entitled to call for its exercise that power ought to be exercised, and the Court will require it to be exercised." This has been followed in numerous decisions since then. Clause 2 (9) (c) is made expressly for the benefit of students. They have, therefore, a right to seek its benefit by fulfilling its terms. Such a right cannot be denied to them merely because the Principal is not inclined to exercise her power. On the other hand, the Principal is under a duty to do so.

17. A general statement is made by the Principal in her affidavit in Civil Writ 398 of 1975 that every student who came to her for a hearing was heard. But this statement is coupled with the assertion that medical certificates produced at the end of the year could not be considered. The Principal has also said regarding late certificates as to why they could not be accepted. We would impress upon the Principal that she should keep the two aspects separate from each other, namely, (1) the necessity of giving a hearing to every affected student whether the medical certificates produced by her were early or late, whether apparently trustworthy or otherwise, and (2) the ultimate decision of the Principal on the merits of each case based on a finding whether the explanation given by the student including the medical certificate produced early or late is believable or not. Natural justice requires that a premature decision

should not be made on the merits of the case before hearing the student. Observations regarding unreliability of the explanations given by the students and the medical certificates produced by them in the counter-affidavits filed by the Principal are unfortunate as likely to bias the Principal's mind and also premature inasmuch as hearing has not been given to any petitioner at the end of the year. The first stage is to give the hearing and it is the second stage to make observation about the merits of the case of the students.

18. During the pendency of the writ petitions, five students made representations to the Principal and/or the Vice-Chancellor without prejudice. The Principal has replied to the students. Since these representations were made without prejudice, they cannot be taken into account. It cannot be said that these students need not now be given a hearing. They will, therefore, stand along with the other students and will fall into one of the three categories into which all thirty petitioners will be divided by us later. We hold that the Principal is bound to hear these students before preventing them from appearing at their examinations on the ground of shortage of attendance.

FETTERING STATUTORY DISCRETION BY ADMINISTRATIVE POLICY.

19. It is true that in acting under clause 2 (9) (c) the Principal exercises a discretion in assessing the nature of the illness and in deciding the merits of the case. But the discretion has to be exercised according to the terms of clause 2 (9) (c). The Principal has to consider cases of illness, accident etc. "during the year" with a view to determine whether lectures and tutorials delivered "during the said period or a part thereof" could be excluded for the purposes of calculation of the attendance of the year. Such a calculation can be made only at the end of the year. It is at that time that the Principal has to consider periods of absence during the year and whether such periods of absence should be excluded for calculating the total attendance of a student for the whole year. It is then that the Principal has to decide each case on its own merits. Such a decision cannot be made before the end of the year nor can several such decisions be made each time there is an absence in a particular period during the year. It is only when the year is completed that the total number of tutorials and the percentage attended by the student can be calculated. It would follow, therefore, that the hearing to a student has to be given at the end of the year and before taking the decision whether the student has or has not fulfilled

the requisite percentage so as to be able to appear for the examination.

20. The administrative instruction regarding the leave of absence in the College prospectus is intended only to ensure that a student does not remain absent without the permission of the Principal. The object is to maintain discipline. At that time no decision is taken whether the period of absence of the student has to be excluded in the calculation of his attendance. That has to be done only at the end of the year. Such leave of absence could be granted for much less serious reasons than are required for exemption of periods of absence for calculation of attendance under clause 2 (9) (c). The medical certificate to be submitted for obtaining leave of absence may not thus be of such serious illness as had disabled the student from attending the College. In the nature of things, the Principal cannot be as strict in granting leave as she would be in granting exemption under clause 2 (9) (c). The Principal has, however, made it a rule of practice that only those medical certificates which are submitted contemporaneously in obtaining leave would be taken into consideration in granting exemption at the end of the year under clause 2 (9) (c). It was contended for the petitioners that only such guidelines for the exercise of her discretion under clause 2 (9) (c) can be laid down by the Principal which are in tune with clause 2 (9) (c) and which do not conflict with it. The law has been ably summarised recently as follows:—

"Fettering discretion by own rules. A public body endowed with a statutory discretion may 'legitimately adopt general rules or principles of policy to guide itself as to the manner of exercising its own discretion in individual cases, provided that such rules or principles are legally relevant to the exercise of its powers, consistent with the purpose of the enabling legislation and not arbitrary or capricious. Nevertheless, it must not disable itself from exercising a genuine discretion in a particular case directly involving individual interests; hence it must be prepared to consider making an exception to the general rule if the circumstance of the case warrant special treatment. These propositions, evolved mainly in the context of licensing and other regulatory powers, have been applied to other situations, for example the award of discretionary investment grants and the allocation of pupils to different classes of schools. The amplitude of a discretionary power may, however, be so wide that the competent authority may be impliedly entitled to adopt a fixed rule never to exercise its discretion in favour of a particular class of person; and such a power

may be expressly conferred by statute." (1, Halsbury's Laws of England, 35, Paragraph 33, 4th Edition).

21. The practice followed by the Principal is subject to the following objections. Firstly, under clause 2 (9) (c), it is the illness which is a ground for exemption and not the medical certificate. The insistence of medical certificate as the only proof of illness cannot be said to be in tune with clause 2 (9) (c). It is conceivable that no doctor was called or was available during the illness. Consideration of the question whether exemption should be granted to a student at the end of the year cannot be ruled out merely because a medical certificate was not produced during the year at the time of the illness. Secondly, the extent of the discretionary power of the Principal is not so wide under clause 2 (9) (c) as to enable the Principal to adopt a fixed policy that no evidence other than medical certificate would be considered and that too only if the medical certificate is filed contemporaneously. Thirdly, the necessity to decide each case on its merits, indicates that no inflexible rule of practice can be followed by the Principal. She is bound to consider exceptional cases on their peculiar facts. For these reasons, we hold that the Principal was not justified in fettering her discretion under clause 2 (9) (c) by following an administrative practice contrary to the terms of clause 2 (9) (c). She is, therefore, bound to consider all cases in which exemption is claimed under clause 2 (9) (c) at the end of the year and decide each case on its own merits in the light of such evidence as may be adduced by the students. Such evidence may include medical certificates which are produced for the first time at the end of the year. A fair construction of clause 2 (9) (c) of Ordinance VII would show that the Principal has to decide on the merits of each case objectively whether the benefit of exemption thereunder should be given to a particular student. The hearing has to be given by the Principal to the students before deciding whether, after granting the exemption, if any, the student is short of attendance.

22. In some English Universities, the disciplinary jurisdiction being vested exclusively in the Visitor is regarded as an internal matter of the University in which the Courts will not interfere. This doctrine has not been imported into India. The Supreme Court has only observed in some decisions such as Board of H. S. & Intermediate Education v. Bagleshwar Prasad, (1963) 3 SCR 767 = (AIR 1966 SC 875) that the exercise of the discretion by the educational authorities would generally be respected by the Courts who would be slow to interfere with their decision. But even in England, violation of

rules of natural justice by the University authorities would lead to judicial review of their action by the Courts (S. A. de Smith, *Judicial Review of Administrative Action*, page 200, Footnotes 44 and 45, 3rd Edition). In the *Board of High School and Intermediate Education v. Chittra Srivastava*, AIR 1970 SC 1039, also the Court granted an opportunity to be heard to a student even though such opportunity was not likely to be of much use. The Court did not feel inhibited by the fact that the appellant was an educational authority.

23. "It is the duty of persons upon whom statutory powers are conferred to keep strictly within those powers" (30, Halsbury's Laws of England, 686, paragraph 1324, 3rd Edition). The remedy available to an aggrieved person against the wrongful exercise of a statutory power is two-fold. If the person exercising a statutory power is not a public authority, the remedy against him may be a special remedy provided by the statute or a general remedy such as injunction or damages under the rules of private law. If, on the other hand, such a person acts as a public authority in exercise of a statutory power or in the performance of a statutory or public duty, then the public law remedies such as the issue of a writ under Article 226 would be available against him. The action of the Principal under Ordinance VII in detaining the petitioners and in not giving hearing before deciding that they are not entitled to exemption under clause 2 (9) (c) is liable to be remedied by an order under Article 226 because the Principal acts in exercise of a statutory power in her public capacity.

24. As for the benefit under clause 2 (9) (a) of Ordinance VII, the Principal has filed an affidavit that such benefit was given whenever participation in extra-curricular activities covered by clause 2 (9) (a) was reported to the lecturer concerned by the teacher in-charge. There is no definite averment by any of the petitioners that on a particular day she was participating in such activity at the instance of the College and that the benefit of such participation for that particular day was not given under clause 2 (9) (a). On the contrary, the Principal has sworn an affidavit that such benefit has been given. If there is any dispute between the parties then it is a disputed question of fact. It cannot be decided in the present case. The Principal is, however, free to hear any petitioner and give her the benefit of clause 2 (9) (a) also.

25. The action of the Principal in detaining certain petitioners on the ground of shortage of attendance is liable to be set aside in respect of two kinds of peti-

tioners. Firstly, those petitioners who sought such hearing but were denied the same on the ground that medical certificates had not been filed contemporaneously and who were not allowed to show cause why they should not be detained and the merits of those cases were not, therefore, considered would have to be given a hearing. Secondly, those petitioners who did not seek the opportunity to be heard before the Principal decided their cases under clause 2 (9) (c) would also be entitled to hearing if they have made definite averments in pleading that they have some cause to show why exemption should be granted to them under clause 2 (9) (c). There is a third category of petitioners who would not be entitled to any relief. They are those who did not seek the hearing before the order was passed by the Principal and who have not made any definite averment in the writ petitions that they have such cause to show as would be covered by clause 2 (9) (c) as to why they should not be detained. We shall now examine the cases of each of the petitioners to decide in which of the three categories they fall.

[Paras 26 to 58 which deal with the individual cases of the petitioners in all the writ petitions are not printed as not being material for the purposes of this report.—Ed.]

Orders accordingly.

AIR 1976 DELHI 43

S. RANGARAJAN, J.

Municipal Corporation of Delhi, Petitioner v. Madan Mohan Khanna and others, Respondents.

Civil Writ Petn. No. 158-D of 1966, D/- 31-7-1975.

(A) Civil P. C. (1908), O. 22, R. 11 — Delhi Municipal Corporation Act (1957), Ss. 122 and 169 — Order fixing ratable value of premises passed by Assessor and Collector — Joint appeal by two landlords representing all owners and by lessee — Death of both landlords — Legal representatives not substituted — Appeal does not abate as lessee has independent right of appeal and appeal by landlords was in representative capacity. C. W. No. 159-D of 1965, D/- 16-10-1973 (Delhi) and AIR 1975 SC 733 and AIR 1962 SC 89 and AIR 1970 SC 488 and AIR 1975 SC 371 and AIR 1915 PC 124, Rel. on.

(Paras 1, 4, 8, 9, 11, 12, 13)

(B) Civil P. C. (1908), S. 11 — Delhi Municipal Corporation Act (1957), S. 120 — Assessment of property tax — Ratable value of premises fixed for particular year — Decision does not operate as res judi-

IS/KS/D577/75/GNB

cata. AIR 1968 Mys 323, Held not good law in view of AIR 1962 SC 53.

An order fixing the ratable value namely the annual rental value of the leased premises for a particular year for the assessment of property tax does not operate as res judicata in subsequent assessment years. AIR 1962 SC 53 and AIR 1975 Delhi 236 (FB), Rel. on; AIR 1957 And Pra 1002, Dist.; AIR 1968 Mys 323 Held not good law in view of AIR 1962 SC 53. (Para 15)

Cases Referred: Chronological Paras

AIR 1975 SC 371 = (1975) 2 SCJ 164	12
AIR 1975 SC 733 = 1975 Pat LJR 84	10
AIR 1975 Delhi 236 = 1975 Ren CR 583 (FB)	16
ILR (1973) 1 Delhi 363 = 1973 Ren CR 93	3, 20
(1973) Civil Writ No. 159-D of 1965, D/- 16-10-1973 (Delhi)	8
AIR 1970 SC 488 = (1970) 2 SCR 726	13
(1970) Civil Revn. No. 370-D of 1965, D/- 27-8-1970 (Delhi)	8
(1968) Civil Appeal No. 1444 of 1966, D/- 24-2-1968 (SC)	13
AIR 1968 Mys 323 = (1967) 2 Mys LJ	85
AIR 1962 SC 53 = (1962) 2 SCR 644	15, 19
AIR 1962 SC 89 = (1962) 2 SCR 636	11
1960 AC 551 = (1960) 2 WLR 404	14
AIR 1957 Andh Pra 1002 = 1956 Andh WR 954	17
AIR 1947 Bom 108 = 48 Bcm LR 691	2
1925 AC 94 = 95 LJPC 33	15
AIR 1915 PC 124 = 42 Ind App 125	12

D. D. Chawla with C. L. Chaudhry, for Petitioner; Mahindar Narain, for Respondents.

ORDER:— The Municipal Corporation of Delhi, which has been recently superseded under Section 490 of the Delhi Municipal Corporation Act, 1957 filed this petition under Articles 226/227 of the Constitution of India as early as on 11-2-1966 for quashing the order passed by Shri Udham Singh, Additional District Judge on 15-9-1965 in the appeal which was preferred to him by (1) Madan Mohan Khanna (2) Seth Jagat Narain and (3) Shri C. V. Desai against the order of the Assessor and Collector fixing the annual rental value which is the rateable value of the premises in question at Rupees 2156.25 P. per month (Rs. 25,875 annually) for the year 1963-64, the same having been previously fixed at Rs. 41,305 per annum by Shri Pritam Singh on 4-5-1961 w. e. f. 1-4-1960 in an earlier appeal. Appellants Nos. 1 and 2 had described themselves as the Managing Landlords of the premises in question, known as Banarsi Krishna Theatre Buildings; appellant No. 3 was the managing partner of Moti Talkies, the lessee of the premises. When the appeal was pending appellants Nos. 1

and 2 died on 29-12-1963 and 12-2-1965, respectively. There were a number of other owners who were not eo nomine parties to the said appeal, which was filed in a representative character. This fact of the death of the two appellants was not brought to the notice of Shri Udham Singh when he decided the appeal; even this writ petition was filed against those two persons despite their having died earlier. An application (C. M. 372-J/69) was made by the present petitioner to implead, not the heirs of those two deceased persons, but two other owners, namely, Jai Shankar and Vijay Narain, obviously by way of substitution. This was allowed to be done by this court's order dated 25-3-1969.

2. It is also necessary to notice, at this stage, that after the annual rental value had been fixed by the Assessor and Collector, an appeal against which was dismissed by Shri Pritam Singh on 4-5-1961, the tax as fixed by him, was paid by the owners for the period 1960-61, 1961-62 and 1962-63. It is also necessary to notice that Shri Pritam Singh had fixed the annual rental value on the basis of 7½% gross receipt of the cinema following a decision of Kania, J. (as he then was) in *Globe Theatres Ltd. v. Chief Judge of Small Cause Court*, 48 Bom LR 691 = (AIR 1947 Bom 108). It may be noticed straightway that in that case the owner himself was running the cinema theatre. It would not, therefore, afford a true analogy to the present case where the premises had been leased out. It is needless in this case to go into the correctness of the Bombay view.

3. There was a notice issued by the Municipal Corporation for enhancing the annual rental value from the previous figure (Rs. 41,305) to a sum of Rs. 47,370 for the year 1963-64 on the ground that the gross receipts had gone up. Objections were, however, filed by the abovesaid two appellants, as representatives of the owners, but the assessment was made at the increased figure mentioned in the notice, namely, Rs. 47,370. Against this order, which was passed on 8-11-1963 by the Assessor and Collector, an appeal was preferred and it was reduced by Shri Udham Singh to a sum of Rs. 25,875 on the footing that what was relevant for this purpose was the rent for which the property has been leased, the amount of the lease being Rs. 1,875 p. m. The standard or fair rent had admittedly not been fixed by the Rent Controller for the premises. Shri Udham Singh found that there was nothing to show that the rent had been fixed at a low figure as a result of collusion in order to deprive the Corporation and the Government of the taxes due to them; this view of Shri Udham Singh happens to be in accord with the later decision of

a Full Bench of this Court in *Dewan Daulat Ram Kapur v. New Delhi Municipal Committee* (ILR (1973) 1 Delhi 363). S. N. Andley, C. J., speaking for the Full Bench, held that in the absence of anything to show that the rent was collusively fixed at a lower figure the annual rental value had to be fixed on the basis of the agreed rent between the parties; if the standard rent had been fixed by the Rent Controller it would be that rent.

4. Shri D. D. Chawla, learned counsel for the petitioner, has contended as follows:

(1) the appeal preferred against the order of the Assessor and Collector abated on the death of the two landlords who had preferred the appeal (along with the lessee) and that it was not legally competent for the lessee to have gone on with the appeal despite the death of the other two appellants;

(2) that Shri Pritam Singh had decided a question of principle; that the basis on which the annual rental value had to be fixed was a certain percentage of gross profits but not the rent realised from the property and that this decision, even if erroneous, operated as *res judicata*.

5. Among other contentions Shri M. N. Andley, learned counsel for the respondents, resisted this writ petition also on the ground that by virtue of the supersession of Delhi Municipal Corporation, the Corporation and its affairs vested in the Central Government and that the present writ petition could not be continued, as it has been laid after the said supersession.
Petitioner's first contention:

6. Before discussing the question whether the appeal which has been decided by Shri Udham Singh abated it is necessary to notice a few relevant provisions of the Delhi Municipal Corporation Act to which reference was made by both sides before me:

"120 (1) The property taxes shall be primarily leviable as follows:—

(a) if the land or building is let, upon the lessor;

(b) if the land or building is sub-let, upon the superior lessor;

(c) if the land or building is unlet, upon the person in whom the right to let the same vests;

Provided that the property taxes in respect of land or building, being property of the Union, possession of which has been delivered in pursuance of Section 20 of the Displaced Persons (Compensation and Rehabilitation) Act, 1954, shall be primarily leviable upon the transferee.

(2) If any land has been let for a term exceeding one year to a tenant and

such tenant has built upon the land, the property taxes assessed in respect of that land and the building erected thereon shall be primarily leviable upon the said tenant, whether the land and building are in the occupation of such tenant or a sub-tenant of such tenant.

Explanation:— The term 'tenant' includes any person deriving title to the land or the building erected upon such land from the tenant whether by operation of law or by transfer *inter vivos*.

(3) The liability of the several owners of any building which is, or purports to be, severally owned in parts or flats or rooms, for payment of property taxes or any instalment thereof payable during the period of such ownership shall be joint and several.

"122 (1) On the failure to recover any sum due on account of property taxes in respect of any land or building from the person primarily liable therefor under Section 120, the Commissioner shall recover from every occupier of such land or building by attachment, in accordance with Section 162 of the rent payable by such occupier, a portion of the total sum due which bears, as nearly as may be, the same proportion to that sum as the rent annually payable by such occupier bears to the total amount of rent annually payable in respect of the whole of the land or building.

(2) An occupier from whom any sum is recovered under sub-section (1) shall be entitled to be reimbursed by the person primarily liable for the payment, and may in addition to having recourse to other remedies that may be open to him, deduct the amount so recovered from the amount of any rent from time to time becoming due from him to such person".

"123. Property taxes due under this Act in respect of any land or building shall, subject to the prior payment of the land revenue, if any, due to the Government thereon, be a first charge—

(a) in the case of any land or building held immediately from the Government, upon the interest in such land or building of the person liable for such taxes and upon the goods and other movable properties, if any, found within or upon such land or building and belonging to such person; and

(b) in the case of any other land or building, upon such land or building and upon the goods and other movable properties, if any, found within or upon such land or building and belonging to the person liable for such taxes.

Explanation.— The term 'property taxes' in this section shall be deemed to include—

(i) charges payable under Sections 117 and 118, and

(ii) the costs on recovery of property taxes and the penalty, if any, payable as specified in the bye-laws."

"124. Save as otherwise provided in this Act, the Corporation shall cause an assessment list of all lands and buildings in Delhi to be prepared in such form and manner and containing such particulars with respect to each land and building as may be prescribed by bye-laws.

(2) When the assessment list has been prepared the Commissioner shall give public notice thereof and of the place where the list or a copy thereof may be inspected, and every person claiming to be the owner, lessee or occupier of any land or building included in the list and any authorised agent of such person, shall be at liberty to inspect the list and to take extracts therefrom free of charge.

(3) The Commissioner shall, at the same time, give public notice of a date, not less than one month thereafter, when he will proceed to consider the rateable values of lands and buildings, entered in the assessment list, and in all cases in which any land or building is for the first time assessed, or the rateable value of any land or building is increased, he shall also give written notice thereof to the owner or to any lessee or occupier of the land or building.

(4) Any objection to a rateable value or any other matter as entered in the assessment list shall be made in writing to the Commissioner before the date fixed in the notice and shall state in what respect the rateable value, or other matter is disputed, and all objections so made shall be recorded in a register to be kept for the purpose.

(5) The objections shall be inquired into and investigated, and the persons making them shall be allowed an opportunity of being heard either in person or by authorisation, by the Commissioner or by any officer of the Corporation authorised in this behalf by the Commissioner.

(6) When all objections have been disposed of, and the revision of the rateable value has been completed, the assessment list shall be authenticated by the signature of the Commissioner or, as the case may be, the officer authorised by him in this behalf, who shall certify that except in the cases, if any, in which amendments have been made as shown therein no valid objection has been made to the rateable values or any other matters entered in the said list.

(7) The assessment list so authenticated shall be deposited in the office of the Corporation and shall be open, free of charge during office hours to all owners, lessees and occupiers of lands and buildings comprised therein or the authorised agents of such persons, and a public

notice that it is so open shall forthwith be published."

"127. It shall be in the discretion of the Commissioner to prepare for the whole or any part of Delhi a new assessment list every year or to adopt the rateable values contained in the list for any year, with such alterations as may in particular cases be deemed necessary, as the rateable values for the year following, giving the same public notice as well as individual notices, to persons affected by such alterations, of the rateable values as if a new assessment list had been prepared."

7. Section 169 provides an appeal against the levy or assessment to any tax under the Act to the Court of the District Judge. Section 170 prescribes certain conditions concerning the right to appeal. Section 171 provides that the order of the court confirming, setting aside or modifying an order in respect of any rateable value or assessment or liability to assessment or taxation shall be final. It may also be noticed, along side, that according to Section 125

"subject to such alterations as may thereafter be made in the assessment list under Section 126 and to the result of any appeal made under the provisions of this Act, the entries in the assessment list authenticated and deposited as provided in Section 124 shall be accepted as conclusive evidence for the purpose of assessing any tax levied under this Act, of the rateable value of all lands and buildings to which such entries respectively relate."

8. On a reading of the abovesaid provisions it is apparent that the liability for the payment of tax due is "primarily" on the owners where the property has been let out. Nonetheless, the lessee also is a person interested in challenging the assessment because in the absence of any contract to the contrary between the landlord and the tenant the landlord could ask for being reimbursed in respect of the property tax paid by him in respect of the premises from the lessee. On this question my attention was drawn to a decision of B. C. Misra, J. in Municipal Corporation of Delhi v. S. Gurmukh Singh Chawla (Civil Writ No. 159-D of 1965 decided on 16-10-1973) (Delhi) where the learned Judge noticed the law as it has been settled by the above Full Bench of this Court (Dewan Daulat Ram Kapur) and also a decision of Prakash Narain, J. in M/s. Tyagi Anand & Co. Pvt. Ltd. v. Municipal Corporation of Delhi (Civil Revn. No. 370-D of 1965 decided on 27-8-1970) (Delhi) which differed from the above noticed view of the Bombay High Court, of course without having the advantage of having the relevant provisions of the law in Bombay. It seems to me that

the Bombay decision, even if correct, would be totally inapplicable to the present case for the reason, already indicated by me, that there was no question in that case of there being any lessee. B. C. Misra J. also discussed the relevant provisions pertaining to an appeal by a lessee against the order of the Assessor and Collector, and held such an appeal by the lessee to be competent. Despite his strenuous efforts Shri D. D. Chawla has really not been able to show how the appeal by the lessee was not competent.

9. It seems to me that the argument for the petitioner, that the appeal which was decided by Shri Udhram Singh had abated, proceeds on a misapprehension. The lessee's appeal, if it was competent (as I have held) could not abate, even though both the owners and the lessee were attacking the same assessment order; though a joint right it was not indivisible. It seems to me the lessee has an independent right to attack the assessment order which he could not lose even in the eventuality of owners not challenging the assessment and the assessment becoming final for this reason so far as the owners are concerned. It is in this view that I have mentioned, at the forefront, the aspects bearing upon the lessee's competence to file an appeal against the assessment; once this is established there could not be any further question arising by reason of the lessee also having joined the appeal which was preferred by the two representatives of the owners.

10. The converse position is that where persons who are jointly and severally interested in the rights put forward in the appeal file not one single appeal but independent appeals, the fact that one or some of those who file independent appeals died without their legal representatives being added within the time prescribed, would not affect the validity of the other appeals where the appellants are alive (vide *Hari Har Prasad Singh v. Balmiki Singh* (AIR 1975 SC 733)).

11. We may now revert to the situation when certain persons jointly file one appeal but the right is not indivisible. Reference to this aspect also was made by the Supreme Court in *State of Punjab v. Nathu Ram*, (1962) 2 SCR 636 = (AIR 1962 SC 89). Raghubar Dayal, J., who spoke for the Court, explained some of the difficulties which are likely to arise in a case where an appeal is jointly filed by some persons and referred to some of the tests adopted by the courts in this regard. The courts would not proceed with an appeal: (a) when the success of the appeal may lead to the court coming to a decision which would be in conflict with the decision between the appellant and the deceased respondent and, therefore, lead to

the court passing of a decree which will be contradictory to one which has become final regarding the same subject-matter between the same parties; (b) when the appellant could not have brought the action for the necessary relief against those respondents alone who are still before the court; (c) when the decree against the surviving respondents, if the appeal succeeds, be ineffective that is to say it could not be successfully executed. He then proceeded to explain that there was a consensus of opinion in the case of a decree which is joint and indivisible, the opinion being that the appeal against the other respondents also will not be proceeded with and will have to be dismissed as a result of the abatement of the appeal against the deceased respondent. It would follow from these observations that if the decree was divisible, though joint, then there could be no scope for application of the principle of abatement. Where despite the landlords not having preferred an appeal against the assessment the tenant on whom the burden of additional (impugned) assessment would lie would be entitled to prefer an appeal and in such a situation there will be no scope at all for the application of the principle of abatement.

12. It is also settled law that an appeal filed in a representative capacity will not abate merely on the death of one or more of the appellants (vide *Charan Singh v. Darshan Singh*, AIR 1975 SC 371). But it is contended by Shri D. D. Chawla that both those persons (Madar Mohan Khanna and Jagat Narain), who had filed the appeal on behalf of the entire body of owners, had both of them died. If the true principle is that a representative action cannot abate by the mere death of the representative(s) I am unable to see how the death of the sole or more than one representative (if that be the case) who brings the action or files the appeal could make any difference. It would obviously not be a case of adding the merely legal representatives of the one or those who died but substituting other owners, who were not co-nominee parties to the said appeal or action. In such a context describing it as the addition of legal representatives, would just not be appropriate. Similar observations had been made by the Judicial Committee of the Privy Council in *V. Venkatanarayana Pillai v. Subbaramal* (AIR 1915 PC 124). That was a case of a suit by a presumptive reversioner to challenge an adoption made by a widow. When the sole plaintiff died the next presumptive reversioner was held entitled to continue the suit. Speaking for the Judicial Committee of the Privy Council Mr. Ameer Ali pointed out that the expression 'legal representative', which had been introduced for the first time in sub-sec-

tion (11) of Section 2 of Act V with the object of putting in the statutory language the results of the decisions on the meaning of the words "legal representative" was itself not clearly worded and had been the subject of criticism by at least one of the High Courts in India. The statutory language was as follows:

"Legal representative means a person who in law represents the estate of a deceased person, and includes any person who intermeddles with the estate of the deceased and where a party sues or is sued in a representative character the person on whom the estate devolves on the death of the party so suing or sued." Mr. Ameer Ali pointed out that the right of the next presumptive reversioner to continue the action of the presumptive reversioner was one to be 'substituted' in place of the deceased appellants "on a broader ground" than adding of legal representatives. In this view there seems to be no scope for the contention that the appeal in this case had abated by reason of the death of the first two appellants.

13. The same result could be reached in this case even on the principle already referred to, namely, that the appeal by the lessee (third appellant) was competent and that he had an independent right of appeal, despite the first two appellants as the representatives of the owners and the third appellant, as a lessee of the premises, joining in challenging the order of assessment, passed by the Assessor and Collector. The Supreme Court had occasion to consider, in *Indian Oxygen Ltd. v. Sri Ram Abdar Singh* (Civil Appeal No. 1444 of 1966 decided on 24-2-1968) (SC) that a claim by each of the five workmen for quarter allowance, which had been agitated jointly, was not a joint claim in respect of a joint right. Shelat, J., speaking for the Supreme Court, pointed out that it was a claim for a separate allowance for each of them. This decision was followed in *Works Manager, Central Rly. Workshop v. Vishwanath* (AIR 1970 SC 488). In that case there was a joint petition under the Payment of Wages Act by the respondents before the Supreme Court and there had been an order in their favour by a single judgment. In appeal to the Supreme Court all the respondents were parties but one of them died during the pendency of the appeal and his legal representative was not brought on record. Dua, J., speaking for the Supreme Court, observed that when the question of abatement was raised it was not pressed by counsel when his attention was drawn to *Indian Oxygen Ltd.* It could not be contended, therefore, that the right of the owners and of the lessee to challenge the said assessment was an "indivisible right".

14. In no view of the matter, therefore, could it be contended that the

said appeal which was decided by Shri Udham Singh had abated. It is needless to be detained by the further argument of Shri Mahindar Narair Andley, which is attractive at first blush, that the difficulty of having two inconsistent decrees in operation at the same time can have no applicability to an assessment order by the rating authority, which is not a decree.

15. Petitioner's second contention: The contention that this petition is barred by the principle of res judicata from attacking the decision of Shri Pritam Singh, namely that the assessment had to be made on a percentage of the gross earnings of the Theatre, has even less force. The true principle in matters of taxation has been explained by B. P. Sinha, C. J. in *Instalment Supply (P.) Ltd. v. Union of India*, (1962) 2 SCR 644 = (AIR 1962 SC 53). The following observations were made at page 658:

"It is well settled that in matters of taxation there is no question of res judicata because each year's assessment is final only for that year and does not govern later years, because it determines only the tax for a particular period (see the decision in the House of Lords in *Society of Medical Officers v. Hope*, 1960 AC 551) approving and following the decision of the Privy Council in *Broken Hill Proprietary Co. Ltd. v. Municipal Council of Broken Hill*, 1925 AC 94).

In *Instalment Supply (P.) Ltd.*, the sales Tax Department had issued certain instructions in conformity with the earlier judgment of the Punjab High Court but the law was laid down more explicitly in a later decision of the Supreme Court. It was pointed out that the Department was bound to take note of what the Supreme Court had laid down and had not estopped itself from issuing those instructions based on the earlier Punjab High Court decision.

16. A similar question came up for consideration before a Full Bench of this Court in *M. N. Soi v. New Delhi Municipal Committee* (C. W. No. 374-D of 1966 decided on 30-5-1975 = (AIR 1975 Delhi 236) (FB)). My Lord the Chief Justice T. V. R. Tatachari, speaking for the Full Bench, pointed out that the omission on the part of an assessee to rely upon the order of the Rent Controller and take the benefit of it during some years does not and could not estop him from relying upon the same in the subsequent years.

17. Shri D. D. Chawla, however, contended that when an assessment is made any question of principle which was decided in the course of the assessment attracted finality and the finality of the said decision would be confined not merely to the period of assessment in question

but would extend to a later period. In support of this contention, which I may at once state I find difficult to accept even on principle (even apart from the above decision of the Supreme Court), he relied upon two decisions. The first was the decision of the Andhra Pradesh High Court (Chandra Reddy, J. as he then was) in *Appalacharyulu v. Rangacharyulu*, (AIR 1957 Andh Pra 1002). The relevant head-note therein reads as follows:

"In judging whether the decision in a previous litigation operates as *res judicata* or not in a later suit covering the subsequent years, the test is whether it decided a general principle that is applicable to the later years also or whether it was particular or special to that particular year: in other words, whether the considerations vary from year to year or are such as would govern the subsequent years also. In the decision of that question, it is also irrelevant whether the previous judgment was erroneous either in law or on fact."

The principle decided therein has no application to a tax case. That was a totally different case where rights of certain hereditary archakas of a temple were asserted, involving a prior decision pertaining to a claim for *samprokshana* expenses by one archaka against another. There had been a previous litigation in connection with such expenses incurred during a previous period and that decision was held to have finality. I am afraid the said decision has no application at all to a case like the present.

18. The second decision which was relied upon was of the Mysore High Court (Somnath Iyer, J. as he then was) in *Kantilal Manilal & Co. v. Belgaum Municipal Borough* (AIR 1968 Mys 323). That was a claim concerning octroi duty collected of course during a certain period. In that connection it was observed that if the earlier litigation, concerning it, was based upon a principle which had application not only to the period to which the earlier suit related but also in respect of future liability the assessee cannot, in respect of the period subsequent to which the demand relates, raise the same allegations which had failed in an earlier litigation. It was also observed, by Somnath Iyer, J. that if the facts and circumstances were peculiar to the period to which the litigation related and did not involve the determination of the principle guiding the quantification of the octroi payable in respect of the future period there would be no bar of the *res judicata*.

19. Without even being detained further by the above two decisions it may be noticed that the decision of the Andhra Pradesh High Court, even if it should

bear on the present question, was prior to the decision of the Supreme Court in *Instalment Supply (P.) Ltd.* (AIR 1962 SC 53) and the decision of Somnath Iyer, J. though later, does not refer to the decision of the Supreme Court or even advert to the principle laid down in the aforesaid decision of the Supreme Court. On the question of the applicability of the doctrine of *res judicata* in matters of taxation, generally speaking, the Mysore decision is clearly contrary to that of the Supreme Court.

20. It is worth recalling that the assessment period with which Shri Udham Singh concerned himself was for the assessment year 1963-64 whereas Shri Pritam Singh had concerned himself with the period up to 1960 and the tax had been paid at a rate fixed by him for the later years. It may also be recalled that the matter was taken before Shri Udham Singh again on account of the notice which was given for enhancement (from the figure fixed by Shri Pritam Singh) resulting in Shri Udham Singh fixing the rental value at a figure even lower than what had been fixed by Shri Pritam Singh. The petitioner cannot complain that Shri Udham Singh had only to concern himself with the question of enhancement when the entire issue of the validity and correctness of assessment, as made by the Assessor and Collector, was open before him; in a sense he had to say what the correct rateable value was according to law. He was then concerned to point out what was the correct basis on which the annual rental value had to be fixed. Shri Udham Singh's decision happens to be in accordance with what was laid down by a Full Bench of this court in *Dewan Daulat Ram Kapur* (ILR (1973) 1 Delhi 363) which again was referred to and explained by the still later Full Bench in *Soi*. Shri D. D. Chawla does not dispute the fact that if there was no *res judicata* arising in the case the decision of Shri Udham Singh could not be assailed, subject, however, to the further question of abatement raised by him. He only contends, on this aspect, that by reason of finality attaching to earlier decision of Shri Pritam Singh and the principle of *res judicata* operating Shri Udham Singh could not have decided in the manner he did. This contention also seems to be without any force whatever.

Respondent's contention:

21. In the above view of the merits of this petition it is needless to go into this aspect.

22. In the result this writ petition fails and is dismissed with costs. Counsel fee Rs. 250.

Petition dismissed.

AIR 1976 DELHI 50

RANGARAJAN, J.

Walaiti Ram Seth, Petitioner v. Siri Krishan Kapoor and others, Respondents.

C. R. No. 510 of 1974, D/- 23-7-1975.*

(A) Civil P. C. (1908), O. 7, R. 1 (i) — Suit for accounts — Valuation — Plaintiff not giving valuation for jurisdiction — Court cannot direct valuation at a specified amount and reject plaint on default — Remedy under writ will be available — (Constitution of India, Art. 227).

Where the plaint in a suit for accounts fails to give the valuation for purposes of jurisdiction all that the Court can do is to direct the plaintiff to give the valuation. It cannot direct the plaintiff to value it at a specified amount. It is for the plaintiff to state his own valuation in the suit for accounts. (Para 3)

The proper order to pass, when the Court has no pecuniary jurisdiction, is not to 'reject' the plaint; the Court has only to 'return' the plaint for presentation to the proper Court. (Para 4)

Even if the plaintiff omitted to file a revision or review against the order, the High Court can interfere under Art. 227 of the Constitution. It is a settled law that the ambit of the power under Article 227 is so wide as to permit interference in cases where the ends of justice so require such a course, even in cases where an appeal lay but was not filed, or an appeal had become barred by time. Even if a revision petition is not filed in time, the same result must follow. (Paras 5 and 6)

Cases Referred: Chronological Paras
ILR (1974) 2 Delhi 491 (FB) 1
(1973) C. M. (M) No. 161 of 1972, D/- 31-10-1973 (Delhi) 6

G. S. Vohra, for Petitioner; Y. K. Sabharwal (for No. 2), for Respondents.

ORDER:— The petitioner is the plaintiff in a suit which he filed for accounts against the defendant. He has stated in the plaint that on taking of accounts nearly Rs. 2 lacs might be due to him. The suit was valued for the purpose of court-fee at Rs. 200. According to Order 7, Rule 1 (i), C.P.C. the plaintiff had to make a statement of the value of the subject-matter of the suit for the purpose of jurisdiction and of court-fee, so far as the case admits. The plaint, as it was originally filed, was silent on the question of valuation for the purposes of jurisdiction. By order dated 19-1-1974 the learned Subordinate Judge Shri Ravi Kumar referred to the judgment of Prithvi Raj, J. in *Daljit Singh v. Bishambar Dayal* where the

*(Against order of Ravi Kumar, Sub-Judge, 1st Class, Delhi, D/- 30-9-1974.)

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learned Judge had held that in a suit for dissolution of partnership and accounts, the plaintiff has to value his suit approximately at the sum, for which he seeks the relief and that he could not fix a fanciful and whimsical valuation for purposes of court-fee and jurisdiction. After indicating the legal position, according to the above decision, the learned trial Judge ordered the plaintiff to value the suit for the purposes of court-fee and jurisdiction approximately at the sum for which he seeks relief and for that purpose to file an amended plaint. It may be noticed that whatever the views expressed by the learned Judge at that time were, based on the judgment of Prithvi Raj, J., all that he could have directed the plaintiff was to state the value for the purpose of jurisdiction; this was a value which had to be given by the plaintiff and no specified value could be directed by the Court. The further question would then arise, as it did arise before the Full Bench of this Court in *Smt. Sheila Devi v. Kishan Lal* (Suits Nos. 35/71, 105/70 and 429/1971 decided on 26-7-1974 (Delhi) (FB)* whether such valuation given by the plaintiff could be interfered with by the Court in such a suit. My Lord the Chief Justice T. V. R. Tatachari, who spoke for the Full Bench, observed that the Court had no power to interfere with such valuation for it was for the plaintiff to make such valuation in such a suit. Even the plaintiff seems to have been under the impression that against the order dated 19-1-1974 he had to file a revision to the High Court as one could see from the plaintiff's representation subsequently made to the Court. Thereupon he seems to have filed an application for review under Order 47, Rule 1, C.P.C. which was dismissed on the ground, properly, that the fact that the law was subsequently decided in a different manner (than what obtained at the time of the original decision) could not be a ground for review.

2. Despite these happenings what seems to be more important for the present purpose is the later order which was passed by the same learned trial Judge on 30-9-1974, which reads as follows:

"The plaintiff was ordered to file the amended plaint valuing the suit for purposes of court-fee and jurisdiction approximately with the sum for which he seeks relief but the plaintiff has not valued the suit as ordered. Only amended plaint has been filed by him. The plaintiff is, therefore, ordered to show cause, if any, why the plaint be not rejected under Order 7, C.P.C. by 15-10-1974."

This revision petition has been filed on 14-10-1974.

*Reported in ILR (1974) 2 Delhi 491 (FB).

3. The facts narrated so far would go to show that despite the impression of the plaintiff that he had to get the earlier order of 19-1-1974 set aside by filing a revision (or even by filing a review application) he is seen to be really aggrieved by the order which was passed on 30-9-1974 wherein the learned trial Judge held that the amended plaint was not in accordance with the earlier order dated 19-1-1974. Even this order was passed on 30-9-1974 itself. The proper order to pass, when the court has no pecuniary jurisdiction, is not to "reject" the plaint; the court has only to "return" the plaint for presentation to the proper court. No such order had been passed. In a sense, therefore, the plaintiff could even wait until such further order is passed (either of "rejection" wrongly or of "returning" the plaint, which is the kind of the order that has to be passed) for the purpose of filing a revision. In this view of the matter it would not be proper to hold that there was any finding attaching to the order dated 19-1-1974 by reason of no revision having been filed as against it.

4. This leaves me completely free to pass the appropriate order, which alone has to be passed, in this revision according to the decision of the Full Bench, namely, that it will be for the plaintiff to state his own valuation in such a suit for the purposes of jurisdiction, with which the Court cannot interfere.

5. Even apart from these considerations I would be inclined to take the view, even if it did arise, that public policy and the interest of the administration of justice clearly require that every suit be tried by the lowest court of competent jurisdiction. This is on the principle that more costly judicial labour than need be should not be expended on such matters. Even if, in any view of the matter, there was an omission to file a revision as against the order dated 19-1-1974 and any application to revise any such order became barred by time when the present revision was filed, even then I would have been inclined to excuse the delay in filing it, or even to hold that I could interfere under Article 227 of the Constitution (which has also been invoked in this case). It is a settled law that the ambit of the power under Article 227 is so wide as to permit interference in cases where the ends of justice do require such a course, even in cases where an appeal lay but was not filed, or an appeal had become barred by time.

6. Even a revision petition is not filed in time, the same result must follow. I have discussed this aspect at some length in *Desh Bandhu Gupta & Co. v. Judge Small Cause Courts* (C. M. (M) No. 161 of 1972 decided on 31-10-1973 (Delhi))

and I need not repeat here what I have already stated therein.

7. I may go even further: supposing a revision had not been filed and the present suit has been returned to the High Court and I was trying that suit sitting on the original side of the High Court I think I would still direct that the suit be sent back for being tried by the lowest Court of the competent jurisdiction. In adopting such course I would be acting in the interest of judicial administration, namely, of not spending the time of a superior court on a cause which can be well dealt with by a court of lesser competence. In this view any course taken or not taken by a party would have not much relevancy.

8. Even though a further order of "rejection" (or return of the plaint has not yet been passed) I am inclined to interfere at this stage in revision because such order is bound to be passed in view of what is the expression of opinion by the lower court. To merely dismiss this petition as premature would cause more trouble to the parties. In order to save the parties from this situation and also any embarrassment to the lower Court I am inclined to set aside the impugned order and indicate what should be the true and proper approach to a case of this description. The impugned orders are set aside. The lower Court will proceed further with the suit from the stage where it is according to law. There will be no order as to costs in this revision petition. The parties will appear before the lower Court on 11th August, 1975.

Order set aside.

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S. N. SHANKAR AND F. S. GILL, JJ.

Kangra Valley Slate Company Ltd.,
Petitioner v. The Union of India and
others, Respondents.

Civil Writ No. 350 of 1975, D/- 30-5-1975.

(A) Mines and Minerals (Regulation and Development) Act (1957), S. 30 read with R. 55 — Order of Central Government holding that after issuing notification making area available for regrant State Government cannot refuse application for grant on ground that it wants to work the area itself — Neither State Government can take the same plea again nor can the Central Government reverse its stand — (Civil P. C. (1908), S. 11 — Constructive res judicata).

The doctrine of res judicata is not a technical doctrine applicable only to records. It is a fundamental doctrine of all

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courts that there must be an end to litigation. This doctrine is not confined to suits alone. (Para 7)

The Central Government cannot review its order passed under S. 30 of the Act in absence of any material on the record making out a case for review of its previous order. (Para 6)

According to the Scheme of Mines and Minerals (Regulation and Development) Act, 1957 and the Rules framed thereunder, the State Government is a statutory authority. It has the power to refuse an application for grant or renewal of mining lease but the Central Government is vested with the revisional powers under S. 30 of the Act and Rule 55. The State Government being a subordinate authority is bound by the order of the Central Government and the Central Government after having once negatived the right of the State Government to reserve the area in question for its own exploitation it was not competent for the State Government to raise the same plea again and to claim the same right. (Para 12)

Cases Referred: Chronological Paras
AIR 1972 Orissa 68 = ILR (1971) Cut 732

(1963) 47 ITR 906 (All.)	12
AIR 1959 Andh Pra 485	11
AIR 1957 SC 38 = 1956 SCR 781	4
AIR 1951 Trav-Co 26	7
AIR 1938 All 388 = 1938 All LJ 511	9
AIR 1916 PC 78 = ILR 43 Cal 694	10
	7

M. C. Bhandare with Miss Uma Mehta and Raj Kumar, for Petitioner; Harish Chandar (for Nos. 1, 2 and 5), N. N. Goswami (for No. 4) and Hardev Singh (for No. 3), for Respondents.

S. N. SHANKAR, J.:— The petitioner-Company by this writ petition under Articles 226 and 227 of the Constitution has prayed that the order dated October 1, 1974 passed by the Central Government in revision under Rule 54 of the Mineral Concession Rules, 1960 be quashed and directions be issued to the State Government to desist from carrying into effect, itself or through any of its agencies, any scheme or operation in the mining area referred to in the petition and to grant the mining lease in respect of this area to the petitioner.

2. The petitioner-Company is incorporated under the Companies Act as a public Limited Company with its registered office at New Delhi. It is engaged in the business of quarrying slates and shale (major minerals) and marketing the same. The dispute relates to the right to obtain lease of land situated in villages Majra and Manethi, Tehsil Rewari, District Gurgaon. On February 9, 1962, the then State of Punjab invited applications for grant of mining lease with respect to an area of 671 bighas of land in the afore-

said villages. Respondent No. 3 Diwan Singh Sethi filed his application for the grant of a part of this area on March 12, 1962 while the petitioner-Company filed its application for a similar grant on March 20, 1962. The State Government did not dispose of these applications within the stipulated period of nine months as required by Rule 24 of the Mineral Concession Rules, 1960 which had the effect of a deemed refusal of these applications vide Rule 24 (3) of the said Rules. Both the petitioner and respondent No. 3 consequently filed revisions before the Central Government under Section 30 of the Mines and Minerals (Regulation and Development) Act, 1957 (hereafter called "the Act") read with Rule 54 of the aforesaid Rules. By its order dated June 25, 1965 the Central Government directed the State Government to consider the applications filed by the petitioner-Company and respondent No. 3 by August 31, 1965. The State of Punjab did not carry out these directions. This led the petitioner-Company to file a writ petition in the High Court of Punjab and Haryana at Chandigarh for orders to the State Government to carry out the directions of the Central Government. In the meantime, at the instance of the State of Haryana which had since come into existence and within whose jurisdiction the lands fell, the Central Government extended the time for consideration of the applications to July 31, 1969. On a statement that the applications will be considered by July 31, 1969, the writ petition was dismissed as infructuous. By order dated July 19, 1969 the State of Haryana informed the petitioner-Company and respondent No. 3 that their applications for grant of mining lease had been rejected because the area in question was being re-notified for the grant of mining lease. This led to a second set of revisions by the petitioner-Company and respondent No. 3 before the Central Government against this decision of the State of Haryana. The Central Government, by order dated February 24, 1970, set aside this decision and directed the State Government to re-consider the applications of the petitioner-Company and respondent No. 3 and decide them on their merits. The State Govt. still did not consider the applications and by letter dated November 4, 1971 the State of Haryana informed the petitioner and respondent No. 3 that in exercise of its executive powers under Article 298 of the Constitution, it had decided to exploit the area itself and on this ground rejected the applications. The petitioner-Company and respondent No. 3 for the third time went in revisions to the Central Government against this order. The Central Government decided these revisions by order dated April 19, 1972 and set aside the order of the State

of Haryana. It held that the State did not have the power to make a declaration under Article 298 of the Constitution after a notification had been issued throwing open the area for grant or re-grant.

3. A plea was advanced on behalf of the State of Haryana before the Central Government that the former was not bound by the acts or decisions of the Government of erstwhile State of Punjab but it was rejected. The Central Government observed that "there is no doubt that the State Government of Haryana duly constituted by the Parliament of India after following the appropriate provision of the Constitution inherits from the erstwhile Government of Punjab such rights and liabilities as were apportioned to it under the Reorganisation order".

The order further said:

"However, this plea made one thing clear viz. the legal implications of Punjab Government's notification dated 30-1-62 making the area available for regrant once such a notification is issued, any subsequent action by the State Government turning down an application for M. L. (mining lease) which is otherwise a valid application, on the ground that the State Government has since changed its mind and decided that the area is not available for regrant, is bound to be interpreted as mala fide. In fact, the State Government has no power to make such a declaration once it had issued a notification throwing open an area for grant or regrant of mining lease. Therefore, one ground given by the State Government in its letter dated 4-11-71 refusing your application cannot be accepted. That impugned order is accordingly set aside as invalid."

The claims of the petitioner-Company and respondent No. 3 were then considered and the Central Government held that because the application of respondent No. 3 was earlier in time he was entitled to the grant of the lease in preference to the petitioner-Company and the State Government was directed to grant mining lease to respondent No. 3 in respect of an area of 129.88 acres of land in the aforesaid villages. This led the petitioner-Company to file a Civil Writ in the High Court of Delhi (C. W. 434/72) which was accepted by this Court on March 8, 1973. Copy of this order is Annexure 'A' filed with the petition. This Court held that while considering the rival claims of the petitioner-Company and respondent No. 3, the Central Government failed to take into account all the facts relevant for this purpose as per sub-sections (1) and (4) of Section 11 of the Act and its decision, therefore, could not be sustained. The order of the Central Government was quashed and the matter was remanded to

the Central Government in the following terms:

"The Central Government had, therefore, a duty to determine the rights of the petitioner-Company claimed under sub-sections (1) and (4) of Section 11 of the said Act. It failed to do so. The impugned order, therefore, has to be set aside and the rights of the petitioner-Company under sub-sections (1) and (4) of Sec. 11 of the said Act have to be determined by the Central Government.

We, therefore, order the issue of a writ of certiorari to quash the impugned order dated April 19, 1972 of the Central Government and further order the issue of a mandamus to the Central Government to hear the matter again and determine whether the petitioner-Company is justified in claiming rights under sub-sections (1) and (4) of Section 11 of the said Act....."

4. The Central Government reconsidered the matter and communicated its decision to the petitioner-Company by letter dated October 1, 1974 Annexure 'N' to the petition. After setting out the previous history of the case and noticing the remand made by this Court in paragraph 11, the letter said:

"The question of determination of inter se claims of the two petitioners can only arise if the area in respect of which the applications have been made is available for grant. Now the State Government had made it clear that they are interested in exploiting the area themselves either directly or on agency basis through the Haryana State Industrial Development Corporation. We are not concerned at this stage as to whether the modalities of the proposed exploitation in the public sector are complete but as laid down in *A. Kotaiah Naidu v. State of Andhra Pradesh* (AIR 1959 Andh Pra 485) the State Government has power to carry on trade or business as prescribed by Article 298 of the Constitution as amended in its parent form by the Seventh Amendment Act, 1956 and a private individual cannot question the right of Government to deal with mineral resources in the State in the manner they deem fit in the public interest."

5. In this view, the Central Government dismissed the revisions of both the petitioners but in para. 12 added:

"..... However, should there be a change in the policy of the State Government and they abandon their plan of exploitation of the minerals in public sector or by themselves and decide to invite applications for mining lease, it would be deemed that both these petitions are resuscitated and their claims will have to be considered on merits. This safeguard is being put only to make sure that the

petitioners do not lose on any make-believe pleas of a policy of State exploitation of mineral resources which can immediately be changed in the near future to their detriment."

6. Shri M. C. Bhandare, appearing for the petitioner, vehemently argued that the Central Government had no jurisdiction to review its own previous decision in the order dated April 19, 1972 where it held that once a notification making the area available for regrant was issued by the Punjab Government the State Government could not turn down the application on the ground that it had changed its mind and had decided to work the area itself. The learned counsel said that the Central Government in that order had explicitly held that the State Government had no powers to take such a decision. This decision of the Central Government, he maintained, was not an administrative decision but a quasi-judicial, if not wholly judicial decision given by the Tribunal in exercise of statutory powers and operated to set at rest the question decided. We find substance in the argument of the learned counsel. No rule of law or authority has been cited before us to justify the somersault taken by the Central Government in the instant case. No material has been placed on record to show that any case for review of the previous decision had been made out or any fresh material whatsoever was placed before the Central Government.

7. The doctrine of *res judicata* is not a technical doctrine applicable only to records. It is a fundamental doctrine of all courts that there must be an end to litigation (see para 357 of Halsbury's Laws of England, Third Edition, Volume 15, page 185). This doctrine is not confined to suits alone. In *Burn & Co., Calcutta v. Their Employees*, 1956 SCR 781 = (AIR 1957-SC 38), this doctrine was applied in the case of an award by the Industrial Tribunal. In this case a previous award was ignored. The Labour Appellate Tribunal subscribed to the view that it was a rule of prudence and not of law. It was further observed that the relevant statute prescribed no limitation as to when and under what circumstances an award could be re-opened. On page 789 (of SCR) = (at p. 43 of AIR) of the report, Venkatarama Ayyar, J., speaking for the Court said:

"But we propose to consider the question on the footing that there is nothing in the statute to indicate the grounds on which an award could be re-opened. What then is the position? Are we to hold that an award given on a matter in controversy, between the parties after full hearing ceases to have any force if either of them repudiates it under Sec-

tion 19 (6), and that the Tribunal has no option, when the matter is again referred to it for adjudication, but to proceed to try it *de novo*, traverse the entire ground once again, and come to a fresh decision. That would be contrary to the well recognised principle that a decision once rendered by a competent authority on a matter in issue between the parties after a full enquiry should not be permitted to be re-agitated. It is on this principle that the rule of *res judicata* enacted in Section 11 of the Civil Procedure Code is based. That Section is, no doubt, in terms inapplicable to the present matter, but the principle underlying it, expressed in the maxim "*interest rei publicae ut sit finis litium*," is founded on sound public policy and is of universal application."

The Court approved the observations of Sir Lawrence Jenkins, Chief Justice in *Sheoparsan Singh v. Ramnandan Prasad Singh*, (1916) ILR 43 Cal 694 = (AIR 1916 PC 78) where though the question arose in relation to a suit, it was observed that the rule of *res judicata* was founded on ancient precedent and was dictated by a wisdom which is for all time.

8. It would also be seen that in the previous Writ Petition No. 434 of 1972 as we have already said the order of the Central Government in which it was held by the Central Govt. that the State Government had no right to reject the applications for mining lease, after making the area available for grant and directing that lease be granted to respondent No. 3, was challenged by the present petitioner. With the leave of the Court, copy of that writ petition along with the counter-affidavit filed by the Central Government in answer thereto was placed on record. The Central Government in that petition defended its order and nowhere took the plea that as the State Government had reserved the area to itself for exploitation, the writ petition could not succeed. That litigation, having been fought on this basis, to our mind, also operates as an estoppel to preclude the Central Government after the matter was remanded to it to take up the plea which it had already rejected and which was never advanced by it in those proceedings to defeat the petitioner's claim. In our view, it was not open to the Central Government to adopt the stand taken in the impugned order after the matter was remanded to it in terms of the mandamus to "determine whether the petitioner-Company is justified in claiming rights under sub-sections (1) and (4) of Section 11 of the said Act". The impugned order of the Central Government, therefore, is manifestly erroneous and cannot be sustained.

9. Shri Harish Chander, learned counsel for the Central Government, and

Shri N. N. Goswami appearing for the State of Haryana, argued that the order of the Central Government having been quashed by the Court in Civil Writ 4-4 of 1972, it was non-existent and there was no bar to the Central Government acceding to the plea of the State Government that it would itself work the area. Reliance in support of this submission was placed on *Perumal Pillai v. Pandaram*, AIR 1951 Trav-Co 26. This case was a case of remand by the court under the provisions of Order 41, Rule 23 which envisages "remand" where the court from whose decree an appeal is preferred has disposed of the suit upon a preliminary point and the decree is reversed in appeal. It was in this context that it was held that where a decree was set aside and the case was remanded to the lower court, all the contentions between the parties were before the court, and it was open for the court to go into all the issues arising out of such contentions. In the present case, there was no such remand. The mandamus issued was in specific terms and entitled the Central Government to determine the rights of the petitioner-Company vis-a-vis the respondent in terms of the mandamus.

10. The learned counsel next referred to *Bachcha Lal v. Lachman*, AIR 1938 All 388. This was also a case of remand under Order 41, Rule 23, C.P.C. and the court held that the case having been decided on a preliminary point and in view of the court's order under Order 41, Rule 23 which re-opened the case, it was open to the defendant to re-agitate the same question in the light of the fresh evidence produced by him. This authority thus is also of no assistance to the learned counsel.

11. Reference was next made to *J. K. Cotton Spinning & Weaving Mills Co. Ltd. v. Commissioner of Income-tax, U. P.*, (1963) 47 ITR 906 (All.). This was a case where on appeal from assessment the Appellate Assistant Commissioner set aside the assessment and directed the Income-tax Officer to make a fresh assessment. It was held that the Income-tax Officer was bound by the directions of the Appellate Assistant Commissioner in making fresh assessment but "subject to those directions" he had the same powers in a fresh assessment as he had originally when making an assessment under Section 23 of the Indian Income-tax Act, 1922. What had happened in this case was that the Income-tax Officer assessed the assessee in the original assessments on the basis of dividends declared by the Company in which it held shares. The Appellate Assistant Commissioner set aside the assessments but pending the appeals an order was passed under Section 23-A of the Indian Income-tax Act, 1922 in regard

to that Company and dividends were allowed to be distributed out of its undistributed profits, the Income-tax Officer in the fresh assessment in this situation included the dividends which the assessee was deemed to have received under Section 23-A. This authority nowhere says that the fresh assessment could be in derogation or in disregard of the directions of the Appellate Assistant Commissioner.

12. According to the Scheme of Mines and Minerals (Regulation and Development) Act, 1957 and the Rules framed thereunder, the State Government is a statutory authority. It has the power to refuse an application for grant or renewal of mining lease but the Central Government is vested with the revisional powers under Section 30 of the Act and Rule 55. The State Government being a subordinate authority is bound by the order of the Central Government—(see *State of Orissa v. Union of India*, AIR 1972 Orissa 68) and the Central Government after having once negated the right of the State Government to reserve the area in question for its own exploitation it was not competent for the State Government to raise the same plea again and to claim the same right.

13. During the pendency of this petition on May 12, 1975 M/s. Haryana Minerals Limited, Chandigarh filed an application under Order 1, Rule 10 praying that as this Company was actually working the area in pursuance of the decision of the State Government to exploit it and the Company was an independent person and had signed an agreement with a foreign Company for the sale of slates of the mines in foreign market was interested in the decision of this petition and may be directed to be impleaded as a respondent in this case. The application was opposed. The learned counsel for the applicant, however, later stated that the Company does not insist to be impleaded as a party provided it is allowed to file a short affidavit and is given a hearing before the decision of the main petition. To this the petitioner agreed. The Company was accordingly heard and its affidavit dated May 9, 1975 was also taken on record. Along with the affidavit, this Company (M/s. Haryana Minerals Ltd.) filed a copy of an agreement dated November 1, 1974 between the Company and M/s. Toko Granit of West Germany. Shri N. N. Goswami argued on behalf of the Company also and urged that according to the agreement the German Company had agreed to buy minimum one thousand sq. metres of multi-coloured slates during the period of the agreement which was for a duration of three years from the date of signing it and that in pursuance of this agreement this Company had already ex-

ported material worth about 2 lakhs. The learned counsel contended that in these circumstances this Court should not exercise its discretion under Article 226 of the Constitution to quash the order of the Central Government. We do not think that in the facts of the case, a case for non-exercise of court's discretion under Article 226 is made out. The remand to the Central Government by order of this Court dated 8th March, 1973 was specifically to determine the rights of the petitioner with reference to his contentions under sub-sections (1) and (4) of Sec. 11 of the Act as against respondent No. 3. This having not been done the State Government had no right to deal with the land through the Company and the agreement entered into by it did not improve its position to confer any better rights on the Company. It is clear from the application itself that the applicant Company is not a separate and distinct entity in that sense. In para 3 of the application (C. M. 901 of 1975) it is stated that the applicant Company is entirely owned by the State Government. If the order of the Central Government in favour of the State Government is not sustainable for reasons we have already stated, it will be putting a premium on the highhandedness of the State Government to permit it to circumvent the law by adopting a device like the present one.

14. Before parting with the case, we may also record that Shri Hardev Singh appeared for respondent No. 3 after arguments had been partly heard. Respondent No. 3 had not filed any counter-affidavit. On May 22, 1975 he filed an application for permission to grant time to respondent No. 3 to file counter-affidavit and prayed for adjournment. We refused any adjournment but allowed him to file counter-affidavit. Counter-affidavit of respondent No. 3 was then filed and taken on record. Shri Hardev Singh, in his arguments, supported the petitioner's contention that the impugned order was vitiated but raised a new ground to attack the order. He contended that under Article 298 of the Constitution the State Government had no power to exploit the land through the agency of a limited company as was sought to be done in this case. He maintained that the Limited Company was never an applicant and no lease to exploit the land had ever been granted to it. As this point was not raised in the main petition, we did not permit the learned counsel to develop this argument.

15. For reasons aforesaid, we quash the order of the Central Government dated October 1, 1974 Annexure 'N' to the petition and further order the issue of mandamus to the Central Government to hear the matter again and determine the rights inter se between the petitioner

and respondent No. 3 with reference to the claim of the petitioner based on sub-sections (1) and (4) of Section 11 of the Act.

16. Having regard to all the circumstances of the case, we leave the parties to bear their own costs.

Order accordingly.

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AVADH BEHARI ROHATGI, J.

M/s. Ex-Servicemen Enterprises (P.) Limited, Plaintiff v. Sumey Singh, Defendant.

Suit No. 37 of 1971, D/- 23-5-1975.

(A) Specific Relief Act (1963), S. 22 (2), Proviso — Application for amendment of plaint — Amendment sought for relief of possession after passing of decree — Maintainability.

In the instant case, a decree for specific performance was passed in terms of the prayer in the plaint. There was no decree for possession. The plaintiff sought possession of the land agreed to be purchased. As he could not have it, the amendment of the plaint was sought.

Held, if the plaint was to be amended so as to include relief of possession, the court was not powerless to allow the amendment. (Paras 25, 26)

The legislature has given to the court wide freedom by using the words "at any stage of the proceedings" in proviso to S. 22 (2). The term "proceeding" is a very comprehensive term and means a prescribed course of action for enforcing a legal right. The term includes execution proceedings also. AIR 1956 All 586, Relied on. (Paras 21, 22)

The expression "at any stage" in its literal and actual meaning means without limitation either in frequency or duration or length of time. The expression gives the widest freedom to a court of law so that it may do justice to the parties in the case. The expression includes execution. Execution is a stage in the legal proceedings. (Paras 22, 23)

Amendment for including the relief of possession can be allowed "on such terms as may be just". These words also point in the same direction. Justice was the dominant idea in the mind of the legislature at the time it was enacting the proviso. It knew, one would presume, of the difficulties which a litigant might face by omitting a relief to which he may be entitled and which the section says he must ask for. The proviso says the court "shall" allow the amendment. The words are emphatic and imperative. AIR 1950

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All 415 and AIR 1952 Cal 362 and AIR 1954 All 643, Relied on. (Para 24)

Cases Referred: Chronological Paras
(1975) 1 All ER 16 29

AIR 1956 All 586 = 1956 All LJ 470 22

AIR 1954 All 643 = 1954 All LJ 255 14

AIR 1952 Cal 362 = ILR (1950) 1 Cal 350 13

AIR 1950 All 415 = 1950 All LJ 296 13

(1898) 1 QB 131 = 67 LJQB 1 28

1892 AC 298 = 62 LJQB 50 28

1892 P 201 = 61 LJP 57 25

V. S. Sawhney, for Plaintiff; R. M. Lal and L. C. Chechi, for Defendant.

ORDER:— The facts of this case need not be recounted in detail. They are fully set out in my order dated September 30, 1974, made on I. A. 1706 of 1974. They are also set out in the order of the appellate Bench dated October 17, 1974, which heard the appeal against my order.

2. On January 18, 1971, the plaintiff brought a suit for specific performance against the defendant. Specific performance was sought in respect of agricultural land measuring 48 bighas and 10 biswas owned by the defendant in village Khampur Sub-Tehsil Mehrauli. The defendant had agreed to sell the land to the plaintiff. As he did not convey the property the plaintiff brought the suit.

3. On November 1, 1973, before I. P. S. Chowla, J. the parties reached a compromise. The terms were reduced to writing. The suit was decreed in terms of the compromise.

4. The term of the compromise was that the plaintiff will pay Rupees 50,000 over the original agreed price of Rs. 66,100 which he had already paid to the defendant. The total consideration for the property was, therefore, now agreed at Rs. 1,16,100.

5. In terms of the compromise the plaintiff has deposited Rs. 50,000 in the Reserve Bank of India. But the defendant does not deliver possession of the land agreed to be sold. His principal objection is that there was no claim for possession in the plaint and there is no decree for possession against him. He cannot be asked to deliver possession, it is said.

6. In the original plaint the plaintiff claimed that

"a decree directing the sale of the land in his favour be passed against the defendant....."

Chawla, J. recorded the statements of the parties. Both of them agreed that a decree may be passed in favour of the plaintiff against the defendant. The only essential term of the compromise was, as I have said, that the consideration was Rs. 1,16,100 instead of Rs. 66,100. Chawla, J. decreed the suit on November 1, 1973, in terms of the compromise.

7. The plaintiff has now moved an application for the amendment of the original plaint. The following paragraph is sought to be added:

"The plaintiff be also granted a decree for possession of the suit land and the possession of the same be delivered to him."

Since the relief of possession was not included in the original plaint this is now sought to be added by way of amendment.

8. The defendant opposes this application. His objection mainly is this. An application for the amendment of the plaint after the passing of the decree is not maintainable. The court after the passing of the decree has become functus officio. At the stage of the execution proceedings the plaint cannot be amended. Secondly, since consent decree by way of compromise was passed in the suit the court cannot allow the relief of possession now to the plaintiff as there is no term in the compromise under which the plaintiff can claim the relief of possession.

9. The court certainly is faced with an extraordinary situation. A decree for specific performance has been passed in terms of the prayer in the plaint. There is no decree for possession. The plaintiff seeks possession of the land agreed to be purchased. He cannot have it as the decree is silent on the matter of possession. After the passing of the decree the amendment of the plaint is sought. Has the court power to allow the amendment? That is the sole question.

10. Section 22 of the Specific Relief Act provides:

"22. (1) Notwithstanding anything to the contrary contained in the Code of Civil Procedure, 1908, any person suing for the specific performance of a contract for the transfer of immovable property may, in an appropriate case, ask for—

(a) possession, or partition and separate possession, of the property, in addition to "such performance"; or

(b) any other relief to which he may be entitled, including the refund of any earnest money or deposit paid or made by him in case his claim for specific performance is refused.

(2) No relief under clause (a) or clause (b) of sub-section (1) shall be granted by the court unless it has been specifically claimed:

Provided that where the plaintiff has not claimed any such relief in the plaint, the court shall, at any stage of the proceeding, allow him to amend the plaint on such terms as may be just for including a claim for such relief.

(3) The power of the court to grant relief under clause (b) of sub-section (1)

shall be without prejudice to its powers to award compensation under Sec. 21."

11. This section makes it incumbent on a plaintiff to ask for possession of the property in addition to specific performance. Sub-section (2) provides that if in a suit for specific performance the plaintiff has omitted to ask for the possession of the property in addition to specific performance no relief shall be granted by the court unless it has been specifically claimed. The effect of the section is that in a suit for specific performance prayer for possession must be distinctly and specifically made.

12. On March 1, 1964, the Specific Relief Act, 1963 (47 of 1963) came into force. This Act altered the law by enacting Section 22. It made it necessary for a plaintiff to ask specifically the relief of possession in suits for specific performance.

13. Prior to the Act of 1963 the Act in force was the Specific Relief Act of 1887 (Act No. 1 of 1887). Under the old Act it was not necessary for a plaintiff to ask for the relief of possession separately and specifically. It was enough for him to claim only a decree for specific performance. Relief of possession was comprehended in the decree for specific performance. Under the old Act the High Courts had held that the claim to possession was included in the claim to specific performance. Decided cases laid down that possession can be asked for in execution of a decree for specific performance even though possession was not claimed in the plaint on the ground that the relief of possession is merely incidental to that of execution of a deed of conveyance: See *Arjun Singh v. Sahu Maharaj Narain*, AIR 1950 All 415 and *Kartik Chandra v. Dibakar Bhattacharjee*, AIR 1952 Cal 362.

14. *Pt. Balmukand v. Veer Chand*, AIR 1954 All 643 may be taken as fairly representative of the view which prevailed before the enactment of the new Act in 1963. There a Division Bench held that where in a suit for specific performance of a contract for sale no relief for possession is claimed and consequently the decree passed in the suit contains no relief of delivery of possession, the court executing the decree is competent to deliver possession; an order directing delivery of possession being merely incidental to the execution of the deed of sale.

15. In that case the plaintiff filed a suit for specific performance of a contract and the suit was decreed. The plaintiff had also asked for delivery of possession of the property, but no mention was made in the decree about the delivery of possession. The judgment-debtor contended that the plaintiff having claimed possession and possession not having been specifically

ly granted in the decree it must be deemed that the relief for possession was refused and the plaintiff could not claim delivery of possession.

The Division Bench rejected the argument and said:

"We do not think there is any force in this contention. Section 55 (1) (f) of the Transfer of Property Act of 1882 provides that

"The seller is bound

(f) to give, on being so required, the buyer or such person as he directs such possession of the property as its nature admits;"

The decree for specific performance, which provides that the property shall be sold to the plaintiff by the defendants and the sale deed shall be executed within a certain time, failing which the court will have the sale deed executed by a person nominated by it, implies that delivery of possession shall be given in accordance with the provisions of Section 55 (1) (f) T. P. Act. Delivery of possession is a necessary ingredient and part of transfer of ownership."

The learned Judges continued:

"We do not think that it is necessary in a suit for specific performance either to separately claim possession or it is necessary for the court to pass a decree for possession. A decree for specific performance of contract includes every thing incidental to be done by one party or another to complete the sale transaction, the rights and obligations of the parties in such a matter being indicated by Sec. 55, T. P. Act."

The plaintiff, therefore, when he filed the suit on January 18, 1971, was under the impression that the relief of possession was implicit in a claim for specific performance. This has led to all the difficulty. The plaintiff thought so. The defendant too must have thought likewise. The court too was under that impression, it seems. Nobody realised at the time of the passing of the decree that a separate prayer for possession has to be made in the plaint and a decree for possession is also to be passed. Without it the plaintiff will not be able to recover possession.

16. Section 22 is a new section in the Act of 1963. There was no corresponding or analogous provision in the old Act. Since the decree did not give the plaintiff the relief of possession, is the court now powerless to put him in possession of the property though he has a decree for specific performance in his favour? If possession is not delivered to the plaintiff the decree becomes valueless for him to all intents and purposes though he has paid Rs. 1,16,100 to the defendant.

17. Section 22 enacts a rule of pleading. The legislature thought it will

be useful to introduce a rule that in order to avoid multiplicity of proceedings the plaintiff may claim a decree for possession in a suit for specific performance even though, strictly speaking, the right to possession accrues only when specific performance is decreed. The legislature has now made a statutory provision enabling the plaintiff to ask for possession in the suit for specific performance and empowering the court to provide in the decree itself that upon payment by the plaintiff of the consideration money within the given time, the defendant should execute the deed and put the plaintiff in possession: See the Ninth Report of the Law Commission, page 35.

18. In my opinion the proviso gives ample power to a court to allow the amendment of the plaint even at this stage. The proviso says that the amendment of the plaint can be allowed "at any stage of the proceedings" on such terms as may be just for including a claim for possession where the plaintiff has not claimed such relief in his original plaint.

19. What then is the meaning of the expression "at any stage of the proceedings"? Admittedly a decree has been passed. Will these words cover cases where amendment is sought after the passing of the decree? This is the question to be answered.

20. The word "proceeding" is not defined in the Act. Shorter Oxford Dictionary defines it as "carrying on of an action at law; a legal action or process, any act done by authority of a court of law; any step taken in a cause by either party."

21. The term "proceeding" is a very comprehensive term and generally speaking means a prescribed course of action for enforcing a legal right. It is not a technical expression with a definite meaning attached to it, but one the ambit of whose meaning will be governed by the statute. It indicates a prescribed mode in which judicial business is conducted.

22. The word "proceeding" in Section 22 in my opinion includes execution proceedings also. Such a wide interpretation has been placed on this word by the courts in decided cases: See *Companies Act 1913, Section 171* and *Rameshwar Nath v. U. P. Union Bank, AIR 1956 All 586 (588)*. The expression "at any stage" in its literal and actual meaning means without limitation either in frequency or duration or length of time. It is not a restrictive expression. The general purpose and scope of a statute where this expression is used may show that the expression has not a limited or controlled meaning. It is a term giving the widest freedom to a court of law so that it may do justice to the parties in the case.

23. "At any stage" will include execution. Execution is a stage in the legal proceedings. It is a step in the judicial process. It marks a stage in litigation. It is a step in the ladder. In the journey of litigation there are various stages. Execution is one of them. It registers a degree of advance towards the goal which the litigant has set out for himself.

24. Amendment for including the relief of possession can be allowed "on such terms as may be just". These words also point in the same direction. Justice was the dominant idea in the mind of the legislature at the time it was enacting the proviso. It knew, one would presume, of the difficulties which a litigant might face by omitting a relief to which he may be entitled and which the section says he must ask for. The proviso says the court "shall" allow the amendment. The words are emphatic and imperative.

25. In the *Duke of Buccleuch (1892) P 201*, Fry L. J. rejected such an argument as has now been raised before me. He said:

"I base my decision upon the words 'at any stage of the proceedings'. It has been argued that the rules do not apply after final judgment. They apply, in my opinion, as long as anything remains to be done in the case."

I would myself adopt these words. I will say that the argument that a Judge cannot allow amendment after the passing of the decree is an argument against the very words of the section which says "at any stage". The proceedings are not yet over. So long as anything remains to be done in the case the power resides in the court. The court has granted a decree for specific performance. The plaintiff has done his part. He has paid Rs. 1,16,100. Now in execution he wants the possession of the land. Courts are not powerless to give him the relief of possession. If plaint has to be amended so as to include the relief of possession this court I think has the power to allow amendment.

26. Counsel for the defendant says that the court has become *functus officio* after the judgment was signed by the Judge under Rule 3 of Order XX of the Code of Civil Procedure. I do not agree. The legislature has given to the court wide freedom by using the words "at any stage." Then it is said that it is a decree of compromise and, therefore, no amendment of the plaint should be allowed. I cannot accept this submission. This will mean injustice. The plaintiff will get nothing. Delivery of possession is a necessary ingredient and part of transfer of ownership. In fact this is what specific performance means. In the Act of 1877, Section 5 provided:

"Specific relief is given—

(a) by taking possession of certain property and delivering it to a claimant.
....."

27. The defendant himself knew that decree for specific performance will mean that he will have to hand over the possession of the land for the money he has received. Now he cannot take advantage of a technical flaw. Equity looks on that as done which ought to be done. The defendant himself stated before the court in execution proceedings that he was prepared to hand over possession. As he did not deliver possession I appointed a receiver who has taken the possession of the land from him. That order was upheld in appeal. Now all that remains is the amendment of the plaint so that the provisions of Section 22 are fulfilled.

28. The counsel for the defendant has referred me to *The Tabernacle Permanent Building Society v. Johan Knight*, 1892 AC 298 and *In re Palmer & Co. and Hosken & Co.*, (1898) 1 QB 131. I do not think these authorities help him. In *Re Palmer & Co.* case it was held that where the proceedings are complete, for example, when the award has been made in an arbitration the power of the Judge is gone. With regard to these rulings it will be enough to say that the meaning of the expression such as "at any stage of the proceedings" is determined by the context in which it is used. Words cannot be read in isolation; their colour and content are derived from their context.

29. It is said that rules of construction do not permit such a wide interpretation. Of rules of construction Lord Reid has said:

"They are not rules in the ordinary sense of having some binding force. They are our servants not our masters. They are aids to construction, presumptions or pointers. Not infrequently one 'rule' points in one direction, another in a different direction. In each case we must look at all relevant circumstances and decide as a matter of judgment what weight to attach to any particular rule."
(*Maunsell v. Olins*, (1975) 1 All ER 16).

30. On a consideration of all relevant circumstances my conclusion is this. The power of the Judge is not gone. It remains in him as an indwelling spirit. So long as anything remains to be done in the case he can exercise that power for the sake of justice. When the Judge finds that a verbal interpretation of the law might lead to injustice he recalls to mind as a comforting thought the words of Paul of Tarsus: "the letter killeth, but the spirit giveth life."

31. For these reasons I grant the application. I allow the amendment of the plaint on payment of Rs. 300 as costs.
Application allowed.

AIR 1976 DELHI 60

PRITHVI RAJ, J.

M/s. Anand Silk Store, Plaintiff v. M/s. Shree Ram Silk Mfg. Co. and others, Defendants.

Suit No. 146 of 1975, D/- 21-4-1975.

(A) Civil P. C. (1908), S. 10 — Stay of suit — Prayer restraining defendant from proceeding with his previously instituted suit in another court — Cannot be granted when that suit was not vexatious.

The plaintiff filed a suit in the Delhi High Court and prayed for an ad interim injunction restraining the defendant from proceeding with his suit previously filed by him against the plaintiff in the court at Chinsura in West Bengal. Held, that the relief could not be granted as the previously instituted suit was neither vexatious nor was there any contract between the parties choosing the forum at Delhi for the settlement of their disputes. The mere fact that Chinsura Court was situate at a long distance from Delhi or that most of the witnesses were from Delhi was not by itself sufficient to hold that the previous suit was vexatious when it had been instituted in a competent court. AIR 1962 SC 527, Followed.

(Paras 17, 18)

Cases Referred: Chronological Paras
AIR 1962 SC 527 = 1962 Supp (1) SCR 450 14

C. K. Daphtary, Sr. Advocate with S. P. Mahna, for Plaintiff; B. Sen, Sr. Advocate with O. P. Khaitan and B. Mohan, for Defendants.

ORDER:— This is plaintiff's application under Sections 10, 22 and 151 read with Order 39, Rules 1 and 2, Code of Civil Procedure, praying that ad interim injunction be issued restraining defendant No. 1 (herein called 'the defendant') from proceeding with its money suits filed against the plaintiff and others which suits are stated to be pending in the Court of Shri D. Paul, Second Subordinate Judge, Chinsura, District Hooghly (West Bengal). In the alternative, the plaintiff prays that the trial of the said suits be stayed till the disposal of the present suit filed by it against defendant for rendition of accounts.

2. The plaintiff filed the present suit on the allegation that it was appointed to be the sole-selling agent by the defendant with effect from 13th April, 1962, to promote the sales of their products in

the States of Delhi, Haryana, Punjab, Jammu and Kashmir and Himachal Pradesh on terms and conditions stipulated in sub-para (1) to (11) of para 3 of the plaint; that the plaintiff is alleged to have made huge sales to the various parties on behalf of the defendant for which services huge commission, brokerage/special promotion commission and sales incentive as also bonus etc. became due to it from the defendant; and on the transactions carried out by the plaintiff a large sum of several lacs of rupees would be found due to it from the defendant; and that the defendant always delayed the settlement of the accounts and ultimately with the object of harassing the plaintiff had filed false and frivolous suits, enumerated in para 5 of the application, against the plaintiff in the Court of Second Subordinate Judge, Chinsura (West Bengal) in respect of some transactions put through by the plaintiff at Delhi.

3. The plaintiff contends that the defendant had brought the above suits in the Court at Chinsura despite the fact that their head office and registered office is situate at 14-Netaji Subash Road, Calcutta and that Chinsura is about 40 miles away from Calcutta city. The defendant is alleged to have chosen the Court at Chinsura with mala fide intention in order to harass the plaintiff to deter it from claiming its legitimate dues because the plaintiff will have to face a lot of difficulty in reaching the Court at Chinsura. The plaintiff avers that the stay of suits in the Court at Chinsura is necessary because the balance of convenience is in favour of the plaintiff inasmuch as the witnesses and the evidence pertaining to the disputes between the plaintiff and the defendant are easily available in Delhi.

4. The case of the defendant is that Hasting Mill Ltd. with its registered office at No. 14, Netaji Subash Road, Calcutta, carries on various kinds of business in jute, textiles etc. in the State of West Bengal. The textile business of the company consisting of the manufacture and sale of synthetic and art silk fabrics is carried on under the name and style of Shree Ram Silk Mfg. Co. at Konnagar, District Hooghly (West Bengal). At all material times the sales office of the said business as well as its factory were located at its Mill premises in Konnagar. The defendant opposed the application contending that between 1967 and 1973 it sold and delivered diverse quantities of synthetic and art silk fabrics to various concerns pursuant to the orders procured by the plaintiff at Delhi which were forwarded to and accepted by the defendant at its office at Konnagar. The goods thereafter were despatched by rail or road direct to the purchaser under advice to

the plaintiff. As a result of such transactions a total sum exceeding Rs. 30 lacs became due and payable to the defendant; that the plaintiff as del credere agent was independently liable to pay to the defendant the said several sums due from the various buyers if the buyers failed to pay the purchase price. The buyers having failed to pay the price of the goods sold to them suits were filed against the concerns for recovery of the balance price of the goods sold. In each of the suits the plaintiff was made a co-defendant because as a del credere agent the plaintiff was jointly and severally liable for the payment of the outstanding sums due from the parties whereof orders had been booked through the plaintiff. The defendant avers that the plaintiff after repeatedly obtaining extension of time ultimately filed its written statement on 5th February, 1975 in Suit No. 18 of 1974 (Hastings Mill Ltd. v. Anand & Company) pending in the Court at Chinsura while in the other suits the plaintiff had repeatedly obtained dates for extension of time for filing its written statement.

5. The present suit is stated to have been filed by way of a counter-blast to the claim of the defendant as on or about 7th February, 1975, the defendant made two applications for attachment before judgment in two suits, viz., Suit No. 11 of 1974 (Hastings Mill Ltd. v. Anand Agencies) and Suit No. 10 of 1974 (Hastings Mill Ltd. v. Shere-E-Punjab Silk Store). The defendant further alleged that no demand either for payment of any commission or for accounts had ever been made by the plaintiff before the filing of the present suit which had been done more than a year after the institution of suits at Chinsura Court.

6. The plaintiff in its rejoinder to the reply filed by the defendant, challenged the competency of Shri Praphulla Chandra Shanti Lal Shah to file affidavit in reply on behalf of the defendant on the ground that prima facie on the face of the reply it is not borne out that he was authorised by any resolution of the defendant to file a counter to the application.

7. On merits the contentions of the defendant were traversed and the pleas taken in the application were reiterated.

8. On behalf of the plaintiff it was vehemently contended that the defendant has chosen the Court at Chinsura with mala fide intention in order to harass and demoralise it because of the long distance and difficult journey. It was submitted that the venue for the trial of the disputes between the plaintiff and the defendant would be Delhi because the plaintiff had procured supply orders/contracts for the supply of goods of the defendant from the various parties in the District of Delhi,

Haryana, Jammu and Kashmir, Punjab, and Himachal Pradesh for which region the plaintiff had acted as sole-selling agent of the defendant and which orders were transmitted to the defendant from Delhi; that the defendant had their bank account with United Bank of India, Chandni Chowk, Delhi, and the plaintiff used to deposit cheques or used to conduct dealings with the defendant through the above bankers at Delhi and that all the witnesses and evidence etc. pertaining to the disputes between the plaintiff and the defendant are easily available in Delhi. It was also contended that delivery of goods was made to the parties at Delhi when R/R was handed over to a party by the plaintiff at Delhi.

9. It was argued that the mala fide of the defendant in choosing the Court at Chinsura is amply borne out in that notwithstanding the fact that the head office of the defendant was at 14-Netaji Subash Road, Calcutta, they had chosen to file the suits at Chinsura.

10. The defendant in para 3 (a) of its reply to the application avers that at all material times the sales office of its textile business carried on under the name and style of Shree Ram Silk Mfg. Co. as well as its factory were located at its Mill premises at Konnagar. Except for a denial simpliciter the plaintiff have not placed any material on the record to contend that the sales office as well as the factory of the defendant was not located at its mill premises in Konnagar. Further, whether the business transactions were concluded between the parties at Delhi or were concluded by acceptance of the orders procured by the plaintiff from the various parties and forwarded to the defendant at its office at Konnagar is a question to be determined on evidence. Besides, the contention that the Chinsura Court has or has no jurisdiction to try the suits filed before it can be taken up by the plaintiff in those suits and it is for that Court to determine the said question.

11. What has to be seen in the present application is whether there exist compelling circumstances entitling the plaintiff to the grant of the prayer made in this application.

12. The defendant in para 3 (d) of its reply to the application had given the details and dates on which the various suits were instituted against the plaintiff and others in Chinsura Court. The plaintiff in its rejoinder has not controverted the dates on which these suits were filed. The suits in Chinsura Courts were instituted between July 16, 1974 and 17th December, 1974, while the present suit was filed in this Court on 17th March, 1975.

13. The plaintiff in the present suit seeks to restrain the defendant from pro-

ceeding with the suits filed by the defendant earlier in point of time in Chinsura Court.

14. Their Lordships of the Supreme Court in *Manohar Lal Chopra v. Hiralal*, AIR 1962 SC 527, observed that the question of issuing an order to a party restraining him from proceeding with another suit in a regularly constituted Court of law deserves great care and consideration and that such an order is not to be made unless absolutely necessary for the ends of justice. In that case, it was found that it was the plaintiff of the subsequent suit who sought to restrain the plaintiff of the earlier suit from proceeding with his suit. It was held that that could not be justified on general principle when the previous suit had been instituted in a competent Court. It was further observed that it is open to a plaintiff to choose the forum in which to file his suit.

15. In the above cited case the appellant filed his suit in Asansol against the respondent who was resident of Indore. A contention was raised that the appellant chose the forum at Asansol merely to harass the respondent. It was observed that the mere fact that Asansol Court is situate at a long distance from the place of residence of the respondent was not sufficient to establish that the suit had been filed in that Court in order to put the respondent to trouble and harassment and to unnecessary expense.

16. It may bear mention here that in the above case the respondent subsequent to the suit of the appellant at Asansol filed a suit at Indore and obtained an order from the Indore Court restraining the appellant to proceed with his suit at Asansol. Their Lordships of the Supreme Court in that connection observed:—

"The effect of issuing an injunction to the plaintiff of the suit at Asansol, indirectly achieves the object which an injunction to the Court would have done. A court ought not to achieve indirectly what it cannot do directly. The plaintiff, who has been restrained, is expected to bring the restraint order to the notice of the Court. If that Court, as expected by the Indore Court, respects the injunction order against the appellant and does not proceed with the suit, the injunction order issued to the appellant who is the plaintiff in that suit is as effective an order for arresting the progress of that suit as an injunction order to the Court would have been. If the Court insists on proceeding with the suit, the plaintiff will have either to disobey the restraint order or will run the risk of his suit being dismissed for want of prosecution. Either of these results is a consequence which an order of the Court should not ordinarily lead to."

17. The Court, however, held that if the previously instituted suit is a vexatious suit or has been instituted in violation of the terms of the contract it can be stayed. Does the present application fulfil the twin contingencies, noted above. It is not the case of the plaintiff that there was a contract between the parties choosing the forum at Delhi for the settlement of the disputes between the parties. All that was urged was that the registered office of the respondent is at Calcutta and that as such normally the defendant should have filed the suits at Calcutta where the plaintiff could not only obtain better and comfortable accommodation but also better legal assistance as well. This submission was sought to be supported from the footnote given under the contract (Annexure C-4) to the effect that the registered office of the seller in Calcutta is to be deemed to be the place where the contract is made, where it is to be performed and where the price of goods are payable. Now this is a contention which is open to the plaintiff to urge before the Chinsura Court to oust its jurisdiction but would not be a ground enabling this Court to restrain the defendant from proceeding with their cases. The mere fact that Chinsura Court is situate at a long distance from Delhi or that most of the witnesses are from Delhi, Punjab, Harayana, Jammu and Kashmir and Himachal Pradesh would not by itself be sufficient to hold that the previous suits filed by the defendant are vexatious when the previous suits have been instituted in a competent court. In this view of the matter I need not consider the argument of the defendant that the present suit has been filed by way of a counter-blast to their applications seeking attachment before judgment of the plaintiff's properties or that their alleged claim in respect of commission etc. is a false claim having not been made at any time before the institution of the suits by the defendant.

18. For the reasons stated above the application fails and is hereby dismissed, leaving the parties to bear their respective costs.

Application dismissed.

AIR 1976 DELHI 63

B. C. MISRA, J.

S. N. Soni, Appellant v. Taufiq Farooki and others, Respondents.

Second Appeal No. 102 of 1971, D/- 2-4-1975.*

*(From judgment and decree of J. D. Jain, Addl. Dist. J. Delhi, D/- 4-1-1971.)

HS/IS/C946/75/AUM

(A) Partnership Act (1932), S. 19 — Rights of third party — Partner assigning pronote in excess of implied authority — Suit by assignee on pronote — Right of defendant-debtor to assail legality and validity of assignment.

Ordinarily, where a partner acts in violation of the authority of other partners to compromise or relinquish the claim of the firm against a third party, that party would not be allowed to raise the plea of the excess of authority of the partner, while the other partners acquiesce in the same. Nevertheless, in a case where the third party debtor is not a privy to the action of the partner in assigning the promissory note in excess of the implied authority of the partner and in derogation of the rights of the other partners, the principal debtor, who was not a party to the assignment, should be entitled to challenge the validity of the act or assignment on any ground legally open. Moreover, in a case where a suit was brought by the plaintiff on the ground that he is an assignee from the firm and is, therefore, entitled to recover the debt due to the firm, it would be open to the debtor to challenge the legality and validity of the assignment, which is an integral part of the cause of action of the plaintiff against the debtor. (Para 11)

(B) Partnership Act (1932), S. 19 (2) (c) — Authority to relinquish claims — Partner assigning pronote in excess of implied authority — Other partners subsequently ratifying assignment — Validity of assignment.

All the partners of the firm can ratify an act of a partner, which has been done by him in excess of the implied authority or without any authority, provided the act is such that it could be legally done with the authority of all the partners previously given and that the partners ratify the act with full knowledge of the facts. (Para 17)

In the instant case, one of the partners (say K) assigned the pronote for lesser value than was due to the firm. This was in excess of his implied authority. All other partners subsequently mutually agreed by the deed of dissolution that the pronote in dispute had been allotted to K who had been authorised to deal with it in any way he liked as his personal property and that his acts relating to the pronote had been ratified. The other partners relinquished their right, title, interest or claim in the said pronote altogether.

Held, assignment of pronote was valid and did not suffer from any legal infirmity. (1897) 1 Ch 213 and (1887) 13 AC 111, Relied on; ILR (1969) Andh Pra 274, Distinguished. (Paras 17, 20)

- (C) Partnership Act (1932), S. 19 (2)
 — Restrictions contained in sub-sec. (2)
 — Not absolute.

A perusal of the provisions of Sections 19 and 20 of the Partnership Act, 1932, shows that the implied authority mentioned in S. 19 is subject to the contract between the partners and it is also subject to the usage or custom of the trade. The provisions contained in S. 19 are a statutory presumption of the terms of the contract between the partners which is rebuttable. The restrictions have been imposed for the benefit of and in the interests of the partners and no absolute legal bar has been imposed by the law against the partners in acting contrary to the provisions of sub-sec. (2) and it is certainly open to the partners to relax or waive the restrictions. (Para 7)

Cases Referred: Chronological Paras
 ILR (1969) Andh Pra 274 = (1967) 2 Andh
 WR 131 18
 AIR 1942 Bom 22 = 43 Bom LR 888 18
 AIR 1936 Mad 593 = ILR 59 Mad 1036 18

(1897) 1 Ch 213 = 66 LJ Ch 128 16
 (1887) 13 AC 111 = 57 LJ PC 42 16
 S. K. Bagga, for Appellant; Kailash
 Narain, for Respondents.

JUDGMENT:— This second appeal under Section 100 of the Code of Civil Procedure, has been filed by the third defendant against the appellate judgment and decree of Mr. J. D. Jain, Additional District Judge, Delhi, dated 4th January, 1971, by which he has allowed the appeal and reversing the decree of the court of first instance, dated 19th August, 1969, finally decreed the suit of the plaintiff respondent No. 1 for recovery of Rupees 1,340, which includes a sum of Rupees 1,000 as principal and the balance as interest as claim of the plaintiff for Rupees 1,400. In this judgment, reference to the defendants would be to defendants 1, 2 and 3, while the creditor defendant No. 4 will be referred to as the finance company. In this second appeal, the plaintiff has been arrayed as respondent No. 1, while the finance company, which was the original creditor of the defendants has been arrayed as respondent No. 4. Respondents 2 and 3 in the appeal are defendants 1 and 2, while the appellant is defendant No. 3.

2. The material facts of the case are that defendants 1, 2 and 3 executed a promissory note in favour of the finance company on 9th June, 1965 for a sum of Rs. 1,000 carrying interest at the rate of 12% per annum (Ex. P-3). This pronote was transferred by endorsement in favour of the plaintiff-respondent No. 1 by Krishan Avtar, one of the partners of the finance company. The consideration for the assignment as evidenced by Ex. P-2

was Rs. 550 and not the value of the promissory note. After obtaining the assignment, the plaintiff having served a notice of demand on the defendants instituted a suit on 6th June, 1968 for recovery of the amount of pronote making a total of Rs. 1,400 including interest and Rs. 60 as costs of the notice. The suit was contested on various grounds, one of the grounds being that the assignment was unauthorised and invalid. On the pleadings of the parties, the following issues were framed:—

"1. Whether the plaint has been verified properly?

2. Whether defendant No. 3 signed the pronote only as a witness as alleged in para. 1 of the written statement on merit?

3. Whether the endorsement in favour of the plaintiff is valid?

4. Relief."

The court of first instance answered issues 1 and 2 in favour of the plaintiff, but decided issue No. 3 against the plaintiff, with the result that it dismissed the suit. Feeling aggrieved, the plaintiff filed an appeal. Before the Additional District Judge, the findings on issues 1 and 2 had not been assailed, but the plaintiff had contended that the decision of the lower court on issue No. 3 was contrary to law. During the hearing of the appeal the plaintiff filed an application under Order 41, Rule 27 of the Code of Civil Procedure for permission to produce additional evidence. This application was allowed by order dated 19th September, 1971, and as a result Sohan Lal Dewan (one of the partners of the finance company) was examined as A.W. 1, and he produced and proved the deed of dissolution of the partnership, (Ex. A.W. 1/1). The lower appellate court came to the conclusion that the endorsement was valid and whatever defect had existed in the authority of Krishan Avtar the same had been cured. On this finding, the lower appellate court reversed the decree of the trial court and decreed the suit of the plaintiff as mentioned above.

3. Mr. Bagga, counsel for the appellant, has argued the appeal at considerable length. He has not challenged the findings on issues 1 and 2, but has seriously contended that the finding on issue No. 3 is illegal.

4. To appreciate the contention of the counsel for the appellant, a few more facts may be noticed, which emerge from the record after the additional evidence had been produced in the court below. The finance company, defendant No. 4, was a partnership firm consisting of five partners, two of them were Sohan Lal Dewan, (who was examined as A.W. 1), and Krishan Avtar, who represented the

registered as Misc. Case No. 50 of 1969, the application filed by defendants 2, 3, 4, 5, 7, 8, 9, 10, 11, 12, 13, 17 and 18 was registered as Misc. Case No. 51 of 1969 and the application filed by Kabi Chandra Barman and Debendra Nath Barman, sons of deceased defendant No. 14, was registered as Misc. Case No. 52 of 1969. All these three miscellaneous cases were fixed for hearing on 12-1-1970. The learned Munsiff took up all the three miscellaneous cases together and by a common order dated 12-1-1970 allowed the applications and set aside the ex parte decree on condition of payment of cost of Rs. 12/- in each case by 29-1-1970, failing which the applications would stand rejected.

2. The order dated 12-1-1970 is quoted below:

"Both parties are present. The learned Advocate for the opposite parties submits that if appropriate costs are paid he has no objection to the allowing of the petitions. Hence the petitions for setting aside of the ex parte decree are allowed and the defendants are allowed to contest the suit. Misc. Case Nos. 50, 51 and 52 of 1969 are accordingly disposed of. Petitioners of each of the miscellaneous cases shall pay Rs. 12/- to the opposite parties as costs. The suit is next fixed on 29-1-1970 for steps. If the costs are not deposited on the next date, the applications will stand dismissed."

3. It appears that the defendants-petitioners in Misc. Case Nos. 50, 51 and 52 of 1969 did not deposit the costs on 29-1-70 and the learned trial Court passed the following order on 29-1-1970:

"The petitioners did not deposit costs. Their advocate filed hazri. The three petitions for setting aside the ex parte decree are treated as rejected." Thereafter on 19-2-1970 the decree was prepared.

4. The petitioners in Misc. Case No. 51 of 1969 filed an application under Section 151 of the Code of Civil Procedure on 6-2-1970 praying that the order dated 29-1-1970 passed in Misc. Case No. 51 of 1969 may be set aside and after allowing time to deposit Rs. 12/- the original suit may be restored. This application was registered as Misc. Case (J) No. 8 of 1970. On 20-2-70 the petitioners in Misc. Case No. 62 of 1969 and Misc. Case No. 50 of 1969 filed two separate applications under Section 151, Civil Procedure Code with the same prayer and these two applications were registered as Misc. Case (J) No. 14 of 1970 and Misc. Case (J) No. 15 of 1970, respectively.

5. The learned Munsiff by his order dated 24-11-1971 in Misc. Case (J) Nos. 8, 14 and 15 of 1970, under Section 151 of the Code of Civil Procedure, set aside the order dated 29-1-1970 rejecting the previous three

miscellaneous cases and restored the original suit on payment of the cost awarded in the previous miscellaneous cases, directing the petitioners to pay the said costs on 20-12-71. This order dated 24-11-1971 has been impugned in these revision petitions.

6. Going through the orders of the learned Munsiff dated 12-1-1970 and 24-11-1971 it is found that by order dated 24-11-1971 the learned Munsiff only extended the time for payment of the costs that were awarded by him on 12-1-1970 in Misc. Case Nos. 50, 51 and 52 of 1969.

7. Mr. N. Chakravarty, the learned Counsel for the petitioners, submits that the learned Munsiff by his order dated 12-1-1970 passed in Misc. Case Nos. 50, 51 and 52 of 1969 set aside the ex parte decree and restored the original suit on payment of cost of Rs. 12/- in each case and it was directed that the costs must be paid on 29-1-1970, failing which the miscellaneous cases would be treated as dismissed. As it happened, the costs were not paid by the petitioners in Misc. Case Nos. 50, 51 and 52 of 1969 and accordingly the order dated 29-1-1970 was passed, which has already been quoted.

8. So, the point that arises for consideration in these cases is whether the learned Munsiff had jurisdiction to extend the time for depositing the costs as ordered on 12-1-1970. The Court's mandate was that the costs must be paid on 29-1-1970, failing which the miscellaneous cases for setting aside the ex parte decree would stand rejected. So when the costs were not paid on that date, the effect of the order dated 12-1-1970 was that the Misc. Case Nos. 50, 51 and 52 of 1969 stood dismissed. The petitioners in Misc. Case (J) Nos. 8, 14 and 15 of 1970 filed petitions for setting aside the order dated 29-1-1970 and to restore the original suit allowing time to pay the costs as ordered on 12-1-1970. It is also to be noted that the applications under Section 151 of the Code of Civil Procedure were filed on 6-2-1970 and 20-2-1970 whereas the deposit of the costs were to be made on 20-12-1971 as directed by the learned Munsiff. So, in effect, by his order dated 24-11-1971 the learned Munsiff extended the time for depositing costs as ordered on 12-1-1970.

9. In *Dinesh Chandra Nath v. Surendra Chandra Nath*, Assam LR (1971) Assam and Naga 124 = (AIR 1971 Assam and Naga 156) this Court observed as follows:

"Two points that arise for consideration in this case are:

(1) Whether the learned Munsiff had jurisdiction to extend time for payment of the cost in view of his orders dated 14-12-1967

and 21-12-1967, and (2) whether the application under Order 47 rule 1, Civil Procedure Code for review of such an order lay.

The learned Munsiff disposed of the revival petition under Order 9 rule 9, Civil Procedure Code by allowing the petition and restoring the suit on condition that the plaintiff-petitioners must pay the cost of Rs. 15/- by 20-12-1967. In the order he clearly stated that if the plaintiff petitioners failed to pay the cost within the fixed time, the revival petition would stand dismissed. It is settled law that if a suit is revived on condition of payment of cost within a fixed time and if the order further says that if the cost is not paid within the fixed time, the application for revival of the suit shall stand dismissed, then in such case, on default of the petitioner to make payment of cost within the fixed time, the order of dismissal of the petition takes effect automatically. In the instant case, on the default of the petitioners the order of dismissal took effect automatically, moreover the learned Munsiff passed another order on 21-12-1967 dismissing the petition for revival. In the circumstances the Court became functus officio thereafter and there was no scope for extension of the time for payment of the cost as contemplated under Section 148, Civil Procedure Code."

10. In *Dinesh Chandra Nath's case* (AIR 1971 Assam 156) (supra) this Court relied on the decisions in *Peda Nasar Saheb v. Perecherla Nabi Saheb* (AIR 1957 Andh Pra 780), *S. A. Balakrishna Ayyar v. Parvatham-mal* (AIR 1928 Mad 154), and *Tarapada Sarkar v. Nepal Gazi* (AIR 1965 Cal 354). The Court held, relying on the above decisions and the reasonings given therein, that the learned Munsiff had no jurisdiction to extend time for payment of cost.

11. The facts of this case are almost identical only with the difference that in the instant case the application is under Order 9 Rule 13 and in *Dinesh Chandra Nath's case* (AIR 1971 Assam 156) the application was under Order 9 Rule 9 of the Code of Civil Procedure.

12. In AIR 1957 Andh Pra 780 (supra), Chief Justice Subba Rao, as he then was, observed as follows:

"If an application for setting aside the ex parte decree is dismissed, it cannot be suggested, and indeed it is not suggested that after the dismissal, any further relief can be asked for in that application. If in such an application a conditional order is made and if on non-compliance with that condition the application is dismissed by the Court, it cannot also be argued that further orders can be made in that application. If it is the legal position, we do not see how when an application automatically stands

dismissed on non-compliance with a particular condition, a party will be in a better position than in the other two cases. Under Section 148, Civil Procedure Code, where any period is fixed or granted by the Court, for the doing of any act prescribed or allowed by this Code, the Court, may, in its discretion from time to time enlarge such period originally fixed or granted may have expired. The period prescribed under the section can be extended only during the currency of the previous order. Once an order has become defunct, no question of extending the time made under that order can arise."

The other decisions referred to in the Assam case (*Dinesh Chandra Nath's case*) (AIR 1971 Assam 156) (supra), are also to the above effect.

13. Mr. J. N. Sarma, the learned Counsel for the opposite parties, submits that an application under S. 151 of the Code of Civil Procedure is maintainable even if an application under O. 9, R. 13, Civil Procedure Code has been dismissed for default and for this proposition he has relied on a decision of this Court reported in AIR 1954 Assam 1 (FB) (*Madanlall Agarwalla v. Tripura Modern Bank Ltd.*), wherein the point that was decided was whether an application under Section 151, Civil Procedure Code will lie after an application under Order 9 Rule 13, Civil Procedure Code was dismissed for default, and it has been held that such an application may lie and in appropriate cases the Court may even grant relief. But that case does not help the opposite parties in the present case. The applications filed on 6-2-1970 and 20-2-1970, as stated hereinabove, were for relief by extending the time for depositing the costs as ordered on 12-1-1970 in Misc. Case Nos. 50, 51 and 52 of 1969. So, in effect all the three applications were filed for extension of time for depositing the costs as ordered on 12-1-1970. When the Court ordered on 12-1-1970 that the miscellaneous cases were allowed and the ex parte decree was set aside, it categorically stated that the costs must be paid on 29-1-1970, failing which the miscellaneous case would stand dismissed. If the order is couched in such words, then no further order regarding the dismissal of the cases for not complying with the mandatory direction of the Court regarding the payment of costs need be passed. Whatever that may be, in the instant case there was again an order on 29-1-1970 that as the petitioners in those cases had failed to deposit the costs as directed, the Misc. Case Nos. 50, 51 and 52 of 1969 stood dismissed. Thereafter the Court was not in seisin of those cases. What was sought to be done by the applications under Section 151, Civil Procedure Code filed on 6-2-1970 and 20-2-1970 was to obtain an extension of time for depositing the costs as ordered on 12-1-1970. As has been

held by this Court in Dinesh Chandra Nath's case (AIR 1971 Assam 156) (supra) and in the other cases referred to in that judgment, I am clearly of the opinion that the learned Munsiff in a round about way extended the time for deposit of the costs as ordered on 12-1-1970 till 20-12-1971 and by allowing time he acted without jurisdiction.

Mr. J. N. Sarma, the learned Counsel for the opposite parties, further submits that by allowing the petitioners in Misc. Case (J) Nos. 8, 14 and 15 of 1970 to deposit costs on 20-12-1971, the learned Munsiff did substantial justice and therefore he had jurisdiction to pass that order under Section 151, Civil Procedure Code. But it must be remembered that justice is not one sided. Justice must be for both the parties in a litigation. In the instant case, the widow as the plaintiff filed the suit some time in February 1967 and the suit was decreed ex parte on 9-7-1969. Thereafter order was passed in the Misc. cases No. 50, 51 and 52 of 1969 under Order 9 Rule 13, Civil Procedure Code on 12-1-1970 with a clear direction of the Court that the costs awarded must be paid by 29-1-1970. But the petitioners in those miscellaneous cases did not deposit the costs. They have no doubt come with some explanation for not depositing the costs on 29-1-1970. Whatever that may be, the causes shown cannot be sufficient cause for setting aside the ex parte decree. It is found that some of the petitioners in Misc. Case Nos. 50, 51 and 52 of 1969 were served with summonses and the Court ordered the suit to proceed ex parte against them and ultimately the suit was decreed ex parte. Thereafter they filed the applications for setting aside the ex parte decree. In the circumstances I find that the learned Munsiff by his order dated 24-11-1971 extending the time for deposit of the costs as directed by him in his order dated 12-1-1970 till 20-12-1971, committed an error of jurisdiction and the impugned order dated 24-11-1971 is accordingly set aside.

14. All the three revision petitions are allowed. But in the facts and circumstances of the case, I make no order as to costs.

Petitions allowed.

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(KOHIMA BENCH)

BAHARUL ISLAM, J.

Meso Jamir, Petitioner v. Okotso Village,
Opposite Party.

Civil Revn. No. 4 (H) of 1973. L/-
14-7-1975*.

*(Against order of S. B. Chettri, Addl. Cy. Commr. Mokokchung in C. A. No. 5 of 1972, D/- 22-8-1973).

HS/HS/C853/75/VSS

(A) Rules for Administration of Justice and Police in the Naga Hills District, 1937, Rule 34 — Powers of appellate Court — Though Civil P. C. does not apply to Nagaland, by virtue of Rule 35, appellate Court has power to take additional evidence, if justice of a case demands, either suo motu or at instance of parties. ((i) Ibid Rule 35; (ii) Civil P. C. (1908), Order 41 Rule 27).
(Para 6)

(B) Rules for Administration of Justice and Police in the Naga Hills District, 1937, Rules 34, 35 — Powers of Appellate Court — Appellate Court has power to make spot inspection in presence of both parties or their representatives — Not necessary to make memorandum of local inspection. (Civil P. C. (1908), Order 18, Rule 18).
(Para 7)

(C) Rules for Administration of Justice and Police in the Naga Hills District, 1937, Rule 34 — Order imposing penalty for alleged offence of violation of prohibitory order — No notice to show cause as to why penalty should not be levied issued to offenders — No charge for offence framed — No procedure of law followed — Order not sustainable.
(Para 9)

(D) Rules for Administration of Justice and Police in the Naga Hills District 1937, Rule 34 — S. D. O. demarcating boundary between two villages in accordance with directions of earlier Deputy Commissioner — Appeal against that order — Appellate Court examining whether demarcation made by S. D. O. was in terms of directions — Question of res judicata does not arise. (Civil P. C. (1908), Section 11).
(Para 8)

R. B. Singh and A. P. Subba, for Petitioner; W. A. Shishak, for Opposite Party.

ORDER:— This is an application in revision under Rule 34 of the Rules for Administration of Justice and Police in the Naga Hills District, 1937 (hereinafter called 'the Rules') and is directed against the order dated 22-8-1973 passed by the Additional Deputy Commissioner, Mokokchung, in Civil Appeal No. 5 of 1972.

2. The petitioners belong to the Jamir clan of the Ao tribe of Mangmetong village in the district of Mokokchung of the State of Nagaland represented by Shri Meso Jamir and the opposite parties are members of the Lotha tribe of Okotso village in the district of Mokokchung in the State of Nagaland represented by the Gaon Buras of the village. The dispute relates to a piece of land consisting of some Jhum Khetis located between the two villages named above, namely, Okotso and Mangmetong. The dispute is a very long standing one. It was settled in 1896 by Mr. Shuttleworth, who set a boundary between the two villages.

The dispute again having arisen, the matter was finally settled by Mr. W. Dundas, the then Sub-Divisional Officer, Mokokchung, in 1907 in Case No. 212 of 1907. The dispute again cropped up in 1960 when some people of the petitioner village claimed right and ownership over some portion of the land in question. The Assistant Commissioner No. 2 Mokokchung, by his order dated 9-5-1961 restrained both the parties from cultivating the land. In 1965 Shri N. I. Jamir, the then Additional Deputy Commissioner, Mokokchung, by his order dated 26-3-1965 upheld the order of Mr. W. Dundas and directed demarcation of the boundary on the ground. In 1972 the petitioners wanted to till a portion of the disputed land where upon the respondent objected. On 17-5-1972 the S. D. O. (Civil), Mokokchung, visited the disputed area. He was accompanied by the Superintendent of Police, Mokokchung, P. A. to Deputy Commissioner, Dobhasis of Mokokchung and Sungro and Gaon Buras of Mangmetong and Okotsu, and in their presence he made a spot verification of the matter with the help of the map prepared by Mr. W. Dundas, aforesaid, which was in Case No. 212 of 1907 and he demarcated the boundary between the two villages by his order dated 17-5-1972. This order was appealed against before the Additional Deputy Commissioner, Mokokchung who passed this impugned order in Civil Appeal No. 5/72.

3. The learned Additional Deputy Commissioner took evidence on the matter and also made a spot verification on 28-4-1973. He found that the disputed land fell in village Okotso (Opposite Party) in terms of the decree made by W. Dundas in 1907, but 8 persons of the petitioner village were in occupation of it in spite of the orders of injunction passed by the Court restraining both the parties from occupying the land. He levied a fine of Rs. 50/- each on those 8 persons. He found that the disputed land fell to the village of the opposite party, but it was unlawfully occupied by the petitioner-party and passed his order accordingly after setting aside the order of the Sub-Divisional Officer, Mokokchung, passed on 17-5-1972. This order has been challenged by the present application.

4. Shri R. B. Singh, learned counsel appearing for the petitioner, first submits that Shri S. B. Chettri, Additional Deputy Commissioner, in his impugned order has gone behind the decree by hearing an appeal against the order dated 17-5-1972 passed in an execution case by the Sub-Divisional Officer. It is admitted by both the parties that the correct decree in the long standing dispute with regard to the land in question was the decree made by Mr. W. Dundas in 1907, and that this decree should be respected. It has also been found by all the officers concerned, namely, Shri N. I. Jamir, Additional Deputy Commissioner

in his order dated 26-3-1965, Shri S. Lima Aier, Sub-Divisional Officer (Civil) in his order dated 17-5-1972 and Shri S. B. Chettri, Additional Deputy Commissioner in his impugned order, that the decree passed by Mr. W. Dundas was the correct decree and accepted by both the contending parties. The subsequent disputes, therefore, before the Additional Deputy Commissioner in 1965, the Sub-Divisional Officer (Civil) in 1972 and the Additional Deputy Commissioner in 1973 were all by way of execution or implementation of the decree made by W. Dundas. It is also the contention of the petitioner that the case before the Sub-Divisional Officer was by way of execution of the decree passed by W. Dundas. When this is the accepted position, an order passed in an execution case by the Sub-Divisional Officer is appealable to the Deputy Commissioner under Rule 34 of the Rules, and the appeal may be disposed of by the Additional Deputy Commissioner. It is not the contention of learned counsel that the appeal before the Additional Deputy Commissioner was incompetent, but his contention is that the Additional Deputy Commissioner went behind the decree. Learned counsel is not correct in his submission, for in fact the learned Additional Deputy Commissioner has very categorically stated in his order as follows:

"There cannot be any appeal against the order passed by Mr. W. Dundas, SDO, Mokokchung in Case No. 212 of 1907 at this stage as it is barred by limitation and the matter or matters already settled by Mr. W. Dundas in the said case cannot be re-opened at this stage..... The present appeal is only against the demarcation made by SDO (C), Mokokchung, on 17-5-1972 against which an appeal was filed by the present appellants in time as prescribed under Rule 34 of the Rules for the Administration of Justice and Police in the Naga Hills District."

The contention of learned counsel, therefore, that Shri Chettri, the Additional Deputy Commissioner, went behind the decree has no substance.

5. The 2nd submission of learned counsel is that the Additional Deputy Commissioner had no power to take additional evidence without sufficient and specific grounds, Counsel has further submitted that Shri Chettri has not considered the evidence already on record and that he tried the case *de novo*.

6. Under Order 41 Rule 27, Code of Civil Procedure, the appellate Court has power to take additional evidence. The Civil Procedure Code does not apply to Nagaland. But under Rule 35 of the Rules, the Court of the Deputy Commissioner and his Assistant, as well as the High Court, "shall be guided by the spirit, but not bound by the letter of the Code of Civil

Procedure". An appellate Court in Nagaland, therefore, has power to take additional evidence, if the justice of a case demands, either suo motu or at the instance of a party or parties. In the instant case additional evidence was adduced by both the parties and was accepted by the Court. No illegality has been committed by the learned Additional Deputy Commissioner in this regard.

It is not correct to say that the learned Additional Deputy Commissioner has not considered the evidence already on record. As it will presently appear, he had considered the evidence, particularly the documentary evidence including the sketch map, that was on record. The second submission of learned counsel also has no substance.

7. The next submission of learned counsel is that "the spot verification of the learned Additional Deputy Commissioner cannot be substituted for evidence on record" and that "his order has been vitiated as no record of his inspection has been kept in the file".

Order 18 Rule 18 of the Code of Civil Procedure gives power to a court at any stage to inspect any property or thing concerning which any question may arise. In the instant case the learned Additional Deputy Commissioner made the spot verification on 28-4-1973 as the appellants before him (the opposite parties herein) contended that the demarcation of the boundary by the Sub-Divisional Officer was wrong and not in terms of the decree of Mr. W. Dundas. He made the spot verification with the representatives of both the parties, some Dobhasis from Mokokchung and the local Supervisor Kanungo. He carried with him the records, the sketch map and the orders passed by the Deputy Commissioner in Case No. 212 of 1907 when he made the spot verification. On the spot verification he found that the demarcation of the boundary by the Sub-Divisional Officer was wrong and not in consonance with the decree of Mr. Dundas. There is no provision in the Civil Procedure Code or in the Rules for making a memorandum of local inspection. If the officer or Court deems it necessary, he or it may take note of the actual facts found in the local inspection. In the instant case a memorandum of spot verification was not deemed necessary as the Additional Deputy Commissioner took all the necessary records with him and with their help and the help of the Supervisor Kanungo, he verified whether the demarcation of the boundary by the Sub-Divisional Officer was correct, and he found it was not. The submission of learned counsel that the learned Additional Deputy Commissioner substituted his verification for the evidence on record, has no substance and a memorandum of the spot verification also was not necessary in the present case.

8. The next submission of learned counsel is that the appeal before the Additional Deputy Commissioner was barred by res judicata in view of the order passed by the Additional Deputy Commissioner Mokokchung, on 26-3-1965 in this regard. The Additional Deputy Commissioner (Shri N. I. Jamir) merely passed an order directing demarcation of the boundary in terms of the decree passed by Mr. W. Dundas and it appears that the order was carried out by the Subdivisional officer, who made the demarcation by his order dated 17-5-1972. The learned Additional Deputy Commissioner in his impugned order examined whether the demarcation by the Sub-Divisional Officer in terms of the direction of the earlier Additional Deputy Commissioner was correct. The question of res judicata does not arise in the present case.

9. The last submission of learned counsel is that the order of the Additional Deputy Commissioner imposing penalty of Rupees 50/- each against 8 persons named in his order is illegal. Learned counsel is on a firmer ground on this point. The imposition of the penalty is for the alleged offence of violations of prohibitory orders passed by Court. No notice was issued to the persons penalised to show cause as to why the penalty should not be levied; nor were they charged with the offence. No procedure of law was followed by the learned Additional Deputy Commissioner. The order of penalty, therefore, is not sustainable in law. His order levying the penalty of Rs. 50/- each against the 8 persons named in his order, totalling Rs. 400/-, is set aside.

10. The application is partly allowed. I, however, make no order as to costs.

Application partly allowed.

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M. C. PATHAK, C. J. AND D. PATHAK, J.

Deochand Sarda, Petitioner v. The Union of India and others, Opposite Parties.
Civil Rule No. 276 of 1973 D/- 19-8-1975.

(A) Customs Act (1962), Section 129
(1) — Deposit of demanded duty pending appeal — Immediately after rejecting prayer to dispense with deposit, appeal dismissed for non-compliance with section — If and when valid.

Though the duty or penalty demanded is not deposited during the pendency of the appeal, the appeal has to be rejected; yet the appellate authority has a discretion under

JS/KS/D633/75/JRM

the proviso to dispense with such deposit. There is also no time limit laid down by the section for making the deposit. As such it will follow that after rejecting such a prayer for dispensation, appellant should be given some reasonable time by the appellate authority to make the deposit and on his failure the authority can dismiss the appeal. (Paras 10 and 12)

Thus dismissal of the appeal for non-compliance with the section immediately after rejection of such prayer for dispensation is illegal. (Para 11)

A. M. Mazumdar and S. A. Laskar, for Petitioner; M. S. Rahman, for Opposite Parties.

PATHAK, C. J.— By this application under Article 226 of the Constitution of India the petitioner has challenged the order dated 25-7-1970 passed by the Appellate Collector of Customs and the order dated 7-12-1972 passed by the Government of India in revision application under the Customs Act, 1962.

2. The petitioner is a Cloth Merchant having his business under the name and style of "M/s Sarda and Co." situated at Silchar town. The Customs Preventive Officers seized five pieces of cloth measuring 23.05 metres under Case No. 17/CL/Imp/Prev./Sil/69, dated 9-6-1969, vide T. R. S. No. 25 of Book No. 439, dated 9-6-1969 and Inventory dated 9-6-1969. The petitioner challenged that seizure and also by a statement dated 9-6-1969 explained to the Customs Preventive Officer the licit sources and the character of those goods. The petitioner was served by the Assistant Collector, Customs, with a show-cause notice, being C. No. 50/CL/Sil/Cus/69/9299, dated 14/15-7-69 on the charges mentioned in the show-cause memo and he was asked to show-cause against the charges mentioned therein.

The petitioner showed cause by his petition dated 24-7-1969. By adjudication order No. Div/Sil/1581/Cus/69, dated 10-10-1969 the Assistant Collector, Customs rejected the explanation of the petitioner and confiscated the seized cloth in question under Section 111 (P) of the Customs (Amendment) Act, 1969 and made the confiscation absolute in terms of Section 123 (1) of Customs Act, 1962 and also imposed a penalty of Rs. 1,000/- on the petitioner under Section 112 of the Customs Act, 1962 and thereafter the petitioner preferred an appeal on 13-2-1972 against the order of absolute confiscation and imposition of personal penalty passed by the Assistant Collector of Customs and Central Excise, Silchar before the Appellate Collector of Customs, Calcutta.

As it appears the case was fixed for hearing on 25-7-1970. The appellant-peti-

tioner made a prayer before the Appellate authority for stay of realisation of the personal penalty till the decision of the appeal. The Appellate Collector, however, rejected that prayer and at the same time rejected the appeal itself for non-compliance with the provision of Section 129 (1) of the Customs Act, 1962. A revision application was filed against this order before the Government of India and that application was also rejected. Hence this writ petition against the aforesaid two impugned orders.

3. We have heard the learned counsel of both the parties.

4. The point that arises for consideration is whether an appeal under Section 128 read with Section 129 of the Customs Act 1962 is at all entertainable without deposit of the penalty levied and if entertainable whether the appeal may be heard without deposit of the penalty levied?

5. Sections 128 and 129 of the Customs Act, 1962 are quoted below:—

"128. Appeals— (1) Any person aggrieved by any decision or order passed under this Act may, within three months from the date of the communication to him of such decision or order,—

(a) where the decision or order has been passed by a Collector of Customs, appeal to the Board;

(b) where the decision or order has been passed by an officer of customs lower in rank than a Collector of Customs, appeal to the Appellate Collector of Customs:

Provided that the Appellate Authority may, if it is satisfied that the appellant was prevented by sufficient cause from presenting the appeal within the aforesaid period of three months, allow it to be presented within a further period of three months.

(2) The Appellate Authority may, after giving an opportunity to the appellant to be heard, if he so desires, and making such further inquiry as may be necessary, pass such order as it thinks fit, confirming, modifying or annulling the decision or order appealed against:

Provided that an order enhancing any penalty or fine in lieu of confiscation or confiscating goods of greater value shall not be passed

(a) by an Appellate Collector of Customs;

(b) by the Board unless the appellant has been given a reasonable opportunity of showing cause against the proposed order:

Provided further that where the Appellate Authority is of opinion that any duty of customs has been short-levied, no order enhancing the duty shall be passed unless the appellant is given notice within the

time-limit specified in Section 28 to show cause against the proposed order”.

“129. Deposit, pending appeal, of duty demanded or penalty levied.— (1) Where the decision or order appealed against relates to any duty demanded in respect of goods which are not under the control of customs authorities or any penalty levied under this Act, any person desirous of appealing against such decision or order shall, pending the appeal, deposit with the proper officer the duty demanded or the penalty levied:

Provided that where in any particular case the Appellate Authority is of opinion that the deposit of duty demanded or penalty levied will cause undue hardship to the appellant, it may in its discretion dispense with such deposit, either unconditionally or subject to such conditions as it may deem fit.

(2) If upon any such appeal it is decided that the whole or any portion of such duty or penalty was not leviable, the proper officer shall return to the appellant such amount of duty or penalty as was not leviable.”

6. It appears that under Section 128 any person aggrieved by any decision or order passed under the Act may, within three months from the date of the communication, against such decision or order file an appeal to the Appellate Collector of Customs. Section 129 lays down that when the appeal is against the decision or order relating to any duty demanded in respect of goods which are not under the control of customs authorities or any penalty levied under the Act, any person desirous of appealing against such decision or order shall, pending the appeal, deposit with the proper officer the duty demanded or the penalty levied. It has also been provided that where in any particular case the Appellate Authority is of opinion that the deposit of duty demanded or penalty levied will cause undue hardship to the appellant, it may in its discretion dispense with such deposit, either unconditionally or subject to such conditions as it may deem fit.

7. The language of the proviso to Section 129 (1) is different from the first proviso to Section 30 (1) of the Assam Sales Tax Act 1947. Similarly the first proviso to Section 19 (1) of the Assam Finance (Sales Tax) Act, 1956 is also different from the proviso to Section 129 (1) of the Customs Act, 1962.

8. The first proviso to sub-section (1) of Section 30 of the Assam Sales Tax Act, 1947 reads as follows:—

“Provided that no appeal shall be entertained by the said authority unless he is satisfied that the amount of tax assessed or

the penalty levied, if not otherwise directed by him, has been paid.”

Similarly the first proviso to sub-section (1) of Section 19 of the Assam Finance (Sales Tax) Act, 1956 reads as follows:—

“Provided that no appeal shall be entertained by the said authority unless he is satisfied that the amount of tax assessed or the penalty levied, if not otherwise directed by him, has been paid.”

9. As quoted hereinabove, the language of the proviso to Section 129 (1) of the Customs Act, 1962 is different from the above provisions of the Assam Sales Tax Act and the Assam Finance (Sales Tax) Act. Under sub-section (1) of Section 129 the penalty levied has to be deposited pending the appeal. That shows that the appeal is entertainable but during the pendency of the appeal the penalty levied must be paid unless the appellate authority in its discretion dispenses with such deposit unconditionally or subject to such conditions as it may deem fit considering the fact that the deposit of the penalty levied will cause undue hardship to the appellant. So the next question that arises is when the appeal is filed and the appeal is pending, at what point of time the appellant is to pay or deposit the penalty in question.

10. In the instant case we find from the impugned order of the Appellate Collector of Customs that the appeal was taken up on 25th July 1970 and on that date the Appellate Collector found that there was no justifiable reason for dispensing with the deposit of the penalty levied and having so found the Appellate Collector immediately rejected the appeal for non-compliance with the provision of Section 129 (1). There is nothing in express term as to what should be done if the penalty levied is not deposited during the pendency of the appeal. But on a perusal of the language of the whole section it may legally be interpreted that if the penalty is not deposited during the pendency of the appeal, the appeal cannot be heard, or in other words, the appeal will be ultimately rejected for non-depositing the penalty levied.

But there is a provision for exercising the discretion by the Appellate Authority and when the appellant prays to the Appellate Authority for exercising that discretion for dispensing with the deposit of duty demanded or penalty levied it may reasonably be said that after rejection of that prayer made under the proviso to sub-section (1) of Section 129, the appellant should be given some reasonable time to deposit the duty demanded or the penalty levied and if he fails to do that then the appellate Authority will have the jurisdiction to dismiss the appeal for non-compliance with the provision of sub-section (1) of Section 129.

In our considered opinion the Appellate Authority may not have jurisdiction to im-

mediately dismiss the appeal after rejecting the prayer of the appellant for dispensing with the deposit of the duty demanded or penalty levied without giving him reasonable time to comply with the requirements of sub-section (1) of Section 129, after the appellant is informed about the order of rejection of his prayer made under the proviso to sub-section (1) of Section 129. In that view we hold that impugned order rejecting the appeal immediately after rejecting the prayer made by the appellant for dispensing with the deposit of penalty levied under sub-section (1) of Section 129, is not sustainable in law and as such the order is liable to be quashed.

11. In the revisional order the Revisional Authority has observed that the Appellate authority is fully competent to reject the appeal for non-compliance with the provisions of sub-section (1) of Section 129 of the Customs Act, 1962. Then it has observed that it would serve no purpose to keep the appeal pending indefinitely.

12. It is correct that the Appellate Authority is competent to reject the appeal for non-compliance with Section 129 (1) of the Customs Act, 1962, but the language of sub-section (1) of Section 129 does not fix any limit within what time the deposit is to be made. It simply says that pending the appeal the duty demanded and the penalty levied shall be paid. That being the position after the prayer made under the proviso to sub-section (1) of Section 129 is rejected, the appellant should be asked to comply with the requirements of sub-s. (1) of S. 129, within a reasonable time as may be fixed by the Appellate Authority and if he fails to do that then the Appellate Authority will have the jurisdiction to reject the appeal for non-compliance with the provision of sub-section (1) of Section 129 of the Customs Act, 1962.

13. In the result we hold that the Appellate Authority committed an error of law on the face of it in rejecting the appeal immediately after rejecting the prayer made under the proviso to sub-section (1) of Section 129 of the Customs Act, 1962. The impugned orders of the Appellate Authority and of the Revisional Authority are therefore quashed.

14. The appellant-petitioner is allowed one month's time from to-day to deposit the penalty levied with the proper officer and if the deposit is made within the stipulated time, then the Appellate Authority shall restore the appeal to its file and dispose of the same in accordance with law.

15. If the penalty levied is not deposited with the proper officer within the time fixed herein, the present petition shall stand dismissed and the Rule shall stand discharged and the impugned orders of the Appellate Authority and the Revisional Authority also will stand.

16. The petition is allowed conditionally and the Rule is made absolute conditionally on the above terms. We, however, make no order as to costs.

17. Records shall be sent down immediately.

D. PATHAK, J.:— I agree.

Petition allowed.

AIR 1976 GAUHATI 24

BAHARUL ISLAM J.

Praneswar Das and others, Appellants v. Abharsharam Boj and others, Respondents.

First Appeal No. 93 of 1971, D/- 11-6-1975*.

(A) T. P. Act (1882), Sections 41, 53 — Benami Transaction — Onus of proof — Principles of — Motive — Proof of — Necessity.

Normal law is that when a person is the ostensible owner of property he is presumed to be its real owner. If a person alleges that the ostensible owner is not the real owner, the burden is upon him to prove that the ostensible owner is not the real owner. He is to prove it by cogent evidence beyond reasonable doubt that he is the real owner. It is not sufficient to create a mere doubt in the mind of the Court that the ostensible owner may not be the real owner, or that the ostensible owner is real owner is doubtful. (Para 11)

Motive is one of the ingredients of a benami transaction and when the plaintiff alleges a motive he has to prove it. If he fails to prove the alleged motive of the benami transaction, his failure will detract from the credibility of his case. (Para 13)

The source of the consideration money is not the conclusive test to determine the question of a benami transaction. It is to be considered along with other surrounding circumstances. (Para 17)

(B) Limitation Act (1908), Article 120 — Suit for declaration that the sale deed in suit was a benami purchase and that the plaintiff was a real owner — Article 120 which was residuary article applied. (Para 23)

(C) Court-fees Act (1870), Section 7 (iv) (b) and (c) — Plaintiff's suit for declaration that the sale deed in suit was benami and that he was the real owner — Reliefs also for confirmation and recovery of possession of property — Held that it was a declaratory suit with consequential reliefs

* (From Judgment D/- 19-11-1970 and decree D/- 11-12-1970 passed by Asst. Dist. J., L. A. D. Gauhati in T. S. No. 1 of 1965).

GS/IS/C444/75/HGP

and was covered by Section 7 (iv) (c) and not by Section 7 (iv) (b). (Paras 27, 28)

Cases Referred: Chronological Paras

AIR 1965 SC 1364 = (1965) 1 SCR 86	12
AIR 1949 FC 88 = (1949) 1 Mad LJ 568	12
AIR 1926 PC 77 = 24 All LJ 758	12
AIR 1921 PC 69 = 25 Cal WN 409	12

A. M. Majumdar and S. R. Bhattecharjee, for Appellants; S. R. Khaund and J. N. Sarma, for Respondents.

JUDGMENT:— The plaintiff filed the suit, out of which the present appeal arises, in the Court of the Assistant District Judge No. 1 at Gauhati, for a declaration that the purchase of the land described in the schedule 'A' to the plaint by the registered deed dated 3-12-1927 in the name of Dukhuram was a benami purchase by, on behalf of, and for the plaintiff; for a declaration that the sale of the lands described in schedule 'C' to the plaint to defendant No. 4 by Rangila by a registered deed dated 1-12-1959 was fraudulent and null and void; for a declaration that the decree granting Letters of Administration in favour of defendants Nos. 1 to 3 by the Additional District Judge, Gauhati in T. S. (Probate) No. 10 of 1962 in respect of the 'B' schedule land was not binding on the plaintiff; and for confirmation of his possession in respect of the 'B' schedule land and for recovery of possession of the 'C' schedule land. The land described in schedule 'A' measures 54B-K-14 Lechas comprising the land measuring 43B-4K-11 Lechas described in Schedule 'B' and 10 B. 2K. 19 Lechas described in schedule 'C' to the plaint.

2. The plaintiff's case may be stated as follows:—

Domram and Kaluram were two brothers being the son of one late Dhaniram. Kaluram died leaving two sons, Dukhuram and Laghanu. Laghanu died leaving Baliram (defendant No. 5) and Dhariya Ram (defendant No. 6). Dukhuram died leaving his widow, Rangila only. Rangila died in 1960. The plaintiff is the son of Domram. The plaintiff alleges that he entered into an agreement for the purchase of the 'A' schedule land from late Anandiram Das for a consideration of Rupees 1300/-. The agreement was effected by a registered deed dated 23-12-1927. An earnest money of Rs. 200/- was paid on the date of the agreement. The stipulation was that the balance of Rs. 1100/- of the consideration money would be paid within a month when the sale deed would be executed. Accordingly the plaintiff paid the balance sum of Rs. 1100/- on 3-12-1927 and purchased the land from Anandiram and took delivery of possession thereof. As the plaintiff was in Government service and as his two nephews, defendants Nos. 5 and 6, were jointly living with him he got the sale deed

executed in the name of his cousin, Dukhuram, who was living separately from him. The plaintiff alleges that although the sale deed was executed in the name of Dukhuram the consideration money was paid by him; he himself took delivery of possession of the land and was in possession thereof; he paid the land revenue and exercised all his rights in respect of the land continuously since the date of purchase. After the death of Dukhuram there was some litigation in respect of the suit land, but it was he who was taking all steps in those litigations in the name of Rangila. He possessed the land through tenants and adhiars and realised rents in respect thereof. Dukhuram was keeping a shop at Shillong where he died about 30 years ago. After the death of Dukhuram he maintained Rangila at his house till about 5 years ago when she picked up a quarrel with his wife and left Shillong for her brother's home. Defendant No. 3, Chiroram Boj, was her brother. Defendant No. 2 is Chiroram's son. Defendant No. 1 is the son of Rangila's sister. After a few months of her stay with defendant No. 3, Rangila fell ill. Taking advantage of that position defendants Nos. 1 to 3 got a registered sale deed dated 1-12-1957 executed by Rangila in the name of defendant No. 4, Harmohan Bora, and got the money misappropriated. The plaintiff had no knowledge of the sale till April, 1961 when he learnt it from the tenants when he went to collect the rents. On 27-5-1960 Rangila executed a will in respect of the 'B' schedule land in favour of defendants Nos. 1 to 3. The plaintiff alleges that the will was collusive and involuntary. A few months after the execution of the will, namely, 15-6-1960, Rangila died. The plaintiff alleges that the purchase of the 'C' schedule land by the defendant No. 4 was collusive and the sale is void. It is also alleged that defendants Nos. 1 to 3 got Letters of Administration vide the decree of the Additional District Judge in T. Suit 10/60 in respect of the 'B' schedule land. The plaintiff further alleges that when the defendant No. 4 appeared and filed his written statement he came to know that defendant No. 4 had sold the 'C' schedule land in turn to the Gauhati Development Authority, which originally was not made a party to the suit but later on joined as defendant No. 4 (a).

3. Defendants Nos. 1 to 3 have filed a joint written statement. They have inter alia pleaded that the suit was barred by limitation, it was bad for multifariousness; and that the suit was inadequately valued and adequate Court-fee had not been paid. Their factual plea is, that late Dukhuram was not in any way related to the plaintiff; Dukhuram, during his lifetime was keeping a shop at Shillong and was a man of substance. They allege that in 1927 Dukhuram purchased the land with his own money from late Anandiram by the registered sale deed

in question, got his name mutated and was in possession thereof. They deny that the plaintiff paid the consideration money. They admit that the plaintiff was known to Dukhuram, who requested the former to help him in the purchase of the land. Dukhuram paid the earnest money of Rs. 200/- to the plaintiff to have the agreement for sale in the name of Dukhuram, but the plaintiff fraudulently got it executed in his own name, but later on when the fact was discovered the sale deed was executed in the name of Dukhuram. They claim that Dukhuram was the absolute owner of the suit land. They admit that Dukhuram died without any issue leaving his widow, Rangila as his sole heiress. After the death of her husband Rangila left Shillong and was living separately with her brother, defendant No. 3. It is also alleged by them that defendant No. 1, Abharsharam, was living with Dukhuram and Rangila at Shillong since his childhood and after the death of Dukhuram he left Shillong and he and Rangila used to stay at the residence of defendant No. 3. They deny that the plaintiff had to do anything with the suit land. They aver that during his lifetime Dukhuram managed the land and after his death it was managed by Rangila with the help of defendant No. 1. Rangila being in need of money sold the 'C' schedule land to defendant No. 4 by a registered deed dated 1-12-1959 for Rs. 6,500/- and put defendant No. 4 in possession thereof. Defendant No. 4 in turn, sold it to defendant No. 4 (a) who was put in possession thereof. They further aver that Rangila, out of natural love and affection and of her own free will executed the will bequeathing the 'B' schedule land to them. They, in due course, duly applied for Letters of Administration in respect of the will. The suit was contested by the plaintiff but the Additional District Judge granted the Letters of Administration vide T. S. No. 10/62 on contest. On the strength of the Letters of Administration they got their names mutated in place of Rangila in respect of the land. They further plead that Rangila instituted Title Suit No. 1160/34 in the Court of the Sadar Munsiff, Gauhati, in respect of 27 Bighas 17 Lechas which is half of the suit land against one Bimala Dasya and others and got a decree in her favour and got possession of the land. The plaintiff knew about the suit but he did not set up any claim to the suit land. Thereafter also the plaintiff and one Sukuram filed mutation case No. 227 of 1933-34 claiming the suit land by right of inheritance from Dukhuram, but their case was rejected by the Assistant Settlement Officer by his order dated 2-1-1934 in which it was held that Rangila was the sole heir of Dukhuram and that she had been in possession of the land. The plaintiff did not prefer any appeal against that order, nor did he institute any civil suit.

4. Defendant No. 4, Harmohan Bora, has filed a separate written statement. His

material plea is that he was a bona fide purchaser of the 'C' schedule land for valuable consideration and was protected under Section 41 of the T. P. Act. He pleads that the land was in possession of some tenants who surrendered their possession by registered deed of relinquishment dated 1-12-1959 in his favour on payment of Rs. 1000/-. He further pleads that the plaintiff consented to the mutation of his name in respect of the 'C' schedule land on 1-6-1962 before the Settlement Officer, Kamrup. He has also stated that by a registered sale deed dated 17-1-1962 he has sold the land to defendant No. 4 (a).

5. Defendant No. 4 (a), the Gauhati Development Authority, has filed a separate written statement. They deny the plaintiff's allegations. Their case is that they purchased the land of schedule 'C' from defendant No. 4 by registered sale deed dated 17-1-1962 for Rs. 53,343/- and got possession thereof. This purchase was necessary to implement the "Middle Income Group Housing Scheme" of the Government of Assam. They plead that they are bona fide purchasers for valuable consideration and are protected under Section 41 of the Transfer of Property Act. They have also pleaded that the plaintiff's suit is barred under Section 60 of the Town and Country Planning Act, 1959.

6. On the basis of the pleadings the following issues have been framed by the trial Court:

"1. Whether the suit is maintainable in this form?

2. Whether the suit is barred by limitation?

3. Whether the suit is bad for non-joinder of the Gauhati Development Authority, which purchased the interest of the defendant No. 4 by a registered sale deed before the institution of the suit?

4. Whether the suit is bad for mis-joinder of causes of action?

5. Whether the different reliefs claimed in the suit can be combined together in one suit and whether one suit is competent to cover all these reliefs?

6. Whether the suit is properly valued and the plaint is adequately stamped?

7. Whether the purchase dated 3-12-1937 of the "A" schedule land by late Dukhuram was a banemi one for and on behalf of the plaintiff?

8. Whether the sale dated 1-12-1959 by late Rangila Dasya in favour of the defendant No. 4 is a collusive and fraudulent one?

9. Whether the probate granted by the Addl. District Judge, L. A. D., Gauhati in T. S. No. 10/62 is binding on the plaintiff?

10. Whether the plaintiff is estopped by his acts and conduct to institute this suit?

11. To what reliefs, if any, are the parties entitled?

Additional issues:—

1. Whether the defendant No. 4 (a) is a bona fide transferee for value, without any notice of the claim of the plaintiff and protected under Section 41 of the Transfer of Property Act?

2. Whether the suit against the defendant No. 4 (a) is maintainable under Section 60 of the Assam Town and Country Planning Act, 1959 (Assam Act 11 of 1960)?

3. Whether the plaintiff has acquired title in respect of the suit land by right of adverse possession as claimed by him?

7. After trial the learned trial Court has held that the plaintiff "has completely failed to prove his alleged case that the purchase dated 3-12-1927 of the 'A' schedule land by late Dukhuram was a benami one for and on behalf of the plaintiff". It has also held that the sale deed executed by Rangila in favour of defendant No. 4 was genuine and that defendants Nos. 4 and 4 (a) were protected under Section 41 of the Transfer of Property Act. It dismissed the suit. Hence this appeal by the plaintiff.

8. The only submission made before me by Shri A. M. Majumdar, learned counsel for the appellants, is that the finding of the learned Court below that the plaintiff has failed to prove his case that the purchase of land in the name of Dukhuram under sale deed Ext. 2 was not a benami transaction, is erroneous. He has expressly given up any challenge to the findings of the learned Court below that the sale in favour of defendant No. 4 by Rangila was genuine and that defendants Nos. 4 and 4 (a) were protected under Section 41 of the Transfer of Property Act.

9. In reply Sri J. N. Sarma, learned counsel for defendants 1, 2, 3 submit that the finding of the learned Trial Judge on the point of benami is a correct one. In addition he has raised two other points; (i) that the plaintiff's suit was barred by limitation and (ii) that appellants did not pay adequate court fee in the suit, as well as in the appeal.

10. Before we consider the alleged benami purchase let us examine the relevant law on the point.

11. The normal law is when a person is the ostensible owner of property he is presumed to be its real owner. When land is purchased by a registered deed in the name of a person the presumption is that he is the real owner of the land as well as ostensible. If a person alleges that the ostensible owner is not the real owner, the burden is upon him to prove that the ostensible owner is not the real owner. When a plaintiff brings a suit on the allegation that though the suit land stands in the name of the defendant and was purchased in his name it was a benami purchase and the real owner is

the plaintiff, the burden is upon him (plaintiff) to prove it. He is to prove it by cogent evidence beyond reasonable doubt that he is the real owner. It is not sufficient for the plaintiff to create a mere doubt in the mind of the Court that the ostensible owner may not be the real owner, or that the ostensible owner is real owner is doubtful.

12. The Privy Council in AIR 1928 P. C. 77 have held:—

"In all benamidar transactions the very object of the parties is secrecy; but still the person who alleges that property conveyed on another belongs to himself must prove his allegation and prove it beyond reasonable doubt".

In another decision reported in AIR 1921 PC 69 the Privy Council has held:

"The burden of proof lies on the party assailing a transaction as benami, although the circumstances may be suspicious. In such cases it is essential to take care that the decision of the Court rests not upon suspicion, but upon legal grounds, established by legal testimony".

Their Lordships of the Federal Court in the case of Gangadara Ayyar v. Subramania Sastrigal reported in AIR 1949 FC 88 have laid down the law in still clearer terms thus:

"The onus of establishing that a transaction is benami is on the person asserting benami nature of the transaction and it must be strictly made out. The decision of the Court cannot rest on mere suspicion but must rest on legal grounds and legal testimony. In the absence of evidence the apparent title must prevail.

In a case where it is asserted that an assignment in the name of one person is in reality for the benefit of another, the real test is the source whence the consideration came and when it is not possible to obtain evidence which conclusively establishes or rebuts the allegation, the case must be dealt with on reasonable probabilities and legal inferences arising from proved or admitted facts."

Their Lordships of the Supreme Court laid down the law in AIR 1965 SC 1364 with regard to the test by which a transaction can be determined whether it was a benami one. Their Lordships have observed:

".....We start with the position that the Court will presume an ostensible title to be the real title unless, a plaintiff who seeks to assert the contrary pleads and proves that the ostensible owner is not the real owner. In other words, the onus is on the person who alleges a transaction to be benami to make it out. Of course, the source of the funds from which the purchase is made coupled with the manner of its enjoyment would be a very material factor for establishing the case of benami but the mere proof of the source of the purchase money would not finally establish the benami nature of the defendant's title."

Their Lordships then quoted with approval Mayne's observation in the Hindu Law on the point:

"While the source from which the money came is undoubtedly a valuable test, it cannot be considered to be the sole or conclusive criterion. For, the question whether a particular transaction is benami or not, is one of intention and there may be other circumstances to negative the prima facie inference from the fact that the purchase money was supplied by or belonged to another. The position of the parties, the relation to one another, the motives which could govern their actions and their subsequent conduct may well rebut the presumption." Their Lordships further observed:

"Even where the benami is established, effect will not be given to the real title if the result of doing so would be to violate the provisions of the statute or to work a fraud upon innocent persons".

13. In the light of the above principles of law on the question, let us now examine the present case. Motive is one of the ingredients of a benami transaction and when the plaintiff alleges a motive he has to prove it. If he fails to prove the alleged motive of the benami transaction, his failure will detract from the credibility of his case. In the instant case the plaintiff alleged that he purchased the suit land in the name of Dukhuram for two reasons: first that he was in Government service and it was not possible for him to buy the land in his own name; and second, that his nephews, Baliram and Dhariya, (defendants 5 and 6 respectively) were living jointly with him. He did not purchase the land in his own name lest defendants 5 and 6 claimed shares in it.

14. To prove that he was in Government service, the plaintiff's is the only evidence. He has also relied on his own description, occupation—service in the agreement for sale, Ext. 1. The agreement stands in the name of the plaintiff. He has not explained as to why Ext. 1 was executed in his name although allegedly he was in Government service and living jointly with defendants Nos. 5 and 6. Even he himself has not stated the nature of his service under the Government. On the other hand, his own witness Udit (P. W. 1) has stated that he knew the plaintiff from his childhood and that the plaintiff used to work as a Mohoril (Pleader's clerk) in the Court. His allegation that he was in Government service has been seriously challenged by the defendants. The plaintiff has adduced no dependable evidence. It must, therefore, be held that the plaintiff has failed to establish that he was in Government service at the time of the transaction.

15. It is an admitted fact that originally the plaintiff lived in village Kheheripara. Presumably he was living there with

his two cousins, defendants 5 and 6. In the plaint the address of defendants 5 and 6 is Kharipara, Mouza Barbangsar, District Kamrup, while the plaintiff's address has been given as North Gauhati Town, Mouza Sila Sundari Ghopa, in the district of Kamrup. In his evidence the plaintiff has stated that in 1920 or 1921 he shifted to North Gauhati from his original village Khehenipara and since then he has been living there. He has not deposed that defendants Nos. 5 and 6 also shifted to North Gauhati with him. There is, therefore, no evidence to prove his allegation that at the time of the transaction, which took place in 1927, he was living jointly with defendants Nos. 5 and 6. On the contrary the evidence shows that he was living separately from his cousins. In the result it must be held that the plaintiff has failed to establish the second motive also of the alleged benami purchase.

16. The next consideration is the source of the consideration money. The plaintiff in his evidence has stated that he paid the consideration, which was his money. His evidence is that there was an agreement for the purchase (Ext. 1) executed on 23-11-1927 on which date he paid an earnest money of Rs. 200/- and on the date of purchase, namely, 3-12-1927 he paid the balance amount of Rs. 1100/-. P. W. 1, Udit in his evidence has supported him on this point. On the other hand the evidence of defendant No. 1 who was with Dukhu at Shillong at the relevant time is that the plaintiff took the money from Dukhu. I do not have any reason to disbelieve P. W. 1. So it must be held that the actual payment of the consideration of the purchase was made by the plaintiff, although there is no credible evidence on the source of the money. The presumption is that it was the plaintiff's own money.

17. The source of the consideration money is not the conclusive test to determine the question of a benami transaction. It is to be considered along with other surrounding circumstances.

18. Let us now examine the other surrounding circumstances in the case. Let us first find on possession.

(i) Possession

The plaintiff has examined P. Ws. 2, 3 and 4 to prove his possession of the suit land, and proved some documents,

Exhibits 3 (1) to 3 (16)

P. W. 2, Kiringa Mikir, deposes that he possessed 24 bighas out of the suit land as a tenant under the plaintiff. The land in question is agricultural land. His evidence is that he used to pay cash rent of Rs. 2/- per bigha for 5 bighas and for the remaining area he used to pay rent in kind at the rate of 3 puras of paddy per bigha. He is aged

about 35 years. His evidence is that settlement was taken by his father from the plaintiff. To prove the tenancy he has proved some rent receipts marked as Exts. 3 (1) to 3 (16). I have examined Exts. 3 (1) to 3 (16) in original. It appears that Exts. 3 (1) and 3 (2) are for the rents for the same year 1964. Each of them is for 20 maunds of paddy and Rs. 10/-. Ext. 3 (2) is dated 3-1-1965 and Ext. 3 (1) is dated 6-1-1966. The plaintiff's evidence is that P. W. 2 possessed 25 bighas of land. The plaintiff deposes that the original agreement was with the father of P. W. 2 in the year 1927-28. He says that he used to give him 20 maunds of paddy per year. The rent receipts, Exts. 3 (1) to 3 (7) and 3 (11) to 3 (16) appear to have been written on pieces of white paper of same sizes and same quality. They also appear to have been written with the same pen and ink. Ext. 3 (8) also appears to have been written on a piece of paper of same size and of same quality as of Exts. 3 (1) to 3 (7) but with pencil. Exts. 3 (9) and 3 (10) appear to have been written on pieces of paper of the same quality as the paper of other receipts of the 3 series, though of different sizes but with the same pen and with the same ink. Furthermore there are some clear over-writings. In Ext. 3 (4) originally the year of rent was mentioned as '1362', which was a Bengali year, but '9' has been over-written on '3' and made it '1962'. Similarly '9' has been over-written on '3' in Ext. 3 (5) and the year '1361' has been made '1961'; similarly in Ext. 3 (7) '1356' has been altered to '1956'; in Ext. 3 (8) '1350' has been altered to '1950'; in Ext. 3 (9) '1342' has been altered to '1942'; in Ext. 3 (10) '1340' has been altered to '1940'; and in Ext. 3 (12) '1334' has been altered to '1934'. Exts. 3 (1) to 3 (16) are suspicious documents and appear to have been fabricated for the purpose of the suit. No reliance can be put on them. The plaintiff's case that 24 Bighas of the suit land was possessed by him through his tenant P. W. 2 has to be rejected.

Exhibits 5 (1) to 5 (11).

P. W. 3 is Tithiram Mikir. He deposes that he occupied 4 bighas of the disputed land under the plaintiff on condition of paying 9 maunds of paddy per bigha as rent. He deposes that he used to pay the aforesaid rents and obtained rent receipts. These rent receipts have been proved as Exts. 5 (1) to 5 (11). He deposes that arrangement was not made with him. He is a very young man of 20 years at the time of deposition. The earliest receipt granted relates to 1953. He gave his evidence in 1966. He was, therefore, born about in 1946 and in 1953 he was about 13 years old. He admits that his father Kania is alive. No explanation has been given by the plaintiff as to why P. W. 3 has been examined in preference to his father, who presumably took the original arrangement. That apart, these Exts. 5 (1)

to 5 (11) also appear to have been written on pieces of papers of the same sizes and quality and with the same ink and pen. Exts. 5 (1) to 5 (11) executed in favour of P. W. 3, Tithiram, appear to have been written on pieces of paper of sizes and quality as of Exts. 3 series. Exts. 5 (1) to 5 (11) also appear to be suspicious and appear to have been fabricated for the purpose of the suit. No reliance can be placed on them. The evidence of P. W. 3 that he possessed 4 bighas of the disputed land as tenant under the plaintiff cannot be accepted.

Exhibits 5 (12) to 5 (21).

P. W. 4 is Rajen Mikir aged about 25 years. He deposes that he occupied 4 bighas of the suit land under the plaintiff on payment of 4 maunds of paddy for the 4 bighas of land. He further deposes that the plaintiff used to grant him rent receipts. These rent receipts have been proved as Exts. 5 (12) to 5 (21). Exts. 5 (12) to 5 (21) also appear to have been written on pieces of paper of similar sizes and quality, as Exts. 5 (1) to 5 (11) and Ext. 3 series, Exts. 5 (12) to 5 (21) also appear to have been written with the same pen and same ink as Exts. 5 (1) to (11) and 3 series. No reliance can be placed on these receipts, Exts. 5 (12) to 5 (21). P. W. 4 is aged about 25 years at the time of his deposition on 30-9-1966. So he was about 15 years in 1955 when the earliest receipt, Ext. 5 (15), for the year 1956 was issued. Another suspicious thing is that the rent receipt Ext. 5 (16) for four maunds of paddy for the year 1964 is shown to have been issued on 6-1-1955, that is to say, 9 years earlier than the year of rent. These receipts Exts. 5 (12) to 5 (21) are highly suspicious and unacceptable.

In fact all the exhibits 3 series and 5 series appear to be of the same age and appear to have been manufactured at the same time for use in the suit.

The plaintiff's case that he possessed the suit land through P. Ws. 2, 3 and 4 has to be rejected.

Exhibit 6 series.

Exts. 6 (1) to 6 (11) have been filed by the plaintiff. They purport to be the revenue receipts in respect of the suit land and with these receipts the plaintiff intends to prove his possession of the land. Exts. 6 (1), 6 (5) to 6 (7) and 6 (11) do not bear the signature or seal of the Mauzadar. These documents appear to be collusive. They are worthless. The rest, namely, Exts. 6 (2), 6 (3), 6 (4), 6 (8), 6 (9) and 6 (10) have been duly signed on behalf of the Mauzadar and also bear his seal. Exts. 6 (2), 6 (9) and 6 (10) show payment of revenue by Dukhuram on behalf of Anandiram. Exts. 6 (3) and 6 (8) show payment of revenue by Dukhuram on behalf of himself. Ext. 6 (4) shows payment of revenue by Dukhuram by money order. These receipts have come from

the custody of the plaintiff. The suggestion of the defendant was that these receipts were filed by Rangila in the Title Suit before the Munsiff, but they were taken back from the Munsiff's Court by the plaintiff. These receipts show that they were exhibited before the Munsiff. They however do not prove payment of revenue, by the plaintiff. So and in view of the fact that Exts. 6 (1), 6 (5) to 6 (7) and 6 (11) have been held to be collusive, the revenue receipts Ext. 6 series do not prove plaintiff's possession of the suit land. So it must be held that plaintiff has failed to prove his possession.

(ii) Ext. 8 is the chitha of the disputed patta. This document shows the names of Praneswar and defendant No. 4—Harmohan Bora as the pattadars. The name of the plaintiff appears to have been mutated by right of inheritance in place of Rangila, while the name of defendant No. 4 has been mutated on the chitha by right of purchase.

(iii) Ext. 10 is a copy of the Jamabandi of the suit patta. This document shows the name of Rangila as the pattadar in place of Dukhuram. Before Dukhuram, the names of Anandi Koch and Bimala were shown as pattadars. The name of Dukhuram was mutated in place of Anandiram by right of purchase in respect of half the land. After his death Rangila's name was mutated in his place on 16-6-1934 while Dukhuram's name had been mutated on 3-8-1930.

(iv) Ext. 12 is a patta of the suit land. This patta was admittedly issued jointly to the plaintiff and defendant No. 4 on 3-8-65 during the settlement operation while there was still an appeal pending before the Settlement Officer against the order dated 9-7-64 of the Assistant Settlement Officer in respect of the order of settlement of the disputed land.

19. Let us now examine the evidence on possession adduced by the defendants.

Ext. A is the registered sale deed executed by Rangila in favour of defendant No. 4, Harmohan, selling 10B-2K-6 Lechas of land out of the disputed patta on 1-12-1959. This document was signed by P. W. 2 Kiringa Mikir, as one of the attesting witnesses. One of the recitals in Ext. A is that the land sold was in possession of Chandi Kachari and his cousin under sukani agreement under the vendor, Rangila.

Ext. C is a registered deed of relinquishment. Ext. C shows that Chandi Kachari, Bhupen Chandra Boro and Abhoyram Kachari were tenants in respect of 10B-2K-6 Lechas of the 'C' schedule land sold by Rangila to defendant No. 4 under Ext. A. The tenants have relinquished their tenancy right in favour of the vendor Harmohan Bora. D. W. 4, Gobinda Ch. Talukdar, deposes that Harmohan Bora sold the above mentioned land which he had purchased under Ext. A to the Gauhati Development Authority, defendant No. 4 (a). He says that

when Harmohan purchased the land from Rangila, Chandi Kachari, Bhupen Chandra Bora and Abhoyram had been in possession of the land and they relinquished their possession by executing the deed of relinquishment, Ext. C. He says that this deed was read over to them. He has proved the signatures of the executants on Ext. C. He further deposes that after vacant possession was taken by Harmohan Bora he was put in possession and that he continued to be in possession. He has proved the rent receipts Exts. 1, 1 (1), 1 (2) and 1 (3) executed by defendant No. 4 (a) to him. Ext. 8, the chitha discloses the name of Chandi Kachari as a tenant in respect of 3B-3K-9 Lechas of land, of dag No. 24/19/759 and 3B. 7 Lechas of dag No. 25/19. This document also disclosed the name of P. W. 2 as one of the tenants.

D. W. 3 is an employee of the Gauhati Development Authority. He also proved Exts. 1, 1 (1), 1 (2) and 1 (3) as rent receipts issued by defendant No. 4 (a) to Gobinda Talukdar (D. W. 4).

D. W. 5 is Shrimati Jambati Das. Her evidence is that she was possessing 1 pura of land under Rangila for a long time on payment of 12 puras of paddy per year. She deposes that the paddy used to be collected by defendant No. 1, Abharsharam. She says that no rent receipt was issued for the rents. Her former husband was Dom whose name also appears in the chitha. She deposes that Dom also possessed 1 pura of land. She deposes that Praneswar never realised any rent from them. She deposes that before her marriage one Bidur used to possess that land.

D. W. 7 is Muria Mikir. His evidence is that he cultivated 6 bighas of the disputed land under Rangila on payment of 3 puras of paddy per bigha per year. He says that he has been possessing this land for about 25 years. He further says that defendant No. 1 used to collect the paddy and that the plaintiff never realised any rent from them.

D. W. 2, Harmohan Bora, deposes that he purchased 10B-2K-6 Lechas of the 'C' schedule land from Rangila by Ext. A. His evidence is that before his purchase there were three tenants on the land he paid Rs. 1000/- to the tenants, got a deed of relinquishment (Ext. C) executed by them, and took khas possession of the land. Thereafter he sold the land to defendant No. 4 (a) and gave possession to it. He deposes that after his purchase he got his name mutated. The plaintiff raised objection before the Settlement Officer against the mutation of his name. The objection was duly heard, but later on the objection was withdrawn by the plaintiff. The plaintiff consented to it and put his signature. This signature has been denied by the plaintiff. The defendants have filed the original order sheet in the Misc. Case No. 337 of 1961-62—Pranes-

war Das v. Harmohan Bora, pending before the Settlement Officer, Gauhati. The order dated 14-6-1962 shows an endorsement "Seen. P. Das 14-6-1962". This endorsement has been marked as Ext. X as the signature has been disputed by the plaintiff. The original petition of objection filed by the plaintiff before the Settlement Officer has also been filed. The objection petition bears two full signatures of the plaintiff marked as Y (1) and Y (2). The disputed signatures were sent to an expert who has given his opinion that the signature in Ext. X appears to be of that of the plaintiff. The hand-writing expert, Mr. M. B. Dixit, was examined on commission and his evidence has been tendered. On the basis of his evidence it must be held that the disputed signature was of the plaintiff. It, therefore, cannot be said that the plaintiff was not a consenting party to the mutation of the name of defendant No. 2 to 10B. 2 Kathas of land sold to defendant No. 4.

Ext. S is a Khatian in respect of 3B-4K-13 Lechas of land covered by dag No. 156 (old) and 168 (new) of the disputed patta. This khatian shows the name of Rangila as the pattadar and the name of Dom as the tenant.

Ext. T is another Khatian in respect of 6B-1K-15 Lechas covered by dag No. 90 (old) 94 (new) of the suit patta. This Khatian also shows the name of Rangila as the pattadar and Moria Mikir as the tenant.

Ext. N is a copy of the Jamabandi. This shows the name of Rangila as the pattadar, her name having been mutated in place of Dukhuram. Before her, her husband Dulhuram's name was mutated in place of Anandiram in respect of 27B-17 Lechas of land by right of purchase.

Ext. O, is a certified copy of the order in mutation case No. K. P. 268 of 1963-64, in which Abharsharam was the applicant. The order dated 15-6-1964 shows that the names of Abharsa Bez (defendant No. 1), Puspa Ram Bez and Chira Ram Bez were mutated in place of Rangila by right of inheritance in respect of 49B-4K-13 Lechas of land covered by patta No. 133 of village Hengrabari, Mouza Beltola.

20. A consideration of the above evidence conclusively proves possession of the land by Dukhuram, after him by Rangila and after her by the defendants.

21. There are some other circumstances which militate against the plaintiff's case. They are disclosed by Exts. K, P, M and 7.

Ext. K is the certified copy of the judgment of the Sadar Munsiff, Gauhati, in Title Suit No. 1760 of 1930 by Rangila, widow of Dukhuram, against Bimala Dasya in respect of the suit land. The suit was for a declaration of right, title and recovery of possession of 27B-17 Lechas of land covered

by the disputed patta. The suit was decreed with costs in favour of the plaintiff. The plaintiff knew about the suit, for, in his deposition he says, "in the year 1930 T. S. No. 1760/1930 was instituted by Dukhuram against Bimola Dasya in the Court of the Musiff, Gauhati and during the pendency of that suit Dukhuram died. On the death of Dukhuram the name of Rangila Dasya was substituted in place of Dukhuram. The suit was decreed in favour of Rangila. I took all steps in that case for Dukhuram and Rangila. Rangila obtained possession of the land through Court". The plaintiff did not claim any title for himself to the suit land.

Ext. P is a certified copy of the order dated 2-1-1934 of the Assistant Settlement Officer, Gauhati, in Case No. 227 of 1933-34. In that case the plaintiff and one Sukuram Das were the applicants. In that case the plaintiff claimed the land "by right of inheritance from Dukhuram". The Assistant Settlement Officer rejected the application and referred the plaintiff to the civil court.

Ext. M is the certified copy of the probate of the will granted by the Additional District Judge, Gauhati, to defendant No. 1 and others in Probate Title Suit No. 10 of 1962 in respect of the 'B' schedule land. In the probate case also the plaintiff set up his claim, not as the purchaser, but as an heir of Dukhuram.

Ext. 7, the jamabandi, also shows that the plaintiff's name was mutated in place of Rangila by order of the Assistant Settlement Officer dated 2-8-1960 in the chitha as an heir to Rangila.

These exhibits K, P, M and 7 belie the plaintiff's case that he was the purchaser of the disputed land under Ext. 2 and that Dukhuram was the benamdar.

The plaintiff has admitted in his cross-examination that the name of Rangila was mutated in place of Dukhuram with the consent of the plaintiff.

D. W. 8, Abharsharam, is defendant No. 1. His evidence is that Dukhuram was doing his business at Shillong. His wife Rangila was living with him at Shillong. They had no issue. He was living with them from his age of about 12 or 14 years. Rangila was his mother's younger sister. He has proved 17 revenue receipts Exts. J to J (16) showing payment of revenue for the suit land by Rangila. He deposed that he managed the land after the death of Dukhu.

22. Considering the facts of the case and the surrounding circumstances, I hold that the plaintiff has failed to establish that the purchase in question was benami.

23. Shri J. N. Sarma, learned counsel for the appellants submits that the suit was barred by limitation. Issue No. 2, as quoted above, was on the question of limitation. But the learned trial court did not give any finding on it as the issue was not

pressed. But as the question of limitation goes to the very root of jurisdiction of the Court, it has been allowed to be canvassed, before me.

As stated above, the deed of purchase (Ext. 2) was executed on 3-12-1927. The plaintiff's suit is for a declaration that this deed is a benami purchase and that he is the real owner. In my opinion Article 120 of the Limitation Act, 1908 applies to the suit. It is a residuary Article, which prescribes a period of six years for a suit and the suit ought to have been filed within six years from the date of the execution of Ext. 2. The suit, therefore, was clearly out of time.

24. In the suit the plaintiff prayed for confirmation of possession in respect of 'B' schedule land and for recovery of possession in respect of the 'C' schedule land. Alternatively, he prayed for a declaration of his title by right of adverse possession in respect of both 'B' and 'C' schedule land. It has been found above that the plaintiff has not been able to establish his possession at all. On the other hand the defendants have by cogent evidence been able to prove their possession. It must, therefore, be held that the plaintiff has not acquired any title by adverse possession.

25. The only other question that remains for consideration is the question of valuation of the suit and payment of court fee. Issue No. 6 was "whether the suit is properly valued and the plaint is adequately stamped". The learned court below has not given any clear finding on it. He has found that the plaintiff has not adequately valued the suit, both for the purpose of jurisdiction as well as court-fee. He has very vaguely held that "the suit has not been properly valued and proper Court-fee not paid".

The plaintiff has valued the suit at Rs. 8,000/-. There is vague evidence on the record that in 1960-61 the price of the land would be Rs. 4000/- to Rs. 5000/- per bigha. There is no concrete dependable evidence; So I accept the valuation of Rs. 8000/- for the purpose of Court's pecuniary jurisdiction and hold that the suit was properly valued for pecuniary jurisdiction.

26. At the time of filing of the memorandum of this appeal, the office note was that the memo was not adequately stamped and the appellant was directed to pay the deficit court-fee; but as he failed to do so, the matter was put up before the Court for orders. Presumably the correctness of the office order was questioned by the appellant's counsel. So a Division Bench of the Court on 2-9-1971 passed the following order:

"Let the appeal be registered subject to the matter relating to Court-fee to be decided at the time of hearing in presence of the other side".

Thus the matter of Court-fee falls for decision.

27. For possession the plaintiff has paid Court-fee at 5 times the annual revenue under Section 7 (v) (b) of the Court-Fees Act and for declaration a fixed fee of Rs. 20/- has been paid under Article 17 (iii) of Schedule II of the Court-fees Act. Clearly this is a declaratory suit with consequential reliefs, the dominant prayer being for a declaration that the purchase in question under Ext. 2 was a benami transaction, the reliefs of confirmation and recovery of possession were merely consequential, depending on the declaration sought. The suit, therefore, is clearly covered by Section 7 (iv) (c) of the Court-fees Act, which provides:

"7. The amount of fee payable under this Act in the suits next hereinafter mentioned shall be computed as follows:

(iv) In suits—

(c) to obtain a declaratory decree or order, where consequential relief is prayed,

according to the amount at which the relief sought is valued in the plaint or memorandum of appeal.

In all such suits the plaintiff shall state the amount at which he values the relief sought."

28. The plaintiff could not have filed the suit for mere declaration that the purchase of the A schedule land by registered deed dated 3-12-1927 was a benami purchase without seeking the reliefs of possession of the B and C schedule lands as in that case the suit would have been hit by Section 34 of the Specific Relief Act, 1963. Section 7 (v) (b) of the Court-fees Act is not applicable to the present case. Section 7 (v) (b) applies when the suit is for possession of land which is not permanently settled, but which forms an entire estate or a definite share of an estate, paying annual revenue to Government, or forms part of such estate and it is also recorded as a estate or a definite share of an estate paying annual revenue to the Government. In the instant case neither the B schedule land nor the C schedule land forms an entire estate or a definite share of an estate paying annual revenue to the Government nor is it recorded as such an estate. B schedule and C schedule lands are merely parts of a bigger area. They do not fulfil the conditions laid down under Section 7 (v) (b) of the Court-fees Act.

29. In the instant case the plaintiff has put the valuation at Rs. 8000/-. He is liable to pay Court-fee on this amount both on the plaint as well as in the memorandum of this appeal.

30. In the result the appeal is dismissed with costs.

Appeal dismissed.

will do, unaided by anyone, will be in public interest. He has got to decide the matters on objective facts with the aid of those who have raised objections to the proposal. This is, in our opinion, the minimum which the licensing authority ought to have done. He did not do so. However, the situation in the instant case is worse because on 28th April, 1973, the petitioner wrote a letter to the licensing authority in which he reminded the licensing authority of the objections which he had lodged lest the licensing authority should overlook them. By that letter the petitioner requested the licensing authority to hear him before granting a No-objection Certificate to the respondents Nos. 2 to 4 and to inform him whether he had stated any reasons in support of his order directing the issue of a No-objection Certificate to the respondents Nos. 2 to 4. The licensing authority replied to that letter on 3rd May, 1973. All that has been stated in that letter is that after having considered the objections lodged by the petitioner a No-objection Certificate was ordered to be issued to the respondents Nos. 2 to 4 and that he had taken into account the fact that the proposed theatre should not cause any interference or disturbance to the Students' Home run by the petitioner. The licensing authority in that letter does not state anything about the petitioner having been heard by him before he made the said order dated 29th March, 1973, nor does he state that he had made a reasoned order in that behalf even though the petitioner had made a specific enquiry in that respect.

11. The statutory duty cast upon the licensing authority to invite public objections is not a matter of empty formality nor is it a matter to be dealt with light-mindedly. It is a matter of substance. The substance lies in safeguarding public interests fully. In order to fully safeguard the public interests, it should have heard the petitioner, particularly when the petitioner wanted to be heard in the matter and should have informed the petitioner, particularly when the petitioner had made a specific enquiry in that behalf that he had made a reasoned order in the matter. Mr. Vakil has, however, tried to argue that the respondents Nos. 2 to 4 have a fundamental right to deal with their property in any manner they like and to carry on their business and that the petitioner cannot interfere with or object to it. Enjoyment of their property by the respondents Nos. 2 to 4 and their carrying on business in their property are matters which are subject to public interests. That is exactly what the Bombay Cinema Rules, 1954, provide for and that is exactly what we believe the licensing authority should have done.



Rule-made absolute.

AIR 1976 GUJARAT 17.

J. M. SHETH AND A. N. SURTI, JJ.

Vilas Vasantrai Shastri, Appellant v. Vasantrai Vishnu Shastri and others, Respondents.

First Appeal No. 809 of 1969. D/- 23-1-1975.*

(A) Hindu Law — Joint family — Alienation by Karta — Legal necessity — Proof — Recitals in sale deed or mortgage deed — Evidentiary value.

Recitals of legal necessity in mortgages or deeds of sale executed by a father or a manager are admissible in evidence but are not of themselves evidence of such a necessity without substantiation by evidence aliunde. They may be corroborated by representations made by the borrower. But the recitals are of the manager and they alone amount to a representation about the need of the family or where owing to the length of time it is impossible to produce other evidence, they have evidentiary value also.

(Paras 21 and 24)

(B) Hindu Law — Joint family property — Alienation — Right of after-born son to challenge — Doctrine of overlapping.

In order that an after-born son should have a right to challenge an alienation he must be born at a time when there is some coparcener in existence in the joint family who has a right to challenge the alienation. There must be no gap between the existence of a coparcener who has a right to challenge and the birth of a son who enters the coparcenary, subsequently. Therefore, the two lives viz. the lives of the son who has a right to challenge and the life of the subsequently born son must overlap. AIR 1954 Bom 386 (FB) and (1957) 59 Bom LR 1117 and AIR 1925 PC 33 and AIR 1957 Andh Pra 386 and AIR 1969 Andh Pra 24 and AIR 1964 SC 510. Mulla's Hindu Law, Arts. 270, 271 and 271-A, AIR 1927 All 702 and AIR 1928 Bom 383. Rel. on. (Para 39)

Cases Referred: Chronological Paras
AIR 1969 Andh Pra 24 = (1968) 1 Andh WR 236 31
AIR 1964 SC 510 = (1964) 4 SCR 497 32
AIR 1957 Andh Pra 386 = 1956 Andh WR 1067 30
(1957) 59 Bom LR 1117 = 1957 Nag LJ 358 27

*(Against order of Y. S. Shinde, Civil J. (Sr. Divn.), Navsari in Spl. Civil Suit No. 23 of 1968).

AIR 1954 Bom 386 = 56 Bom LR 426 (FB) 26, 27

AIR 1928 Bom 383 = 30 Bom LR 1095 35

AIR 1927 All 702 = 25 All LJ 734 34

AIR 1925 PC 33 = 52 Ind App 69 28, 35

G. C. Patel, for Appellant; K. H. Kati, for Respondents Nos. 5 and 6.

SURTU, J.:— This appeal is directed against the judgment and decree passed by the learned Civil Judge, (Senior Division), Navsari, in Special Civil Suit No. 23 of 1968. By the aforesaid decree, the learned Civil Judge, (Senior Division), Navsari, directed inter alia that the appellant-plaintiff's suit for a declaration pertaining to sales in favour of respondents Nos. 5 and 6 be dismissed. He, however, declared that the mortgage in favour of the respondent No. 7 is not binding to the appellant-plaintiff and respondent No. 2. The learned Civil Judge also held that the appellant-plaintiff had half share in the family properties except those properties alienated in favour of respondents Nos. 5 and 6. He also directed that suitable arrangements to be made for the maintenance and marriage expenses of respondent No. 3. He appointed the Commissioner to effect the partition and gave certain directions for taking accounts and for submitting his report. The operative portion of the judgment of the trial Court in this behalf is as follows:—

"1. The suit of plaintiff for a declaration pertaining to sales in favour of defendants Nos. 5 and 6 is dismissed.

2. The mortgage in favour of defendant No. 7 is hereby declared not binding to the share of plaintiff and defendant No. 2.

3. The plaintiff has 1/3rd share in the family properties except those alienated to defendants Nos. 5 and 6.

4. It is hereby ordered that the partition of the family properties shall be effected by Shri G. V. Patel, Pleader, who is appointed a Commissioner to effect the partition. The Commissioner shall propose what suitable arrangement should be made for the maintenance and marriage of defendant No. 3. In doing so, he will take into consideration the observations in course of this judgment.

5. Defendant No. 1 shall submit before the Commissioner the accounts of income and expenses etc. pertaining to the joint family properties from 1952. The Commissioner shall submit his report pertaining to liabilities and assets etc. for consideration for the final decree. The Commissioner shall take possession of the properties and shall submit his proposal for interim arrangement for maintenance of plaintiff and defendants Nos. 1, 2 and 3.

6. Plaintiff shall deposit Rs. 150 (Rs. one hundred and fifty only) in the first

instance towards expenses which the Commissioner may incur.

7. Considering the facts and circumstances revealed parties shall bear their own costs be paid up by him.

8. A preliminary decree shall be drawn up accordingly."

2. In the appeal before us the only grievance of the appellant-plaintiff is that the learned trial Judge was in error in not granting the declaration pertaining to sales in favour of respondents Nos. 5 and 6 (original defendants Nos. 5 and 6).

3. Now in order to understand the grievance of the appellant-plaintiff a few facts relevant for the disposal of the appeal may be stated in brief.

4. The suit was filed on behalf of the minor plaintiff by his maternal uncle Gajanand Vishwanath Junnarkar as next friend of the minor. In the suit the father, the mother and the sisters of the plaintiff are impleaded as defendants Nos. 1 to 4. Defendants Nos. 5, 6 and 7 are the alienees of the properties belonging to "the Hindu Undivided Family" (hereinafter referred to as "H. U. F.") formed of the plaintiff and respondents Nos. 1 to 4.

5. In substance it was the case of the plaintiff that his grandfather Vishnu Anna Shastri became the owner of properties mentioned in para. 4 of the plaint by virtue of the partition deed dated 27th January, 1887 between his grandfather Vishnu Anna Shastri and his brother Vasudev Anna Shastri. It was the case of the plaintiff that the said properties belonged to the H. U. F. It was also the case of the plaintiff that the properties mentioned at Items Nos. 2 and 3 in paragraph 4 of the plaint were transferred in favour of defendant No. 5 evidenced by a bogus document dated 17th October, 1938 Ex. 57, by one Maganlal Hargovandas Soni. It was alleged that at the relevant time defendant No. 5 was knowing that the said Maganlal Hargovandas Soni had got executed by defendant No. 1 a bogus document in his favour on 7th April, 1951 evidenced by Ex. 64 and that the said transaction had taken place during the lifetime of defendant No. 1's father Vishnu Anna Shastri. The plaintiff attacked the said alienation of 1951 on the following grounds:

(1) That defendant No. 1 had no authority in law to execute the said document dated 7th April, 1951 in his capacity as the Karta of the H. U. F. as defendant No. 1's father was alive at the time of the said alienation;

(2) That the said alienation was not for the benefit of the family and was not occasioned as a result of any "legal necessity or for the benefit of the estate" of the said H. U. F.

6. In this view of the matter the plaintiff alleged that the alienation in favour of defendant No. 5 is also illegal as:

(i) Defendant No. 5 was knowing about the interest of the plaintiff in the said alienated properties;

(ii) The transaction was illegal for want of consideration;

(iii) That defendant No. 5 was knowing that defendant No. 1 was incurring debts because of his gambling habits.

We may mention at this stage that the appellant-plaintiff was already in his mother's womb on 5th September, 1952 and was born on 8th March, 1953, whereas the document dated 7th April, 1951 evidenced by Ex. 54 was executed by defendant No. 1 when the father of defendant No. 1 was alive. We may also mention at this stage that defendant No. 1's father died in September, 1952 at the age of 95 years. At this stage we may also mention the case of the plaintiff against defendant No. 6. He alleged that the document dated 6th November, 1962 evidenced by Ex. 69 and executed by defendant No. 1 in favour of defendant No. 6 was illegal as the said transaction was effected without any legal necessity for the H. U. F. as the family was already having a monthly rental income of Rs. 520/-. It was alleged that defendant No. 6 was knowing that the property mentioned at Item No. 5 of paragraph 4 of the plaint alienated by the document Ex. 69, was the property of the H. U. F. It was alleged that it was not necessary to incur any debts for the educational expenses of the plaintiff or the marriage expenses of the members of the family. It was also alleged that defendant No. 6 was knowing that the plaintiff and defendants Nos. 2 to 4 were residing at Baroda and that defendant No. 1 indulged in gambling habits and that with a view to defeat the rights of the plaintiff, defendant No. 6 in collusion with defendant No. 1 got executed bogus document Exhibit 69 purporting to show that the consideration for the same is Rs. 8,999/- whereas in fact the document Ex. 69 was executed without any consideration. It was alleged that the necessary sanction was also not obtained from the Court as the said transaction was affecting the rights of the plaintiff, who was a minor at the relevant time.

7. It is not necessary for us to set out the other details mentioned in the plaint for the disposal of the present appeal.

8. Defendants Nos. 1 to 4 in essence and substance supported the appellant-plaintiff by their written statements Exs. 6, 7 and 8.

9. Defendant No. 5 resisted the suit by the written statement, Ex. 13. In substance he contended: (1) that the suit should be dismissed as Maganlal Hargovandas Soni was not joined as a party to the suit, (2) that defendant No. 1 was managing the properties of H. U. F. during the lifetime of his father during the year 1951 as his father was old and invalid; (3) that a sum of Rs. 7,995/- was paid to Manganlal Hargovandas Soni as the amount of consideration for the document Ex. 57; (4) that the suit was filed by the plaintiff in collusion with other defendants; (5) that the necessary alterations were made by him subsequent to the alienation in the properties alienated; (6) that taxes of the same were paid by him; (7) that he was using the property as a tenant prior to the execution of Ex. 57.

10. Defendant No. 6 resisted the suit by written statement Ex. 15. He contended that the plaintiff had filed the suit in collusion with defendants Nos. 1 to 4 to defeat his rights. He raised the contentions viz:

(a) That the suit was barred by law of limitation;

(b) That the suit is bad for joinder of parties and misjoinder of causes of action.

(c) That the monthly income of rent from H. U. F. property was much less than Rs. 520/- and hence it was not possible to maintain the members of H. U. F. or to save any amount from the income of rent. He stated that in the year 1939 the rental income of H. U. F. was Rs. 80/- per month, whereas in the year 1947, the monthly rental income was Rs. 210/-. He, therefore, contended that it was not possible to maintain the members of the said H. U. F. from the said income and hence for maintenance and the marriage expenses of the members of the H. U. F., it was necessary to incur debts. He stated that because of the said legal necessity, on 6-11-1962, the document, Ex. 69, was executed by defendant No. 1 in his favour for the consideration of Rs. 8,999/-. In this view of the matter he submitted that the suit should be dismissed against him.

11. The learned Civil Judge, after raising the necessary issues at Ex. 31 and recording the evidence passed the aforesaid decree partially accepting the case of the plaintiff and partially dismissing the plaintiff's case in regard to the alienations of H. U. F. properties in favour of defendants Nos. 5 and 6. It is under these circumstances that the present appeal is filed by the plaintiff.

12. No cross-objections are filed in this appeal.

13. The learned trial Judge took the view that Maganlal Hargovandas Soni

is a necessary party to the suit, who alone is competent to say whether the alienation of the year 1951 was for legal necessity, or what inquiry was made by him in that behalf about the existence of the same. Under the circumstances, he took the view that as Maganlal Hargovandas Soni was not made a party to the suit, he dismissed the suit against defendant No. 5. He also took the view that the accrual of the cause of action for filing the suit arose on the date of the alienation (Ex. 64) i.e. 7th April, 1951 and as the suit was not filed within 12 years thereafter, Ex. 64 cannot be challenged. However, he took the view that the suit in so far it challenged the transaction in favour of defendant No. 5 by Maganlal is concerned is within the prescribed period of limitation. He took the view that unless Ex. 64 is set aside, the purchase of properties by defendant No. 5 cannot be impeached. He also took the view that the suit against defendant No. 6 was filed within the period of limitation but the transaction evidenced by Ex. 69 dated 6th November, 1962 was effected for the legal necessity, and the benefit of the H. U. F.

14. In course of the hearing of the appeal, Mr. G. C. Patel, the learned advocate appearing on behalf of the plaintiff has raised the following contentions.

(1) That when defendant No. 1 executed the document dated 7th April, 1951 evidenced by Ex. 64 in favour of Maganlal Hargovandas Soni, defendant No. 1's father was alive and hence defendant No. 1 had no authority of law or otherwise and was legally incompetent to execute the document in regard to any H. U. F. property. In substance the contention was that at the relevant time the senior most member of the H. U. F. viz. defendant No. 1's father was the senior most member of the H. U. F. and was "KARTA" or the manager of the H. U. F. and hence the impugned alienation evidenced by Exhibit 64 is illegal, void and of no consequence.

(2) That assuming that defendant No. 1 was the manager of the said H. U. F., even then, the said alienation evidenced by Ex. 64 was effected without any legal necessity for the H. U. F. or without any benefit to the estate of the H. U. F. or for the payments of antecedent debts of the H. U. F. and hence the said alienation is illegal and not binding to the plaintiff.

(3) That the plaintiff who was born on 8th March, 1953 was in existence in his mother's womb on 5th September, 1969, when the plaintiff's grand-father was alive. On that day the plaintiff's grand-father, one of the coparceners of the said H. U. F. had a right in law to challenge the said alienation dated 7th April, 1951 evidenced by Ex. 64 and hence

by reason of the doctrine of overlapping, the plaintiff is having a right to challenge the said alienation effected on 7th April, 1951.

(4) That the plaintiff could challenge the said alienation within a period of 12 years after the alienee took the possession of the property in question in the year 1954 and hence the period of limitation for challenging such an alienation would start from the date on which the alienee took the possession of the property. In this behalf it was urged that the suit was filed on 9th August, 1968 and the same was filed in time as the plaintiff is entitled to get the benefit of Section 6 of the new Limitation Act of 1963.

(5) That no legal or valid consideration had been passed by Maganlal Hargovandas Soni in favour of defendant No. 1 for effecting the transaction on 7th April, 1951 in respect of the property mentioned in Ex. 64 and hence Ex. 64 is not a bona fide alienation.

(6) That no legal or valid consideration had been passed by defendant No. 5 in favour of Maganlal Hargovandas Soni for the impugned alienation on 17th October, 1958 evidenced by Ex. 57 and hence the same is illegal, void and of no consequence.

(7) That in regard to the aforesaid alienation in the year 1951, the learned trial Judge erred in holding that as Maganlal Hargovandas Soni was the necessary party and the suit should not have been dismissed against defendant No. 5 on that count.

(8) That the alienation dated 6th November, 1962 evidenced by Ex. 69 by defendant No. 1 in favour of defendant No. 6 was effected without any legal necessity and without receiving any consideration from defendant No. 6 and hence Ex. 69 was illegal, void and of no consequence.

These were the only contentions raised by Mr. G. C. Patel in course of the hearing of the appeal and now we proceed to dispose of the same.

15. Dealing with the first contention raised by Mr. Patel, we may state that it was the case of defendant No. 5 in his written statement, Ex. 13, that defendant No. 1 was managing the affairs of the H. U. F. and that the father of defendant No. 1 was invalid prior to his death in September, 1952. In this behalf the evidence of Gajanan Vishwanath Junnerkar, Ex. 23 is that he had knowledge pertaining to the documents in favour of defendants Nos. 5, 6 and 7. This witness in his cross-examination on behalf of defendant No. 2, no doubt, deposed that defendant No. 1's father used to manage the family properties till his death but when

cross-examined on behalf of defendant No. 3, the witness deposed in categorical terms that defendant No. 1's father was in management of the properties till 1950. He also deposed that when municipal taxes under Ex. 54 were paid in October, 1944, defendant No. 1's father was about 75 to 77 years of age. On this point, Shakkunila, Ex. 48, the mother of the plaintiff (original defendant No. 2) tried to support the plaintiff's case by deposing that her father-in-law used to collect the rent and after his death her husband collected rent. She also stated that all taxes and electric charges were paid by her father-in-law, but she also stated that her father-in-law had considerably bent from his waist since about 15 to 20 years. She denied the suggestion that defendant No. 1 as the manager of H. U. F. properties had filed suits for possession of H. U. F. properties against defendants Nos. 5 and 6. It is important to note that on this point defendant No. 1 would have been the best witness, but he did not enter the witness box in course of the hearing of the suit.

16. In this behalf the evidence given by defendant No. 5 is of considerable assistance to arrive at a correct conclusion. He stated that in 1948 a suit was filed by defendant No. 1 against him and it was compromised whereby the rent was increased from Rs. 45/- to Rs. 67-25rs. In substance he stated that he was knowing defendant No. 1's father who was physically very weak due to old age and had bent forward through waist and was deaf. He also stated that his vision was also not good. He stated that, that was the condition of defendant No. 1's father 3 or 4 years before his death. He also deposed that the work of collecting rent, repairs etc. was done by defendant No. 1. He also stated that since 1943, due to the ill-health of defendant No. 1's father, defendant No. 1 did all the management and that in the year 1943 defendant No. 1's father was aged about 85 years and the same is also supported by the death certificate of defendant No. 1's father produced at Ex. 41. He also deposed that the alienation effected in the year 1951 by defendant No. 1 was effected by him as "The head" of H. U. F.

17. The aforesaid evidence of defendant No. 5 is also supported by the evidence of Ishwarlal Hargovandas Ex. 63, the attesting witness to Ex. 64. This witness in terms deposed that the management of the properties was entrusted to defendant No. 1 by his father 15 or 20 years before he died. Witness Chhotubhai Ranchhodji Desai, Ex. 65, had received Rs. 3,500/- from defendant No. 1 being the amount paid to him and he also deposed that the management of H. U. F. and the properties thereof was done by

defendant No. 1. as defendant No. 1's father was very old. This witness in the cross-examination of the plaintiff stated that he had lent money to defendant No. 1 as Karta of the joint family. On behalf of defendant No. 5, witness Vithaldas Dayaram, Ex. 66, aged about 84 years was examined and he deposed that since about 8 to 10 years before the death of defendant No. 1's father, defendant No. 1's father was keeping indifferent health and was not able to move out nor could do any work and had entrusted the management of the properties to defendant No. 1. This evidence is also supported by the evidence of defendant No. 6, who also stated that in the year 1967 defendant No. 1's father was about 75 to 80 years and had bent in waist, could not hear and was not doing any management and that defendant No. 1 used to manage the properties.

18. Having regard to the aforesaid trustworthy evidence, it is clearly established that when defendant No. 1 executed the document dated 7th April, 1951 evidenced by Ex. 64 in favour of Maganlal Hargovandas Soni, defendant No. 1 was managing the affairs of the H. U. F. during the lifetime of his father who died in September, 1952.

19. That brings us to the discussion on the second contention raised by Mr. Patel. In substance the submission was that the document Ex. 64 dated 7th April, 1951 was executed by defendant No. 1 in favour of Maganlal Hargovandas Soni without any "legal necessity" for the H. U. F. or without any "benefit to the estate of the H. U. F." or for making any payments in regard to the antecedent debts incurred by the H. U. F.

20. The recitals in the document Ex. 64 dated 7th April, 1951 may be mentioned here. It is clearly stated in Ex. 64 that a sum of Rs. 6,500/- was paid by Maganlal Hargovandas Soni to defendant No. 1 for the following particulars.

- | | |
|--------------------|--|
| (1) Rs. 3580/- | for paying antecedent debt of Chhotalal Ranchhodji Desai (Ex. 58). |
| (2) Rs. 1538-50ps. | for paying and discharging the antecedent debts of the father (of deft. No. 1) and to pay and discharge the miscellaneous debts. |
| (3) Rs. 1381-50ps. | for house-hold expenses. |
| <hr/> | |
| Rs. 6500-00ps. | Total |

It was also mentioned in the said document, Ex. 64, that the possession of the alienated properties was handed over by defendant to Maganlal Hargovandas Soni.

21. Now it is well settled that recitals of legal necessity in mortgages or deeds of sale executed by a father or the manager and admissible in evidence, but are not of themselves evidence of such a necessity without substantiation by evidence aliunde. They may be corroborated by representation made by the borrower. But the recitals are the admissions of the manager and they also amount to a representation about the need of the family or where owing to the length of time it is impossible to produce other evidence, they have evidentiary value also.

22. Our attention was also invited to the document dated October 17, 1958, Ex. 57 executed by Maganlal Hargovandas Soni in favour of defendant No. 5. It is significant to note that defendant No. 1 has attested Ex. 57. As stated in the documents, Ex. 57, defendant No. 5 purchased the right, title and interest of Maganlal Hargovandas Soni in the concerned alienated properties as mentioned in Ex. 64.

23. Now apart from the aforesaid recitals contained in Ex. 64, there is voluminous oral evidence to prove that in the year 1951, there existed the "legal necessity" of the H. U. F. justifying the transaction evidenced by Ex. 64. In this behalf, witness Chhotubhai Ranchhodji Desai, Ex. 58, stated that defendant No. 1 paid to him Rs. 3,500/- and some more amount 15 or 17 years back. This witness deposed that the aforesaid amount of Rs. 3,500/- was lent by him to defendant No. 1 in his capacity as Karta of H. U. F. The aforesaid recitals in Ex. 64 substantially corroborate the evidence of this witness. The evidence of Gajanand, Ex. 42, also discloses that the family was maintained only from the monthly rental income from the properties of H. U. F. and only rent was all along their source of maintenance. The evidence of Shakuntala, (plaintiff's mother) Ex. 48, shows that the educational expenses of the plaintiff were borne by the maternal uncles of the plaintiff. She stated that the monthly rent was Rs. 150/- from the year 1939. She also deposed that her 50 tolas of gold ornaments and all the silver utensils were sold between the years 1939 to 1951-52. She also deposed that the repairs to the H. U. F. properties were done after 1951. Her evidence also discloses that the family had to run two establishments and defendant No. 1 used to send Rs. 120/- to her at Baroda. In clearest terms, she admitted that due to bad financial position, plaintiff was staying with her brother. The evidence of defendant No. 5 also shows that in the year 1950-51 the total rental income was Rs. 150/- per month. He also deposed that the family had to pay electric charges from that amount and the

family had to incur debts in case of sickness or marriage. In 1955 the family had to repair the staircase of the terrace and that two stair-cases, one of R. C. C. and one of wood were required to be placed. He stated that the total expenses for the said work came to about Rs. 5,500/- to Rs. 6,000/-. He also stated that the plaintiff was staying with his maternal uncle and that the family had to pay to him Rs. 55/- for plaintiff's lodging charges. He stated that the financial position of the H. U. F. was always very poor and defendant No. 1 had to file suits against the tenants for the recovery of rents. He stated that he was knowing defendant No. 1 from the year 1943 and he had no means to incur expenses on occasions like the demise in the family or the marriage in family or for the repairs of H. U. F. He also deposed that during the sickness of defendant No. 1, defendant No. 1 had incurred the debts. Ishwarlal Hargovandas, Ex. 63, one of the attesting witnesses to Ex. 64 also supports the case of defendant No. 5 in this behalf and stated that defendant No. 2 the mother of the plaintiff was seeing him many times and she used to tell him that she was having great difficulty in her maintenance. Defendant No. 6 also supports the case of defendant No. 5. Defendant No. 6 was a tenant in the H. U. F. property since the year 1937. He stated that the repairs to H. U. F. properties were done in the years 1947 and 1957. He also stated that defendant No. 1 sustained losses in coal business and for family purposes defendant No. 1 had to incur debts. He stated that the H. U. F. was having the income of rent to the extent of Rs. 100/- to Rs. 250/- between the years 1943 and 1957. He stated that H. U. F. properties were repaired by defendant No. 1 after having taken the loan from Chhotalal (Ex. 57). Witness Babulal P. Shah, Ex. 85, deposed that he is an advocate and was residing in the H. U. F. property. He stated that defendant No. 1 had to file suits against the tenants of H. U. F. for the recovery of rent. Navnilal Maganlal Soni, defendant No. 7, also stated inter alia that it was true that sometimes defendants Nos. 1 and 2 were in need of money for expenses for the family.

24. Thus on a careful consideration of the aforesaid evidence, which in our opinion is trustworthy we are convinced that the impugned alienation evidenced by Ex. 64 dated 7th April, 1951 was effected on account of legal necessity of the H. U. F. for the benefit of the estate of the H. U. F. and for payments of antecedent debts incurred for the family. In this view of the matter, we do not see any substance or merit in the second contention raised by Mr. Patel.

25. The third contention of Mr. Patel was that the plaintiff who was born on 8th March, 1953 was in existence in the mother's womb on 5th September, 1952 when the plaintiff's grandfather was alive. On that day i.e. on 5th September, 1952 the plaintiff's grandfather, one of the coparceners of the H. U. F. had a right in law to challenge the impugned alienation evidenced by Ex. 64 dated 7th April, 1951 and hence, by reason of the doctrine of overlapping, the plaintiff has a right to challenge the said alienation.

26. The reported decision of the Full Bench in *Shivaji Ganpati v. Murlidhar Daji*, AIR 1954 Bom 386, explains the doctrine of overlapping. Chagla, C. J. observed in para. 6 as follows:—

"It would be better to explain what has been called the doctrine of overlapping. As I have pointed out, in order that an after-born son should have a right to challenge an alienation he must be born at a time when there is some coparcener in existence in the joint family who has a right to challenge the alienation. There must be no gap between the existence of a coparcener who has a right to challenge and the birth of a son who enters the coparcenary subsequently. Therefore, the two lives, viz. the life of the son who has a right to challenge and the life of the subsequently born son must overlap, and that is the doctrine of overlapping."

27. In the case of *Mahadu Ukarda v. Tulsabai*, (1957) 59 Bom LR 1117, Justice Mudholkar observed while referring the case in *Shivaji Ganpati v. Murlidhar*, AIR 1954 Bom 386 (Supra) has observed as follows:—

"In that case it was held that where a cause of action to challenge an alienation by the father has accrued to a son then existing, a subsequently born son is also entitled to challenge that alienation as much as the earlier born son provided that the right of the earlier born son had not become barred prior to the birth of the subsequently born son by reason of the death or adoption of the earlier born son or by reason of the fact that the right of the earlier born son had before the birth of the subsequently born son become barred by limitation. It may, however, be pointed out that even according to the Full Bench the right to challenge an alienation constitutes one cause of action and that no fresh right accrues to the son subsequently born. It is also accepted by the Full Bench that limitation runs from the date of alienation and not from the date on which the son who could challenge the alienation is born."

28. In this behalf we may also usefully refer to the reported decision of the *Ranodip v. Parmeshwar*, AIR 1925 FC 33. A few facts of that decision may be

stated in brief. The suit out of which the appeal arose was instituted on 23rd June, 1920, by the four sons of the sixth defendant, Thakur Prithi Singh, claiming possession of the village described in the plaint. The plaintiffs and their father were a Joint Hindu Family governed by the law of the Mitakshara, and it was the plaintiffs' case that the village was the ancestral property of the joint family. On 3rd June, 1893, the plaintiffs' father purported to sell the village to Manjee Ram, who was represented in this suit by his descendants, defendants Nos. 1 to 5. The seventh defendant claimed as a mortgagee from defendants Nos. 1, 2 and 5. It was the contention of the plaintiffs that the sale was not binding on them as it was not made for legal necessity, and on this ground they claimed a decree for possession. It was thought necessary to consider whether the suit was barred by limitation, and for that purpose, the dates at which the several plaintiffs were born, became important. In that case plaintiff No. 1 was born on 23rd August, 1886; plaintiff No. 2, on the 4th August, 1891; plaintiff No. 3 on 1st October, 1897; and plaintiff No. 4 on 30th November, 1900. From the said facts it is clear that first and second plaintiffs were in existence at the date of the sale, but the other two plaintiffs were born after its completion. The time from which the period of limitation began to run had throughout been treated as the 3rd June, 1893, on the assumption that the alienees then took possession of the property within the meaning of Article 126 contained in the First Schedule to the Indian Limitation Act, 1908.

29. Now the prescribed period of 12 years from this date expired in 1905, but the plaintiffs contended that limitation was saved by Section 7 of the Limitation Act, read with Ss. 6 and 8. Sir Lawrence Jenkins in course of the judgment observed as follows:—

"It is conceded that the suit would not be saved by these sections if brought by the first three plaintiffs alone; but it is contended that the fourth plaintiff is entitled to the expended period for which the sections provide and that the suit is, therefore, not barred by limitation. Both the Courts in India have decided adversely to this contention.

The cause of action arose on the 3rd June, 1893, and it is from that date that the period of limitation is to be reckoned. The fourth plaintiff's subsequent birth on the 30th November, 1900, did not create a fresh cause of action or a new starting point from which limitation should be reckoned.

To the contention that by the cited sections the period of limitation is extend-

ed for three years from the cessation of the fourth plaintiff's minority the answer is that by their express terms this extended period can only be claimed by a person entitled to institute the suit at the time from which the period of limitation is to be reckoned. The fourth plaintiff does not come within this description, for at that time he was not in existence. He, therefore, is not entitled to the three years' extension, and his suit is consequently barred."

30. Our attention was also invited to the reported decision in *Seshamma v. Venkayya*, AIR 1957 Andh Pra 386, Viswanath Sastri, J. in para. 3 of the judgment observed as follows:—

"That an improper alienation of joint family property by a father or manager can be set aside at the instance of an after-born coparcener provided there was in existence at the date of the alienation some coparcener who could challenge it and he had not consented to the alienation or ratified it before the after-born son was begotten."

31. In *Venugopalaswamy Varu Temple v. Visweswara*, AIR 1969 Andh Pra 24, in paragraph 9 of the judgment it is observed as follows:—

"That an after-born son can, under certain circumstances sue to set aside his father's alienation of ancestral property is not disputed. The law seems to be now fairly settled that a son born in a joint Hindu family acquires by birth interest in ancestral property, but does not acquire any interest in any right to sue. The cause of action accrues only on an alienation and only when the purchaser takes possession under the alienation. See Article 126, now Article 109, of the (new) Limitation Act. It would be a mistake to think that a new cause of action occurs upon the subsequent birth of a son in the family. The after-born son does not acquire a fresh cause of action and consequently a fresh period of limitation does not start from the date of his birth. In this case, the time from which the period of limitation is to be reckoned is the date of the transfer and taking of possession under it by the purchaser. When he was not born on the day of the transfer, he could not be said to be suffering from any disability on the date and eventually cannot take any advantage of Section 6, Limitation Act. It will thus be clear that a subsequently born son has the same cause of action which accrued to another coparcener apart from the father who made the alienation and who was living at the time of alienation."

32. In *Guramma v. Mallappa*, AIR 1964 SC 510, the Supreme Court observed as follows in paragraph 13 of the judgment:—

"A coparcener, whether he is natural born or adopted into the family, acquires an interest by birth or adoption, as the case may be, in the ancestral property of the family. A managing member of the family has power to alienate for value joint family property either for family necessity or for the benefit of the estate. An alienation can also be made by a managing member with the consent of all the coparceners of the family. The sole surviving member of a coparcenary has an absolute power to alienate the family property, as at the time of alienation there is no other member who has joint interest in the family. If another member was in existence or in the womb of his mother at the time of the alienation, the power of the manager was circumscribed as aforesaid and his alienation would be voidable at the instance of the existing member or the member who was in the womb but was subsequently born, as the case may be, unless it was made for purposes binding on the member of the family or the existing member consented to it or the subsequently born member ratified it after he attained majority. If another member was conceived in the family, or included therein by adoption before such consent or ratification, his right to avoid the alienation will not be affected."

33. Our attention was also invited to Articles 270 and 271 of Mulla's Hindu Law, 14th Edition. Article 270 of Mulla's Hindu Law provides inter alia as follows:—

"An alienation may also be set aside at the instance of any coparcener who, though born subsequent to the date of alienation, was in his mother's womb at the date of alienation; the reason is that under the Hindu law a son conceived is, in many respects equal to a son born."

"In alienation of joint family property made by a father, there being no male issue in existence at the date of the alienation, is valid though made without legal necessity. Such an alienation cannot be objected to by a son born after the date of the alienation on the ground that it was made without legal necessity. But an alienation made by a father who has sons then living not being one for legal necessity, or for payment of an antecedent debt, if made without their consent, may be set aside by one of those sons—partially or wholly according to the state in which the question arises." Article 271 of Mulla's Hindu Law provides inter alia as follows:—

"The period of limitation for setting aside an alienation by a father of joint family property is twelve years from the date when the alienee takes possession of

the property (Limitation Act, 1908, Schedule 1, Article 126). If however, the alienee has not taken possession the only right of the son will be to obtain a declaration that the deed of alienation is invalid and the limitation prescribed was six years under Article 120 of the old Limitation Act. A similar provision is incorporated in Article 109 of the New Limitation Act.

The cause of action in a suit to set aside the father's alienation arises when the alienee takes possession of the property. The period of twelve years is therefore to be counted from that date. That is the material date not only as regards the suit of a son in existence at the date, but also the suit of a son not in existence at the date. The extension of three years given by Section 6 of the Limitation Act cannot be availed of by the sons not in existence at the time of the alienation.

Article 271-A provides as follows:—

"A suit by a Hindu to set aside an alienation of joint family property made before his birth by his grandfather without any justifying necessity is governed not by Article 126 but by Article 144. But the same principles apply. If the suit is brought more than 12 years after the date of alienation it is barred."

34. Mr. Patel also invited our attention to the decision in *Bindeshri Upadhya v. Sital Upadhya*, AIR 1927 All 702. In that case a suit was brought by the plaintiffs for a declaration that a certain mortgage-deed executed on 22nd May, 1915 by their father, defendant No. 1, in favour of defendants Nos. 2 and 3 is invalid on the ground that their father executed the deed without legal necessity and that the property being an occupancy holding could not be transferred under the provisions of the Tenancy Act. The defendant had raised a plea that the suit was barred by limitation. The trial Court having applied Article 126, Limitation Act, found that the suit was maintainable as it was brought within 12 years of the date of the alienation impugned. In first appeal the District Judge held that Article 126 was not applicable inasmuch as the plaintiffs were not asking for possession but only for a declaration. The point which was argued before the High Court was that the lower Appellate Court was wrong in refusing to apply Art. 126 of the Limitation Act. It was contended that Article 126 will apply even though the alienee does not get possession of the mortgaged property in cases where the interest actually mortgaged was not capable of physical possession. The said proposition was not accepted by the High Court. Mr. Patel submitted that in cases where the alienee does not get the pos-

session of the alienated property, the provisions of Article 126 of the Old Limitation Act equal to Article 109 of the New Limitation Act cannot be made applicable.

35. In *Chintaman v. Bhagvan*, AIR 1928 Bom 383, Fawcett, Ag. C. J. observed as follows:—

"Article 126 has frequently been applied in such cases. A recent instance is the case of *Randoo Singh v. Parmeshwar Prasad*, AIR 1925 PC 33 (Supra), where the Privy Council applied that article to a similar case. But undoubtedly that article contemplates the case of an alienation where the alienee has taken possession of the property, because limitation only runs from the date when the alienee so takes possession. It is only when such possession has been taken that any cause of action accrues to the plaintiff, so far as Article 126 is concerned."

36. Mr. Patel also invited our attention to Sections 26 and 27 (1) of Baroda Hindu Nibandh which provides as follows:

26 (1) Karta kone kahevo: (Ka) Sahabhagispaiki koipana eka—

(1) Kutumbani milakatano vahivata shake chhe, tatha

(2) Beeja shakhaso prave kutumbana vahevar chalavi shake chhe;

(kha) ava Sahabhagine Karta Kahe chhe.

(2) Karta thavana pitana hakka vishe: Je avibhakta kutumba fakta pita, mata tatha putro maline thavelu hova teva kutumbana pita kavadesar reete nalavak na hova to, kutumbana karta tarike karna karavano teno hakka chhe.

He also invited our attention to Section 27 (1) of Baroda Hindu Nibandh

27 (1) Sahabhagi sammati apava a samartha hova tyare kartana kaya krutvo samavika milakatane bandhankaraka ganva: Vastutah athava kavadesar reete vvavahar karnar eka athava vadhare sahabhagi, beeja sahabhagio (ka) sagir howathi kiwva (kha) eetar karanathi.

Sammati apava asamartha hova tyare, tevi sammati leedha vagar neeche janavela krutyo paiki koi krutya kare to te mate avibhakta kutumbani samavik milakatamano asamartha hitasambandha javabdar ganashe:—

(1) Avibhakta kutumbana

(a) (1) Kayada, agar

(2) jarurivat karan matena, kinva

(aa) avibhakta kutumbani samavik milakatana kavada matena tamara vvavahar;

(2) avibhakta kutumbana bharan-poshan mate jarurivatana vvavahar;

(3) avibhakta kutumbani samavik milakatana rakshana tatha vahivat matena jarur te vvavahar;

(4) avashva dharmakrivao;

(5) sahabhagiona tatha sawashrito.

lagna vigere dharmik sanskar matena farur te vyavahar:

Khulasao:— Sammati apava asmartha sahlabhagini jat upar ke agavi milakata upar ava vayavaharathi koi jawabdhari pade che ema samajavu nahi.

37. Mr. Patel also invited our attention to B. B. Mitra's Limitation Act, 14th Edition page 420. On that page under the caption "when time runs", it is stated that the Legislature has clearly fixed an overt and patent fact, namely the taking of possession of the property by the alienee, as the event from which the period has to be calculated, so as to avoid as far as possible the difficult question as to the notice. The cause of action accrues when the alienee takes possession, and no new cause of action arises on the death of the plaintiff's father.

38. We have carefully considered the aforesaid authorities and the provisions of law pointed out to us from Articles 126 and 144 of the Old Limitation Act equivalent to Articles 109 and 65 respectively of the New Limitation Act. We have also seen Section 6 of the Limitation Act, Section 6 (1) of the Limitation Act, 1963 provides as follows:—

"6 (1), Where a person entitled to institute a suit or make an application for the execution of a decree is, at the time from which the prescribed period is to be reckoned, a minor or insane, or an idiot, he may institute the suit or make the application within the same period after the disability has ceased, as would otherwise have been allowed from the time specified therefor in the third column of the Schedule."

Section 9 of the New Limitation Act provides as follows:—

"9. Where once time has begun to run, no subsequent disability or inability to institute a suit or make an application stops it:

Provided that, where letters of administration to the estate of a creditor have been granted to his debtor, the running of the period of limitation for a suit to recover the debt shall be suspended while the administration continues."

39. In view of the aforesaid doctrine of "overlapping". It is clear to us that in the instant case, defendant No. 1's father was in existence in the H. U. F. who had a right to challenge the alienation evidenced by Ex. 64 dated 7th April, 1951. It is equally clear to us that the plaintiff was in existence in the mother's womb in September, 1952 when defendant No. 1's father was alive. Therefore, the two lives, viz. the life of defendant No. 1's father who had a right to challenge and the life of the plaintiff in the mother's womb overlapped. In the con-

text of these facts, the plaintiff had a right to challenge the impugned alienation of year 1951.

40. The next contention of Mr. Patel was that the plaintiff could only challenge the said alienation within a period of 12 years after the plaintiff took possession of the properties alienated. In the instant case, Mr. Patel submitted that Maganlal Hargovandas Soni took the possession of the alienated properties in the year 1954 when the plaintiff was a minor and hence he was under a legal disability to file the suit challenging the impugned alienation. Mr. Patel submitted that in view of this the suit which was filed, on 9th August, 1968 was filed in time.

40-A. In order to appreciate the contention of Mr. Patel, we looked at the plaint Ex. 1. No specific averment is set out in the plaint indicating that Maganlal Hargovandas Soni took the possession of the alienated properties in the year 1954. The only allegation in this behalf is contained in para. 12 of the plaint and that averment is that the cause of action to file the said suit had arisen on 19th February, 1968 when the plaintiff came to know about the suit alienations. Now it is well settled that it is the duty of the plaintiff to show as to how the suit is filed within a period prescribed by law of limitation by stating clearly the facts in the plaint. In the instant case no such averments are set out in the plaint.

40-B. But apart from the absence of the relevant averments in the plaint, we also saw the written statement Ex. 6 given by defendant No. 1, but the same is also silent as to when the alienee Maganlal Hargovandas Soni took the possession of the alienated properties. Defendant No. 1 could have been the best witness but as stated earlier he did not enter the witness box to give evidence. Defendant No. 2, the mother of the plaintiff and defendants Nos. 3 and 4 the sisters of the plaintiff are also silent about the same in their respective written statements. The alienee Maganlal Hargovandas Soni is not a party to the suit nor he has been examined as a witness in the case. Even on reading the written statement Ex. 13 of defendant No. 5, it is difficult for us to come to the conclusion as to when the alienee Maganlal Hargovandas Soni took the possession of the alienated properties. Such a contention does not arise from the pleadings of the parties. In this behalf the necessary issue was not raised before the learned trial Judge. The parties did not focus their attention on this aspect of the matter and hence it is not possible for us to agree or accept the said submission of Mr. Patel. In the instant case, however, the impugned alienation evidenced by the document dated 7th April, 1951

clearly shows that the possession of the alienated properties was given to the alienee Maganlal Hargovandas Soni on that day. But assuming that the suit was filed in time, even then it must fail against defendant No. 5 as we have already taken the view that the alienation evidenced by Ex. 64 was effected for the legal necessity of the H. U. F. for the benefit of the estate of the H. U. F. and for payment of antecedent debts of the family. Mr. Patel also submitted that no consideration was passed by the alienee Maganlal Hargovandas Soni for the alienation of the H. U. F. properties in the year 1951 in favour of defendant No. 1, but in view of the clear recitals contained in Ex. 64, and the evidence of Chhotalal Ranchhodji Desai, Ex. 58, it is not possible for us to agree or accept the said submission of Mr. Patel.

41. Mr. Patel then submitted that defendant No. 5 did not pay any consideration to Maganlal Hargovandas Soni for effecting the transaction evidenced by Ex. 57 dated 17th October, 1958. On this point, we are having the unimpeachable evidence of defendant No. 5 who deposed that he paid to Maganlal Hargovandas Soni a sum of Rs. 7,995/- for effecting the said transaction and the contents of Ex. 57 corroborate the same. In this view of the matter there is no substance in this submission of Mr. Patel.

42. Mr. Patel then submitted that the learned trial Judge was in error in dismissing the plaintiff's suit for the reasons mentioned in the earlier part of the judgment as Maganlal Hargovandas Soni was a necessary party to the suit. Mr. Patel is right in his submission. No doubt, Maganlal Hargovandas Soni would have been a proper party in the suit but on that count the learned trial Judge should not have dismissed the plaintiff's suit against defendant No. 5.

43. We may mention here that Defendant No. 5 in his evidence at Ex. 56 deposed that when he had purchased the alienated property in the year 1958 from Maganlal Hargovandas Soni, defendant No. 1 had attested the document, Ex. 57 in his favour and further stated in his presence that defendant No. 1 had signed the document Ex. 64 dated 7-4-1961 in favour of Maganlal Hargovandas Soni which provides in terms that the possession of the alienated property was given to him in the year 1951. Defendant No. 1 could have objected to such a recital in Ex. 64 if the possession of the alienated property was not given to the alienee in the year 1951. No such plea was taken in the written statement of defendants Nos. 1 to 4 and defendant No. 5 was not cross-examined on this point by defendant No. 2. In this view of the matter,

we cannot agree with the submission of Mr. Patel that the possession of the alienated property was given to the alienee Maganlal in the year 1954.

44. These were the only contentions raised by Mr. Patel for attacking the legality of the alienation in favour of defendant No. 5 and as we do not find any substance in the same, we agree with the ultimate conclusion arrived at by the learned trial Judge in this behalf.

45. That brings us to the attack of Mr. Patel on the alienation effected by defendant No. 1 in favour of defendant No. 6 evidenced by Ex. 69 dated 6th November, 1962. His main attack was on two grounds viz:—

(1) That the impugned alienation was effected without any legal necessity; and

(2) That defendant No. 6 did not pay to defendant No. 1 any consideration for effecting the said alienation.

46. The impugned alienation evidenced by Ex. 69 is dated 6th November, 1962 and is executed by defendant No. 1 on behalf of himself and on behalf of the minor for the receipt of consideration of Rs. 8,999/-. It is stated in the said document that the transaction was effected for the legal necessity and for the benefit of the estate of the family. It is significant to note that the mother of the plaintiff i.e. defendant No. 2 attested the said document. Witness Nanubhai Bhimbhai, Ex. 79, also attested the same and he fully supports the case of the alienee defendant No. 6 in his evidence.

47. In this behalf our attention was drawn to the second important document M. 28/3 which is a receipt bearing the same date i.e. 6th November, 1962 passed by defendant No. 1 and defendant No. 2 in favour of defendant No. 6 showing that the aforesaid payment of Rupees 8,999/- was made by defendant No. 6 to defendant No. 1. Defendant No. 6 in terms deposed in Ex. 68 that he was knowing the signature and writings of defendants Nos. 1 and 2 and he had seen them writing Ex. 28/3. He also deposed that minor Shakuntala, the sister of the plaintiff, was present when the consideration was paid. In view of this evidence, the learned trial Judge ought to have exhibited Ex. 28/3. We hereby take the view that the contents of Ex. 28/3 are duly proved by the aforesaid evidence and the same is ordered to be exhibited as Ex. "A" in the appeal. Ex. 28/3 states inter alia that the said alienation had taken place for the benefit and the interest of the family. This also clearly proves that the plaintiff's mother defendant No. 2 was not only an attesting witness to Ex. 69 but she knew the contents and the purpose of the impugned aliena-

tion fully. We may mention once again at this stage that Ex. 28/3 is addressed by defendants Nos. 1 and 2 to defendant No. 6 and it is stated therein, inter alia that a sum of Rs. 8,999/- was received by defendant No. 1 from defendant No. 6.

48. But apart from the aforesaid documentary evidence Exs. 69 and 28/3 (now marked Ex. "A" in the record of the appeal), there is overwhelming oral evidence to prove that the aforesaid alienation took place because of the legal necessity of the H. U. F. Now it is an admitted fact that the daughter of defendants Nos. 1 and 2 married in February, 1963 i.e. to say within three months after the execution of the impugned alienation Ex. 69. Defendant No. 2 in terms deposed that defendants Nos. 5 and 6 did attend the marriage of her daughter. The aforesaid evidence does disclose that even in the year 1962 the family was having the monthly rental income of Rs. 250/-. The evidence also shows that it was difficult for the family to defray expenses on occasions like marriage, demise, repairing the property of H. U. F., payment of antecedent debts or for the sickness of the members of the family. The aforesaid evidence also shows that the plaintiff had to stay with his maternal uncle and that he had to pay to him Rs. 55/- per month for his lodging-charges. The evidence also shows that the family had to run two establishments viz. one at Baroda and one at Navsari. The aforesaid evidence also shows that defendant No. 2 was telling Ishwarlal Ex. 63 that she was having difficulties in maintaining the family.

49. In this behalf we may refer to the evidence of Gajanand Vishwanath Junnarkar, Ex. 42, who deposed inter alia that he did not pay any money to his sister defendant No. 2 at the time of the marriage of defendant No. 2's daughter in February, 1963. He stated that the marriage was performed with economy. In this behalf it is significant to note that the plaintiff's mother, defendant No. 2, deposed that in regard to the marriage expenses her brother and relatives had helped her for expenses. She also deposed that the marriage expenses were only to the extent of Rs. 200/-.

50. In this behalf we may refer to the evidence of defendant No. 5 who deposed that for the marriage of Mrunnalani, he, defendant No. 6 Bansilal Desai, Bhaïbbhai Mulla and others had been to Baroda. He also deposed that the marriage was performed in pomp and not in simplicity. He stated that financial position of defendant No. 1 and his family was always very poor and that defendant No. 1 had to file suits many times to recover rents from the tenants. He also deposed that he knew defendant 2 since 1943 and he

had no means to defray expenses on occasions of demise in family or marriages in family or for repairs to properties etc.

Defendant No. 6, Navnitrai, Ex. 68 deposed that defendants Nos. 1 and 2 had told him that they would require money for the marriage. He also deposed that some 8 or 10 days prior to the transaction of the impugned alienation, defendants Nos. 1 and 2 had told him that the alienated properties would be sold to him. He also deposed that he told them that he would make inquiries as to whether there would be any marriage of defendant No. 4 or not. He also deposed that the consideration for the impugned alienation was fixed at Rs. 9,000/-. He stated that he had withdrawn money from his family account in the Dena Bank and that he had withdrawn a sum of Rs. 11,000/-. He also deposed that he had purchased the alienated properties by the impugned alienation dated 6th November, 1962 for Rupees 8,999. The evidence of this witness is duly corroborated by the contents of Ex. 69 and Ex. 28/3 (now marked Ex. A in the record of the appeal).

51. On behalf of defendant No. 6 witness Nanubhai Bhimbhai, Ex. 79, was also examined. This witness is the attesting witness to Ex. 69. The witness deposed in clear terms that something like Rs. 8,000/- was paid (by defendant No. 6) to defendant No. 1 in the office of the Registrar. He also deposed that the payment was made in presence of defendant No. 2, the mother of the plaintiff. He stated that defendants Nos. 1, 2 and 6 were saying to him that the aforesaid amount was to be spent for the marriage of the daughter of defendant No. 1. In cross-examination the witness deposed that when defendant No. 6 paid the money to defendant No. 1, defendants Nos. 1 and 2 both counted money. Defendants Nos. 1, 2 and 6 were talking inter se that the aforesaid amount was required for the marriage of defendant No. 1's daughter. He also stated that, the talk about the aforesaid money being taken for marriage of the daughter was going on, when execution and attestations were being done on Ex. 69.

52. We are also having the evidence of defendant No. 7 at Ex. 88, and even defendant No. 7 also deposed inter alia that it was true that sometimes defendants Nos. 1 and 2 were in need of money for expenses.

53. Thus on a careful reading of the aforesaid oral evidence, we are convinced that the impugned alienation Ex. 69 was effected by defendant No. 2 for legal necessity viz. for the marriage expenses of the daughter of defendant No. 1 and for other family expenses. In this behalf, as stated above, the oral evi-

dence of the aforesaid witnesses is duly corroborated by the contents of Ex. 69 and Ex. 28/3 (Ex. A of the record of the appeal). On reading the said evidence, we are also convinced that in the instant case defendant No. 6 did pay to the defendant No. 1 the amount of consideration as mentioned in Ex. 64 and Ex. 28/3. As a result of the said discussion, we are convinced that there is no substance or merit in the submission made by Mr. Patel that the alienation dated 6th November, 1962 evidenced by Ex. 69 by defendant No. 1 in favour of defendant No. 6 was effected without any legal necessity or without receiving any consideration.

54. These were the only contentions raised by Mr. Patel for attacking the legality of the alienation dated 6th November, 1962.

55. We have carefully considered all the submissions made by Mr. Patel and there is no substance or merit in any of his submissions.

56. In the result the appeal is dismissed with costs. As the appeal is filed in forma pauperis, a copy of the decree be sent to the Collector for recovering the requisite amount of court-fees.

Appeal dismissed.

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J. M. SHETH AND A. N. SURTI, JJ.

B. L. Shukla and another, Appellants v. Fatmabai Ismail, Respondent.

First Appeal No. 899 of 1973 with Civil Appln. No. 1950 of 1974, D/- 9-1-1975.

(A) Civil P. C. (1908), Section 80 — 'Act purported to be done by public officer in his official capacity' — Suit for malicious prosecution against police officers — Notice under S. 80 is essential irrespective of whether they acted mala fide or bona fide, for maintainability of suit.

Where the defendants police officers, acting in the course of the investigation had filed a charge sheet against the plaintiffs for the offence of murder but they were ultimately acquitted of the charge, there was no escape from the conclusion that the act in question was done or was purported to be done in the discharge of official duty by the police officers in their official capacity. Question that the act was purported to be done in the discharge of their duty was so done on account of malice, is absolutely irrelevant for deciding the question whether such a statutory notice is required to be given under Section 80. The absence of such statutory notice under Section 80 before instituting

the suit for malicious prosecution, makes the suit not maintainable. AIR 1973 SC 2591, Applied; AIR 1941 Pat 461 and AIR 1934 Pat 14 and AIR 1924 Cal 145 and AIR 1918 Mad 62 (FB), Rel. on. (Para 16)

Cases Referred: Chronological Paras
AIR 1973 SC 2591 = 1973 Cri LJ 1795 16
AIR 1941 Pat 461 = 22 Pat LT 392 15
AIR 1934 Pat 14 = 154 Ind Cas 219 14
AIR 1924 Cal 145 = 28 Cal WN 10 13
AIR 1918 Mad 62 = 34 Mad LJ 494 (FB) 12

G. M. Vidvarthi, Asstt. Govt. Pleader, for Appellants; D. D. Vyas, for Respondent.

J. M. SHETH, J.:— This appeal is directed against the judgment and decree passed by the learned Civil Judge, Senior Division, Junagadh, in Special Civil Suit No. 58 of 1971, filed by the plaintiff-respondent against the appellants-defendants for recovery of Rs. 10,500/- by way of damages for malicious prosecution.

2. Appellant No. 1 B. L. Shukla was at the material time a police officer attached to Chorwad Police Station. Appellant No. 2 Kantilal K. Vora was at the material time Deputy Superintendent of Police, Verav Sub-Division. These two police officers were concerned with the investigation of the case registered at C. R. No. 101 of 1970 of Chorwad Police Station. In the course of an inquiry under Section 174 of the Criminal Procedure Code on the information lodged by one Bharatdas Shamdas, it transpired that Prabhudas Shamdas was murdered. His death took place on the night between 26-10-1970 and 27-10-1970 between 11.00 p.m. and 2.00 a.m. On 29-10-1970, at 19.15 hours, information was lodged regarding this offence of murder. Appellant No. 1, Police Sub-Inspector Shukla, was a formal complainant. The facts disclosed were that one Bai Divali Sidi had administered poison to deceased Prabhudas Shamdas who was residing with her and with whom she was in illicit connection. She was residing at village Gadu where she was running a lodge. Dead body of deceased Prabhudas was initially found behind that lodge run by Bai Divali.

3. First Information Report, according to the appellants, was lodged for the offences punishable under Sections 302 and 328 of the Indian Penal Code against Bai Divali only. At a later point of time, on arresting Bai Divali and on interrogating her, it was found that present respondent Bai Fatma Ismail had come in the afternoon on 26-10-1970 to village Gadu and met Bai Divali. Bai Divali made a grievance before her that deceased Prabhudas was harassing her and consequently she was thinking of ending her own life. Respondent, Fatmabai thereupon advised her not to take such a step but to adminis-

ter poison to Prabhudas. Respondent supplied a packet containing poison to Bai Divali and obtained Rs. 3/- for it. It is significant to note that Bai Fatma, according to the appellants, was working towards Bantwa side as a nurse.

4. In the course of the investigation, statements of several persons were recorded. Bai Divali's statement was recorded and it was found that respondent Fatmabai had abetted the act of poisoning Prabhudas which resulted into the death of Prabhudas. On 30-11-1970, respondent Bai Fatma was arrested. Her bail application was rejected by the Court. Report was made to add certain sections of the Indian Penal Code and to add the name of present respondent as accused by present appellant No. 1. After the necessary investigation, Bai Divali as well as respondent Bai Fatma were charge-sheeted to the Court of the Judicial Magistrate, First Class. After a preliminary inquiry, both of them were committed to the Court of Session to stand their trial. At the Sessions trial, both the accused including respondent Bai Fatma were acquitted. According to the appellants, they were acquitted giving them benefit of doubt.

5. Respondent gave intimation to the appellants by telegrams Exs. 24 and 22 respectively, dated 7-7-1971, regarding taking of action for malicious prosecution and claiming damages to the extent of Rs. 11,000/-. They were practically in identical language. Respondent Bai Fatma filed present Civil Suit No. 58 of 1971 on 17-8-1971, claiming damages to the tune of Rs. 10,500/- for malicious prosecution.

6. At the trial, respondent's case was that appellant No. 1 had demanded Rs. 500/- from her by calling her at the police station. On her having not acceded to that demand, she was threatened to be involved in this case, and it was for that reason that she was subsequently involved in the said case.

7. Several contentions were raised before the trial Court on behalf of the appellants denying the allegations made by the respondent against them. Written statement of appellant No. 2 (original defendant No. 2) was filed at Ex. 12. Appellant No. 1 (original defendant No. 1) filed his written statement at Ex. 52.

8. The learned trial Judge, after framing the issues and recording evidence, found that (1) Plaintiff proved that she was maliciously prosecuted for offences under Sections 302/34 of the Indian Penal Code in Sessions Case No. 18 of 1971 by the defendants; (2) she proved damages to her reputation and mental torture; (3) she is entitled to Rs. 5,500/- by way of damages; (4) she is entitled to Rs. 2,000/- as damages towards the costs of her defence; (5) Defendants failed to

prove that action was taken in their official capacity and so they were not liable; (6) notice under Section 80 of the Civil Procedure Code, according to the learned trial Judge, is not necessary as the suit has not been filed against the Government, but the plaintiff had sued the defendants in their personal capacity of Police Sub-Inspector and Deputy Superintendent of Police; (7) suit is not barred under the provisions of Bombay Police Act, 1951. In view of these findings of his, the learned trial Judge has decreed the suit against both the defendants (present appellants) to the extent of Rs. 7,500/- and awarded proportionate costs of the suit. Defendants were directed to bear the costs of the suit.

9. Mr. G. M. Vidyarthi, learned Assistant Government Pleader, appearing for the appellants, has made the following submissions:

(1) Suit is not maintainable for want of statutory notice under Section 80 of the Civil Procedure Code.

(2) Suit is barred under Section 159 of the Bombay Police Act, 1951.

(3) Suit is also barred for want of notice, under Section 161 of the Bombay Police Act, 1951.

(4) There is no evidence to establish that the prosecution was launched by the appellants against the respondent maliciously and there was want of reasonable and probable cause for launching such a prosecution.

Mr. Vidyarthi has contended that at the relevant time, appellant No. 1 Mr. Shukla was working as a Police Sub-Inspector attached to Police Station, Chorwad. Appellant No. 2 Kantilal Vora was at the material time working as Deputy Superintendent of Police, Veraval Sub-Division. The area of the Police Station in question was within his jurisdiction. These are undisputed facts. Both these officers were investigating the offence in question. Police Sub-Inspector was investigating the offence and on coming to know about the offence, he had lodged a formal complaint on behalf of the State. During the investigation of that case, it transpired that respondent had also hand in the said murder of Prabhudas. It was in the course of discharge of his duty that he had arrested the respondent, Deputy Superintendent of Police had verified the statements made by the Police Sub-Inspector and had approved of, the report to be made by the investigating officer to the Court under Section 173 of the Criminal Procedure Code. Both the officers were, therefore, acting in discharge of their official duty. It cannot be gainsaid, submitted Mr. Vidyarthi, that at any rate they were purporting to act in discharge of their duty in their official capacity.

That being the position, such a suit for recovery of damages for malicious prosecution is not maintainable without giving a statutory notice, as required under Section 80 of the Civil Procedure Code. Admittedly, such a statutory notice under Section 80 of the Civil Procedure Code has not been given by the respondent to the appellants prior to the filing of the present suit. The suit should, therefore, fail on that ground.

10. Relevant part of Section 80 of the Civil Procedure Code, material for our purposes, reads:

"No suit shall be instituted against a public officer in respect of any act purporting to be done by such public officer in his official capacity, until the expiration of two months next after notice in writing has been delivered to, or left at the office of ... and, in the case of a public officer, delivered to him or left at his office, stating the cause of action, the name, description and place of residence of the plaintiff and the relief which he claims; and the plaint shall contain a statement that such notice has been so delivered or left."

It is an admitted position before us that no such notice under Section 80 of the Civil Procedure Code has been given.

11. Telegraphic intimation given to appellant No. 1 by Ex. 24 and to appellant No. 2 by Ex. 22, was in the following terms:

"You are hereby informed that you prosecuted and ordered to prosecute my client Fatmabai Ismail maliciously without any reasonable cause and without due care and caution for murder charge. Stop. She has been acquitted by the Hon'ble Sessions Judge. Hence my client will take criminal and civil action for damages of Rs. 11,000/- against you and Sub-Inspector Police Veraval."

Mr. Vidarthi has contended that in the circumstances of the case, there is no escape from the conclusion that the act complained of, was the act done by these appellants in discharge of their duty in their official capacity and at any rate, it was an act purporting to be done by them in their official capacity in discharge of their duty. Question whether they acted mala fide or maliciously, meaning thereby, that there was want of good faith on their part was irrelevant so far as the determination of the question regarding the necessity of giving statutory notice under Section 80 of the Civil Procedure Code was concerned. In support of his submission, he has invited our attention to several decisions.

12. We first propose to refer to the Full Bench decision of the Madras High Court in Samanthala Koti Reddi v.

Pothuri Subbiah, AIR 1918 Mad 62 (FB). Wallis, C. J., has observed at p. 69:

"According to the Concise Oxford Dictionary recently published at the Clarendon Press, to 'purport' in this context means to 'be intended to seem'. There can be no doubt that the act of the Village Munsif in handing over the surplus proceeds of the revenue sale to the defaulting owner was an act 'intended to seem' to be done by him in his official capacity so as to render notice of suit necessary, if effect is to be given to the language of the section according to the natural meaning of the words used. The legislature may well have considered it desirable to require notice of suit to be given in all such cases, and I see no reason for putting a restrictive construction upon the section. It is significant that the words 'purporting to be done' are wider than 'done or intended to be done' under the provisions of this Act. In Section 264 of the Public Health Act, which appear to be the most comprehensive words used in any of the corresponding statutory provisions in England, seeing that they also include 'acts intended to seem to be done in his official capacity,' and it is quite probable that they were chosen on that very ground and for the purpose of making the English decisions inapplicable."

Sadasiva Aiyar, J., in his judgment at page 71, has observed:

"In the present case the appellant's act in paying over the balance of the revenue sale proceeds to the defaulter was an act falling within the ordinary duties of his office as Village Munsif and he clearly professed to do it in execution of that duty and it would be quite reasonable on the part of an ordinary third person who becomes aware of the Village Munsif's act in so returning the balance to the defaulter, to receive the impression that the act was done by the Village Munsif in his official capacity. I think the question of the good faith or the bad faith of the public officer, either as regards his belief in the legality or propriety of his act or the limit of his powers or the existence of facts justifying the exercise of such powers, is irrelevant in the consideration of the question whether the officer is entitled to notice under Section 80, Civil Procedure Code." Spencer, J., in his judgment, at page 71, observes:

" 'Purporting' literally means 'holding out,' and neither 'profess' nor 'pretend' is an exact synonym for it. 'Profess', as its derivation suggests, generally implies an open declaration in words. 'Pretend,' more often than not, is used where that which is held out is not what it really is. I think that the word 'purporting'

covers a profession by acts or by words or by appearance of what is true as well as of what is not true."

This decision fully supports the submission made by Mr. Vidyarathi in this behalf.

13. In *Dakshina Ranjan Ghose v. Omar Chand Oswal*, AIR 1924 Cal 145, a Division Bench of Calcutta High Court has also observed:

"In a suit for damages for wrongful arrest against a public officer, he is entitled to notice of suit under Section 80, even if in the discharge of his duty he has acted mala fide."

14. Similar view has been taken by a single Judge of Patna High Court in *Ram Kishun Prasad v. Ram Narain Prasad*, AIR 1934 Pat 14, observing:

"A public officer against whom a suit is filed in respect of an act done by him in his official capacity is entitled to notice under Section 80, even though he has acted mala fide."

15. In *Noor Mohammad v. Abdul Fateh*, AIR 1941 Pat 461, Rowland, J., has observed:

"In considering the question of notice under Section 80 the Court has to see whether the public officer purported to act as such. The question of his good or bad faith is irrelevant. Where the police constables arrest a person and take him to the police station as a person accused of theft their act purports to be an official act and hence notice under Section 80 is necessary."

16. The Supreme Court, in *Pukhrai v. State of Rajasthan*, AIR 1973 SC 2591, had an occasion to interpret similar expression used in Section 197 of the Criminal Procedure Code. At page 2592, the Supreme Court has observed:

"While the law is well settled the difficulty really arises in applying the law to the facts of any particular case. The intention behind the section is to prevent public servants from being unnecessarily harassed. The section is not restricted only to cases of anything purported to be done in good faith, for a person who ostensibly acts in execution of his duty still purports to act, although he may have a dishonest intention. Nor is it confined to cases where the act, which constitutes the offence, is the official duty of the official concerned. Such an interpretation would involve a contradiction in terms because an offence can never be an official duty. The offence should have been committed when an act is done in the execution of duty or when an act purports to be done in the execution of the duty. The test appears to be not that the offence is capable of being committed only by a public servant in an act done

or purporting to be done in the execution of his duty. The section cannot be confined to only such acts as are done by a public servant directly in pursuance of his public office, though in excess of the duty or under a mistaken belief as to the existence of such duty. Nor need the act constituting the offence be so inseparably connected with the official duty as to form part and parcel of the same transaction. What is necessary is that the offence must be in respect of an act done or purported to be done in the discharge of an official duty. It does not apply to acts done purely in a private capacity by a public servant. Expressions such as the 'capacity in which the act is performed', 'cloak of office' and 'professed exercise of office' may not always be appropriate to describe or delimit the scope of the section. An act merely because it was done negligently does not cease to be one done or purporting to be done in execution of a duty."

In the instant case, there is no escape from the conclusion that the act in question was done or was purported to be done in the discharge of official duty by the appellants in their official capacity. Question that the act was purported to be done in the discharge of their duty was so done on account of malice, is absolutely irrelevant for deciding the question whether such a statutory notice is required to be given under Section 80 of the Civil Procedure Code. The learned trial Judge has committed, in our opinion, an error of law in reaching the conclusion that no such notice was necessary. We find that such a notice under Section 80 of the Civil Procedure Code is required to be given. It having been not given, the suit is not maintainable and the suit should fail on that ground.

17. Mr. D. D. Vyas, appearing for the respondent, has submitted that, in case the Court reaches the conclusion that such a notice is necessary, it is not necessary for the Court to decide other submissions made by Mr. Vidyarathi. In that view of the matter, we find that it is not necessary to consider other submissions made by Mr. Vidyarathi. The suit fails as notice is not given as required under Section 80 of the Civil Procedure Code.

18. Appeal is allowed. The judgment and decree passed by the trial Court are set aside and Special Civil Suit No. 58 of 1971 is dismissed on the ground that it is not maintainable for want of notice under Section 80 of the Civil Procedure Code. Taking into consideration the peculiar circumstances of the case, parties are ordered to bear their own costs in the suit. Respondent is directed to pay the costs of the appellant in the appeal and bear her own.

Thus precaution has been taken by the legislature to see that the Committee consists of reasonable set of persons who do not suffer from any mental infirmity or who are not otherwise ill reputed, habitual offenders etc. Section 13 of the Act describes the functions of the Committee. So far as the present case is concerned, we need only refer to the provisions of Sections 43 which is the provision relating to ejectment of an unauthorised or unlawful occupant. Sections 43 and 44 of the Act may be quoted here :

"43. (1) If the Committee is of opinion that any person is in unauthorised occupation of any wakaf property and that he should be evicted, the Committee shall issue in the manner hereinafter provided a notice in writing calling upon that person to show cause why an order of eviction should not be made.

(2) The notice shall:—

- a) specify the grounds on which the order of eviction is proposed to be made; and
- b) require all persons concerned, that is to say, all persons who are, or may be, in occupation of, or claim interest in, the wakaf property to show cause, if any, against the proposed order on or before such date as is specified in the notice, being a date not earlier than ten days from the date of issue thereof

(3) The Committee shall cause the notice to be served by having it affixed on the outer door or some other conspicuous part of the wakaf property, and in such other manner as may be prescribed, whereupon the notice shall be deemed to have been duly given to all persons concerned.

44. (1) If, after considering the cause, if any, shown by any person in pursuance of a notice under Section 43 and any evidence he may produce in support of the same and after giving him a reasonable opportunity of being heard, the Committee is satisfied that the wakaf property is in unauthorised occupation, the Committee may, on a date to be fixed for the purpose, make an order of eviction, for reasons to be recorded therein, directing that the wakaf property shall be vacated by all persons who may be in occupation thereof or any part thereof, and cause a copy of the order to be affixed on the outer door or some other conspicuous part of the wakaf property.

(2) If any person refuses or fails to comply with the order of eviction within forty-five days of the date of its publication under sub-section (1); the Committee or any Officer duly authorised by the Committee in this behalf may evict that person from, and take

possession of, the wakaf property and may, for that purpose, call upon the Officer-in-Charge Police Station of the area to render assistance in evicting that person."

6. An analysis of Sections 43 and 44 of the Act would show that the power vested in the Committee is not uncanalized or arbitrary one but is a controlled one. In the first place the Committee must come to a tentative opinion before proceeding under Section 43 of the Act that any person is an unauthorised occupant. Such tentative opinion may be based on a report or information which is before the Committee. Thereafter the Committee has to issue a notice in the manner prescribed to the unauthorised occupant to show cause why an order of eviction should not be made. The statute also provides that notice must contain the grounds on which the order of eviction is proposed to be made so as to give sufficient notice to the unauthorised occupant to defend his case. Clause (3) of Section 43 also states that the notice must also be served by being pasted on the conspicuous part of the Wakaf property so as to make the notice effective. Section 44 clause (1) provides that after considering the cause shown by the unauthorised occupant and taking evidence and giving reasonable opportunity to the occupant to defend himself, if the committee is satisfied that the occupation of the person is unauthorised then it may pass the order of eviction. Here also the legislature has acted with great caution. Sub-section (2) of Section 44 provides that if after the occupant defies the order of eviction within 45 days of its publication, then only he would be evicted by the Committee through the agency of the police. It would thus be seen that the legislature has taken all possible, precautions against any injustice being caused to any such person and the two sections i.e. Sections 43 and 44 contain all the important indicia and rules of natural justice. Not only this, but under Section 48 appeal lies from any order passed by the Committee under Section 44 i.e. the order of eviction to a District Judge, who is undoubtedly a very senior judicial officer so that the District Judge may examine the decision of the Committee in an objective manner. Neither before the District Judge nor before the Committee is there any provision in the statute which bars the unauthorised occupant from being defended through a lawyer. Finally S. 49 of the Act runs thus :

"49. Every order made by the District Judge under this Act shall be final and shall not be called in question in any original suit, application, or execution proceedings."

This section clearly makes any order passed by the District Judge final and the jurisdiction of the Civil Court is ousted.

7. Mr. Malhotra submitted however that under Section 13 (2) (i) the Committee has been conferred with the powers to institute and defend proceedings in a court of law relating to Wakf property and therefore

the Committee has a discretion to proceed against the unauthorised occupant either according to the provisions of Sections 43 and 44 or to institute a suit against him in a Court. These two remedies being purely selective are discriminatory so as to attract Article 14 of the Constitution of India.

8. In the first place the argument is totally misconceived. The scope of Sections 43 and 44 and that of Section 13 (2) (i) are entirely different. Sections 43 and 44 deal specifically with the cases of unauthorised occupants whereas Section 13 (2) (i) deal with only the functions of the Committee in protecting and defending the Wakf property. When the Committee has been armed with specific powers to deal with a particular situation, there is no reason to suppose that it should abnegate its functions and proceed under Section 13 (2) (i) of the Act. Thus on this ground alone this case is clearly distinguishable from the case of the Supreme Court in AIR 1967 SC 1581. Nevertheless Northern India Caterers case was fully considered by the Supreme Court in the Chhagganlal's case (reported in AIR 1974 SC 2009) where the law laid down by their Lordships in the Northern India Caterers case (AIR 1967 SC 1581) has not been accepted as correct law though the Northern India Caterers case has not been specifically overruled by the later decision of the Supreme Court. The judgment written by Alagiriswami, J. who spoke for A. N. Ray, Chief Justice, Palekar and Mathew, JJ. and for himself observed as follows:—

"Where a statute providing for a more drastic procedure different from the ordinary procedure covers the whole field covered by the ordinary procedure as in Anwar Ali Sarkar's case 1952 SCR 284 = (AIR 1952 SC 75) and Suraj Mall Mohta's case (1955) 1 SCR 448 = (AIR 1954 SC 545) without any guideline as to the class of cases in which either procedure is to be resorted to, the statute will be hit by Article 14. Even there, as mentioned in Suraj Mall Mohta's case, a provision for appeal may cure the defect. Further, in such cases if from the preamble and surrounding circumstances as well as the provisions of the statute themselves explained and amplified by affidavits, necessary guidelines could be inferred as in Saurashtra case 1952 SCR 435 = (AIR 1952 SC 123) and Jyoti Prasad's case (1962) 2 SCR 125 = (AIR 1961 SC 1602) the statute will not be hit by Art. 14"

"..... This is sufficient guidance for the authorities on whom the power has been conferred. With such an indication clearly given in the statutes one expects the officers concerned to avail themselves of the procedures prescribed by the Acts and not resort to the dilatory procedure of the ordinary civil court. Even normally one cannot imagine an officer having choice, of two procedures, one which enables him to get possession of the property quickly and the other which would

be prolonged one, to resort to the latter. Administrative officers, no less than the courts, do not function in a vacuum. It would be extremely unreal to hold that an administrative officer would in taking proceedings for eviction of unauthorised occupants of Government property or Municipal property resort to the procedure prescribed by the two Acts in one case and to the ordinary Civil Court in the other. The provisions of these two Acts cannot be struck down in the fanciful theory that power would be exercised in such an unrealistic fashion."

X X X X X
"..... On the whole, considering the object with which these special procedures were enacted by the legislature we would not be prepared to hold that the difference between the two procedures is so unconscionable as to attract the vice of discrimination. After all Article 14 does not demand a fanatical approach. We, therefore, hold that neither the provisions of Chapter V-A of the Bombay Municipal Corporation Act nor the provisions of the Bombay Government Premises (Eviction) Act, 1955 are hit by Art. 14 of the Constitution."

9. In making this observation their Lordships clearly expressed their disagreement with the majority view in Northern India Caterers' case (AIR 1967 SC 1581) and observed as follows:—

"..... Furthermore, the fact that the Legislature considered that the ordinary procedure is insufficient or ineffective in evicting unauthorised occupants of Government and Corporation Property and provided a special speedy procedure therefor is a clear guidance for the authorities charged with the duty of evicting unauthorised occupants. We, therefore, find ourselves unable to agree with the majority in the Northern India Caterers' case (1967) 3 SCR 399 = (AIR 1967 SC 1581)."

10. Similarly Bhagwati, J. speaking for himself and V. R. Krishna Iyer, J. observed as follows:

"..... The legislature can, therefore, do no more than define broad categories and indicate the policy and purpose underlying the legislation and leave it to a stated authority to make selective application of the law in accordance with such policy and purpose. That would not be obnoxious to Article 14 because in such a case the discretion to make the selection would be a guided and controlled discretion and not an absolute and unfettered one."

X X X X X
"..... We are of the view that the decision in (1967) 3 SCR 399 = (AIR 1967 1581) does not represent the correct law and must be overruled."

X X X X X
"..... What the equality clause is intended to strike at are real and substantial disparities substantive or processual and arbi-

trary or capricious actions of the executive and it would be contrary to the object and intentment of the equality clause to exalt delicate distinctions, shades of harshness and the theoretical possibilities of prejudice into legislative inequality or executive discrimination. Our approach to Article 14 must be informed by a sense of perspective and proportion based on robust understanding and rejection of over-refined distinctions. The whole dimension of protection against discrimination in the processual sphere relates to real and substantial disparities in procedures. What is necessary to attract the inhibition of Article 14 is that there must be substantial and qualitative differences between the two procedures so that one is really and substantially more drastic and prejudicial than the other and not mere superfine differences which in this imperfect world of fallible human instruments are bound to exist when two procedures are prescribed."

"..... We may also observe that there is no magic formula by which it can be said that one procedure is substantially more drastic and onerous than the other. It does not follow that merely because one procedure provides the forum of a civil court while the other provides the forum of an administrative tribunal, the latter is necessarily more drastic and onerous than the former. We cannot accept such a bald proposition. Incead, not infrequently, the poor man gets lost when he is drawn into a regular suit in a civil court which, it is well known, has a long drawn out expensive and escalating litigative system which often spells ruin to the ordinary man, and, consequently, by contrast, a prompt and inexpensive instrument, though manned by administrative personnel untainted in the sophisticated court methodology and unaided by long and intricate argument of counsel engaged on onerous terms, may be preferred by many in this country. The procedure of the civil court also suffers from many technicalities."

"..... We must cast aside our predilection for the existing system of administration of justice which has prevailed over a long period of time and examine the special machinery set up by the legislature objectively and dispassionately, without any preconceived notion or prejudice against it, and find out whether the special machinery is really and substantially more drastic and prejudicial than the age old machinery of Civil Court."

"..... The determination of the liability to eviction would, therefore, really in practice be made by a Municipal Officer having proper and adequate legal training. Then again, the occupant against whom the special procedure is set in motion would have a right to file his written statement and produce documents and he would also be entitled to examine and cross-examine witnesses. The Municipal Commissioner or other officer holding the inquiry is given the power to summon

and enforce the attendance of witnesses and examine them on oath and also require the discovery and production of documents. The occupant is also entitled to appear at the inquiry by advocate, attorney or pleader. Thus, in effect and substance the same procedure which is followed in a Civil Court is made available in the proceedings before the Municipal Commissioner or other officer holding the inquiry. Then there is also a right of appeal against the decision of the Municipal Commissioner or other officer and this right of appeal is to a senior and highly experienced judicial officer and not to a mere executive authority."

11. In view of the observations of the Supreme Court quoted above, the ratio and the propositions that emerge from the decisions of the Supreme Court may be summarized as follows:—

- (a) That the mere fact that the power conferred by a statute on an authority is selective and is exposed to two remedies (i) to proceed in a civil suit, and (ii) to resort to drastic procedure provided by the Act, is not by itself sufficient to attract Article 14 of the Constitution of India if the preamble of the Act contains sufficient guidelines and the order passed under the Act is subject to an appeal.
- (b) Merely because two remedies are left to the discretion of an authority, it is not reasonable to infer that the authority would take recourse to long drawn procedure of a civil suit in preference to a short and effective remedy provided by the Act. It will be extremely fanciful to imagine that the authority should resort to artificial course of choosing the protracted proceedings unless the needs of the situation so demand in view of the complexities of the questions involved.
- (c) That there is no special charm contained in the procedure of the civil court and in the growing needs of the modern times if the procedure provided by an Act is reasonable and effective, so as to give sufficient opportunity to the aggrieved party to prove its case and incorporates rules of natural justice that is not discriminatory and can be preferred to the procedure of the civil court.
- (d) That the majority view taken in the Northern India Caterers case (AIR 1967 SC 1581) was not correct and the majority of the Judges of the Supreme Court in Chhagganlal's case (AIR 1974 SC 2009) have expressed their dissent from the same.

12. In view of these propositions adumbrated by their Lordships in their recent judgment in Chhagganlal's case (AIR 1974 SC 2009) it is difficult to accept the argument of Mr. Malhotra that Sections 43 and 44 of the Act are violative of Article 14 of the Con-

stitution of India. In fact I find that Sections 43 and 44 contain procedure which is almost as effective and as exhaustive as that of a Civil Court. An occupant is given full and complete opportunity to defend himself and appeal is also provided against the order of the Committee to the District Judge, and the appellate order has been made final and cannot be questioned in any civil suit. In these circumstances, therefore, it can hardly be argued with any show of force that Article 14 of the Constitution of India is attracted to this case. For these reasons therefore, I hold that Sections 43 and 44 of the Act are constitutionally valid and are not violative of Article 14 of the Constitution of India. The first contention raised by Mr. Malhotra is overruled.

13. As regards the second point, the contention is to be stated only to be rejected. It is the admitted case of the parties that the preliminary notice was issued to the plaintiff for vacating the premises and instead of filing the show cause, he filed an appeal to the District Judge which was dismissed on 18-12-1959 as being premature. Thereafter the second notice was issued on 6-2-1960 directing the plaintiff to vacate the premises and against that order the plaintiff went in appeal to the District Judge. Before the District Judge the parties compromised and the plaintiff agreed to vacate the premises within a month and the appeal was accordingly disposed of in terms of the compromise arrived at by the parties. Thereafter the plaintiff took a most extraordinary and ingenious course of filing a civil suit, thus delaying the eviction by the Committee for a period of more than 13 years. Having done so, the plaintiff cannot be heard to say that if the order of the District Judge is valid the status quo-ante should be restored and fresh proceedings for eviction should be taken. If the order of the District Judge was valid in law as has been found by the courts below after the case was remitted to them by me, then the order of eviction passed by the Committee has merged in the order of the District Judge which is final and binding on the parties and cannot be challenged in any Civil Court by virtue of Section 49 of the Act. In these circumstances, therefore, the plaintiff has got no claim to remain in possession of the premises. For these reasons the second contention is also rejected.

14. The result is that the appeal is allowed and the judgments and decrees below are hereby set aside, and the suit of the plaintiff is dismissed with costs throughout.

15. Prayer for leave to appeal under letters patent was made by the learned counsel for the plaintiff respondent, which is refused because the matter is completely concluded by the decision of the Supreme Court in Chhagganlal's case AIR 1974 SC 2009 and the report containing the findings of fact given by the two courts below.

Appeal allowed.

AIR 1976 JAMMU AND KASHMIR 20 MIAN JALAL-UD-DIN, J.

Ramun and others, Petitioners v. Hon'ble Revenue Minister and others, Respondents.

Writ Petn. No. 98 of 1972, D/- 5-6-1975.

(A) Constitution of India, Art. 226 — Writ of certiorari — Petitioner challenging order of mutation — Authorities who passed order made parties — Landlords in whose favour order was passed were dead at time of filing petition — Petitioner failing to bring legal representatives of deceased landlords on record — Order cannot be disturbed in their absence. (AIR 1963 SC 786, Followed).

(Paras 6 and 7)

(B) Constitution of India, Art. 226 — Principle of natural justice — Principle that party must be heard — Compliance of.

Principle that party must be heard and no decision should be arrived at without hearing the party, is satisfied if party adversely affected is given opportunity to know the case at some stage and not all stages of the proceeding. (Para 8)

Where it is clear from the order of revenue authority that after affording an opportunity to parties he has decided the revision, it cannot be said that the order violated the principle of natural justice. AIR 1956 Pat 202 and AIR 1957 Pat 21, Rel. on.

(Paras 8 and 9)

Cases Referred: Chronological Paras
AIR 1963 SC 786 = (1963) Supp 1 SCR 6
AIR 1957 Pat 21 = 1956 BLJR 631 8
AIR 1956 Pat 202 = 1956 BLJR 647 8
S. P. Gupta, for Petitioners; A. D. Singh, for Respondents.

ORDER:— The petitioners seek the quashing of the order dated 12-7-1972 of respondent No. 1 and also the order dated 10-4-1972 of respondent No. 2 by means of a writ of certiorari. The petitioners have averred that they are tillers of the land as described in mutations Nos. 886, 738, 746, 740, 742 and 903 situate in village Kotli Tehsil Sambar: that they have been in occupation of the said land as tillers for many years before the relevant date of the promulgation of the Big Landed Estates Abolition Act i.e. 1st Kartik 2007; that the respondents are Big Landlords and were given due notices under the provisions of the Big Landed Estates Abolition Act by the concerned authorities for selecting the prescribed unit of 182 kanals, but they intentionally did not appear and did not make selection of the land and therefore the Revenue authorities made selection of the requisite units for them on their behalf and attested the mutation as mentioned above. It is averred that this order of selection was passed by the Tehsildar on 15th Bhadon 2008 Samvat and the land which was left out from the selection units of the respondents was mutated in favour of the petitioners as proprietors on the strength that

they were tillers of the said land. After conferment of the proprietary rights on the petitioners they made great improvements in the land. Respondents, however, approached the revenue authorities for cancellation of the above mentioned orders by which selection of the land was made by the Tehsildar. The Financial Commissioner vide his order dated 10-4-1962 accepted the revision of the respondents by which the respondents have been given the right to make fresh selection of their units and the mutations by which selection was made by the Tehsildar have been set aside. When the petitioners came to know of the said order they preferred a revision petition before respondent No. 1 for setting aside of the order of the Financial Commissioner dated 10-4-1962, but the revision was rejected by the respondent No. 1 on 12-7-1972. The petitioners seek the quashing of these orders on the following grounds:—

- (a) That the orders were passed without making the petitioners parties before the Divisional Commissioner and the Financial Commissioner. They were not given any opportunity to meet the case of the respondents and the petitioners have been condemned unheard. These orders have been passed in contravention of the principle of natural justice. They are therefore illegal and without jurisdiction. Respondent No. 1 failed to consider the fact that the respondents were given notices under Section 14 of the Big Landed Estates Abolition Act but they did not avail of the same. Therefore the order suffers from an error that is apparent on the face of the record.
- (b) Once a selection was made by the Tehsildar for the respondents that selection could not be assailed especially when the proprietary rights of the respondents had extinguished in the land not kept for their selection. The land so left was transferred in favour of the petitioners as proprietors in whose favour mutations were attested.
- (c) Selection could be made only once whether it be by the Tehsildar or by the proprietors themselves and this could not subsequently be challenged in any court of law.
- (d) No fraud or undue influence, or coercion was alleged against the Tehsildar and therefore the selection could not be upset.
- (e) Mutations conferring proprietary rights on the petitioners were attested in the year 2008 and it was after 21 years that they were being discharged and their claims disregarded in a summary way.

2. Respondents Nos. 1 and 2 have not filed any reply affidavit. Objections have, however been filed on their behalf by the Assistant Advocate General. In these objections it has been admitted that Special Tehsil-

dar Samba made selection for the landlords in pursuance of which mutations were attested in the year 2008. As regards the dispute raised by the petitioners that notices under Section 14 of the Big Landed Estates Abolition Act were sent to the landlords it has been submitted that this question was gone into by the revenue authorities and they had come to the finding that no such notices were served on them (vide Annexures A & B). The Special Tehsildar Samba expropriated the said landlords from the lands in question suo motu and without compliance of the provisions of Section 14 of the Big Landed Estates Abolition Act. This illegal expropriation was further crowned by another illegal act by attestation of mutations in favour of the tillers of the land. The position that the petitioners have become the proprietors of the land pursuant to the mutations has not been accepted. It is admitted that the revision petition filed by the petitioners was dismissed by the Respondent No. 1. The orders of the Divisional Commissioner and the Financial Commissioner merged with the order of the 1st respondent. The petitioners were given ample opportunity by the respondent No. 1 to be heard in the matter. The entire record was before the first respondent. This opportunity was availed of by the petitioners but they failed to substantiate the allegations that the landlords were given the requisite notices. The grounds urged by the petitioners for quashing the order have not been admitted by the respondents. It has further been averred that the petitioners were not necessary parties before the Revenue authorities and therefore the allegation made is misconceived.

3. Respondent Nos. 3, 7, 9, 10, 11, 12 and 13 have also filed their objections. In their objections they have stated that Parkash Singh respondent No. 4 and Masu respondent No. 3 died long before the filing of the writ petition, therefore the writ petition being against dead persons is liable to be dismissed. No persons of the names of Harnam Singh son of Khojoo respondent No. 13, Nahar son of Khoju respondent No. 14, Hanja son of Aswara exist. The writ petition has been presented against wrong persons. On merits it is stated that Kaka, Puran Singh, Nagar Singh, Tara, Lachiman, Harnam Singh, Nar Dehi landlords who were given right of selection in the disputed lands have not been made parties. Non-impleadment of these persons is fatal to the petition. Only one landlord Jabbar Singh selected land in collusion with the Tehsildar out of the Joint holders without the knowledge of the other landlords the respondents. Therefore the action of the Tehsildar in selecting land without the consent of other landlords was illegal. It has been denied that the petitioners were the tillers of the land at the relevant time. Respondents landlords were never given notices under the provisions of the Big Landed Estates Abolition Act by the concerned authorities to select the prescribed unit of land. This has also been held by all

the Revenue officers including respondent No. 1. The petitioners had an opportunity to meet the case and therefore there was no violation of the principle of natural justice.

4. I have heard the learned counsel for the parties.

5. In this case preliminary objections have been raised by S. Aytar Singh learned counsel for the other respondents that the writ must fail because of the non-impledment of necessary parties in the case and also because the writ has been filed against the dead persons namely Parkash Singh and Massu respondents 3 and 4.

6. It appears that during the progress of this petition the petitioners made an application praying for substitution of legal heirs of Parkash and Massu. This application was contested by the other respondents on the ground that substitution could not be ordered in their case as these two respondents had already died at the time of filing of the petition. The matter was pending until December, 1974 when the counsel for the petitioners stated before the court that he did not want to bring the legal representatives of the deceased respondents on record as the deceased respondents were not necessary parties in this petition. An exception was taken by the counsel for the respondents to this statement. The court however observed that it was unnecessary to opine on this matter at that stage. If the counsel for the petitioners made a statement he did it at his own risk. If incidentally a question arises during the hearing of the case whether these persons are necessary parties to the petition and in their absence or in absence of their substituted representatives the petition could not proceed that could be considered at the appropriate stage. The application for substitution was therefore dismissed as not pressed. It was ordered that the writ petition shall be treated to have abated as against these deceased respondents. It may be stated here that the petitioners have themselves made an averment in the writ petition that the respondents including Parkash and Massu are big landlords and they were given due notices under the provisions of the Big Landed Estates Abolition Act to select their units of lands, but they did not avail of the same and they remained absent. The Revenue authorities selected their units and attested various mutations; that it was the land which was left out from the selected units of the respondents which was mutated in favour of the petitioners as tillers of the land. It is further averred that the respondents approached the revenue authorities for cancellation of the above order of selection of the land. Thus from this as well as from the attested copies of the orders of mutation it appears that these respondents namely Massu and Parkash have figured everywhere and have been in picture throughout. Orders passed by the Revenue authorities including the one of the Revenue Minister which are

sought to be impugned by the petitioners have been passed in favour of these respondents as well. It is therefore manifest that these respondents are necessary parties. It is contended by the other respondents that these two respondents (Massu and Parkash) were dead at the time of the filing of the petition. This has not been controverted by the petitioners in the case; nor have the petitioners made any attempt to bring their legal representatives on the record. The result is that as these respondents are necessary parties and their representative have not been brought on the record the writ petition cannot lie. A Constitution Bench of the Supreme Court deciding Civil Appeal No. 586 of 1962 Udit Narain Singh v. Addl. Member of Board of Revenue Bihar, reported as AIR 1963 SC 786 has laid down that where in a petition for a writ of certiorari made to the High Court, only the Tribunal whose order was sought to be quashed was made party but the persons who were parties before the lower Tribunal and in whose favour the impugned order was passed were not joined as parties, the petition was incompetent and was liable to be rejected.

7. The same argument will apply with equal force in the case of those landlords who have not been made parties. It seems that some of the original landlords whose names appear in the orders of mutation have died. Following are some of the original landlords or their representatives:

1. Kaka son of Hari Singh
2. Puran Singh son of Dhanu
3. Nagar Singh son of Dhawan
4. Tara d/o Lachman
5. Machan d/o Lachman
6. Harnam Singh son of Laju
7. Nar Dehi d/o Laju

As these persons are not on the record before us in the petition therefore the impugned order cannot be disturbed in their absence.

8. Grievance of the petitioners that they have not been heard when the impugned order was passed by respondent No. 1 is also not genuine and the argument is devoid of force. The order of the Revenue Minister shows that he did hear the parties and after affording an opportunity to them decided the revision petition. He noticed that there were some landlords like Dhannun and Laju who have not been permitted to retain even the ceiling areas of 182 kanals which could be allowed to them under the Act. He found the order of mutation passed by the Special Tehsildar was full of flaws and suffered legal infirmity. The principle as regards the right of party to be heard is enshrined in the maxim 'audi alteram partem'. But that does not give a party right to be heard at every stage. What the rule requires is that no case should be decided without hearing the parties. That indeed has been done by respondent No. 1. A Division Bench of the Patna High Court in a case reported

as AIR 1956 Pat 202 has laid down that it is not correct to state that the party adversely affected should be heard at each and every stage of the administrative process. The principle, that a party must be heard and no decision should be arrived at without hearing the party, is satisfied if the party adversely affected is given the opportunity to know the case he has to meet and to answer that case at some stage and not at all stages of proceeding. The same view has been reiterated in AIR 1957 Pat 21.

9. In view of this it is difficult to accede to the contention of the petitioners that they were heard at no stage by the Revenue authorities in the matter and that therefore the impugned order violated the principle of natural justice.

10. The order passed by the Revenue Minister does not suffer from the legal flaw even otherwise. He has expressed the view that no notices to file their claims were served upon the respondents landlords under Section 14 of the Act by the Special Tehsildar Samba. It was at the instance of the Land Reforms Officer who obtained a report from the Special Tehsildar Samba that the Commissioner sought cancellation of the mutation orders as it was found that these orders of mutation violated Section 14 of the Big Landed Estates Abolition Act. What the revenue Minister has done is that he has directed the Tehsildar Samba to afford a reasonable opportunity to the landlords to file their declarations under Section 14 of this Act and also give opportunity to both the parties to be heard before passing orders on these matters. The order of respondent No. 1 in my view cannot be termed as unjust. It secures justice for those landlords who have been expropriated without notice and who have been given land less than the ceiling area permitted by the Act.

11. In my view the writ cannot succeed. The same is therefore dismissed. No order as to costs.

Petition dismissed.

AIR 1976 JAMMU AND KASHMIR 23 MIAN JALAL-UD-DIN, J.

Mistry Ali Mohd. Abdullah and others, Appellants v. Khawaja Abdul Qadus and others, Respondents.

Second Appeal No. 73 of 1972, D/- 16-5-1975.*

(A) Easements Act (1882), S. 15 — Right of way — Enjoyment as of right not proved — Claim of easement right not sustainable.

In order to establish the right of pathway by the plaintiffs over the land in dispute that

* (Against judgment of Dist. J., Bhadarwah, D/- 4-11-1972).

has ripened into right of easement, it must be shown that the enjoyment of such right by the plaintiffs was peaceful and open and that the pathway was being used as of right as an easement without interruption and that too over a period of 20 years. (Para 6)

A permissive user of pathway does not create any vested right to claim easement. AIR 1926 Lah 522 (1) and AIR 1958 Orissa 248, Rel. on. (Para 13)

Cases Referred: Chronological Paras
AIR 1958 Orissa 248 = 24 Cut LT 117 14
AIR 1926 Lah 522 (1) = 95 Ind Cas 269 14

I. K. Kotwal, for Appellants; R. P. Bakshi and G. A. Tak, for Respondents.

JUDGMENT:— This is plaintiff's second appeal and arises out of a suit for declaration founded on right of easement and also for mandatory injunction that was decreed by the Munsiff, Doda, but on appeal was dismissed by the District Judge, Bhadarwah.

2. Briefly stating the facts of the case are as under:

There is a residential house of the plaintiffs-appellants situate in Khasra Nos. 969, 970-min at Nagar, Bhadarwah. Land comprising Khasra No. 976-min adjacent to these survey numbers belongs to the defendants. The plaintiffs claim a right of way over the land in khasra No. 976-min. They also claim right to use the water of the spring located in the said survey number. The plaintiffs have averred that they have been enjoying this right of easement over the land of the defendants and they have been using the same as their path-way and also have been enjoying the water of the spring for over twenty years. The defendants have raised obstruction thereon by erecting a wooden fence and thus have been and are preventing the plaintiffs from exercising this right of easement.

3. The defendants resisted this suit on the ground that no such right of easement is available to the plaintiffs. The defendants have outright denied the right of easement, and also the right of the plaintiffs to use water of the spring located in the land of the defendants.

4. The suit was originally brought in the Court of the Sub Judge Bhadarwah, wherefrom it was transferred to the Court of Munsiff, Doda, who on a consideration of the evidence that was led by the parties in the case and after hearing arguments, found that the plaintiff's right of easement was established and that the defendants have wrongfully obstructed the path-way. The Munsiff consequently decreed the suit of the plaintiffs as prayed by them. On appeal, the learned District Judge, Bhadarwah, found that no such right existed in favour of the plaintiffs, on the other hand the evidence led by the plaintiffs negatived their claim. The requirements of Section 15 of the Easements Act have not been fulfilled. The learned District Judge also held spot inspection and after making personal observation found that the

right of easement of the plaintiff was not established. He therefore, set aside the judgment and decree of the trial court, and dismissed the suit of the plaintiffs. Aggrieved by this order of the District Judge, the plaintiffs have come up in further appeal to this court.

5. I have heard the learned counsel for the parties at great length.

6. In order to establish the right of pathway by the plaintiffs over the land in dispute that has ripened into right of easement, it must be shown that the enjoyment of such right by the plaintiffs was peaceable and open and that the pathway was being used as of right as an easement without interruption and that too over a period of 20 years. I have been led through the evidence that has been adduced by the parties in the case. There are glaring discrepancies in the statements of the plaintiff's witnesses. It is true that the plaintiffs have been using the land comprising Survey No. 976-min in possession of the defendants for some time but there is no evidence to show that this pathway was being used by them as of right and openly so as to enable them to claim right of easement.

7. Abdul Aziz P. W. stated that the land in dispute belongs to the parties and is comprised of one survey number, which is not a fact. Then he proceeds to say that half of the land belongs to the plaintiffs and the other half to the defendants. There is an old path-way from the house of the plaintiffs leading to their land. There is also a spring in the joint land of the parties. It is clear that this is not the case of the plaintiffs at all.

8. Ghulam Mohd P. W. stated that there is a pathway from the house of the plaintiffs which leads to their land but this is a general pathway and all people use it. It is a sort of thoroughfare. This witness has functioned as Patwari and as Girdawar some time past in this area.

9. Mohd. Sultan P. W. affirmed that the spring is located in the land of the plaintiffs and that he saw the plaintiffs using the path-way from the year 1947. This again is not the case of the plaintiffs.

10. Munawar Bhan P. W. stated that there is a pathway that goes from the house of the plaintiffs to the spring of the defendants but this pathway leads through the land of the parties, and that this pathway is being used from antiquity.

11. Hemraj P. W. has also stated that the spring is located in the joint land of the Parties. From the statement of Ahad Kumar P. W. it appears that the disputed pathway is being used like a thoroughfare. This pathway is exactly like the other thoroughfares, which are used by the public. Moreover he has further stated that pathway is not being used as a matter of right but its user is founded upon permission given by the

owners thereof. The witness could not say whether this was a public pathway or a private one.

12. Shri Ali Mohd plaintiff as his own witness also stated that the spring was located in the joint holdings of the parties.

13. Now the evidence of the plaintiffs, a resumé of which has been given above, does not establish the case of the plaintiffs that they have been using this pathway as of right and also openly. It can be well gleaned from the evidence on record that the pathway the plaintiffs have been using was on mere permissive lines which did not create any vested right in the plaintiffs to claim a right of easement. There is, also the report of the various revenue officers on the record especially the report of the Naib-Tehsildar who went on spot and found that no pathway, as claimed by the plaintiffs, existed. It is also found that there are no entries in the revenue records suggesting that a right of path-way existed on Survey No. 976-min. Had this been so, then there ought to have been some entries in 'WAJIB UL ARAZ' or in some other revenue record. It is also not correct that the spring is located in the joint land of the parties as given out by some of the witnesses of the plaintiffs. That indeed runs counter to the very case set up by the plaintiffs.

14. In *Piara Lal v. Ishq Lal*, AIR 1926 Lah 522 (1) it has been held that in order to claim a right of easement it must be shown that it was not attributable to any permission on the owner's part. In *Lambodar Panda v. Ramesh Chandra*, AIR 1958 Orissa 248 the view has been laid down that a person claiming a right of way should prove that the user was as of right. It has been further observed that according to the conditions in India there is a presumption that the user is permissive and the person claiming the right must prove the acquisition of such right under Section 20 of the Limitation Act or Sec. 15 of the Easements Act.

15. It is also to be noticed that the District Judge who is the first appellate court went himself on spot, and after conducting spot inspection and after examining the position came to the categorical conclusion that the plaintiffs have not been using this way as of right.

16. For the foregoing reasons I am inclined to agree with the view expressed by the learned District Judge in appeal and I affirm the judgment of the District Judge and dismiss the appeal. However in view of the peculiar circumstances of the case, the parties are left to bear their own costs throughout.

Appeal dismissed.

AIR 1976 JAMMU AND KASHMIR 25**MUFTI BAHAUDDIN FAROOQI, J.**

Nabir Bhat and others, Petitioners v. Mala Hamza and others, Respondents.

Writ Petn. No. 50 of 1972, D/- 30-4-1975.

(A) Jammu and Kashmir Consolidation of Holdings Act (1962), S. 8 — Jurisdiction of Consolidation Tehsildar — It is exclusive and not concurrent with Civil or Revenue Court or any authority under any other law.

In the instant case, the dispute was as regards the correctness of the entries based on the order of mutation. The tenants-occupants could have raised the dispute in response to a notice under Section 8 (2) and the Consolidation Tehsildar was competent to hear and determine the same under Section 8 (5). The jurisdiction exercisable by him in the matter was exclusive. In that view, the Government could not entertain the revision petition much less could it be heard and decided by the Revenue Minister.

(Paras 7, 8)

(B) Evidence Act (1872), S. 115 — Estoppel by acquiescence — Acquiescence by party would not prevent it from challenging the order of authority lacking inherent jurisdiction.

(Para 9)

A. M. Bhat, for Petitioners; S. Koul and H. S. Oberoi, for Respondents.

ORDER :— This is a writ petition under Section 103 of the Constitution of Jammu and Kashmir.

2. The facts are few and simple. One, Samad Ganai, died in the year 2001 Bk. leaving behind considerable landed property in village Krankashiwar, Tehsil Sopore. Following the death of Samad Ganai, his landed property was mutated in the name of his widow, Mst. Sahbi, his son, Mohd. Maqbool, and his three daughters, Mst. Sabi, Mst. Khurshi and Mst. Azizi as legal heirs and successors of the deceased. The order of mutation was passed on 23rd of Bhaadon, 2007 by Special Tehsildar, Sopore. Soon after the Big Landed Estates Abolition Act, 2007 came into force whereby ownership rights were conferred on tenants-occupants of lands owned by a person in excess of the ceiling area. Respondents 1 to 5 herein, were the tenants-occupants of a portion of the land owned by the deceased Samad Ganai. In order to get the benefit of the provisions of the Big Landed Estates Abolition Act conferring proprietary title on the tenants-occupants, they raised a dispute about the correctness of order of mutation which was finally settled by the then Financial Commissioner by his order dated 31-8-1961 upholding the order of mutation. Aggrieved by the order of the Financial Commissioner, the respondents 1 to 5 herein, filed a revision before the Government which was dismissed

in default on 2-11-1970. An application for restoration filed by them too was rejected. Thereafter they filed another revision petition before the Government on 2-6-1971 which was decided by the Revenue Minister acting on behalf of the Government by his judgment dated 3-7-1972. The Revenue Minister reversed the decision of the Financial Commissioner and remanded the case for fresh enquiry. Aggrieved by this order the petitioners have filed this writ petition and challenged the order as ultra vires and without jurisdiction.

3. The case of the petitioners is that by Notification SRO 135 dated 3-4-1968, the Government, in exercise of the powers conferred by Section 4 of the J. & K. Consolidation of Holdings Act, 1962 declared its decision to make a scheme of consolidation for 48 villages including village Krankashiwar where the land in dispute was situated and as such the Revenue Minister had no jurisdiction to entertain the revision petition much less to decide the same. The case of the respondents in reply is that the Revenue Minister was competent to hear and dispose of the revision petition and, in any case, the petitioners not having raised this point before him, they were estopped from attacking the judgment on this ground. Two points arise for determination :—

1/- Whether the Revenue Minister was competent to entertain, hear and dispose of the revision petition filed by respondents 1 to 5 on 2-8-1971;

2/- Whether the petitioners are estopped from challenging the order on the ground of absence of jurisdiction when they had not raised this point before the Revenue Minister.

4. The Jammu and Kashmir Consolidation of Holdings Act, 1962 (Shortly called the 'Act') was enacted by the State Legislature in the year 1962. It received the assent of the Sadar-i-Riyasat, as the head of the State was then called, on 7-3-1962 and was published in Government Gazette on 9-3-1962. By its preamble the Act was designed "to provide for the consolidation of Agricultural holdings" in the State for the development of agriculture. Briefly stated, the scheme of the Act is that after a declaration is made by the Government, in respect of any area under Section 4, the Consolidation authorities shall undertake to revise the existing revenue records pertaining to such area; hear and determine disputes as regards the correctness and nature of the entries in such records; and, then conduct consolidation operations on the basis of the records, as so revised. The preparation of the records is therefore an important plank on which the consolidation of holdings is founded. The Legislature has, therefore, in its wisdom chosen to provide that actions pertaining to the correctness or nature of the entries in the revenue records, be such actions pending

on the date of declaration under Section 4 or those brought thereafter on the basis of a prior cause of action or a cause of action accruing subsequently, should be instituted before the appropriate Consolidation authority under the Act who is required to hear and determine the same in accordance with the provisions of the Act and the rules made thereunder. (Sections 5, 8, 12). Section 8 reads :—

“Upon revision of the estate maps under Section 7, the Settlement Officer (Consolidation) shall, subject to the provisions herein-after contained, cause to be revised the Khasra Girdwari of the unit after field to field girdawari and the current Jamabandi after its test and verification. He shall also cause to be prepared in respect of the plots falling in the unit, a statement showing the mistakes and disputes discovered during the course of field to field girdawari and test and verification of the current Jamabandi.

2. Upon preparation of the statement mentioned in sub-section (1), the Assistant Consolidation Officer shall, after correcting the clerical mistakes, if any, send notice, together with relevant extracts from the current Jamabandi showing mistakes and disputes discovered under sub-section (1), to tenure-holders concerned and to the persons interested calling upon them to file before him objections if any, within thirty days from the date of the receipt of the notice, disputing the correctness or nature of the entries in the extracts and pointing out any omission therefrom.

3. The Consolidation Naib Tehsildar shall, after hearing the parties concerned, or where no objection is filed, after such enquiries as, he may consider necessary make an effort as far as may be, to settle the disputed entries and mistakes by conciliation between the parties appearing before him and pass orders on the basis of conciliation so arrived at. The Consolidation Naib-Tehsildar while so acting, shall be deemed to be a Court of competent jurisdiction;

Provided that, no order under this sub-section shall be passed on the basis of conciliation which is repugnant to the provisions of any law or rule or Government order for the time being in force.

4. The Consolidation Naib Tehsildar shall send the remaining disputed cases with a report on each case to the consolidation Tehsildar for disposal in the manner herein-after provided.

5. Upon receipt of the disputed cases under sub-section (4), the Consolidation Tehsildar shall—

(a) issue notice to the parties concerned calling upon them to appear before him on a date and place mentioned therein, and

(b) hear the parties concerned and record evidence, where tendered and decide

the objections, as if it were a court of competent jurisdiction.

6. The annual records shall be revised on the basis of the orders of the Consolidation Naib Tehsildar under sub-section (3) and the orders of the Consolidation Tehsildar under sub-section (5).”

5. Clearly this section gives a right to a tenure-holder or other person interested to question the correctness or the nature of the entries in the existing revenue records and empowers the Consolidation Tehsildar to hear and determine the same, as if it were the Court of competent jurisdiction. The question is whether this power is exercisable by the Consolidation Tehsildar exclusively or concurrently with Civil and Revenue Courts, Revenue Officers and other authorities under other laws. Section 57 reads :—

“Notwithstanding anything contained in any other law for the time being in force, the declaration and adjudication of rights of tenure-holders in respect of land lying in an area, for which a declaration has been issued under Section 4, or adjudication of any other right arising out of consolidation proceedings and in regard to which a proceeding could or ought to have been taken under this Act, shall be done in accordance with the provisions of this Act and no civil or revenue court shall entertain any suit or proceeding with respect to rights in such land or with respect to any other matters for which a proceeding could or ought to have been taken under this Act.”

6. This section expressly excludes the jurisdiction of the Civil and Revenue Courts in respect of matters falling within the jurisdiction of the Consolidation authorities. There is no like provision expressly excluding the jurisdiction of Revenue officers and other authorities in the matter under other laws. On principle, however, the bar must be treated to be equally applicable to such officers and authorities, the reason is that the Act being a special Act dealing with a particular subject comprehensively, the jurisdiction conferred on the settlement authorities constituting the machinery for its implementation must be held to be exclusive. In any case all possibility of confusion and doubt on this point is prevented by Section 3. That section reads :

“The provisions of this Act and the rules made thereunder shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any such law.”

7. On the terms of this section, the provisions of the Act are of overriding nature. Accordingly the jurisdiction exercisable by a Revenue Officer or other authority under any other law in respect of any question or matter, which the Settlement authority is competent to hear and determine under the Act, ceases in respect of any area covered by a declaration under Section 4 as long as

such declaration is effective. In my opinion, therefore, the jurisdiction exercisable by the Consolidation Tehsildar under Section 8 is exclusive and not concurrently exercisable by a civil or Revenue Court, Revenue Officer or other authority under any other law.

8. In the present case the declaration under S. 4 was made on 3-4-1968. The impugned order was passed on 3rd July, 1972 on the basis of a revision petition filed on 2nd August, 1971. At the relevant time the declaration under Section 4 of the Act was effective and continues to be so even now, as stated by the counsel for the petitioners and not disputed by the other side. The dispute was in substance as regards the correctness of the entries based on the order of mutation. The dispute could be raised by the respondents in response of notice under sub-section (2) of S. 8 and it was competent for the Consolidation Tehsildar to hear and determine the same in accordance with the provisions of sub-section (5) thereof. On the principle of law stated above the jurisdiction exercisable by the Special Tehsildar in the matter was exclusive and could not be concurrently exercisable by the Government or any other officer or authority under the Big Landed Estates Abolition Act. In that view, the Government could not entertain the revision petition much less could it be heard and decided by the Revenue Minister acting on behalf of the Government. That disposes of the first point.

9. The second point does not need much discussion. The law is well settled that acquiescence by parties would not confer jurisdiction on any court or other authority to hear and determine a matter where such court or authority lacks inherent jurisdiction to hear and determine the same. The fact, therefore, that the petitioners omitted to raise this point before the Revenue Minister would not prevent them from assailing the order on the ground that the Revenue Minister had no jurisdiction to hear and determine the matter.

10. In the result I accept this petition and by a writ of certiorari quash the impugned order. The parties will bear their own costs.

Petition allowed.

AIR 1976 JAMMU AND KASHMIR 27
JASWANT SINGH, C. J. AND MUFTI, J.

Thakur Krishen Singh, Appellant v. Smt. Simro Devi, Respondent.

First Misc. Appeal No. 3 of 1974, D/- 23-4-1975.

(A) J. and K. Hindu Marriage Act (8 of 1955), S. 13 (1) (viii) — Divorce under — Can be had only by the spouse obtaining decree for judicial separation.

GS/GS/C431/75/CWM

The phraseology of clause (viii) of sub-section (1) of S. 13 of the Act is clear. The words 'against that party' occurring herein leave no room for doubt that it is only the injured spouse who has obtained the decree for judicial separation i.e. at whose instance a decree for judicial separation has been passed, that can make an application under the said clause of Section 13 (1) of the Act. If the intention of the legislature had been that either party can avail of the decree, it would have said so in clear terms. AIR 1961 Punj 320, Rel. on. (Para 5)

The Hindu Marriage (Amendment) Act 1964 (Central Act 44 of 1964) enabling either spouse to take advantage of the decree for judicial separation has not been adapted by the State Legislature with the result that clause (viii) of sub-section (1) of S. 13 of the Act operates in its full glory and relief by way of divorce on the ground mentioned therein can be had only by a husband or wife who had obtained a decree for judicial separation and not by the other spouse. (Para 7)

Cases Referred: Chronological Paras
AIR 1961 Punj 320 = ILR (1961) 2 Punj 512 5

S. P. Gupta, for Appellant; I. K. Kotwal, for Respondent.

JUDGMENT:— This appeal is directed against the judgment dated March 26, 1974, of the learned Addl. District Judge, Jammu, whereby he dismissed the application brought by the appellant herein for divorce under Section 13 (1) (viii) of the Hindu Marriage Act, 1955, Act No. VIII of 1955 hereinafter referred to as 'the Act'.

2. It appears that the respondent herein obtained a decree for judicial separation from the Court of the District Judge, Jammu, on May 20, 1971, against the appellant on the ground that the latter had been guilty of desertion and cruelty as contemplated by clauses (a) and (b) of sub-section (1) of S. 10 of the Act. On December 29, 1972 the appellant made the aforesaid application praying that since the respondent had not resumed cohabitation for a period of two years after the passing of the aforesaid decree for judicial separation in spite of several attempts made by him, a decree for divorce dissolving the marriage be passed in his favour.

3. On appearing before the Court in response to the notice given by it, the respondent took a preliminary objection regarding the maintainability of the aforesaid application. Her contention in substance was that clause (viii) of sub-section (1) of S. 13 of the Act can be availed of by that spouse alone at whose instance a decree for judicial separation has been passed and since in the instant case the decree was passed at her instance, the application was not tenable. The plea raised by the respondent found favour with the learned Additional District Judge,

Jammu who dismissed the application as stated above.

4. Appearing in support of the appeal, Mr. Gupta has strenuously urged that a decree for judicial separation can be availed of by either spouse and if the cohabitation is not resumed for a period of two years or upwards after the passing of the decree, any one of the spouses can come forward and pray for a decree for divorce under Sec. 13 of the Act.

5. We are afraid we cannot accede to this contention. The phraseology of clause (viii) of sub-section (1) of S. 13 of the Act is clear. The words 'against that party' occurring herein leave no room for doubt that it is only the injured spouse who has obtained the decree for judicial separation i.e. at whose instance a decree for judicial separation has been passed, that can make an application under the said clause of Section 13 (1) of the Act. If the intention of the legislature had been that either party can avail of the decree, it would have said so in clear terms. We are fortified in our view by the decision of the Punjab High Court in Waryam Singh v. Smt. Pritpal Kuar AIR 1961 Punj 320 where it was held as follows :

"The argument that there is no justification either in principle or logic to make a distinction between the two spouses after a decree for judicial separation has been passed overlooks altogether the essential nature of decrees which tend to break loose the marriage ties. It is well to remember that the marriage under many systems of jurisprudence was a sacred union and it is only lately that a divorce or a judicial separation has received the sanction of law. A decree for judicial separation or dissolution of marriage is not to be lightly granted and it is only in cases of specified matrimonial wrongs or other natural infirmities that the innocent party may be accorded the discretionary relief which is provided under the Hindu Marriage Act.

Under Section 10 either party to a marriage may seek a decree for the judicial separation on the ground that the other party has deserted the petitioner for a period of not less than two years, or has treated the petitioner with cruelty or similar lapses. A decree for judicial separation can only be granted at the instance of an innocent party and against the spouse who has been guilty of the matrimonial wrongs mentioned in Section 10. Likewise, a decree for dissolution of marriage under Section 13 may be granted and again to an innocent party if the other spouse is living in adultery or because of some other infirmity in him or her for which the petitioner cannot be said to be at fault.

D. F. Mulla, in his commentary on the Hindu Marriage Act at page 853 of the 12th edition of the Principles of Hindu Law, states the matter thus :

"At the same time the view seems to have been taken that the injured or innocent spouse who has obtained a decree for judicial separation should have the right to seek dissolution of the marriage by a decree of divorce where the parties have not resumed cohabitation for a period of two years or more after the passing of such decree."

This conclusion of the learned authority, in my opinion is clearly in consonance with the principles governing matrimonial jurisdiction of divorce courts both here and in England. It would be indeed strange if a husband who has no independent right of his own to ask for dissolution of marriage under Section 13 is permitted to seek the umbrage of a decree for judicial separation obtained by his wife against him. It is to be borne in mind that only one of the two parties is given a right to ask for divorce under clause (viii) on ground of judicial separation and in the present instance that party is the wife in whose favour a decree for judicial separation was granted and who in other words, is the innocent party.

Under sub-section (1) of S. 13 of the Hindu Marriage Act, the husband or the wife can bring a petition on the ground that "the other party" (and these words are important) has not resumed cohabitation for a period of two years after the passing of a decree for judicial separation against that party. The words "the other Party" in sub-section (1) and "against that party" in clause (viii), in my mind, provide a key to the construction of this provision and these clearly exclude the right of one of the spouses, namely the party against whom the decree has been granted to claim the protection of a divorce court for a decree for dissolution of marriage."

.....
 "Neither the plain language of Sec. 13 nor the principles of Divorce Law could justify the conclusion that a husband, who is the guilty party in the present case, can obtain a decree for dissolution of marriage because his own wrong was found sufficient to entitle his wife in 1958 to obtain a decree for judicial separation. It would be singularly inappropriate to accord the same judicial status to a decree obtained under the Divorce Jurisdiction of a Court as an ordinary decree which in some situations may afford further relief to all the parties to it on its basis. The decree for judicial separation is of a personal nature and enures only for the benefit of the party in whose favour it is granted as is clearly specified in Sec. 13 itself."

6. It will also not be out of place to mention that Section 13 of the Hindu Marriage Act, Act No. 25 of 1955 (Central Act) was amended by the Hindu Marriage Amendment Act, Act No. 44 of 1964. By virtue of the Amendment Act a new clause in the form of clause (1) of sub-section (1-A) was inserted in place of the original clause (viii)

of sub-section (1) in S. 13 enabling either spouse to take advantage of the decree for judicial separation and apply for a decree dissolving the marriage if cohabitation has taken place between the spouses for a period of two years or more after passing of a decree for judicial separation.

7. This amendment has not been adapted by the State Legislature with the result that clause (viii) of sub-section (1) of S. 13 of the Act operates in its full glory and relief by way of divorce on the ground mentioned therein can be had only by a husband or wife who had obtained a decree for judicial separation and not by the other spouse.

8. For the foregoing reasons we find ourselves unable to interfere with the judgment and decree passed by the court below. In the result the appeal fails and is hereby dismissed but in the circumstances of the case without any order as to costs.

Appeal dismissed.

AIR 1976 JAMMU AND KASHMIR 29 JASWANT SINGH, J.

Smt. Bhagwanti, Petitioner v. Custodian General and another, Respondents.

Writ Petn. No. 206 of 1974, D/- 14-3-1975.

(A) Constitution of India, Art. 22c — Writ petition — Parties to—Stranger requesting impleadment — Permissibility — Test: — (Civil P. C. (1908), O. 1, R. 10).

The applicant was granted lease of a portion of a building by the Custodian of Evacuee Property. A writ was filed by someone else relating to that building whereon an interim order was passed by the Court maintaining the status quo, with the result that the applicant was denied possession. He, therefore, sought to be impleaded as a party to the writ petition.

Held that the principle for impleading a third party to a proceeding is avoidance of multiplicity of proceedings and hence the Court has no jurisdiction to add a party unless it is a necessary or proper party. A necessary party is one without whom no order can be made effectively and a proper party is one whose presence is necessary for a complete and final decision on the questions involved in the proceeding. (Para 5)

If the questions at issue can be worked out without anyone being brought in a stranger should not be added to the litigation. The eventual interest of a party in the fruits of the litigation cannot be held to be a true test of impleading the parties according to the Code of Civil Procedure.

(Para 6)

That the applicant is incidentally affected by the stay order or that he may indirectly be affected by the judgment that may eventually be passed or that he is interested in the fruits of the litigation are irrelevant for his impleadment. AIR 1963 SC 786; AIR 1953 SC 521; AIR 1969 Raj 252, Foll. (Para 7)

Cases Referred: Chronological Paras
AIR 1974 Cal 358 = 78 Cal WN 555 6
AIR 1973 Guj 97 = ILR (1972) Guj 1034 8
AIR 1969 Raj 252 = 1969 Raj LW 215 7
AIR 1964 SC 1746 = (1964) 7 SCR 596 7
AIR 1963 SC 786 = (1963) Supp 1 SCR 5
676 5
(1956) 1 All ER 273 = (1956) 2 WLR 372 7
AIR 1953 SC 521 = 1954 SCR 506 6

B. R. Choudhary, for Petitioner; G. A. Tak and V. K. Gupta, for Respondent.

ORDER:— This is an application by one Tilak Raj Sharma for being impleaded as a party to writ Petition No. 206 of 1974 filed on November 27, 1974, by Smt. Bhagwanti, against the Custodian General Jammu and Kashmir and the Custodian, Evacuee Property, Jammu.

2. The case of the applicant is that as respondent No. 2 has vide his order No. RS 911-74-EP dated November 26, 1974, leased out to him for a period of one year two rooms in the upper storey of the house in relation to which Smt. Bhagwanti has brought the aforesaid writ petition and as he cannot get possession of the said rooms in view of the ad interim order directing maintenance of status quo, he is a necessary and a proper party to the writ petition and it is in the fitness of things that he should be added as a party to the petition.

3. Mr. B. R. Chowdhary appearing on behalf of the petitioner has opposed the application and has contended that no person can under law be added as a party to a case merely because he would be incidentally affected by the ultimate judgment that may be passed therein or that he is interested in the fruit of the judgment.

4. I have given my earnest consideration to the submissions made by the learned counsel for the parties.

5. It cannot be disputed that the governing principle for impleading a third party to a suit or proceeding is avoidance of multiplicity of proceedings and that it is only a necessary or a proper party that can be impleaded in a suit or other proceeding, which means that the court has no jurisdiction to add a party unless it is a necessary or a proper party. A person is said to be necessary party if he is sought to be joined as a party i.e. in whose absence no effective judgment, decree or order can be passed, and a person can be said to be a proper party if his presence before the court is necessary to enable it to effectively and completely adjudicate upon and settle all the questions involv-

ed in a suit or a proceeding. It was pointed out by their Lordships of the Supreme Court in *Udit Narain Singh v. Addl. Member Board of Revenue, Bihar*, AIR 1963 SC 786, that a necessary party is one without whom no order can be made effectively and a proper party is one in whose absence an effective order can be made but whose presence is necessary for a complete and final decision on the questions involved in the proceeding.

6. It follows, therefore, that the guiding consideration in the matter of addition of parties is whether the Court can, between the parties as arrayed before it, effectively and completely adjudicate upon and settle the questions involved in the case. If the question or questions at issue between the parties can be worked without anyone else being brought in, the stranger should not be added as a party to the litigation. The fact that a stranger may eventually be affected by the judgment or the execution of the decree or order against the defendant or the respondent, as the case may be, is not a cogent ground to make him a party. I am fortified in this view by a decision of the Calcutta High Court in *Narayan Chandra Garai v. Matri Bhandar Pvt. Ltd.*, AIR 1974 Cal 358. In *Deputy Commissioner Hardoi in charge Court of Wards Bharawam Estate v. Rama Krishna Narain*, AIR 1953 SC 521 at p. 526, their Lordships of the Supreme Court pointed out that the eventual interest of a party in the fruits of the litigation cannot be held to be a true test of impleading the parties according to the Code of Civil Procedure.

7. In *Hochtief Gammon v. Industrial Tribunal, Bhubaneshwar*, AIR 1964 SC 1746 at p. 1750, their Lordships observed:

"The test always must be, is the addition of the party necessary to make adjudication itself effective and enforceable." In *Fateh Raj v. Suraj Roop*, AIR 1969 Raj 252, Jagat Narain, J. after referring to a decision in *Amon v. Raphael Tuck and Sons Ltd.*, (1956) 1 All ER 273 said at p. 253:

"In the above decision a note in the Annual Practice 1955 at page 232 is reproduced which runs as follows:

"Generally speaking intervention can only be insisted upon in three classes of cases, namely (A) In a representative action where the intervenor is one of a class whom plaintiff claims to represent. The intervenor may say, 'deny that plaintiff represents me—add me as a defendant.....' (B) Where the proprietary rights of the intervenor are directly affected by the proceedings (C) In action claiming the specific performance of contracts where third persons have an interest in the question of the manner in which the contract should be performed." Examining the question in the light of the above decisions, Tilak Raj Sharma cannot be deemed to be a proper or a necessary party to the writ petition. That he is incidentally affected by the aforesaid stay order passed by

the court or that he may indirectly be affected by the judgment that may eventually be passed in the case or that he is interested in the fruits of the litigation cannot be relevant consideration for making him a party to the petition.

8. In *Mahuva Municipality, Mahuva v. Mehta Kirtikumar Umedchand*, AIR 1973 Guj 97, where in a suit (filed by a person interested in the land proposed to be acquired under the Land Acquisition Act 1894) challenging the validity of the acquisition proceedings started by the Government the Mahuva Municipality made an application for being impleaded as a party to the suit, the application was refused on the ground that the Mahuva Municipality was not a necessary party.

9. For the foregoing reasons, the application cannot be allowed. It is accordingly rejected.

Application rejected.

AIR 1976 JAMMU AND KASHMIR 30 MUFTI BAHADUR FAROOQI, J.

Vijay Kumar and another, Petitioners v. B. K. Thapper and another, Respondents.

Civil Original Suit No. 89 of 1974, D/-10-1-1975.

(A) Civil P. C. (1908), O. 40, R. 1 — Receiver pendente lite — When can be appointed — (J. & K. Specific Relief Act (37 of 1977 Smvt.), S. 9).

Order 40, Rule 1 of the Civil P. C. empowers a Court to appoint receiver of any property where it appears to the Court to be just and convenient that such appointment should be made. The exercise of the power is however limited by the proviso. The proviso clearly refers to a case where a person in possession is a third person and the parties to the suit have no present right to disturb his possession. AIR 1932 Mad 193, Foll. (Para 5)

In the ordinary sense, the words 'just and convenient', would denote what is practicable and what the interests of justice require. Now what is practicable and in the interests of justice would depend on the facts and circumstances of each case. The court has, therefore, a wide discretion in the matter of appointment of Receiver but the discretion must be sound and reasonable.

A Court will not appoint a receiver against a bona fide possessor with legal title save in exceptional circumstances as, for instance, when the property is in danger of being wasted, destroyed or lost. But where he has no legal right to possession as, for example, when he is a mere trespasser or one whose original entry was lawful and of right but whose right to the possession, has terminated, and he has refused or failed to quit

despite demand, it is the duty of the Court to interpose and appoint a receiver at the instance of the party having legal title to possession irrespective of the fact whether the possessor is guilty of waste, dissipation, or malversation or the fact that damages are recoverable from such possessor for use and occupation.

Under the ordinary law, once a tenancy has ceased either by efflux of time or by a legal notice to quit, the tenant loses his right and title to possession if he has no other valid claim to remain in possession. He has no right or title to continue in possession. Of course he is not liable to be evicted except in due course of law but it is one thing to say that he cannot be ousted except in due course of law and another thing to say that he has no right and title to be in possession.

The words "although he may not have a right to continue in possession after the termination of the tenancy" in Section 9 of the Specific Relief Act are clearly suggestive. They leave no room for doubt that a tenant has no right to possession after the termination of the tenancy. Without anything else, therefore, the defendants have no right or title to possession in the present case. (Receiver pendente lite appointed). AIR 1973 Ker 76; AIR 1968 SC 620; AIR 1954 Bom 358; AIR 1958 Punj 314; (1888) ILR 15 Cal 818, Considered and Applied; AIR 1971 Ker 27; AIR 1972 Mys 20 Unreported Judgment of J. & K. High Court in S. Joginder Singh v. Balkisandas (Jammu Bench), Dist.

(Paras 6, 8, 9, 19)

(B) J. & K. Houses and Shops Rent Control Act (34 of 1966), S. 2 (5) read with S. 34 (2) — Lease of property consisting of Cinema hall, with its premises consisting of structures, fixtures, and talkie equipment — Lease was a composite one and did not attract provisions of S. 2 (5) though a notification issued under repealed Act which continued in operation per new Act S. 34 (2) applied the provisions to any premises let out for trade and business — Lessee whose tenancy was validly terminated could not claim the status of a 'statutory tenant' under the Act — There was thus no justifiable reason to allow the former lessee defendants to use the premises and take advantage as against the new lessees plaintiffs. (Receiver appointed pending suit). AIR 1950 Mad 284, Rel. on.

(Paras 11, 12, 13, 14)

Cases Referred: Chronological Paras

AIR 1973 Ker 76 = 1971 Ker LT 155 (FB) 9

AIR 1972 Mys 20 = (1971) 2 Mys LJ 228 15 16

AIR 1971 Ker 27 15

AIR 1968 SC 620 = (1968) 2 SCR 203 9

AIR 1958 Punj 314 = 60 Pun LR 62 9

AIR 1954 Bom 358 = 56 Bom LR 308 9

AIR 1950 Mad 284 = (1949) 2 Mad LJ 694 13

AIR 1932 Mad 193 = 61 Mad LJ 904 5

(1888) ILR 15 Cal 818 8

S. P. Gupta, N. L. Bhalgotra, R. P. Sethi, for Petitioners; I. D. Grover, K. N. Raina, for Respondents.

ORDER :— By a lease deed dated 12-12-1966 Dharmarth Trust, plaintiff No. 2 here, leased out a theatre in the City known as 'Hari Talkies' together with its machinery, fittings and furniture to the defendants here, S/Sshri B. K. Thapper and Ram Prakash, for a period of ten years effective from 10-10-1964. Under Clause 15 of the lease deed it was stipulated that, upon the expiration of the period of lease, the lessees will hand over the possession of the demised premises together with all machinery, fittings and furniture as also the improvements made by them during the continuance of the lease to the lessor. The term of the lease expired on 30-9-1974. Long before that date, on 13-2-1974, Dharmarth Trust, through its counsel, Mr. Janak Lal Sehgal served a notice on the lessees asking them to deliver the possession on due date failing which it was added, that the lessees will be liable to pay damages for the use and occupation of the demised property at the rate of Rs. 35,000/- per month till such time they handed back the possession to the lessor. Subsequently, by a lease deed dated 27-9-1974, which has since been registered, Dharmarth Trust leased out the theatre and Talkie equipment to Mr. Vijay Kumar plaintiff No. 1 here, for a period of ten years commencing from 2-10-1974. On 28-9-1974 Mr. B. K. Thapper and Mr. Ram Prakash filed a suit in the Court of Sub Judge (CJM), Jammu praying for permanent injunction restraining the new lessee from disturbing or interfering with their possession of the leased premises. An ad interim order of maintaining status quo was issued by the Sub-Judge, C. J. M. Jammu. It was subsequently vacated on an application made by the lessor and the new lessee whereby they undertook not to evict the erstwhile lessees except in due course of law. Thereafter a dispute arose between the parties as regards possession which travelled into the Court on a motion made by the police and has since been determined by Sub-Registrar, Judicial Magistrate, Jammu, by his judgment dated 17-12-1974 whereby he has declared the erstwhile lessees to be in possession of the demised premises and forbidden disturbance until they are evicted in due course of law. On 16-12-1974, that is, one day before the date of the judgment, the new lessee and the lessor filed this suit on the original side of this Court for declaration that the plaintiff No. 1 was in possession of the theatre and the Talkie equipment and for permanent injunction restraining the defendants and their employees, agents and servants from interfering with his possession: and, in the alternative, for ejectment of the defendants from the disputed property including the machinery fittings, furniture and the improvements made therein.

2. Giving a background of the events stated above, which are not disputed, the

plaintiffs have stated in their plaint that with a view to cover up the increased expenditure on account of expansion in its field of activities, the Dharmarth Trust wanted to lease out the disputed property on better financial terms than before, after the lease in favour of the defendants had expired. With this object in view they formulated certain proposals which were put to the defendants, but these proposals were not acceptable to them. Plaintiff No. 1, however, accepted the proposals and as such by a lease deed dated 27-9-1974, a lease was granted of the disputed property in his favour effective from 2-10-1974. The defendants entered into negotiations with him as a result of which they voluntarily surrendered the possession in favour of plaintiff No. 2 on 2-10-1974 who, in turn, delivered the same to plaintiff No. 1 on the same day. It is added that the surrender of possession was conditioned to the payment of Rs. 50,000/- by plaintiff No. 1 to the defendants as also to the defendants being permitted to sell tickets in respect of the cinema shows exhibited on 2-10-1974 which the said plaintiff fulfilled and posted his own gatekeepers and other staff at work, but at about 11-30 in the night, after the last show was over, the defendants started instigating their men to remove the gatekeepers and other staff posted by plaintiff No. 1 and tried to dispossess him with the result that the law and order machinery came into motion and, to begin with, clamped Section 144, Cri. P. C. in the premises of the theatre and then followed it up by taking proceedings under Section 145, Cri. P. C.

3. Along with the suit the plaintiffs submitted an application which is styled as one under Order 40, Rule 1 and Order 39, Rules 1 and 2, Civil P. C. They have prayed that a receiver be appointed pendente lite or else a temporary injunction be issued against the defendants restraining them from interfering with the plaintiff's possession and enjoyment of the property including the machinery, fixtures and furniture till the disposal of the suit. The application is founded on the plea that the defendants have no right or title to the possession and enjoyment of the property; that the Jammu and Kashmir Houses and Shops Rent Control Act, 1966 is not applicable to the present case; that the plea about statutory tenancy based on that Act raised by the defendants in their suit filed before Sub-Judge CJM Jammu is baseless and unfounded; that the right and title to the possession and enjoyment of the disputed property is vested in the plaintiffs; that if the property is allowed to remain in the hands of the defendants, there is danger that it will be dissipated and irreparable mischief will be done particularly so because the relations between the parties are so much strained that the defendants will not hesitate to destroy the machinery and furniture and render it useless; and, that the property as also the rights and interests of the plaintiffs

are exposed to manifest peril and require to be preserved and protected. The defendants have opposed the application. They have not filed their written statement so far. In their objections to the application the defendants urged that the relief for the injunction much less a temporary injunction asked for could not be granted in view of the decision under Section 145, Criminal P. C. As regards the prayer for the appointment of a receiver, they opposed it both in their objections and at the hearing mainly on the ground that the prayer, if acceded to, would result in depriving them of their legal and constitutional right to hold the property as statutory tenants under Houses and Shops Rent Control Act which, they said, was applicable to the demised premises by virtue of notification No. 193 of 1961 adding that a receiver cannot be appointed in supersession of a statutory tenant. They further urged that otherwise also they could not be deprived of the use and occupation of the disputed property including the machinery, fittings and furniture by the appointment of a receiver because, said they, a receiver cannot be appointed in a case of ejectment against a tenant overstaying the period of lease, particularly so when, as in the present case, the lessor has indicated that he will charge damages for wrongful use and occupation. They added that the fears of the plaintiffs about damages to the property were baseless. They raised some technical objections as well. At the hearing of the application the counsel for the plaintiffs did not press the prayer for issue of a temporary injunction for the obvious reason that the decision of Sub-Registrar, Judicial Magistrate, Jammu, in proceedings under Section 145, Criminal P. C. was an impediment. He confined himself to the prayer for the appointment of receiver alone which the other side opposed.

4. The short question for determination is whether on the facts and circumstances of the present case a receiver can be justifiably appointed.

5. Order 40, Rule 1 of the Civil P. C. empowers a court to appoint receiver of any property where it appears to the court to be just and convenient that such appointment should be made. The exercise of this power is however limited by the proviso that the appointment of receiver will not authorise the court—

“To remove from the possession or the custody of property any person whom any party to the suit has not a present right so to remove.”

The proviso clearly refers to a case where a person in possession is a third person and the parties to the suit have no present right to disturb his possession. This was the view taken by Ramesam and Cornish, JJ. in *Vythulinga Pandarasannadhi v. Board of Control, Thiagarajaswami Devasthanam*, (AIR 1932 Mad 193). I fully agree with this view. I make these observations because it was

Under Section 2, clause (3) of the Mysore Rent Control Act, 1961, Parts IV and V of this Act are made applicable to the areas specified in Schedule II. The relevant entry in Schedule II reads as follows:

"61. Bhadravati Old Town and Bhadravati New Board area excluding New Town and Paper Town."

The admission of the learned counsel for the decree-holder in the execution Court contained in the first two sentences in the statement referred to above is to the effect that the suit schedule site is within the municipal limits of Old Town Bhadravathi or within the limits of the Old Town Municipality of Bhadravathi. This is an admission on a question of fact and is binding on the decree-holder. But this admission is only to the effect that the suit schedule site is within the municipal limits of Bhadravati Old Town Municipality. In Schedule II of the Act, the areas of several towns have been referred to as the "Municipal Borough", the "Municipal District" or the "Municipality" of the Town concerned. But the term 'Municipality' is significantly absent with regard to Bhadravati. The Act has been made applicable to the Bhadravati Old Town and a portion of Bhadravati New Board area. It is the contention of Mr. Gopal appearing for the respondent-decree-holder that the municipal limits of Bhadravati Old Town including villages which do not form part of Bhadravati Old Town Municipality is much larger in extent than the area comprised in Bhadravati Old Town only. On a reading of the above entries in Schedule II it cannot be said that the said contention is without basis. The schedule in the execution application as well as the schedule in the decree described the suit schedule site as situated in Anehalli village within the municipal limits by the side of B. H. Road, Bhadravati. Its boundaries are also given. The mere fact that the description of the suit schedule site is admitted to be within the municipal limits of Bhadravati Old Town will not, therefore, amount to an admission that the suit schedule site is within the limits of Bhadravati Old Town itself. It cannot, therefore, be said that it is apparent on the face of the record that the Court which passed the decree had no jurisdiction to pass the decree.

13. Reliance is next placed on the admission contained in the third sentence referred to above to the effect that there is no dispute with regard to the applicability of the Rent Control Act to sites situated within the Municipal limits of Bhadravati Town. If this admission is binding on the decree-holder, it would be an admission to the effect that the Court which passed the decree had no inherent

jurisdiction to pass it. But it is contended by Mr. Gopal that this admission is only with regard to the interpretation of the relevant entry in Schedule II of the Act and that the said admission was made under a mis-apprehension of the position in law as to the interpretation of the said entry in Schedule II. This contention has to be accepted. The admission amounts to an admission on a question of law. The decree-holder, therefore, is not estopped from saying that the suit schedule site has not been shown to be within the limits of Bhadravati Old Town and that the Act is not applicable to the said site. It was, therefore, open to the decree-holder to take the contention as he did in the lower appellate Court that the House Rent Control Act did not apply to the suit schedule site. The lower appellate Court was therefore justified in coming to the conclusion that it is not apparent on the face of the record that the Court which passed the decree for eviction lacked inherent jurisdiction to pass the decree.

14. This appeal, therefore, is dismissed with costs.

Appeal dismissed.

AIR 1976 KARNATAKA 17

K. JAGANNATHA SHETTY, J.

K. N. Kama Setty, Petitioner v. The Karnataka State Transport Appellate Tribunal and others, Respondents.

Writ Petn. No. 918 of 1974. D/- 10-11-1975.

(A) Motor Vehicles Act (1939), S. 47 — Grant of permit — Existence of direct traffic, if a condition precedent.

If by the grant of permit, the need of the travelling public at intermediate places could be met, the R. T. A. may grant the permit although there is no direct traffic between the two termini. The existence of direct traffic is not a necessary requisite for the grant of stage carriage permit. W. P. No. 282 of 1972, D/- 27-11-1973 (Kar) and W. P. No. 1666 of 1973, D/- 5-2-1975 (Kar). Followed: AIR 1966 Mys 341, Explained. (Paras 4, 5)

Cases Referred: Chronological Paras
(1975) W. P. No. 1666 of 1973, D/- 5-2-1975 (Knt) 4
(1973) W. P. No. 282 of 1972, D/- 27-11-1973 (Knt) 4
AIR 1966 Mys 341 = (1965) 2 Mys LJ 656 2

M. R. Venkatanarasimhachar, for Petitioner; S. Ananda Shetty for C. S. Shanthamallappa (for Nos. 5, 6 and 10), A. K. Lakshmeshwar (for No. 12) and M. Rangaswami (for No. 7), for Respondents.

LS/LS/E459/75/SSG

ORDER:— The petitioner was granted a stage carriage permit on the route Somasetthalli to Madhugiri. The grant was challenged by several objectors in the appeals before the Karnataka State Transport Appellate Tribunal. The Tribunal found that there are no direct passengers from Somasetthalli to Madhugiri and held that the Regional Transport Authority had no jurisdiction to grant the permit. The Tribunal has not considered the other contentions urged for and on behalf of the grant. The correctness of the view taken by the Tribunal on the necessity of direct passengers from Somasetthalli to Madhugiri as a condition precedent for the grant of permit is the only question that has been debated before me in this writ petition.

2. The question, if I may put it in other words, is whether the R. T. A. could grant a permit when it is satisfied that the grant would serve the needs of the travelling public at the intermediate places, though there are no direct passengers from the two termini of the route. The observation made by this Court in *G. T. Venkataswamy Reddy v. K. V. Puttanarasimharaju*, (AIR 1966 Mys 341) was relied upon by the Tribunal in support of its conclusion. The particular observation made in the said judgment is found at para. 12 at page 343 and is as follows:—

"The contention that the R. T. O., Tumkur, within whose jurisdiction only 18 miles of the route lie was not the proper authority to hold the traffic survey or to report about the need, has no substance. The Tribunal came to the conclusion that large number of persons go as Pilgrims to Tirupathi from Kunigal and the surrounding areas. In reaching that conclusion, it relied on the report of the R. T. O. and the S. P. The R. T. O. and the S. P., Tumkur were well qualified to find out whether there was any need for a stage carriage service for taking pilgrims from Kunigal to Tirupathi. What those authorities had to investigate was as to the probable number of pilgrims daily travelling from Kunigal to Tirupathi and back and not the passengers that may be available at other points on the route."

3. From the above observations, it cannot be stated that this Court had intended to lay down as a proposition of law that the R. T. A. has no jurisdiction to grant permit if there are no direct passengers from the starting point of a route to its terminus.

4. We have got, on the other hand two decisions of this Court in which it has been clearly laid down that even though there are no direct passengers, the grant could be made if there is evidence to in-

dicade that the sectors' need is served by granting the permit. See *R. N. Javanna v. The Mysore State Transport Appellate Tribunal*, (W. P. No. 282 of 1972 disposed of on 27-11-1973) (Knt) and *D. Gurulingappa v. The Mysore State Transport Appellate Tribunal*, Bangalore, (W. P. No. 1666/73 disposed of on 5-2-1975).

5. Section 47 of the Motor Vehicles Act provides that the R. T. A. in considering the application for stage carriage permit shall consider the interests of the public generally and the benefit to any particular locality or localities likely to be afforded by the service, etc. What follows from these provisions is that if by the grant of permit, the need of the travelling public at intermediate places could be met, the R. T. A. may grant the permit although there are no direct traffic between the two termini. The existence of direct traffic is not a necessary requisite for the grant of stage carriage permit.

6. In the result, the rule is made absolute. The order of the Tribunal is quashed and the matter shall stand remitted to the Tribunal for reconsideration of the appeals in accordance with law and in the light of the observations made above. The Tribunal shall reconsider the matter within two months from the date of the receipt of this order.

7. No costs.

Petition allowed.

AIR 1976 KARNATAKA 18

D. M. CHANDRASHEKHAR AND

B. VENKATASWAMI, JJ.

M. Narasimhaiah, Bangalore-21, Appellant v. The State Transport Appellate Tribunal, Bangalore-1 and others, Respondents.

Writ Appeal No. 665 of 1974. D/- D/- 29-8-1975.

(A) Motor Vehicles Act (1939), Ss. 64, 47 — Death of applicant during pendency of appeal against grant of permit to him — Substitution of heirs in place of applicant — Permissibility.

If during the pendency of the proceedings before the Transport Authority an applicant dies, the Transport Authority has power and discretion to allow his heirs to be substituted and to grant a permit to such heirs. The position cannot be different if such applicant dies after the grant of permit made by the Transport Authority, but during the pendency of an appeal from such grant even though the permit might not have been actually issued to him in pursuance of that grant, because an appeal is in the nature of con-

JS/KS/D884/75/SSG

tinuation of the original proceeding and is a rehearing of the case. AIR 1941 FC 5. Applied. (Paras 8, 11)

While undoubtedly the qualifications and capabilities of the heirs of the original grantee of a permit, have to be taken into account by the Transport Authority before the permit granted to him can be made available to his heirs, such determination of qualifications and capabilities of the heirs can be done not only by the Transport Authority granting the permit but also by the appellate authority. An appeal, even if it be before a Tribunal constituted under an Act, is in the nature of re-hearing of application for grant of permit. (Paras 9, 10)

Cases Referred: Chronological Paras

AIR 1975 SC 1805 = 1975 UJ (SC) 687 5

AIR 1974 SC 1274 = (1974) 3 SCR 931 4, 5, 11

(1963) Civil Appl. No. 797 of 1963. D/- 20-12-1963 (SC) 10

AIR 1941 FC 5 = 1940 FCR 84 8

M. Rangaswamy, for Appellant; G. S. Shanthamallappa, for Respondent (No. 3).

D. M. CHANDRASHEKHAR, J.:—This is an appeal from the order of Venkataramiah, J. in Writ Petition No. 3784 of 1974. The appellant was the petitioner therein.

2. In the writ petition, the petitioner had assailed the judgment of the Karnataka State Transport Appellate Tribunal (hereinafter referred to as the S. T. A. T.). The learned single Judge dismissed the writ petition holding that there was no ground to interfere with that judgment.

3. Narasoji Rao whose heirs are respondents 3 (a) to (e) herein, had applied to the Regional Transport Authority, Bangalore (hereinafter referred to as the R. T. A.) for grant of a permit to operate a stage carriage between Bangalore and Mavathur. The R. T. A. by its resolution dated 25-11-1963, rejected that application. Against that resolution, he had preferred an appeal to the S. T. A. T., which set aside that resolution and remanded the case to the R. T. A. The appeal by the petitioner to the Karnataka Revenue Appellate Tribunal against the order of the S. T. A. T. was unsuccessful. After remand, the R. T. A., by its resolution dated 25/26/4-1972, granted a permit to Narasoji Rao. Against such grant, the petitioner went up in appeal to the S. T. A. T.

During the pendency of that appeal, Narasoji Rao died on 8-2-1974. His heirs were permitted to come on record in his place in that appeal. The S. T. A. T. affirmed the grant of the permit in favour of Narasoji Rao, represented by his heirs, but remanded the case to the R. T. A. to fix,

after hearing the parties, a fresh schedule of timings for the stage carriage for which that permit was granted. As stated earlier, the order of the S. T. A. T. was impugned in the writ petition.

4. Both the S. T. A. T. and the learned single Judge relied on the ruling of the Supreme Court in Ramautar Lal Jain v. Maya Kaur, (AIR 1974 SC 1274) that in case of death of an applicant for grant of a stage carriage permit, his heirs can apply for substitution in his place, that the Transport Authority has jurisdiction and discretion in the matter of allowing or refusing such substitution and that if the proceedings before the Transport Authority are likely to be delayed or if such substitution would be detrimental to the interest of the public, the Transport Authority is not bound to allow such substitution. The learned single Judge held that the aforesaid ruling of the Supreme Court applies with greater force to a case in which the Transport Authority had already granted a permit and the grantee dies during the pendency of an appeal against such grant.

5. In this appeal Mr. M. Rangaswamy, learned Counsel for the appellant, contended that the view taken by the learned single Judge that in the appeal before the S. T. A. T. the heirs of Narasoji Rao could be substituted, was clearly erroneous. Elaborating his contention, Mr. Rangaswamy argued that there is a distinction between the proceeding up to the stage of grant of a permit and the proceeding at the stage of issuing a permit, pursuant to such grant. Mr. Rangaswamy invited our attention to the observations of the Supreme Court in Civil Appeal No. 481 of 1973 = (reported in AIR 1975 SC 1805), (Kundur Rudrapa v. Mysore Revenue Appellate Tribunal) that issuance of a permit after an order granting it, is only a ministerial act necessarily following the grant of the permit.

Mr. Rangaswamy also invited our attention to the observations of the Supreme Court in Messrs. Ram Autar Lal Jain's case AIR 1974 SC 1274 that in deciding the grant of a permit, the merits of the applicant should be considered vis-a-vis other applicants, that such merits depend generally upon the peculiar position, capabilities and qualifications of an applicant which may be either personal or peculiarly or particularly those of a concern or organisation and that an heir or successor of an applicant will not necessarily have his (the applicant's) qualifications or capabilities with regard to a transport service for the benefit of the public.

6. Mr. Rangaswamy maintained that if an applicant for a permit dies at

the stage of the Transport Authority considering whether a permit should be granted to him, the Transport Authority can, after permitting his heirs to come on record, consider the qualifications and capabilities of such heirs for grant of the permit for which the deceased applicant had applied, that the Transport Authority cannot, at the stage of issuing a permit in pursuance of a grant, consider the qualifications and capabilities of such heirs, because at that stage the Transport Authority has to merely perform the ministerial act of issuing a permit in pursuance of a grant already made and there will be no enquiry of any kind at that stage and that hence if an applicant in whose favour a permit has been granted, dies before a permit is issued, the grant abates and his heirs can only make a fresh application to the Transport Authority for grant of a permit.

In that view Mr. Rangaswamy maintained that when Narasoji Rao died during the pendency of the appeal, the S. T. A. T. should have treated the grant of the permit as having abated and should not have affirmed the grant in favour of Narasoji Rao, represented by his heirs.

7. On the other hand, Mr. C. S. Shanthamallappa, learned Counsel for the respondents 3 (a) to (e) contended that grant of a permit and issue thereof in pursuance of such grant are different stages of an integrated proceeding before the Transport authority, that the appellant had not urged before the S. T. A. T. that Narasoji Rao's heirs were in any way disqualified or were not suitable persons for grant of the permit and that hence the S. T. A. T. was justified in affirming the grant of the permit so as to enable Narasoji Rao's heirs to operate the stage carriage.

8. As stated earlier, Mr. Rangaswamy did not dispute that if during the pendency of the proceedings before the Transport Authority an applicant dies, the Transport Authority has power and discretion to allow his heirs to be substituted and to grant a permit to such heirs. The position cannot, in our opinion, be different if such applicant dies after the grant of permit made by the Transport Authority, but during the pendency of an appeal from such grant even though the permit might not have been actually issued to him in pursuance of that grant, because an appeal is in the nature of continuation of the original proceeding and is a re-hearing of the case. As pointed out by the Federal Court in *Lachmeshwar Prasad Shukul v. Keshwar Lal Chaudhuri*, (AIR 1941 FC 5), once an appeal is filed against the decision in a case, the matter becomes subjudice again and thereafter

the appellate Court has seisin of the whole case and the appellate Court is entitled to take into account even facts and events that have come into existence, after the decree or appeal appealed against.

9. While undoubtedly the qualifications and capabilities of the heirs of the original grantee of a permit, have to be taken into account by the Transport Authority before the permit granted to him can be made available to his heirs, such determination of qualifications and capabilities of the heirs can be done not only by the Transport Authority granting the permit but also by the appellate authority. In the present case since the original grantee, Narasoji Rao, died during the pendency of the appeal, the S. T. A. T. could consider the qualifications and capabilities of his heirs and decide whether they were suitable for operating the stage carriage, as the whole matter stood reopened in the appeal. The S. T. A. T. took the view that it was not shown that Narasoji Rao's heirs suffered from any disqualification or were not suitable persons for operating the stage carriage, as can be seen from the following observations:

"In the instant case the appellants have not stated that the respondent's heirs are in any way disqualified from obtaining the permit. In the additional grounds raised, they have not taken any exception to the capacity of the heirs of Narasoji Rao to operate the service if the permit is granted in their favour. I do not find anything in the record which shows that the heirs of Narasoji Rao are not entitled to operate the service or they are incapable of running the service as efficiently as R. Narasoji Rao."

10. However, Mr. Rangaswamy contended that the S. T. A. T. not being a Court of unlimited jurisdiction, but being only a creature of the statute, namely, the Motor Vehicles Act, 1939, its powers are limited to those specified in sub-sec. (1) of Section 64 of that Act, and that under that sub-section the S. T. A. T. has no power to determine the question of qualifications and capabilities of the heirs of the grantee of a permit who dies during the pendency of the appeal.

Support for this contention was sought to be derived from the observations of Mudholkar, J., in Civil Appeal No. 797 of 1963 (SC) on the file of the Supreme Court (*Hanuman Transport Co. Ltd. v. Meenakshi alias Ramabai*) that as there is no provision in the Motor Vehicles Act analogous to Order 41, Rule 33, Civil P. C., the Appellate Tribunal has no power to give the benefit of its remand order to a non-appealing unsuccessful applicant. The above observations do not, in our opinion, detract from the well-established legal

position that an appeal, even if it be before a Tribunal constituted under an Act, is in the nature of re-hearing of the cause, which in the context of the present case was re-hearing of the application for grant of permit.

11. Thus, we do not find any good ground to dissent from the view taken by the learned single Judge that the principle enunciated by the Supreme Court in *M/s. Ramautar Lal Jain's case* AIR 1974 SC 1274 is equally applicable to the proceedings before the Appellate Authority.

12. In the result, this appeal fails and is dismissed. In the circumstances of this case. We direct the parties to bear their own costs in this appeal.

Appeal dismissed.

AIR 1976 KARNATAKA 21

M. SADANANDASWAMY, J.

Mammunhi Beary, Appellant v. Neelamma and another, Respondents.

R. S. A. No. 1082 of 1970, D/- 6-8-1975.*

(A) T. P. Act (1882), S. 63 — Accession to mortgaged property — Right of mortgagor — Extent of.

Section 63 of the T. P. Act does not entitle the mortgagor to recover acquisitions made by the mortgagee for his own benefit in circumstances which do not bring him within Section 90 of the Trusts Act. He would be entitled to redeem the property when the mortgagee had any special advantage by reason of his possession as mortgagee in acquiring it. AIR 1932 PC 199. Relied on.

(Para 8)

It is for the mortgagor, who claims the gains as an accretion to the mortgaged property, to show that it was acquired or made by the mortgagee during the continuance of the mortgage, making use or taking advantage of his position as mortgagee and that too in derogation of his own right; and unless that is shown, the mortgagor would not be entitled to claim the acquisition made by the mortgagee as an accretion to the mortgaged property. (1965) 2 Law Rep 639. Applied. (Para 7)

When an usufructuary mortgagee used his position as mortgagee for the purpose of getting kumki lands on darkfast and such lands were assigned to the mortgagee under Para. 14 of Board's Standing Order No. 15 on the basis of the preferen-

* (Against order of Principal Civil J., Mangalore, in Appl. No. 159 of 1969, D/- 17-6-1970).

tial claim of the mortgagee as wargadar of the mortgaged property, the lands so assigned could be considered to be an accession to the mortgaged property and were liable to be redeemed. The absence of any mention of the right to kumki land in the deeds in question could not deprive the mortgagor of the right to redeem that property. Case law discussed. (Para 12)

(B) T. P. Act (1882), S. 63-A — Improvements to mortgaged property — Value of — Concurrent findings as to — Interference in second appeal — Applicability of S. 63-A — (Civil P. C. (1908). S. 100).

Where the Commissioner valued the areca trees as raised by the mortgagee on the mortgaged land at Rs. 7.50 per tree while the trial Court as well as lower appellate Court concurrently awarded only Rs. 5/- per tree, and the Courts had given valid and sufficient reasons for departing from the valuation adopted by the Commissioner, the principle adopted by the Courts not being wrong it could not be said that there was error in assessing the value of those improvements and in awarding a lump sum for the same so as to warrant interference in second appeal. (Paras 13, 16)

Section 63-A applies only when there is no contract between the parties. In the absence of any agreement, the question whether the mortgagor has to pay for the improvements depends upon whether the claim of the mortgagee comes within the terms of S. 63-A (2) and if there is such an agreement it prevails over S. 63-A (2). But a mortgagee ought not to be allowed to improve the mortgagor out of his estate. The question whether the agreement in question amounts to a clog on redemption is a question to be decided on the facts and circumstances of each case. (Para 16)

(C) Civil P. C. (1908), S. 35 — Redemption suit — Award of cost to mortgagee — Refusal by Court on ground that he denied plaintiff's right to redeem and put forth unreasonable claim for improvements — Discretion exercised by Court held to be not erroneous. (Para 17)

Cases Referred: Chronological Paras

(1970) 2 Mys LJ 39	9. 10
(1966) 2 Mys LJ 38	8. 9. 10
(1965) 2 Law Rep 639	7. 10
(1965) 4 Law Rep 820	10. 11
AIR 1956 Mys 14 = ILR (1956) Mys 260	15
(1954) 2 Mad LJ 665	14
AIR 1944 All 204 = 1944 All WR (HC) 201	16
AIR 1940 PC 3 = 1940 All LJ 70	13
AIR 1932 PC 199 = 59 Ind App 366	7

B. P. Holla, for Appellant; T. S. Krishna Bhat for U. L. Narayana Rao, for Respondents.

ORDER:— This appeal arises out of the suit for redemption filed by the respondents. Respondent 1 is the wife of respondent 2. Respondent No. 2 executed a usufructuary mortgage of the plaint 'A' schedule properties, which consist of nine items, under Ex. P-1 dated 15-3-1943 for Rs. 300/- in favour of one Hukregowda, who assigned his rights in favour of the appellant-defendant 1 under Ex. D-1 dated 6-11-1947. The appellant was in possession till a Receiver was appointed by this Court for the 'A' schedule properties as well as the 'B' schedule properties which form the Kumki lands in respect of the 'A' schedule properties. The 'B' schedule properties are alleged to be the accession to the mortgage properties. The equity of redemption was transferred by the second respondent in favour of one Bommanna Gowda on 30th July, 1943 under Ex. P-3. Bommanna Gowda in turn transferred the equity of redemption under the sale deed, Ex. P-2, dated 22-2-1965 to the first respondent.

It is also alleged that there were a number of valuable timber trees on the suit properties, that the first defendant has cut down trees worth not less than Rs. 5,000/- and that he failed to account for the same. The second defendant is alleged to be the lessee of a portion of the said 'A' schedule properties under the first defendant. The third defendant is alleged to be in occupation of the house in the 'B' schedule properties. The term of the mortgage is 20 years. The plaintiffs also claim future mesne profits at a rate to be determined by the Court. The appellant is the contesting defendant. He denied the right of the plaintiffs to redeem either the 'A' schedule or 'B' schedule properties. He pleaded that he had effected improvements to the suit properties and claimed Rs. 70,000/- as the value of the same. He alleged that he had raised new areca gardens in punja lands and had to spend large sums for levelling the land and laying out ufru kharis etc. He denied having caused any damage but stated that the trees were cut only to prevent menace by the monkeys.

2. A Commissioner was appointed by the trial Court. He submitted his reports, Exs. D-3 and D-4, with regard to the improvements alleged to have been effected by the appellant and the value of the same. The trial Court held that the appellant was entitled to a sum of Rs. 7,138/- towards the value of the improvements effected in the suit 'A' and 'B' schedule properties. It further held that he was liable to pay a sum of Rs. 500/- towards damages caused to the

suit lands. It also held that the 'B' schedule properties form an accession to the mortgaged properties and that the respondents were entitled to redeem the same. It accordingly passed a preliminary decree directing respondent 1 to pay to the first defendant or deposit into Court a sum of Rs. 6,938/- including the mortgage debt of Rs. 300/- after adjusting a sum of Rs. 500/-, being the damages.

3. The first defendant went up in appeal and the plaintiffs filed cross-objections in the lower appellate Court as regards the value of the improvements. The lower appellate Court left open the question of future mesne profits to be decided in the final decree proceedings. But for this modification it confirmed the decree of the trial Court and dismissed the appeal as well as the cross-objections.

4. The main contentions urged by Mr. B. P. Holla, learned Counsel appearing for the appellant, are: that the 'B' schedule properties have been wrongly held to be the accession to the mortgaged properties, that the value of the improvements awarded by the lower appellate Court is low, and that the lower Courts should have accepted the valuation given by the Commissioner.

5. The 'B' schedule properties were assigned to the appellant. According to the case of the respondents they were acquired by the appellant in his capacity as the mortgagee and they form accession to the mortgaged properties, and therefore the respondents were entitled to redeem the same. According to the case of the appellant they were acquired by him independently of his capacity as mortgagee and in his own right and therefore do not form an accession to the mortgaged properties. S. Nos. 45/1, 47/2 and 128/2 were assigned in favour of the appellant under Ex. P-4 dated 19-12-1953.

Sy. Nos. 45/2 and 138/2 were assigned in favour of the appellant under Ex. P-5 dated 24-4-1954. Sy. No. 44/2 was similarly assigned under Ex. P-6 dated 30-6-1962. In Ex. P-5 there is an endorsement to the effect that the prayer in regard to Sy. No. 44/2 was rejected since its assignment will extend the ratio of 2 acres of dry for every one acre of wet land in the holding of the proponent and that there are no special circumstances to recommend its assignment in his favour in excess of this ratio. It is also mentioned that there is no agame in Sy. No. 44/2. It is not disputed that the 'B' schedule properties are Kumki lands in respect of 'A' schedule properties which are the mortgaged properties.

6. Standing Order No. 15 of the Standing Orders of the Board of Revenue, Madras, relate to disposal of land by the

Government. Paragraph 40 of the Standing Order No. 15 sets out the modifications in the Rules contained in that Standing Order in their application to South Kanara. These are contained in Volume I of the Standing Orders of the Board of Revenue published by the Government Press in 1955. Kumaki land is Government waste land within 100 yards of assessed land included in a holding formed prior to fasli 1276. Kumkidar is a person who is entitled to enjoy the kumaki privilege and is necessarily either the registered holder, walawargdar or mulgenidar of the land to which the Kumaki privilege is attached. A Kumakidar's privileges in the land are grazing his cattle, cutting and collecting leaves, timber and other forest produce for his agricultural and domestic purposes.

Any registered holder or walawargdar or mulgenidar who is a kumakidar of the land applied for should be given preference over all other applicants to the extent of those privileges. No kumakidar as such will have any preference to land beyond his kumaki. The kumaki privilege will be admitted even if the land in connection with the enjoyment of which the privilege is claimed is situated in a different village. In the case of unauthorised occupation of kumaki, the adjacent registered holder or walawargdar or mulagenidar shall be liable to forfeit his preferential claim as kumakidar in favour of the occupant if he has failed to bring the occupation to the notice of the authorities for a period of more than six months unless it can be shown that the occupation was without his knowledge. When kumaki land is assigned on *dar-khast* to the kumakidar the value of the trees except sandalwood which stand on the land will be foregone. The right of Government shall be reserved to all other sandal trees which are left standing at the time of assignment as well as those which may grow subsequently on the land assigned.

7. In *Sorabjee v. Dwarkadas Fanchhoddas*, (AIR 1932 PC 199) it was held that Section 63 of the T. P. Act does not entitle the mortgagor to recover acquisitions made by the mortgagee for his own benefit in circumstances which do not bring him within Section 90 of the Trusts Act, and that he would be entitled to redeem the property when the mortgagee had any special advantage by reason of his possession as mortgagee in acquiring it.

After considering the said decision it was observed by B. M. Kalagate, J. in *Mahalinga Shetty v. B. Monappa Herde*, (1965) 2 Law Rep 639 that it is for the mortgagor who claims the gains as an accretion to the mortgaged property, to

show that it was acquired or made by the mortgagee during the continuance of the mortgage, making use or taking advantage of his position as a mortgagee and that too in derogation of his own right; and unless that is shown, the mortgagor would not be entitled to claim the acquisition made by the mortgagee as an accretion to the mortgaged property. In that case the application of the mortgagee for the grant of the kumki lands was opposed by the mortgagor before the revenue authorities. Since the mortgagee obtained it in opposition to the mortgagor, it was held that he did not make use of the position as mortgagee to obtain the grant of the lands. The lands were therefore held to be not an accession to the mortgaged property.

8. In *Rama Handa v. Shankar Narayana Rao*, ((1966) 2 Mys LJ 38), the scope of paragraph 40 of the Board's Standing Order No. 15 was considered. It was observed that whatever may be the preferential claims which the wargdars and mulgenidars might have either by virtue of the practice of the revenue authorities or by virtue of the Board's Standing Orders such preference was undoubtedly extended to them by the Government as the paramount owners of all waste lands.

It was further observed that even in the case of encroachments, the law both in England as well as in India lays down for more than a presumption to the effect that encroachments made by lessees upon land adjacent to leasehold land may be treated as having been made for the more beneficial enjoyment of the leasehold land and therefore intended to be held as part of the leasehold; but that presumption can be rebutted by a number of circumstances tending to show that the intention of the lessee was to acquire the land for his own benefit or that the intention of that lessor was that the said encroached land need not be treated as having been incorporated in his land. But the decisive factor which determined the question in that case was considered to be the fact that the lessor opposed the grant and the lessee acquired the land in spite of the said opposition. It was, therefore, held that the lessee must necessarily have acquired the land for his own benefit and not for the benefit of the lessor or as part of the leaseholding.

9. Mr. Holla has relied on the decision in *Sri Venkataramana Devaru Trust v. Vanajakshi Amma*, ((1970) 2 Mys LJ 39). In that case the 'A' schedule property originally belonged to the deity under a trust or endowment. The previous manager or trustee had sold the same several years ago to the predecessor-in-interest of the first defendant. The present trustee

tee filed a suit for declaration that the said alienation is invalid and for recovery of 'A' schedule property. The suit was decreed and confirmed in second appeal. But subsequent to the decree, and before the actual recovery of possession in execution of the decree was secured, the defendant obtained 'B' schedule property under a darkhast grant made by the Government. For securing the grant the defendant made it appear that she was the owner and occupier of the Verga land of the plaint 'A' schedule and pleaded its Kumki privilege as a ground for preference in her favour so far as the darkhast was concerned.

It was contended by the plaintiff that the 'B' schedule land was secured by the first defendant on a darkhast by pleading Kumki privileges, that she acquired the same by making use of her position as the occupant of the Verga land and that there was a resulting or constructive trust. Following the decision in (1966) 2 Mys LJ 38, it was held that so far as the Kadim Vargadar is concerned, what is called preferential treatment in the matter of darkhast grants or kumki lands cannot be regarded as an advantage or proprietary right or right to proprietorship of the verga land and that the grantee of kumki land cannot be regarded as having made use of his position as the Vargadar or occupant of the Verga land in acquiring the said grant. It was further held that by securing the grant of 'B' schedule property on darkhast the first defendant had not to any extent derogated from any of the proprietary rights or even advantages annexed to proprietorship enjoyed by the plaintiff. The contention of the plaintiff was, therefore, rejected.

10. The question whether assignments made on the basis of the Kumaki privileges in favour of the mortgagee can be considered as an accession to the original mortgaged property was considered by a Division Bench of this Court in Padmaraja Ariga (since deceased) Bv L. Rs. v. Kusumamma. ((1965) 4 Law Rep 820). After considering the provisions of the Board's Standing Order No. 15 it was observed that the benefit of preferential claim does not, to any extent, detract from the Government's right of absolute disposal. It was further observed as follows:

"There is another matter which also should be stated in this connection where the Government waste land is unauthorisedly occupied and cultivation conducted thereon or improvements effected therein, the Government instead of totally evicting the person, does reserve to itself the right of converting the land unauthorisedly occupied into wara land of the occupant by imposting on him back

assessment calculated at certain stipulated rates in respect of the entire period of unauthorised occupation and collects the same before conferring upon the occupant the right of an owner. The legal position is stated in Section 3 of the Madras Land Encroachment Act (III of 1905). In such a case, it will be noticed, the position is not different from an actual grant of land by the Government upon certain conditions. When such grant is made, the fact taken into consideration by the Government would obviously be that the occupation, though unauthorised, has resulted in benefit to the public by the occupant or trespasser growing food crops." It was also noticed that when waste land is granted, the Government generally charges what is called seigniorage, being the amount calculated at certain rate in respect of trees grown thereon, but where, however, the land granted is within kumaki limits of the warg, seigniorage is not charged in respect of trees standing on the kumaki land. The observations in (1965) 2 Law Rep 639 with regard to burden of proof were referred to with approval. It is clear, therefore, that this decision accepted the principle that when the lands are assigned to the mortgagee on the basis of the preferential claim of kumaki, the lands so assigned can be considered to be an accession to the mortgaged property. But this decision does not appear to have been brought to the notice of the learned Single Judge who decided the cases in (1966) 2 Mys LJ 38 and (1970) 2 Mys LJ 39.

The decision of the Division Bench is binding on me though the decision in (1970) 2 Mys LJ 39 appears to support the contention of Mr. Holla. It has to be noticed that on the date of the assignment in (1970) 2 Mys LJ 39 the assignee had lost all right to the warg property though he made a false representation to the Revenue Authorities that he was still the wargadar of those properties.

11. The appellant was put into possession of the mortgaged property soon after Ex. D-1, the deed of assignment in his favour of the mortgagee's rights. He also got himself registered as wargdar at about the same time. Both the lower Courts have relied on the admission of the appellant in his evidence that he took the assignment of the mortgagee's rights for the purpose of getting lands on darkhast. They have also relied on the endorsement on Ex. P-5 to the effect that one of the lands applied for, namely, Sv. No. 44/2, was refused to be granted on the ground that the ratio of 2 acres of dry land for every one acre of wet land would be exceeded. But there is no material to show that the refusal was due to the fact that the applicant claimed preferential rights based on kumaki,

Hence the endorsement is of no help to the mortgagor.

It is the contention of Mr. Holla that under Exs. P-4 and P-6 back assessment has been levied on the assignee and that the grant was therefore on the basis of the wrongful cultivation or encroachment by the mortgagee of the kumaki lands and not on the basis of any preferential claim of the mortgagee in his capacity as wargdar. In Ex. P-4 back assessment has been levied for the period of five years. In Ex. P-6 back assessment has been levied for the period of six years. Except the orders of grant, Exs. P-4, P-5 and P-6, there is no documentary evidence to show the circumstances under which the grants were made in favour of the mortgagee. All the three orders state that the grants are made under B. S. O. No. 15 including B. S. O. No. 15, paragraph 14. Paragraph No. 14 of B. S. O. No. 15 states that the value of trees standing on the land except those proved to have been planted by him should be recovered from the successful applicant.

Paragraph 14 has been modified in its application to South Kanara under the provisions of paragraph 40 of the B. S. O. No. 15. Paragraph 14 as so modified states that when kumaki land is assigned on darkhast to the kumakidar the value of the trees except sandalwood which stand on the land will be foregone. It has to be noticed that according to the report of the Commissioner there are standing trees on the lands assigned under Exs. P-4 and P-6 which were 15 to 20 years old and some of them even 25 years old. The date of the Commissioner's report is 17-1-1967. Ex. P-4, the earliest order, is dated 19-12-1953. In none of the three orders is seigniorage charged on the standing trees. This circumstance shows that the grants were made under paragraph 14 of the B. S. O. No. 15 as modified in its application to the District of South Kanara, in other words, on the basis of the preferential claim of the mortgagee as wargdar of the mortgaged properties.

It is no doubt true that under Exhibits P-4 and P-6 back assessment was also levied. But the levy of back assessment is only a prima facie indication of the grant having been made in the grantee's own right, as held in (1955) 4 Law Rep 820. It was urged on behalf of the mortgagor in that case that even though occupation and improvement by one of the grantees might have been taken to be one of the matters considered as relevant, so far as the grant to the mortgagee was concerned he had no claims other than those based upon the preferential right attached to kumaki, and that the seigniorage charged must be read in the light of the

recommendation of the Tahsildar, that ~~the~~ that it should be charged only in respect of trees on lands other than kumaki lands. It was held that the order of grant contained no indication whatever of any preferential right attached to kumaki having been taken into account or the trees on such land having been excluded from seigniorage, and that the argument based solely on the basis of the Tahsildar's report could not be accepted.

In cases where back assessment was levied and there was no other indication it was held that, prima facie, the grant should be related to unauthorised occupation regularised by the levy of back assessment and the claim of the mortgagor that it is accession to the mortgaged property was rejected in those cases. It was not therefore a case where the seigniorage had been foregone in respect of trees standing on kumaki lands. But, in view of the definite indication in the orders of grant in the present case that they were made on the basis of the preferential claim of the mortgagee as wargdar of the mortgaged properties that decision is not applicable to this case. It is urged by Mr. Holla that the orders of grant should have mentioned that B. S. O. No. 15, para. 14 as modified by paragraph 40 of B. S. O. No. 15 has been relied on if grants were actually on the basis of the kumaki rights. It is no doubt true that if such a mention had been made it would have clarified the matter. But the absence of specific reference to the modification of paragraph 14 by paragraph 40 in the said orders is immaterial for the reasons already stated.

12. It is further contended that the 'B' schedule properties are not mentioned in Exhibit P-2 under which Bommanna Gowda conveyed the equity of redemption in favour of respondent 1. But the right to 'B' schedule properties accrues to the mortgagor only on redemption as provided in Section 63 of the T. P. Act. What has been conveyed to respondent 1 under Ex. P-2 is the right of equity of redemption. Hence, the absence of any mention of the right to 'B' schedule properties cannot deprive the mortgagor of the right to redeem the property which forms an accession to the mortgaged property. Hence, the finding of both the lower Courts that the 'B' schedule properties form an accession to the mortgaged property and are liable to be redeemed has to be confirmed.

13. The next question to be considered is one relating to the value of the improvements. The grievance of the appellant is that though the Commissioner valued the areca trees at Rs. 7-50 per tree, the trial Court as well as the lower

appellate Court awarded only Rs. 5/- per tree. The trial Court inspected the spot at the request of the parties. It held that on the evidence in the case of the areca garden shown as AG-2 in the Commissioner's report contain the most valuable areca trees that the Commissioner had valued the trees in that garden at the rate of Rs. 7/- per tree, as he was of the view that the areca trees in the other areca gardens, in the suit properties were inferior to those in the above said garden, and since those trees also had been valued by the Commissioner at Rs. 7/- per tree it will not be reasonable to assess the value of all the areca nut trees at Rs. 7-50 per tree.

It cannot be said that the trial Court had adopted a wrong principle in doing so. This valuation has also been accepted by the lower appellate Court. The other grounds with regard to valuation relate to the Khanis constructed by the appellant and the charges for blasting rocks for the purpose of levelling the land in order to convert the same into areca garden. In the first report the Commissioner did not state the basis on which he arrived at the value of these improvements and when objections were filed he stated in his second report that the value arrived at by him with regard to these improvements were based on the rates which were then prevailing at the time when improvements were made. But the Commissioner has not stated the source from which he obtained the information relating to the then prevailing rates.

The trial Court, therefore, cannot be said to be in error in assessing the value of those improvements at what it considered to be reasonable and in awarding a lump sum for the same. Mr. Holla has relied on the decision in Chandan Mull Indra Kumar v. Chiman Lal Girdhar Das Parekh. (AIR 1940 PC 3) in support of his contention that the report of the Commissioner should have been accepted in toto by the lower Courts. In that case the statement of the Subordinate Judge to the effect that "interference with the result of a long and careful local investigation except upon clearly defined and sufficient grounds is to be deprecated" was accepted as a correct statement of the principle to be adopted in dealing with the Commissioner's report. But in the present case the trial Court has given valid and sufficient reasons for departing from the valuation adopted by the Commissioner.

14. It is further contended by Mr. Holla that the lower appellate Court was in error in not awarding any amount towards the value of the improvements effected by the appellant on Kumaki lands. He relied on the decision in Rama-

krishna Bhatta v. Subbanna Bhatta, ((1954) 2 Mad LJ 665) according to which the mortgagee will be entitled to half the value of the improvements effected by him on Kumaki lands on redemption of the mortgage. The lower appellate Court rejected this claim on the ground that if the amount determined by the trial Court is enhanced it would amount to a clog on the equity of redemption.

15. Mr. Krishna Bhat has relied on the decision in C. Krishnamurthy Setty v. Abdul Khadar. (AIR 1956 Mys 14). In that case the mortgage was for Rs. 12,500/-. The mortgagee claimed Rs. 10,000/- for making alterations to the buildings and another Rs. 15,000/- for putting up a stair-case on the mortgaged property. The following passage from the book by Fisher on Law of Mortgages was relied on and the claim of the mortgagee was rejected as it would amount to a clog on redemption:

"The mortgagee in possession need not rebuild ruinous premises or increase his debt by laying out large sums beyond the rent for the property when restored ought to be of the same nature as when the mortgagee received it; and if it be wholly or in part converted from its original purpose, the money expended will not be allowed to be charged upon it."

16. Mr. Holla, however, relied on the decision in Chhedi Lal v. Babu Nandan. (AIR 1944 All 204) and contended that the mortgage deed Ex. P-1 contains a recital to the effect that the mortgagor will pay for the improvements effected by the mortgagee at the time of redemption and that therefore the mortgagee will be entitled to the value of the improvements effected. In that case the mortgage deed provided that if the mortgagee constructs any building on the mortgaged property by demolition of the mortgaged property or otherwise, the mortgagor shall pay the entire mortgage money with costs of construction at the time of redemption of the mortgaged property before it is redeemed.

It was held that Section 63-A of the T. P. Act applies only when there is no contract between the parties. In the absence of any agreement, the question whether the mortgagor has to pay for the improvements depends upon whether the claim of the mortgagee comes within the terms of sub-section (2), and if there is such an agreement it prevails over sub-section (2) of Section 63-A. Their Lordships recognised the principle that a mortgagee ought not to be allowed to improve the mortgagor out of his estate, but held that on the facts of that case it could not be said that the spending of the amount by the mortgagor on the construction of

the new house, which was obviously contemplated by the parties at the time of the execution of the mortgage deed, amounted to improvement of the mortgagor out of his estate.

The mortgage money was Rs. 1,200/-. The amount which the mortgagor was required to pay was less than nine times the mortgage money. The question, according to the learned Judges, which came up for decision before them was whether upon a consideration of the facts and circumstances of that case and of the covenant in question, it could be said that the covenant was unconscionable or oppressive so as to make it impossible for the mortgagors to redeem. Thus the question whether it amounts to a clog on redemption is a question to be decided on the facts and circumstances of each case.

In the present case the mortgage amount is Rs. 300/-. The period of redemption is 20 years. The amount awarded by the lower Courts towards the value of the improvements was Rs. 7,138/-. i.e., more than 23 times the mortgage money. The undertaking in Ex. P-1 to pay for the improvements must be understood as being an undertaking to pay for any reasonable improvements. No decision has been cited by Mr. Holla to show that where the value of the improvements exceeded 23 times the amount of the mortgage money it has been considered to be reasonable or not a clog on the equity of redemption. Hence, the lower appellate Court was right in rejecting the prayer of the appellant for enhancement of the value of the improvements payable by the mortgagor.

17. It is next urged by Mr. Holla that the usual rule is to award costs to the mortgagee in a redemption suit. Both the lower Courts have refused to award costs to the mortgagee on the ground that he denied the plaintiffs' right to redeem and also on the ground that he put forth an unreasonable claim for Rs. 70,000/- as the value of the improvements. It cannot be said that the discretion exercised by the lower Courts is erroneous.

18. The Receiver has been appointed by this Court during the pendency of this appeal and he is in possession of the suit properties. The respondents-plaintiffs are entitled to take possession of the suit properties from him as provided in the decree of the trial Court which has been confirmed by the lower appellate Court. The trial Court is authorised to discharge the Receiver after being satisfied with regard to the accounts which shall be rendered to it by the Receiver.

19. This appeal is dismissed with costs.

Appeal dismissed.

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K. JAGANNATHA SHETTY, J.

N. Jayadevappa, Petitioner v. G. Nanjundappa and another, Respondents.

C. R. P. No. 98 of 1975. D/- 5-11-1975.*

(A) Civil P. C. (1908), O. 40, R. 1 — Receivers — Remuneration of — Principles for determination — Suit for dissolution of partnership firm engaged in operating stage carriages — Monthly collection fares estimated at rupees one lakh — Remuneration at 7% on the realisation of the assets held was excessive.

Remuneration of a Receiver is to be fixed by the Court having regard to the nature of the work and the responsibility to be shouldered by the Receiver. It may be a fixed sum or on the percentage basis. There cannot be any absolute standard in the matter. The Court after appraisal of the nature and volume of the work entrusted and the time required for performing the duties, should fix the remuneration of the Receiver. (Para 3)

In a suit for dissolution of a partnership firm engaged in operating stage carriages on different routes in a district, the monthly collection of the fares of which was roughly estimated to be a lakh of rupees, the Court appointed an Advocate of the local Bar as Receiver fixing his remuneration at 7% on the realization of the assets of the firm, relying upon the Mysore State Government Order No. Law 20 L.C.L. 73, dated 28-3-1974 fixing the remuneration of the official Receivers at 7% on the assets realized in insolvency proceedings. If the remuneration fixed worked out to less than Rs. 1,200 p.m., the Receiver was entitled to receive Rs. 1,200/-. It was not in dispute that the remuneration of the Receiver fixed at 7% on the realisation of the assets would work out at Rs. 4,000 to Rs. 5,000 p.m.

Held that the order fixing remuneration based on the Government order could not be a safe guide in the instant case. Five to seven per cent allowed thereunder to the Official Receiver was on the realisation of the assets of the insolvent. It was common knowledge that there would be hardly any appreciable assets of an insolvent and even if there was any, it would be extremely difficult for the Receiver to realise it. (The trial Court was directed by the High Court to

* (Against order of Addl. Civil J. Shimoga, in O. S. No. 35 of 1973. D/- 5-10-1974).

reconsider the matter and fix the appropriate remuneration in the light of the principles stated above); Kerr on Receivers (13th Ed.) p. 248. N. D. Basu's Law of Receivers (2nd Ed., 1964) p. 695 and Woodroffe's Law Relating to Receiver (6th Ed. 1964) p. 237. Ref. (Paras 3 & 4)

K. S. Puttaswamy, for Petitioner; B. Veerabhadrappe, for No. 1 Respondent.

ORDER:— This revision petition is concerned with the validity of an order of the Additional Civil Judge, Shimoga, fixing the remuneration of a Receiver appointed in the suit for dissolution of a partnership firm.

The firm is engaged in operating stage carriages. It has in all about six route permits in the District of Shimoga. The monthly collection of the fares is roughly estimated to be a lakh of rupees. There is separate staff for the operation of the vehicles and also for its maintenance. The Court appointed an Advocate of the local Bar as Receiver fixing his remuneration at 7% on the realisation of the assets of the firm, despite the objection of the petitioner that a fixed remuneration would be sufficient. The Court has relied upon the State Government Order No. LAW 20 LCL 73, dated 28th March 1974 fixing the remuneration of the Official Receivers at 7% on the assets realised in insolvency proceedings. The Court observed that if the remuneration fixed at 7% works out less than Rs. 1,200 per month, the Receiver is entitled to receive a remuneration of Rs. 1,200/-. The receiver was also held entitled to spend any amount to meet his expenses in due discharge of his duties out of the assets of the firm.

2. Challenging the validity of the said order, defendant 1 has approached this Court.

3. It is not in dispute that the remuneration of the Receiver fixed at 7% on the realisation of the assets or income of the firm would work out at Rs. 4,000 to Rs. 5,000 per month depending upon the collection of fares in each month. It was the contention of counsel for the petitioner that the said remuneration was excessive and disproportionate to the work done by the Receiver. It is said that the Receiver has limited function, and is required to supervise the activities of the workmen and has no special responsibility to perform. It is also said that the entire work of the Receiver was formerly performed by the managing partner of the firm who was paid only a sum of Rs. 250/- per month. Counsel for the petitioner has however no objection for paying the Receiver Rs. 750/- per month.

Counsel for the Receiver submitted that this Court may fix any remuneration

above Rs. 1,200/- and below Rs. 2,000/- per month.

On these extreme contentions, I do not think that I can strike a balance. I may, however, briefly state the principles which must enter into the judicial verdict in determining the remuneration of a Receiver in a case like this. In Kerr on Receivers (13th Edition) at page 248, it is stated as follows:

"On gross sums received the percentage is usually from $1\frac{1}{2}$ to $1\frac{1}{2}$ per cent. In the case of receivers and managers there is no fixed scale. They are sometimes allowed 5 per cent. on the receipts; in other cases their remuneration is fixed at a lump sum or regulated by the time employed by the receiver, his partners and clerks. In such cases a time account is required. A statement of particulars of work done is also sometimes required from receivers and managers to enable the rate of remuneration to be fixed.

"A receiver and manager appointed to wind up or carry on a partnership business is, in the absence of express stipulation, entitled to a quantum meruit, though he is himself a partner, irrespective of his liabilities to the partnership as a partner."

In the Law of Receivers by N. D. Basu (Second Edition, 1964), at page 695, the following principles are set out:

"As to what a reasonable fee is, no iron clad rule can be laid down. The amount of work done by the receiver must of course, be taken into consideration, as well as the quality of the work, and the amount of funds passing through the hands of the receiver, and the magnitude of the case, and the responsibility imposed."

The observation in the "Law Relating to Receiver," by Woodroffe (Sixth Edition, 1964) at page 237, appears to be of some use in the present case.

"The amount which will be allowed is what is reasonable having regard to the difficulties or facilities of collection and management and the other circumstances of the estate. When a commission is allowed it is generally at the rate of 5 per cent, though the rate in the case of a very large estate has by arrangement with the receiver been fixed as low as one per cent. of the value of the estate coming into his hands provided that the remuneration was not less than a particular sum."

From these principles, what can be deduced is that the remuneration is to be fixed by the Court having regard to the nature of the work and the responsibility to be shouldered by the Receiver. It may be a fixed sum or on the percentage basis. There cannot be any absolute standard in the matter. The Court after appraisal of

the nature and volume of the work entrusted and the time required for performing the duties, should fix the remuneration of the Receiver. The order of the trial Court basing on the Government Order prescribing the scale of fee to the Official Receiver cannot be a safe guide in the present case. Five to seven per cent allowed thereunder to the Official Receiver is on the realisation of the assets of the insolvent. It is common knowledge that there would be hardly any appreciable assets of an insolvent and even if there is any, it would be extremely difficult for the Receiver to realise it.

4. The trial Court should now reconsider the matter and fix an appropriate remuneration. I therefore, allow the revision petition setting aside the order and with a direction to the trial Court to reconsider the matter in the light of the observations made.

5. No costs.

Petition allowed.

AIR 1976 KARNATAKA 29

K. JAGANNATHA SHETTY, J.

Kariyappa and others, Petitioners v. Patel Rudrappa and others, Respondents.
Civil Revn. Petn. No. 2554 of 1974.
D/- 22-7-1975.*

(A) Civil P. C. (1908), O. 22, Rr. 3, 4; O. 6, R. 18 — Order for substituting legal representatives — Application under O. 6, R. 18 to give effect to the order is un-called for.

When once order is made under C. 22, R. 3 or 4, the said order is to be given effect to, by recording the names in the cause title of the pleadings. It might be done either by the party who obtained the order or by the office of the Court. When such change is made or recorded, it cannot be considered as an amendment of the plaint within the meaning and scope of O. 6, R. 17. Substitution of the legal representatives of the deceased is made to give effect to the order under O. 22, R. 3 or 4. O. 6, R. 17 or 18 has no application to such situation. AIR 1937 Bom 401. Relied on. (Para 5)

Cases Referred: Chronological Paras
AIR 1937 Bom 401 = 39 Bom LR 444 6

S. Vijayashankar, for Petitioners;
M. S. Gopal, for Respondents Nos. 13 to 18 and 20, 21.

ORDER:— What is the duty of a party who has obtained an order from

*(Against order of Munsiff, Bhadravati, C/- 3-7-1974).

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the Court under Order XXII, Rule 4 of the Code of Civil Procedure? Is it for him to correct the cause title of the plaint to give effect to the said order? Should he file an application under O. VI, Rule 18 of the Civil P. C. for leave to amend the cause title? These are the questions that arise for consideration in this revision petition.

2. The matter arises in this way:

One Angadi Kariyappa brought a suit for mesne profits. During the pendency of the suit, defendant 3 died. On 21st December, 1968, the plaintiff filed an application under Order XXII, Rule 4 of the Code of Civil Procedure to bring on record the legal representatives of the deceased. On 22nd September, 1969, the Court allowed the application. But unfortunately nobody did the necessary correction to that effect in the cause title of the plaint. Thereafter, the suit was transferred from one Court to another. After the lapse of a couple of years, the plaintiff was informed that the names of legal representatives of the deceased defendant were not recorded in the cause title of the suit. The plaintiff then came forward with an application under O. VI, R. 18 of the Civil P. C. for extension of time and leave to amend the cause title so as to give effect to the order dated 22nd September, 1969. The plaintiff probably thought that the amendment ought to have been made within fourteen days from the order dated 22nd September, 1969, and since it was not made, he could not amend the cause title without the leave of the Court as required under Order VI, Rule 18 of the Civil P. C. The Court rejected the said application on the ground that it was highly belated.

3. The validity of the said order is called into question in this revision petition.

4. The principal question that arises for consideration is whether O. VI, Rr. 17 and 18 of the Civil P. C. are attracted after the order was made under O. XXII, R. 3 or R. 4 of the Civil P. C. The lower Court proceeded on that assumption. But, it seems to me that there is no justification for such conclusion.

5. Order XXII, Rule 4 of the Civil P. C., so far as it is relevant, provides:

"Where one of two or more defendants dies and the right to sue does not survive against the surviving defendant or defendants alone, or a sole defendant or sole surviving defendant dies and the right to sue survives the Court, on an application made in that behalf, shall cause the legal representative of the deceased defendant to be made a party and shall proceed with the suit."

It is seen therefrom that when the defendant dies and the right to sue sur-

vives the Court, on an application made in that behalf, shall cause the legal representative of the deceased defendant to be made a party and shall proceed with the suit. When once the order is made under the above provision, the said order should be given effect to, by recording the necessary names in the cause title of the pleadings. It might be done either by the party who obtained the order or by the Office of the Court. All that is required to be done is to effect the necessary changes in the particulars of the plaint in substituting the names of the heirs of the deceased. When such change is made or recorded, it cannot be considered as an amendment of the plaint within the meaning and scope of O. VI, R. 17. Substitution of the legal representatives of the deceased is made to give effect to the order made by the Court under Order XXII, Rule 3 or 4. Order VI, Rule 17 or Order VI, Rule 18 of the Civil P. C., has no application to such situation.

6. My view finds support from the observation in the decision of the Bombay High Court in Alabhai Vajsurbhai v. Bhura Bhava, (AIR 1937 Bom 401), wherein it was observed:

"It was no part of the appellant's duty to take the necessary steps to carry out the Court's order for the substitution of the names of the heirs of the deceased respondents who were properly served with notices in order to correct the record of the Court in terms of its order. That was a ministerial function which the Court's establishment was charged to perform. If it was not performed or neglected, the fault would not lie with the appellants."

7. In the view that I have taken, it has to be held that the plaintiff's application under Order VI, Rule 18 of the Civil P. C. was uncalled for.

8. Mr. M. S. Gopal, learned Counsel for the contesting respondents, urged that the suit has abated since the legal representative of the deceased plaintiff has not been brought on record within the time allowed by law. I have no material to hold one way or the other and I express no opinion on that contention. The respondents may raise the same before the Court below.

9. With the above observation, this petition is disposed of, without an order as to costs.

Order accordingly.

AIR 1976 KARNATAKA 30

G. K. GOVINDA BHAT, C. J. AND

M. K. SRINIVASA IYENGAR, J.

Hanumakka, Appellant v. Dase Gowda and others, Respondents.

First Appeal No. 10 of 1973, D/- 10-7-1975.*

(A) Hindu Succession Act (1956), Sections 6, 4 — Coparcenary property — Death of coparcener after commencement of Act — Widow's suit for partition is maintainable — Section 8 of Mysore Hindu Law Women's Rights Act, 1933 is no bar — (Mysore Hindu Law Women's Rights Act (10 of 1933), S. 8).

(Paras 10, 11)

T. S. Ramachandra, for Appellant; K. R. Srinivasa Rao (for Nos. 5 to 9) and N. Basavaraju, Govt. Pleader (for No. 12), for Respondents.

G. K. GOVINDA BHAT, C. J. :— This appeal by the plaintiff, arises out of her suit for partition and separate possession of a one half share in the plaint schedule properties and future mesne profits which has been dismissed by the Court below on the ground that Section 8 of the Mysore Hindu Law Women's Rights Act, 1933 (Mysore Act X of 1933) is a bar to the plaintiff enforcing her right by way of a suit for partition.

2. The material facts, so far as they are relevant for the purpose of this appeal, lie in a very narrow compass. The genealogy of the family of the plaintiff and defendants 1 to 9 is given in the plaint. Dasegowda is the common ancestor. He had two sons by name Narase Gowda and Thimme Gowda. Plaintiff Hanumakka is the widow of the said Thimme Gowda, who died in the year 1962, long after the Hindu Succession Act, 1956 (which will hereinafter be referred to as the 'Act'), came into force. Narase Gowda had three sons by name Mudligirigowda, Dasegowda and Lakshminarasegowda. Mudligirigowda died in 1969 leaving his wife the 6th defendant and children defendants 5, 7, 8 and 9. Dasegowda, younger brother of Mudligirigowda, is the first defendant and his sons are defendants 2 and 3. The fourth defendant is the youngest son of Narasegowda.

3. Plaintiff, alleging that on the death of her husband Thimmegowda in the year 1962, the one half share to which Thimme Gowda would have been entitled to at a partition if the same had taken place immediately before his death, brought the suit for partition claiming a

* (Against order of Addl. Civil J., Tumkur in O. S. No. 17 of 1971, D/- 4-10-1972).

one half share in the plaint schedule properties. The plaint A schedule consists of immovable properties, and the plaint B schedule is a list of movables belonging to the family.

4. Defendants 10 and 11 are alienees of Items 37 and 38 of the plaint A schedule. Defendant 12 is a lessee of Item No. 36 of the plaint A schedule.

5. The trial Court, on the pleadings of the parties, settled as many as fifteen issues.

6. The alienees, i.e., defendants 10 and 11, contended that in any event the properties sold to them should be deemed to have been allotted to the share of their alienor Mudligirigowda in equity.

7. Defendants 5 to 9 are the contesting defendants. They contended, inter alia, that Items 36 to 39 of the plaint A schedule are the self acquired properties of Mudligirigowda and the plaintiff in any event, has no right to claim a share in the said properties.

8. It was not disputed before the Court below that if a partition had taken place immediately before the death of Thimme Gowda in the year 1962, he would have been entitled to a one half share in the properties belonging to the joint family. Plaintiff claims a one half share in the properties by virtue of Section 6 of the Act. The learned Civil Judge upheld the contention of the contesting defendants that Section 8 of the Mysore Act X of 1933 is a bar to the plaintiff suing for partition. The only point that arises for determination in this appeal is whether Section 8 of Mysore Act X of 1933 is a bar to the plaintiff enforcing her right to claim the share to which her husband would have been entitled if a partition had taken place immediately before his death.

9. The Act, in its preamble, states, as follows:

"An Act to amend and codify the law relating to intestate succession among Hindus."

It is applicable to all Hindus in the whole of India except the State of Jammu and Kashmir. Section 6 of the Act states as follows:—

"When a male Hindu dies after the commencement of this Act, having at the time of his death an interest in a Mitakshara coparcenary property, his interest in the property shall devolve by survivorship upon the surviving members of the coparcenary and not in accordance with this Act:

Provided that, if the deceased had left him surviving a female relative specified in class I of the Schedule or a male

relative, specified in that class who claims through such female relative, the interest of the deceased in the Mitakshara coparcenary property shall devolve by testamentary or intestate succession, as the case may be, under this Act and not by survivorship."

(Explanations 1 and 2 omitted as unnecessary).

Plaintiff who is the widow of Thimme-gowda is a Class I heir and therefore her case falls within the scope of the proviso to Section 6 of the Act.

10. Section 4 of the Act overrides all laws in force in the territory of India immediately before the commencement of the Act in so far as such law is repugnant to any of the provisions of the Act. In Mysore Act X of 1933, a widow of a deceased coparcener is not entitled to enforce her right to a share by instituting a suit for partition. Section 8 of Mysore Act X of 1933 provides that where partition takes place out of Court or through Court between coparceners, specified female heirs are entitled to be allotted a share. Section 8 provides for a contingency where the partition in a joint Hindu family takes place and there are widows and other female heirs in the family who are entitled to a share at such partition. This is not a case which falls under Section 8 of Mysore Act X of 1933. If the plaintiff's husband had died before the Act came into force, then, her right was only to claim a share at a partition of the joint family properties but she could not have enforced her right by bringing a suit for partition. As already stated, the plaintiff is a Class I heir. Her husband Thimme-gowda would have been entitled to a one half share in the joint family properties if a partition had taken place immediately before his death. The plaintiff, therefore, succeeded to the one half share of Thimme Gowda under Sec. 6 of the Act. By virtue of Section 14 of the Act, she becomes the absolute owner of the share of Thimme Gowda.

11. The Court below is clearly in error in holding that Section 8 of Mysore Act X of 1933 is a bar to the plaintiff instituting a suit for partition. Therefore, we reverse the finding of the Court below on issue No. 15 and declare that the plaintiff is entitled to a one half share in the plaint A and B schedule properties.

12. Defendants 10 and 11 who are alienees of Items 37 and 38 of the plaint A schedule, are in equity entitled to have the properties alienated to them nominally allotted to the share of the alienor as far as possible.

13. All other material issues have been found in favour of the plaintiff.

14. For the reasons stated above, we reverse the decree of the Court below and decree the plaintiff's suit for partition, declaring that the plaintiff is entitled to a one half share in the plaint A and B schedule properties and that the alienees are entitled to have the equities adjusted in the final decree proceedings. Partition of the agricultural lands has to be effected by the Revenue authorities under Section 54 of the Code of Civil Procedure. Non-agricultural properties have to be partitioned in the final decree proceedings before the Court below.

15. The counsel for the contesting defendants-respondents, were not present when this appeal was heard. The plaintiff who is the appellant is entitled to her costs of this appeal from defendants 5 to 9 who are respondents 5 to 9. Ordered accordingly.

Appeal allowed.

AIR 1976 KARNATAKA* 32

C. HONNIAH AND

M. SADANANDASWAMY, JJ.

Malakappa and others, Appellants v. Mallappa and another, Respondents.

First Appeal No. 153 of 1972, D/- 6-10-1975.**

(A) Hindu Law — Adoption — Dwya-mushyana form — In order to render adoption as valid it is not necessary that adoptive father and natural father must be brothers. (1901) ILR 25 Bom 537 and AIR 1933 Bom 137, Relied on. (Para 7) Cases Referred: Chronological Paras AIR 1972 Raj 9 = 1971 Raj LW 103 4 AIR 1933 Bom 137 = 35 Bom LR 75 6 (1901) ILR 25 Bom 537 = 3 Bom LR 73 5

K. S. Desai, for Appellants; K. A. Swamy (for No. 1) and S. D. Chhatre (for No. 2), for Respondents.

SADANANDASWAMY, J.:— Respondent 1 plaintiff filed the suit in the trial Court for partition and possession of his half share in the suit properties. Defendants 2 to 4 were impleaded as alienees of some of the joint family properties. Defendants 1 to 3 are the appellants. Second respondent is defendant 4.

2. One Siddappa who died on 21-6-1898 had two sons, Basappa and Kulappa. Basappa died on 2-8-1930 and Kulappa died on 23-9-1909. Defendant 1 is

*(Only portions approved for reporting by High Court are reported here.)

** (Against order of Addl. Civil J., Bijapur in O. S. No. 11 of 1969, D/- 6-9-1972.)

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the only son of Basappa and he was born in 1916. The plaintiff is the only son of Kulappa and he was born in 1910. Defendant 1 has an only daughter who is married. Defendant 1 had also got two sisters, Chandrawwa and Dundawwa, the former died about 3 months prior to the suit and the latter about 3 years prior to the suit. Dundawwa adopted the plaintiff. The plaintiff alleges that his adoption was in Dwya-mushyavayana form and claims right in the properties of the natural family also and that he is entitled to partition and possession of half share in the suit properties. Defendant 1 pleaded that the plaintiff was not adopted in Dwya-mushyavayana form, there was a prior partition in the family in 1880 or 1890 and that the suit properties belong to him exclusively since they had fallen to the share of Basappa in the partition between Basappa and Kulappa. The trial Court held on issue 1 that there was no partition between Basappa and Kulappa in 1880 or 1890. On the second issue it held that the plaintiff was adopted in Dwya-mushyavayana form, after an agreement that he should retain his share in his natural family also. On issue 3, it held that the alienation in favour of defendants 2 to 4 are not for legal necessity. It accordingly decreed the suit with a direction to allot in the partition Survey Numbers 210 and 77, as far as possible, to the share of defendant 1 and to allot, as far as possible, the house V. P. C. 770 of Nagathan to the plaintiff and V. P. C. 771 of Nagathan to defendant 1.

3. It is urged by Mr. Desai, learned counsel for the appellants, that the adoption of plaintiff in Dwya-mushyavayana form is not valid since such an adoption would be valid only if it takes place as a result of an agreement between the natural father and the adoptive father. Exhibit P-59 is the adoption deed. It is styled as Dwya-mushyavayana adoption deed. It is a registered deed. It is in evidence that Dundawwa, the adoptive mother and others approached a lawyer and adopted the plaintiff on his advice in Dwya-mushyavayana form. According to the plaintiff's case the adoptive mother asked his real mother to give him in adoption and his natural mother agreed to give the plaintiff in adoption provided he should continue to be the son for his natural family also as he was the only son to his father. The contents of Ex. P-59 show that there was an agreement between the adoptive mother and the natural mother to that effect and that the ceremony of adoption took place. P. W. 2 is an attester of the adoption deed. He is 72 years of age. He has spoken to the circumstances under which the adoption took place. It was suggested to him

Government of India, Department of Communications (P and T Board) Notification dated 18-6-71, published in the Gazette of India Part II Section 3, sub-section (2). A true copy of the said notification is produced herein and marked as Ext. R1. Rental of subscribers falling outside the local area as fixed by the above notification had to be refixed in accordance with the tariffs in force vide Rule 434 of the Indian Telegraph Rules. The petitioner's telephone No. Kottayam-4030 is installed at an actual distance of 1.8 Kms beyond 5 Km Radial Distance from the Kottayam Telephone Exchange. Therefore, the petitioner is to pay an additional Annual Rental of Rs. 240/- with effect from 1-8-1971 (@Rs. 120/- for each additional Km or part thereof of actual distance beyond the local area). Prior to 1-8-1971, the local area of the flat rate Exchanges, was fixed as the area within a radial distance of 5 Km from the Exchange and that of measured rate exchanges was fixed as the area within a radial distance of 6 Km from the exchange. Kottayam telephone exchange is a measured rate exchange and the petitioner's telephone No. KTM-4030 is within 6 KM radial distance of Kottayam exchange and hence prior to 1-8-1971, no additional rental for the Actual Distance beyond the local area had to be paid by the petitioner. Ext. P1 bill is issued by the Accounts Officer for this short claim of rental for the period from 1-8-1971 to 31-1-1973".

Paragraph 12 of the Counter Affidavit proceeds—

"12. With reference to the averments in paragraph 15 of the petitioner's affidavit, it is submitted that in addition to the Gazette notification (i. e. Ext. R1) regarding the change of local area, publicity was given by public notice from 1-3-71 to 1-4-71 on the notice boards of Posts and Telegraphs Offices at Kottayam and also by giving a public notice in the newspapers published from Kottayam. A true copy of the public notice exhibited on the notice board is produced herewith and marked as Ext. R2. The petitioner's contention that his telephone connection is within the radial distance of 5 KM of Kottayam Exchange is not based on facts. The boundaries of local area were fixed with reference to Survey of India Maps. The petitioner did not make any representation pursuant to Ext. R2, notice and therefore there is no merit in the petitioner's contention that he was not given any opportunity to put forward his contention before the boundaries of the radial distance was changed."

Ext. R1 is only a notice published in the Gazette that the reduction of the local area which had already been effected will be implemented with effect from 1-8-1971. Ext. R2 is a public notice issued before Ext. R1, which invited objections and suggestions to the proposal for varying the local area. This had given sufficient indication of the proposed action, and its effects; and, as stated in para-

graph 12 of the counter affidavit the petitioners did not file any objections. I am of the opinion that Ext. R2 met the requirements of notice and opportunity for explanation, and the petitioners cannot have any grievance on the ground that these had not been afforded. In a case and in a situation where a large number of persons may be involved such as where a local area is reduced from its original dimensions to a lesser area, it is inconceivable and cannot be expected as the petitioners would contend, that individual notices should be served on all the persons concerned. I am of the opinion that a public notice such as the one given in this case would suffice and would meet the requirements of justice.

5. Counsel for the respondents also invited my attention to the agreement executed by the petitioner (copy Ext. R3) which shows that the petitioners had agreed to abide by the Telegraph Rules, 1951, the amendments dated 1st April, 1960 and the amendments made or to be made from time to time in the Indian Telegraph Rules in exercise of the powers under Section 7 of the Telegraph Act, 1885. In the face of a contract in these terms and of this amplitude, the petitioners cannot be heard to complain about the reduction of the local area resulting in a consequential enhancement of the telephone charges payable by them which resulted in the demand being raised against them as having been made by Ext. P1 notice which they seek to quash in these writ petitions.

6. I dismiss these writ petitions, but in the circumstances, without costs.

Petitions dismissed.

AIR 1976 KERALA 17

T. CHANDRASEKHARA MENON, J.

Santakumari, Petitioner v. R. T. O. and Registering Authority, Kozhikode, Respondent.

O. P. No. 630 of 1975, D/- 3-3-1975.

(A) Motor Vehicles Act (1939), S. 31 — Recording transfer — No prior enquiry is contemplated under the Section.

Section does not contemplate any enquiry into the question of transfer by the registering authority before recording the transfer. Once the transferee reports the fact of transfer within 30 days to the registering authority and certificate of registration is also submitted in order that particulars of the ownership may be entered in the certificate of registration together with the prescribed fee and a copy of the report received by him from the transferor, and the transferor also makes a report of the transfer to the registering authority, the registering authority has no option but to make the necessary entries in the registration certifi-

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cate. AIR 1959 Raj 175, Rel. on.

(Paras 4, 5)
(B) Motor Vehicles Act (1939), S. 31 read with S. 11A of the Kerala Motor Vehicles (Taxation of Passengers and Goods) Act — S. 11A does not in any way fetter the provisions of S. 31.

(Para 6)
Cases Referred: Chronological Paras
AIR 1959 Raj 175 = 1959 Raj LW 231 5

M. P. Menon and K. Mohammed, for Petitioner; Government Pleader, for Respondent.

ORDER:— In this original petition the petitioner has asked for a writ of mandamus compelling the respondent, viz., the Regional Transport Officer and Registering Authority, Kozhikode to make the necessary entries in the R. C. of Motor Vehicle K.L.Z.-1180 under Section 31 of the Motor Vehicles Act. According to the petitioner, her husband had entered into an agreement with one M. Syed Alavi, Cheruvannoor Transport, Kozhikode for purchase of bus No. K.L.Z. 1180. This agreement provided that on payment of full consideration, viz., Rs. 32,250/- Syed Alavi would issue sale letter in respect of the vehicle to the petitioner's husband or his nominee. This full consideration was paid and the petitioner's husband requested Syed Alavi to issue sale letter in favour of the petitioner and this was done.

2. On 17-1-1975 the petitioner reported to the respondent under S. 31 of the Act for entering the particulars of the transfer in the registration certificate of the vehicle. It is alleged that the petitioner produced the registration certificate, chalan for fees and the transfer report from the transferor Syed Alavi besides her own report in the matter. The complaint of the petitioner is that the respondent refused to note the transfer and return the registration certificate to the petitioner after making the necessary entries. The petitioner contends that no order rejecting the request for entering the particulars of transfer has been passed. The respondent along with his counter has filed Ex. R-1 which states that the "petitioner is informed that her application for transfer of ownership cannot be considered without clearing the arrears of tax and T.P.G. due in the name of the transferor in respect of his vehicles K.L.D. 9605 and K.L.Z. 335."

3. In the counter what is contended is that while action for recovery of arrears of tax is pending against the registered owner Sri Syed Alavi, which was in respect of Vehicle K.L.D. 9605 and K.L.Z. 335 the transfer of the Vehicle has been effected in favour of the petitioner. It is stated that since the endorsement of transfer of ownership will be against the provisions of S. 11A of the Kerala Motor Vehicles (Taxation of

Passengers and Goods) Act Ex. R-1 memo has been issued.

4. I am afraid that the action of the respondent is not in accordance with the law in the matter. Section 31 of the Motor Vehicles Act is as follows:—

"31. Transfer of ownership—(1) Where the ownership of any Motor Vehicle registered under this Chapter is transferred—

(a) the transferor shall, within fourteen days of the transfer, report the transfer to the registering authority within whose jurisdiction the transfer is effected and shall simultaneously send a copy of the said report to the transferee;

(b) the transferee shall, within thirty days of the transfer, report the transfer to the registering authority within whose jurisdiction he resides, and shall forward the certificate of registration to that registering authority together with the prescribed fee and a copy of the report received by him from the transferor in order that particulars of the transfer of ownership may be entered in the certificate of registration.

(2) A registering authority other than the original registration authority making any such entry shall communicate the transfer of ownership to the original registering authority".

From this it is clear that once the transferee reports the fact of transfer within 30 days to the registering authority and certificate of registration is also submitted in order that particulars of the transfer of ownership may be entered in the certificate of registration together with the prescribed fee and a copy of the report received by him from the transferor, and the transferor also makes a report of the transfer to the registering authority, the registering authority has no option but to make the necessary entries in the registration certificate.

5. I may in this connection refer to a Division Bench decision of the Rajasthan High Court in Ratan v. State Transport Authority, Jaipur (AIR 1959 Raj 175), where Justice Jagat Narayan speaking for the Bench said that even in cases of disputed transfers S. 31 provides for recording of the transfer on the registration certificate merely on the report of the transferee. It does not contemplate any enquiry into the question of transfer by the registering authority before recording the transfer. If the registration certificate of the vehicle is produced by a person who alleges to be the transferee the registering authority has no option but to record the transfer.

6. In this case there is no dispute even regarding the transfer. The contention taken up by the respondent is that there are arrears of tax due from the transferor in respect of other vehicles and he refers to S. 11A of the Kerala Motor Vehicles (Taxa-

tion of Passengers and Goods) Act. S. 11A reads as follows:

"11A. Transfers to defraud revenue—When during the pendency of any proceeding under this Act, any operator or other person liable to pay any tax or any other amount under this Act, creates a charge on or parts with the possession by way of sale, mortgage, exchange or any other mode of transfer whatsoever, of any of his assets in favour of any other person with the intention to defeat the recovery of the tax or other amount from him under the Act, such charge or transfer shall be void as against any claim in respect of the tax or other amount found payable by the operator or such person on completion of the said proceeding:

Provided that nothing in this section shall impair the rights of a charge-holder or transferee in good faith for consideration."

Section 11A of the T. P. G. Act does not in any way fetter the provisions of Section 31 of the M. V. Act. It only states that if the transferor is liable to pay any tax or any other amount under the T. P. G. Act and then if he creates a charge on or parts with the possession by way of sale, mortgage, exchange or any other mode of transfer whatsoever of any of his assets in favour of any other person with the intention to defeat the recovery of the tax or other amount from him under the said Act, such charge or transfer shall be void as against any claim in respect of the tax or other amount found payable by the operator or such person who is liable to pay any parts or other amount due under the Act. Therefore, Ex. R- is clearly erroneous.

7. I would issue a writ of mandamus directing the respondent to make necessary entries on account of the transfer of the Vehicle to the petitioner from Syed Mavi as required under Section 31 of the M. V. Act. The transfer of the Vehicle will not in any way interfere with the right of the authority under the Kerala Motor Vehicles (Taxation of Passengers and Goods) Act to proceed against any asset of the transferor including the transferred vehicle if the conditions specified in Section 11A are satisfied.

8. The O. P. is disposed of as above. There will be no order as to costs.

9. Carbon copy of the order will be given to the petitioner on payment of requisite charges and to the Government Pleader free of charges.

Ordered accordingly.

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V. BALAKRISHNA ERADI AND
GEORGE VADAKKEL, JJ.

Valliyil Sreedevi Amma, Appellant v. Subhadra Devi and others, Respondents.

Appeal Suit No. 288 of 1973, D/- 20-1-1975.

(A) Hindu Succession Act (1956), S. 22 (1) and (2) — Co-heir transferring his interest in violation of S. 22 (1) — Remedy of other Co-heirs to acquire transferred interest is by way of suit — Application under Section 22 (2) is not maintainable.

Where one of the Co-heirs transfers his interest in immovable property in violation of Section 22 (1) the remedy of the other Co-heirs to enforce their preferential right under Section 22 (1) to acquire the transferred interest is by way of a regular civil suit before a competent civil court and not by way of an application under S. 22 (2).

(Paras 6, 10)

(B) Hindu Succession Act (1956), S. 22 (1) — Transfer of his interest by Co-heir in violation of S. 22 (1) — Transfer is voidable and not void.

The alienation of his interest by a Co-heir in violation of Section 22 (1) is not void but is voidable at the instance of the other non-alienating Co-heirs. (Para 9)

T. L. Viswanatha Iyer and E. R. Venkiteswaran, for Appellant; T. R. G. Warriar and K. Ramakumar, for Respondents.

BALAKRISHNA ERADI, J.:— This appeal has been preferred against the order of the Subordinate Judge, Tirur dismissing a petition O. P. No. 511 of 1970 filed by the appellant herein under Section 22 (2) of the Hindu Succession Act, 1956 (30 of 1956) hereinafter referred to as the Act. The petition was dismissed by the Court below on the basis of a preliminary finding arrived at by it that an application under Section 22 (2) of the Act for determination of the value of the share of a co-heir is not maintainable if such share has been already transferred by the co-heir to a stranger and that in such cases the remedy available to a party seeking to enforce the right conferred by Section 22 (1) of the Act is only to institute a regular suit for specific performance.

2. The properties described in the petition filed before the Court below, excepting a residential building situated thereon, belonged to one Jayapala Menon. In respect of the residential building the said Jayapala Menon had only an undivided share. Jayapala Menon died intestate on 26-5-1965. Under the provisions of the Act the only heirs entitled to succeed to the estate of the deceased are his mother and

his widow, both of whom are Class I heirs under the Act. The appellant before us who figured as the petitioner in the lower Court is the mother of the deceased Jayapala Menon. The widow of the deceased was impleaded as 1st respondent before the Court below and she is the 1st respondent in this appeal also. On 31-8-1968 the 1st respondent executed a registered sale deed transferring her undivided half share in the petition schedule properties in favour of respondents Nos. 2 to 4 for a consideration of Rs. 10,500/-. It was shortly thereafter that the appellant filed the petition under Section 22 (2) of the Act on 13-11-1968 praying that the value of the 1st respondent's half right in the property may be determined by the Court and that the said right may be directed to be transferred to her on payment of the value so determined, ignoring the sale in favour of respondents Nos. 2 to 4. The petition was originally presented to the District Court, Kozhikode and had been numbered there as O. P. No. 368 of 1968; subsequently it was transferred to the Subordinate Judge's Court, Tirur where it was renumbered as O. P. No. 511 of 1970.

3. Respondents Nos. 2 to 4 who contested the matter before the lower Court raised a preliminary objection that Sec. 22 (2) of the Act does not contemplate any application for fixation of price after the concerned property has already been sold away by the co-heir whose share is sought to be evaluated and that in any event the prayers for the grant of a declaration of invalidity of the sale effected in favour of respondents Nos. 2 to 4 and for a direction for transferring the share of the 1st respondent to the petitioner on payment of the value to be determined by the Court are wholly outside the scope of a petition preferred under Section 22 (2) of the Act.

4. The lower court elaborately went into the merits of the above objections raised by respondents Nos. 2 to 4 and came to the conclusion that although an application for determination of the value of a share of a co-heir is entertainable even after concerned co-heir has alienated that share, the present petition is not maintainable in law in as much as it contained prayers for the relief of declaration of invalidity of the transfer effected in favour of respondents Nos. 2 to 4 and for directing the transfer and vesting of the rights of the 1st respondent in the petitioner which are reliefs that can be granted only in a regular suit. The lower Court expressed the view that the remedy of the petitioner lies only in filing a suit for specific performance and dismissed the petition as not maintainable. The appellant contends that the order so passed by the Court below is contrary to law and should be set aside.

5. The learned advocate appearing for the appellant urged that even though the provision contained in Section 22 may appear to be not sufficiently comprehensive or complete for carrying out the purpose underlying the section, the Court should interpret the section in such a way as would help to give full effect to the intention of Parliament. According to counsel if such an approach is made, it is reasonable to construe Section 22 of the Act as conferring on the court dealing with an application under that provision the incidental powers to investigate into the validity of any transfer that might have been effected by a co-heir in contravention of the right conferred by sub-section (1) of Section 22 and also to declare any such transfer invalid in case it be found on such investigation that the transfer had been effected in contravention of sub-section (1). Counsel pointed out that unless such a construction is placed on the section the result would be virtually to render the right conferred by sub-section (1) nugatory since it can with immunity be defeated by the other co-heir by merely transferring away his share before an application under Section 22 (1) is made by the sharer who wishes to exercise his rights under sub-section (1). On this basis it was submitted that the view taken by the lower court that the petition was defective on the ground that it contained prayers which were outside the scope of an application under sub-section (2) of Section 22 is incorrect and that the order of the Court below dismissing the petition should be set aside.

6. Section 22 of the Act is in the following terms:—

"22 (1). Where, after the commencement of this Act, an interest in any immovable property of an intestate, or in any business carried on by his or her, whether solely or in conjunction with others, devolves upon two or more heirs specified in class I of the Schedule, and any one of such heirs proposes to transfer his or her interest in the property or business, the other heirs shall have a preferential right to acquire the interest proposed to be transferred.

(2) The consideration for which any interest in the property of the deceased may be transferred under this section shall, in the absence of any agreement between the parties, be determined by the Court on application being made to it in this behalf, and if any person proposing to acquire the interest is not willing to acquire it for the consideration so determined, such person shall be liable to pay all costs of or incident to the application.

(3) If there are two or more heirs specified in Class I of the Schedule proposing to acquire any interest under this section, that heir who offers the highest consideration for the transfer shall be preferred.

Explanation.— In this section “Court” means the Court within the limits of whose jurisdiction the immovable property is situate or the business is carried on, and includes any other Court which the State Government may, by notification in the Official Gazette, specify in this behalf.”

The object of sub-section (1) as we understand it is that in cases where by virtue of intestate succession under the Act any interest in immovable property has devolved upon two or more heirs specified in Class I of the Schedule and any one of such heirs proposes to transfer his interest in the property the other heirs should have a preferential right to acquire the interest which is so proposed to be transferred. The said intention of Parliament can be effectuated only if we consider the section as conferring an enforceable right on the heirs other than the one who proposes to transfer his interest. The Section confers on such co-heirs a preferential right to acquire the interest which is proposed to be transferred by the other co-heir. In case the proposed transfer is effected by one of the co-heirs in violation of the right conferred on his co-heirs by sub-s. (1) the latter cannot certainly be without a remedy because every legal right must necessarily carry with it a remedy for enforcing the same. The remedy of the non-alienating co-heirs, in such circumstances, will, in our opinion, be to seek the intervention of the Court to enable them to acquire the right which has been transferred away by the other co-heir in violation of sub-section (1) of Section 22. In as much as the section does not provide any special procedure for seeking the said remedy, the ordinary procedure for enforcement of any civil right has to be resorted to by the co-heirs who wish to enforce their rights under Section 22 (1); in other words the remedy is by way of a regular civil suit before the competent court. Where the properties have been already alienated in favour of strangers there is all the more reason why there should be a full and fair adjudication of the entire matter in a suit tried before a competent civil Court because various factual questions are bound to arise for determination in such a suit where in the principal issue would be whether the transfer complained of was effected in violation of sub-section (1) of Section 22. The main purpose of such a suit instituted by the co-heir will necessarily be the enforcement of the right conferred by Section 22 (1) of the Act. The question of invalidity of the transfer effected by the other co-heir in favour of strangers becomes relevant in such an action as an incidental matter which has necessarily to be gone into for the purpose of determining whether the plaintiff is entitled to the relief sought by him against his co-heir in enforcement of the right conferred by Section 22 (1).

7. We are unable to agree with the contention advanced by the learned counsel for the appellant that the aforesaid question can be legitimately gone into by the Court even in an application filed under Section 22 of the Act. In our opinion the object of the legislature in enacting sub-section (2) of Section 22 is only to provide a cheap and speedy remedy in cases where the property is in the hands of the co-heir who proposes to transfer the same and another co-heir is interested in acquiring the rights of the former but the parties are not able to agree about the consideration for which the former's interest in the property should be transferred to the latter. Where the property itself has been already transferred away by the co-heir first mentioned we fail to see what useful purpose will be served by an investigation conducted by the Court under sub-section (2) for determining the price at which the property may be sold by the former to the latter. In such a case an investigation under sub-section (2) may become relevant only after the person who feels aggrieved by the transfer effected by his co-heir in contravention of the provisions of sub-section (1) has by resort to the appropriate legal process obtained a declaration from the competent Civil Court that the sale effected by the co-heir in favour of strangers is invalid. Even in such a case, unless the co-heir who had effected the impugned alienation again proposes to transfer his interest in the property there can be no occasion for any determination to be made by the Court about the price payable by the other co-sharer under sub-section (2) of Section 22.

8. Decided cases dealing with S. 22 of the Act appear to be few in number and those which have been brought to our notice do not directly deal with the question that we are called upon to decide in this case and hence we do not consider it necessary to advert to them.

9. In the light of what we have stated above we are clearly of the view that the petition filed in the Court by the present appellant under Section 22 (2) of the Act was misconceived and was not maintainable. The 1st respondent had already sold his interest in favour of respondents Nos. 2 to 4 and no steps have been taken by the petitioner in the manner contemplated by law for assertion and enforcement of her rights under sub-section (1). It has to be noticed in this connection that even though Section 22 (1) does confer a right in the co-heirs to acquire the share of another co-heir who proposes to transfer the share there is nothing in the said section which warrants an alienation effected in contravention of its provisions being regarded as void. Such an alienation will, at best, be only voidable at

the instance of the sharer who institutes the suit for enforcement of his right under sub-section (1) and subject to the said limited contingency the sale will be operative and binding.

10. The lower Court was perfectly right in holding that the prayers incorporated in the petition for a declaration of invalidity of the sale effected by the 1st respondent in favour of respondents Nos. 2 to 4 and for a direction for transfer of the 1st respondent's share in favour of the petitioner as a further relief consequential to such a declaration are totally outside the scope of an application under Section 22 (2) of the Act and we have no hesitation to uphold the said finding. We cannot, however, see our way to agree with the view expressed by the lower Court that the proper remedy for the petitioner is to institute a suit for specific performance. Where there is no agreement either contractual or statutory for conveyance of the property there can be no question of a party seeking the relief of specific performance. The remedy, as we have already indicated, is only to file a suit for enforcement of the limited right of purchase conferred by sub-section (1) of Section 22 and in such a suit the question of invalidity of the sale already effected by the co-sharer will be incidentally investigated and decided.

11. In the light of what we have observed above it must follow that the dismissal of the petition by the Court below was fully justified. The order of the Court below is accordingly confirmed and this appeal is dismissed. The parties will bear their respective costs.

Appeal dismissed.

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C. BALAGANGADHARAN NAIR, J.

Karichori Raman Nair, Appellant v. Kodoth Krishnan Nair and another, Respondents.

Second Appeal No. 1021 of 1972, D/- 1-7-1975.*

(A) Arbitration Act (1940), Ss. 32 and 33 — Reference out of Court — Award not made the rule of Court — Suit based on agreement antecedent to award — Maintainable — Award does not extinguish rights under the agreement. AIR 1959 Raj. 162, Dissented from.

Pursuant to an arbitration agreement for partitioning certain properties, an award granting pre-emptive rights was passed but not filed in Court and not made the rule of

the Court. In the course of arbitration proceedings, two of the parties had entered into a pre-emption agreement. Plaintiff brought a suit based on award which was successfully resisted by defendant on the ground that the award was not made the rule of the Court and hence could not be enforced. On the amendment based on pre-emption agreement, it was contended by the defendant that the rights under the agreement had merged in the award.

Held: that the plaintiff could not be non-suited on the ground that the suit was based on the agreement antecedent to the award, because the award which was not made the subject of a judgment was infructuous and unenforceable and was, therefore, incapable of extinguishing the earlier rights if any. AIR 1960 Andh Pra 59 and AIR 1964 Mad 1 (FB), Foll.; AIR 1951 Mad 458 and AIR 1959 Bom 549 and AIR 1953 Pat 42, Rel. on; (1906) ILR 38 Cal 881, Dist. AIR 1959 Raj 162, Dissented from. (Para 14)

(B) Transfer of Property Act (1882), S. 40 — Contract of pre-emption — Provisions apply.

Section 40 applies to a contract of pre-emption and under the last paragraph of the section, the right or obligation created by such a contract may be enforced against a transferee with notice thereof or a gratuitous transferee of the property affected thereby, but not against a transferee for consideration and without notice of the right or obligation nor against such property in his hands. AIR 1967 SC 744 and AIR 1961 Cal 152, Rel. on; AIR 1924 All 400, Ref.; AIR 1972 Ker 17, Dist. (Paras 17 and 19)

Cases Referred: Chronological Paras

AIR 1972 Ker 17 = 1971 Ker LT 159 18, 19

AIR 1967 SC 744 = (1967) 1 SCWR 533 17

AIR 1964 Mad 1 = (1963) 2 Mad LJ 287, (FB) 9, 10, 11, 12

AIR 1961 Cal 152 = 64 Cal WN 416 17

AIR 1960 Andh Pra 59 = (1959) 2 Andh WR 187 (FB) 8, 9

AIR 1959 Bom 549 = ILR (1959) Bom 838 9

AIR 1959 Raj 162 = ILR (1959) 9 Raj 515 12

AIR 1953 Pat 42 = ILR 31 Pat 886 9

AIR 1951 Mad 458 = (1950) 2 Mad LJ 672 9

AIR 1947 Lah 54 = 225 Ind. Cas 8 13

AIR 1924 All 400 = 22 All LJ 265 17

(1906) ILR 38 Cal 881 = 4 Cal LJ 162 11

T. S. Venkiteshwara Iyer, P. K. Balasubramanyam and P. E. Narayanaswamy, for Appellant; K. Chandrasekharan, C. Sankara Menon, K. Vijayan and T. K. Vanajakshy, for Respondent No. 1.

* (Against order of Sub-J., Kasaragod in A. S. No. 35 of 1971.)

JUDGMENT:— Appellant was the second defendant in a suit for enforcement of a right of pre-emption, which has been decreed by the learned Subordinate Judge, Kasargod reversing its dismissal by the learned Munsiff, Kasargod.

2. Plaintiff is the brother of the first defendant. By an agreement (muchalika) Ext. X-1 dated 2-10-1964 they and their two brothers and two sisters appointed P. W. 3, an Advocate who is also their relation, as arbitrator to partition the properties which they had inherited from their father. On 2-8-1965 P. W. 3 passed his award Ext. A-1 dividing the properties among the sharers and allotting the suit property, among other items, to the first defendant. The parties have accepted the partition and have taken their shares in terms of Exhibit A-1. Exhibit A-1 which has been registered but has not been filed in Court as required by the Arbitration Act, provides in paragraph 8 for a right of pre-emption in the following terms:

"Every sharer will have a right of pre-emption in respect of the properties allotted to the other sharer provided such sharer exercising the rights of pre-emption shall have the property allotted to him under the award contiguous to the property in respect of which such right of pre-emption is claimed by such sharer; provided further that such sharer claiming right of pre-emption must be prepared to pay the value of the property prevailing in the market at the time of sale."

By Ext. A-2 dated 21-5-1966 the first defendant sold the suit property to the second defendant-appellant for Rs. 3,000/-. The adjacent property covered by R. S. Nos. 532/3 and 562/4, which belonged to the sharers was sold, on their agreement and was purchased by the plaintiff, even before the award. Claiming that he was entitled to a pre-emptive right under Ext. A-1, and that the sale deed Ext. A-2 contravenes that right, the plaintiff brought the suit for directing the second defendant to surrender the suit property on receipt of Rs. 3,000/- or in the alternative to direct him or the first defendant whoever was liable to execute a transfer deed in favour of the plaintiff.

3. The defendants resisted the suit contending that as the muchalika contained no provision in that regard, the reservation of a pre-emption right in Ext. A-1 was beyond the powers of the Arbitrator and that Ext. A-1 was in any case unenforceable as it had not been filed and made a rule of Court. They also contended that it was with notice to the plaintiff that Ext. A-2 was executed. The second defendant raised a further defence that he had no notice of the pre-emption clause and being a bona

fide purchaser for value he should be protected.

4. The trial Court on a former occasion decreed the suit in the plaintiff's favour, directing the second defendant to transfer the property by a sufficient instrument. In the appeal, A. S. No. 19 of 1968, taken by the second defendant the lower appellate Court held that the suit which as framed involved a decision upon the existence, effect and validity of the award Ext. A-1 was not maintainable as it had not been filed in Court and made by the subject of a decision. It however allowed an application made by the plaintiff to amend the plaint so as to incorporate a paragraph basing the suit on a pre-emption agreement alleged to have been reached by the parties in the course of the arbitration proceedings, before the award. In view of this amendment, the Court set aside the decision and remanded the suit for fresh trial.

5. The defendants thereupon filed additional written statements denying the pre-award agreement on pre-emption, pleaded by the plaintiff.

6. The trial Court upheld this contention and holding that the agreement was not true dismissed the suit. On appeal taken by the plaintiff the learned appellate Judge came to a contrary conclusion and decided in favour of the plaintiff.

7. It was contended for the appellant in the first place that no suit would lie on the original agreement, even if one existed, for once an award was made, the prior agreements become merged in the award which thenceforward becomes the sole source of the rights and liabilities of the parties. This contention would be sound if the award is valid and enforceable but not if the award is one of which the Court would take no cognizance, not having been made the rule of Court. Section 32, Arbitration Act, provides:

"Notwithstanding any law for the time being in force, no suit shall lie on any ground whatsoever for a decision upon the existence, effect or validity of an arbitration agreement or award nor shall any arbitration agreement or award be set aside, amended, modified or in any way affected otherwise than as provided in this Act."

8. After a full discussion of the scheme of the Act with particular reference to Sections 14 and 32 and a fairly exhaustive survey of the relevant case law a Full Bench of the Andhra Pradesh High Court in *Sait Pamandass Sugnam v. Manikyam Pillai*, AIR 1960 Andh Pra 59 (FB) held:

".....It is not open to a defendant to set up an award as a bar to a suit filed on the original cause of action, where the award has not been filed and all proceedings relating thereto had not been gone through as required by the Arbitration Act."

9. The same view has been taken in *Mohamed Yusuf Levai Saheb v. Hajee Mohammed Hussain Rowther*, AIR 1964 Mad 1 (FB) which follows AIR 1960 Andh Pra 59 (FB), AIR 1951 Mad 458, AIR 1959 Bom 549 and AIR 1953 Pat 42.

10. How, apart from statute, a consensual award supersedes the original cause of action which becomes merged in it. In such a case, the award becomes the source of the rights and obligations of the parties and precludes them from seeking to enforce the original rights. That however would be the position only where the statute does not require the award to be filed in Court, for without being filed and made a rule of Court, the award has an inherent vitality derived from the agreement of the parties and such an award, if otherwise valid operates to merge and extinguish all antecedent rights. After the passing of the Arbitration Act, 1940, the position has been basically changed and as pointed out in AIR 1964 Mad 1 at P. 6 (FB):

"It will follow from the above that the principle on which an award was considered effective under the law as it stood prior to 1940, namely, the merger of the original cause of action in the award which furnished a fresh cause of action to the parties, and also of itself operating as equivalent to a judgment has no longer any validity. It cannot also be said that the original cause of action is satisfied by the mere passing of the award, for without filing it and obtaining a judgment thereon the party cannot enforce it. Secondly an award by an arbitration after the Act is but a stage in a scheme formulated therein for the adjudication of disputes by a private tribunal. The confirmation of the same by a judgment of Court is essential in order to render it an effective adjudication of the dispute. The mere fact that an unfiled award might have to be registered or stamped cannot be decisive of its effectiveness, as stamping and registration have to be done on account of statutory provisions and not because that it has any force by itself."

11. Besides repelling the appellant's contention this passage will also establish the inapplicability of *Bhajahari Saha v. Beharilal Basak*, (1906) ILR 33 Cal 881, relied upon by him, for it arose long before the Arbitration Act and merely laid down the law as it then prevailed. Indeed this is one of the decisions discussed in AIR 1964 Mad 1 (FB) and accepted as laying down the law before the enactment of the Arbitration Act, 1940.

12. Counsel for the appellant also relied upon *Firm Gulzarimal Gheesalal v. Firm Rameshchandra Radhyeshyam*, AIR 1959 Raj 162. The dispute between the parties in that case had been referred to an

arbitration and the arbitrators had passed an award, making the defendant liable for certain amounts. The defendant not having complied with the award which was never made a rule of court, the plaintiff brought the suit on the original cause of action and alternatively on the award. The trial court held the award to be illegal and it gave the plaintiff a decree on the original cause of action. Both parties appealed. The first appellate court did not enter any finding on the validity of the award but gave the plaintiff a decree for a larger amount in terms of the award. The defendant took a second appeal to the High Court. A learned single Judge held in the first place that where a dispute culminates in an award, no suit will lie on the original cause of action, which is extinguished and becomes merged in the award. The learned Judge then went into alternative basis of the claim and concluded that when he pleads an award, it is not open to the plaintiff to raise a suit for enforcing the award, and that his only remedy is to file an application under Section 33 and have the award implemented according to the procedure laid down in the Arbitration Act itself. Now this decision, with respect, lays down the two principles correctly—the theory of merger and the ineffectiveness of an award, which has not been made a rule of Court but fails to take note of the inter-action of the latter on the former, for as has been held in AIR 1964 Mad 1 (FB), the original cause of action cannot be said to be satisfied by the mere passing of an award when the award has not been filed and made the subject of a judgment. Without a judgment, neither party can enforce the award.

13. *Pannalal v. Chiman Parkash*, AIR 1947 Lah 54, the only other case quoted by the appellant, decided that a valid award extinguishes all claims submitted for arbitration and furnishes the only basis for the determination of the rights of the parties and that despite the refusal of an application to file it, the award can still be relied upon as a defence in a suit relating to a subject dealt with by it. This decision was concerned with an award long before the Arbitration Act and had no occasion to deal with the effect of the Act on an unfiled award. It does not touch the controversy in this appeal and is therefore inapplicable.

14. With respect, I prefer to follow the Full Bench decisions of the Madras and Andhra Pradesh High Courts rather than the Rajasthan decision, discussed above. The plaintiff cannot be nonsuited on the ground that his suit is based upon the alleged agreement, antecedent to the award, because the award Ext. A-1 which has not been made the subject of a judgment is infructuous and unenforceable and is therefore incapable of extinguishing the earlier rights, if any.

15. The next question that follows in the wake of this finding is whether the agreement of pre-emption alleged to have been reached in the course of the arbitration proceedings is true. On the point the Courts below have recorded contrary findings. Ext. A-1 the muchalika is silent on the point and it only appoints P. W. 3 as arbitrator to partition the properties. There is no record available to evidence the alleged agreement of pre-emption and P. W. 3 has said that the diary of the arbitration proceedings which he had kept had been taken by one of the sharers and had not been returned. The question therefore primarily turns on the testimony of P. W. 3. P. W. 3 is a leading lawyer and no suggestion has been made to doubt his veracity or impartiality. Indeed D. W. 1, husband of the first defendant who gave evidence for her, has stated that he and P. W. 3 are on good terms and that they have full confidence in him—a statement which compels respect to the evidence of P. W. 3. After explaining the background of the differences which arose among the sharers in the course of the arbitration proceedings, P. W. 3 states that in order to resolve the differences, he suggested that a pre-emption clause could be introduced, that the male sharers and the husbands of the female sharers, who were present agreed to that course and that was how paragraph 8 was inserted in Ext. A-1. Now this evidence was given before the plaint was amended, at a time when the existence of a pre-emption agreement before the award had not loomed large in the controversy. The evidence of P. W. 3 is in no manner shaken merely because his statement that this question came up at the last arbitration meeting is contradicted by the evidence of P. W. 2, a younger brother of the plaintiff and the first defendant, that the talk about the pre-emption took place at an earlier meeting and that the suggestion about the pre-emption was made by the plaintiff. These are inconsequential details which do not affect the credibility of P. W. 3. Nor does the evidence of P. W. 3 stand alone. He is corroborated by the plaintiff (P. W. 1 and P. W. 2 who is also a lawyer and who has not been shown to have any bias against his sister, the first defendant. The very fact that the pre-emption clause finds a place in Ext. A-1 probabilises an antecedent agreement, for without such an agreement P. W. 3 would not have, on his own, introduced it. It is also worthy of mention that all the sharers had accepted Ext. A-1 and that the attempt to avoid the pre-emption clause was made only in this suit. I agree with the lower appellate Court in finding that there was a pre-emption agreement prior to the award, as pleaded by the plaintiff.

16. Even so it was argued for the appellant, that the agreement is not binding on the first defendant as on the evidence of P. W. 3 itself, she was not present at that meeting but only her husband D. W. 1. P. W. 3 has stated that all the male sharers and the husbands of the female sharers accepted the pre-emption clause, which he suggested, would be introduced in the partition. Now the evidence shows that the husbands were representing their wives who were the sharers and there cannot be any doubt that they were attending the arbitration proceedings not as visitors but taking part in them on behalf of their wives, with authority, express or implied, to bind them. As for D. W. 1 he had a power of attorney from the first defendant even prior to Ext. A-1 and he was managing her affairs on its strength. What is more he has admitted that the female members were represented by their husbands, that he represented the first defendant in all the meetings, that he did so in order that any action taken would bind her, that after each meeting he even used to tell her what had happened and that she had not objected to any action taken by him or by the arbitrator. The male members were present in person and the female members were represented by their husbands at the meeting where the pre-emption was decided upon. There cannot be any doubt that it is binding upon the first defendant and that this plea of want of authority on the part of D. W. 1 has been put forward only to suit her defence.

17. It was next contended for the appellant that he could be bound by the pre-emption agreement, if only he had notice of it. Counsel submitted that the appellant was a bona fide transferee for value without notice of the agreement and his title could not be dislodged by the plaintiff. In *Basdeo Rai v. Jhagru Rai*, AIR 1924 All 400, it was held by a Division Bench that a contract of pre-emption falls within the second part of Section 40. Transfer of Property Act and that it can be enforced against all gratuitous transferees and even against transferees for consideration with notice. This view was rested on the basis that although such a contract creates no interest in land, it is entered into by the parties with respect to their property and must from its very nature be deemed to be annexed to their ownership within Section 40, Transfer of Property Act. A Bench of the Calcutta High Court in *Ram Baran Prasad v. Ram Mohit Hazra*, AIR 1961 Cal 152, ruled that except where a contrary intention appears, in contracts of pre-emption, as in other contracts, assignability is the rule, that where there is an assignment the benefit and obligation under the pre-emption agreement would pass to the representatives of the original parties, including assignees or trans-

feres, subject to the well-known exception that bona fide transferees for value without notice would not be affected by the obligation. It was further held that the contract is enforceable under Section 27 (b) of the Specific Relief Act and Section 40, Transfer of Property Act. This decision was confirmed in *Ram Baran Prasad v. Ram Mohit Hazra*, (1967) 1 SCWR 533 = (AIR 1967 SC 744). In the course of the judgment, their Lordships observed:

"It is true that the second paragraph of Section 40 of the Transfer of Property Act makes a substantial departure from the English law, for an obligation under a contract which creates no interest in land but which concerns land is made enforceable against an assignee of the land who takes from the promisor either gratuitously or takes for value but with notice."

Section 40, Transfer of Property Act thus applies to a contract of pre-emption and under the last paragraph of the section, the right or obligation created by such a contract "may be enforced against a transferee with notice thereof or a gratuitous transferee of the property affected thereby, but not against a transferee for consideration and without notice of the right or obligation nor against such property in his hands."

18. *Madhavan Nair v. Chinna Kunji*, 1971 Ker LT 159 = (AIR 1972 Ker 17), cited by the respondent has no application as it merely decided that the right of pre-emption is not available against a purchaser at Court-auction.

19. The law being what I have explained above, the question assumes importance whether the appellant had notice of the pre-emption agreement. Neither of the Courts below has entered any finding on this question. The learned appellate Judge before whom the point was specifically taken held against the appellant, holding that once the first defendant is a party to the agreement it naturally binds the appellant also and that the appellant is not entitled to the protection of this plea in view of *Madhavan Nair v. Chinna Kunji*, 1971 Ker LT 159 = (AIR 1972 Ker 17). The former view is unsound and 1971 KLT 159 only decided whether the right of pre-emption could be enforced against a purchaser at a Court sale. Counsel for the respondent contended that despite the absence of any finding, the question admits of any easy answer as Ext. 2 refers to Ext. A-1 and the appellant must therefore be necessarily fixed with knowledge of the pre-emption agreement which is embodied in Ext. A-1. This contention has no force because in view of the amendment of the plaint, relief is sought not on the relevant clause in Ext. A-1 but on the antecedent agreement. What requires investiga-

tion is whether the appellant had notice of that agreement. That question is still open.

20. It was lastly contended for the appellant that the suit in any view fails as the pre-emption agreement operates only in respect of the properties allotted to the several sharers at the partition, whereas the property in relation to which the plaintiff claims the right, was purchased by him at an auction held by the arbitrator. Prima facie this contention would appear to be right but counsel for the respondent contended that when the plaintiff purchased the property he was only augmenting his share as a co-owner, as would appear from the absence of any sale deed in his favour by the arbitrator, pursuant to the auction. While recognising that the absence of allotment of this property to the plaintiff in the partition schedules would tell against this argument, counsel submitted that this objection, in this form has not been presented in either of the Courts below. The objection is fundamental and the fact that it has not been raised in the Court below is no ground to discountenance it. It was then suggested for the respondent that the manner or right in which the property was obtained by the plaintiff and whether it would fall within the pre-emption agreement, might be directed to be considered by the Court below. As the point is taken here for the first time, I feel that the course suggested is the best, in order to avoid injustice to the plaintiff, who has won in the Court below.

21. The trial Court will find, after affording parties a chance to give evidence if they so desire, whether the property in relation to which the plaintiff claims the pre-emption, falls within the ambit of the pre-emption agreement and whether the second defendant is a transferee with notice of the pre-emption agreement. The trial Court will then dispose of the suit in accordance with what has been decided herein.

22. I set aside the judgments and decrees of the Courts below and remand the suit to the trial Court for fresh disposal according to law and in the light of what is stated above. Costs in this appeal will abide by the result of the suit and will be provided for by the trial Court.

Appeal allowed; case remanded.

AIR 1976 KERALA 26

N. D. P. NAMBOODIRIPAD, J.

Mohammad Haji, Petitioner v. Umananda Kamath, Respondent.

Civil Revn. Petns. Nos. 134 and 518 of 1975, D/- 16-6-1975.

HS/IS/C767/75/RSS

(A) Transfer of Property Act (1882), S. 106 — Notice terminating tenancy — Expression “hereby” used in notice means “through this notice” and “not from today”.

The word “hereby” used in business and legal correspondence does not connote the point of time. It always means “through”. When it is said that the tenancy is hereby terminated, it will mean that the tenancy is terminated through notice. Therefore the expression “hereby” used in notice means “through this notice” and “not from today.” Therefore the notice is in conformity with Section 106 and is valid notice to quit as contemplated by that section. AIR 1971 All 506, Relied. AIR 1971 All 302, Distinguished. (Para 3)

Cases Referred: Chronological Eras
AIR-1971 All 302 = 1971 All WR (HC) 121 3
AIR 1971 All 506 = 1971 All WR (HC) 382 3

A. Gangadharan Nair, for Petitioner;
K. P. V. B. James and B. R. Alva, for Respondent.

ORDER:— These two revisions arise out of a proceeding under Section 11 of the Kerala Buildings (Lease and Rent Control) Act, Act 2 of 1965, and referred to herein as the Act. The premises in dispute were let out to the tenant by the petitioner-landlord under Ext. A-1 dated 4-4-1969 for a monthly rent of Rs. 65/-. The landlord is occupying the first floor of the same building, and the premises rented out is the ground floor. Eviction was sought on the ground that the landlord bona fide needed the building for conducting a trade. It was after issuing Ext. A-2 notice dated 9-6-1971 that the eviction proceedings were launched. The tenant denied the bona fide need alleged by the landlord and also contended that the business run by him in the disputed premises is the main source of his income. The tenant also had a case that Ext. A-2 is not in accordance with law. The Rent Control Court repelled the contentions of the tenant and allowed eviction. The tenant took the matter in appeal. The appellate authority confirmed the finding of the Rent Control Court regarding the bona fide need of the landlord, but dismissed the eviction petition on the ground that Ext. A-2 is violative of Section 106 of the Transfer of Property Act. Both the tenant and the landlord took the matter in revision. The revisional Court confirmed the decision of the appellate authority. Hence the tenant has filed C. R. 134/ 1975 and the landlord has preferred C. R. P. 518/1975.

2. In C. R. P. 134/1975 preferred by the tenant the sole question arising for decision is whether I must interfere with the finding of fact entered by the authorities below to the effect that the landlord bona

fide needs the disputed premises for his own use. Three courts, on an appreciation of the evidence in the case concurrently found that the landlord's need is bona fide and that the tenant has got another flourishing business in the same locality in another building. On a perusal of the evidence in the case I entirely agree with the conclusions reached by the authorities below in that respect. I confirm the finding that the landlord bona fide needed the premises for his use and occupation and dismiss C. R. P. 134/1975. No costs.

3. Through C. R. P. 518/1975 the landlord challenges the decision of the revisional authority regarding the invalidity of Ext. A-2 notice. The relevant portion of the notice is in the following terms:

“My client is now living without any job or vocation and he finds it extremely difficult to maintain himself and the members of his family. My client sincerely and honestly wants to start a trade of his own in the room let out to you. My client has no other building. Since my client bona fide needs the room for his own occupation in connection with the trade which he intends to start immediately your tenancy is hereby terminated and you are hereby called upon to surrender possession of the room on or before 4-7-1971 and also pay him the arrears of rent failing which my client will be constrained to file a petition for eviction against you at your risk as to costs which please note.”

The appellate authority and the revisional authority took the view that by the use of the expression “your tenancy is hereby terminated” what the landlord did was to terminate the tenancy forthwith. The tenancy commenced on 4-4-1969 and Ext. A-2 notice demands surrender on or before 4-6-1971. The question for decision is whether the use of the expression “hereby” could be interpreted as meaning “forthwith” or “from the very same date”. As rightly pointed by the revision petitioner the authorities below have not really understood the basis of the conclusion in the decision reported in *H. Z. Islam v. Mohd. Rafi* (AIR 1971 All 302.) The expression used in that case was “your tenancy of the aforesaid house is determined with effect from today.” On the other hand, the decision that is more relevant to the facts of this case is *Laxmi Devi v. Chandramani* (AIR 1971 All 506), which distinguished, AIR 1971 All 302. In that case the expression used in the notice which came up for consideration was “you are, therefore, informed that your tenancy is hereby terminated.” Commenting on the expression “hereby” the Court held as follows:

“The word “hereby” used in business and legal correspondence does not connote the point of time. It always means

'through.' When it is said that the tenancy is hereby terminated, it will mean that the tenancy is terminated through the notice."

I respectfully agree with the construction put on the expression "hereby" in that case. It follows, therefore, that the expression "hereby" used in Ext. A-2 means "through this notice" and not "from today". The authorities below were clearly wrong in taking the view that because of the use of the expression "hereby" the notice has the effect of terminating the tenancy forthwith. I am satisfied that Ext. A-2 is in conformity with Section 106 of the Transfer of Property Act and that there is a valid notice to quit as contemplated by law. The view taken by the appellate and the revisional authorities cannot be sustained.

4. In the result, the orders passed by the revisional authority and the appellate authority are hereby set aside and the order passed by the Rent Control Court allowing eviction is hereby restored. The revision is allowed. In the circumstances of the case I make no order as to costs.

5. It was represented on behalf of the respondent-tenant that he may be given some time to vacate the premises. I am prepared to show some indulgence in that matter. The respondent-tenant in C.R.P. 518/1975 is given time till 30th of July, 1975 to vacate the premises.

Revision allowed.

AIR 1976 KERALA 28

P. GOVINDAN NAIR, C. J. AND
V. KHALID, J.

M. J. Thomas, Prop., Current Book House, Trichur, Petitioner v. The District Collector, Kozhikode and others, Respondents.

O. P. No. 1419 of 1975, D/- 29-5-1975.

(A) Kerala Abkari Act (1 of 1977), Sections 29 and 18A — Kerala Abkari Shops (Disposal in Auction) Rules, 1974, R. 5 — Right to sell arrack — Auction of shops — Interference with order of authorities in writ jurisdiction. AIR 1964 Mad 437, Dissented from. (Constitution of India, Art. 226).

It is clear from Section 18-A of the Act that the amount of rental may be settled by auction. The Rules are applicable when the rental is to be settled by auction. R. 3 in Chap. II gives the Collector of the District the power to put up by public auction the privilege of vending toddy, arrack and foreign liquor, shop by shop, or in a lot. Clearly therefore, the District Collector has the authority to direct that the auction

should be shop by shop or in a lot or lots. Rule 5 (3) (b) gives the officer conducting the sale the liberty to exclude any intending bidder on the ground that the bidder is of doubtful solvency and he is unwilling to deposit such sum as is ordered to be deposited by the said officer. The officer has also the discretion to refuse or to accept the bid of any person on the ground that the bid is clearly speculative and he has the power to fix an upset price for a shop or shops. Further he can close the auction if he is satisfied that there has not been sufficient or fair competition. (Para 11)

Rule 5 (5) of the Rules specifically gives the power to the authority conducting the auction to reject any speculative bid. To test whether the bid is speculative or not, the authority can ask a bidder whether he would be prepared to deposit a larger percentage of the bid amount. These powers are implied from those specifically contained in the Rules. There is nothing illegal in not accepting a solvency certificate and rejecting a bid. The authority has a great discretion in the matter. It is not for the High Court to substitute its assessment of the situation by an assessment of what the High Court may consider to be more proper or more advantageous to the revenue. If the officer had acted within his authority and in a bona fide manner and in accordance with the Rules which has the force of law the auction cannot be set aside by High Court in proceedings under Art. 226 of the Constitution. (Para 13)

Whether in a case the auction sale should have been adjourned is a matter within the discretion of the officer conducting the auction. Further, it is for the officer conducting the auction to determine whether conceivably there has been a detriment to public revenue. If a bid of a particular person is rejected because it was felt by the officer that his bid was speculative the High Court cannot substitute its judgment and reach a conclusion that public revenue had been lost and so the bid should not have been rejected, unless there are materials to show that the rejection was mala fide or arbitrary or perverse or was as a result of bias. AIR 1964 Mad 437, Dissented from. (Paras 16, 18)

Cases Referred: Chronological Paras
AIR 1974 SC 651 = (1974) 3 SCR 64 13
AIR 1972 SC 1816 = (1972) 3 SCR 784 18
AIR 1971 SC 733 = 1971 SCD 196 18
AIR 1964 Mad 437 = (1965) 1 Mad LJ 210 18

N. K. Sreedharan, M. A. T. Pai, M. C. Gopi and P. K. Venugopalan, for Petitioner; Addl. Advocate General and Mani J. Meenattoor, M. M. Abdul Aziz and V. Bhaskaran Nambiar, for Respondents.

GOVINDAN NAIR, C. J.— This is a petition praying for the issue of a writ of certiorari cancelling the auction conducted by the 1st respondent, the District Collector, Kozhikode, on the 19th March, 1975 of the arrack shops of Calicut taluk for the year 1975-76. There are incidental prayers for a direction requiring the 1st respondent, the 2nd respondent, the Board of Revenue, and the 3rd respondent, the State of Kerala to conduct a resale of the arrack shops in Calicut taluk and for the grant of such other consequential and incidental reliefs.

2. The main points raised in the petition are that the solvency certificate produced before the 1st respondent by the petitioner, Ext. P-1, was wrongly and arbitrarily rejected by the 1st respondent and that the 1st respondent has arbitrarily and illegally excluded the petitioner from the auction that took place on the 19th March, 1975 of the arrack shops in Calicut taluk. It was suggested in paragraph 5 of the petition that the petitioner was excluded and his solvency certificate rejected by the 1st respondent because of the backing of the present Minister for Excise to the 4th respondent, one of the persons alleged to be interested in taking the shops.

3. There are four ranges in the Calicut taluk Calicut, Kunnamangalam, Thamarassery and Feroke. In the previous year, 1974-75, the four ranges were separately auctioned and the highest bids accepted for the four ranges were respectively of Rupees 4,29,000/-, Rs. 1,42,000/-, Rs. 1,35,000/- and Rs. 95,000/- totalling Rs. 8,01,000/-. The averment in the petition is that the 4th respondent was the successful bidder of the Calicut range in the previous years and that he "has been retaining Calicut as a monopoly range" and that the "auctioning Officer and other officials associated with the auction are hand in glove with the 4th respondent."

4. According to the averments in the petition, the successful bidder for the year 1975-76 was also the 4th respondent. The events that led up to the acceptance of the highest bid of Rs. 13,11,000/- of the 4th respondent for all the four ranges in the Calicut taluk taken as one lot are narrated in the petition in the following manner.

The petitioner having deposited the earnest money of Rs. 200/- and having obtained a receipt which served as a Hall ticket for admission to the auction room submitted a written offer of Rs. 15,00,000/- for all the shops in the Calicut range taken as one lot, to the 1st respondent, the District Collector, who was the officer authorised to conduct the auction. A copy of the offer has been produced as Ext. P3. According to the petitioner, the 1st respondent informed him that his offer of Rs. 15,00,000/-

could not be accepted and he could not be allowed to bid in the auction "on the ground that Ext. P1 Solvency Certificate did not contain the words 'free from encumbrances'." "Thereafter it is alleged that the 1st respondent did not put the arrack shops individually or even range-wise to auction and there were no bidders to take the entire taluk in one lot. The 1st respondent then, it is said, sent for the petitioner and asked him whether he would take the arrack shops in the Calicut range for Rs. 8,00,000/- after depositing 70% thereof in cash. It is averred that the petitioner readily agreed to the same but that the 1st respondent went back upon the offer and "turned round and asked the petitioner whether he would deposit 70 per cent of the bid amount fixed by the Department, namely Rs. 13,10,000/- (Rupees Thirteen Lakhs and ten thousand only) for all the arrack shops in the 4 ranges of Calicut Taluk." The petitioner has further stated that "before the petitioner could consider the offer and consult his partners the 1st respondent accepted and knocked down the bid of the 4th respondent for Rs. 13,11,000/-" and there are further averments that the 1st respondent did not want to secure large amounts in the auction. His idea and desire was to confer the right to vend arrack in Calicut Range at as low a rental as possible on the 4th respondent."

5. After making the above averments there are the further statements in the petition that as soon as the bid of the 4th respondent was accepted, the petitioner sent a telegram to the 2nd respondent, the Board of Revenue offering Rs. 16,11,000/- for all the shops in the Calicut taluk and that the telegram was followed by a letter of confirmation to the Excise Commissioner. Copies of the telegram and the letter are produced as Exts. P4 and P. 5. It is said that a further telegram was sent to the Chief Minister complaining of the irregularities at the auction held on 19th March 1975. It is said that there has been loss of revenue and the 1st respondent deliberately tried to exclude the petitioner by rejecting the solvency certificate and thus enabled the 4th respondent to be the successful bidder.

6. These averments have been denied by the 1st respondent. The 1st respondent has filed a counter affidavit dated 27th of March, 1975 in answer to C. M. P. No. 4532 of 1975 which prayed for the stay of confirmation of the sale of the arrack shops in Calicut taluk for the year 1975-76 by the Board of Revenue, the 2nd respondent. In answer to the Original petition another counter affidavit has also been filed on the 4th day of April, 1975 by the 1st respondent. The 2nd respondent has supported the stand of the 1st respondent by a counter affidavit dated 1st April, 1975 and

has produced along with that affidavit the form in which solvency certificates should be issued, as Ext. R1, and also a brief affidavit by the Minister for Revenue dated 31st March, 1975, Ext. R2, in which the Minister denied the allegation in paragraph 5 of the Original Petition that the 4th respondent is backed by the Minister and that it is on a tacit understanding and unwritten instructions that arrack shops in Calicut taluk are always given to the 4th respondent. Respondents 4 and 5 have also filed counter affidavits. The 4th respondent has stated that he did not bid at the auction on the 19th March, 1975 and the 5th respondent has stated that it was he and his partners and associates who made the bid of Rupees 13,10,000/- and that bid was on their own behalf and not on behalf of the 4th respondent.

7. In answer to the specific contentions of the petitioner that the solvency certificate Ext. P1 was arbitrarily rejected and that the petitioner was excluded from the auction on the 19th March, 1975, the 1st respondent has stated that the solvency certificate Ext. P1 was not in accordance with the form in which such certificates should be issued and that there was no statement that the properties mentioned therein are free from encumbrances, a statement which should be contained in such a certificate. The encumbrance certificates of the properties were also not produced. It is further averred that considering the total value for which the four ranges in the Calicut taluk were sold for the previous year, the 1st respondent felt that a bid of Rs. 15,00,000/- for the Calicut range alone was a speculative one. The solvency certificate being unacceptable, the 1st respondent asked the petitioner whether he was prepared to furnish cash security of an amount not less than 20% of the bid amount over and above the usual deposit of 30% in addition to offering cash security of 20% of the offered amount in lieu of solvency. The petitioner being not prepared for that, it is said, that his bid contained in Ext. P3, the written offer, was rejected. It is further averred that the petitioner was not excluded from the auction. In fact, it is the case of the 1st respondent that the petitioner was invited to bid at the time of the auction more than once but that the petitioner declined either to bid for the shops in the Calicut range or for all the shops together in the Calicut taluk.

8. A point was made by counsel for the petitioner on an alleged discrepancy between the averments in the counter affidavit dated 27th March, 1975 filed by the 1st respondent in answer to C. M. P. No. 4532 of 1975 and the averments in the counter affidavit of the 1st respondent to the Original Petition dated 4th April, 1975, Accord-

ing to counsel the earlier affidavit states that the petitioner was asked to deposit 50% of the bid amount and not 70% as asserted in the later counter affidavit by the 1st respondent. There does not seem to be much of a point in the submission on behalf of the petitioner for, when the last sentence in paragraph 2 of the counter affidavit of the 1st respondent dated 27th March, 1975 is read with the last sentence in paragraph 4 it is clear that the 1st respondent's case even then was that he wanted 70% the whole being deposited by the petitioner. When the solvency certificate was found by the 1st respondent to be not acceptable, it is said in paragraph 2, that the petitioner was requested "to offer cash security of 20 per cent of the offered amount in lieu of solvency." and at the end of paragraph 4, there is the further averment that "This respondent therefore directed the Writ Petitioner to deposit an amount of 20 per cent over and above and usual deposit of 30 per cent." When the averments in paragraphs 2 and 4 of the counter affidavit dated 27th March, 1975 are read with the provisions in Rule 5 (1) of the Kerala Abkari Shops (Disposal in Auction) Rules 1974, for short, the Rules, it is clear that the 1st respondent was relying on the sub-rule for a guideline in demanding a cash deposit of 50% as well as a further 20% of the bid amount in lieu of solvency certificate. It is evident therefore that even according to the averments in paragraphs 2 and 4 of the counter affidavit dated 27th March, 1975 the 1st respondent required in all a deposit of 70% of the bid amount of Rs. 15,00,000/-. This is what is stated in the later counter affidavit dated 4th April, 1975. We are thus unable to see any discrepancy.

9. In the reply affidavit the petitioner has urged new points relying on a letter No. XA1-21000/74 dated 12-3-1975 addressed to the District Collectors by a Member of the Board of Revenue. Relying on this letter it was contended that the shops should have been put up to auction in the order given in the schedule of abkari shops indicated in the sale notification for 1971-73. According to the petitioner this had not been done. It was further contended that cash security can be demanded only after a bid has been accepted and at the time of the execution of the agreement as envisaged by sub-rule (10) of Rule 5 of the rules and not before acceptance of the bid as the highest bid.

10. The Rules have been framed in exercise of the powers conferred by Sections 18-A and 29 of the Abkari Act, I of 1077. Section 29 embodies the power to frame rules. Section 18A is in these terms:—

"18A. Grant of exclusive or other privilege of manufacture, etc., on payment of

rentals.— (1) It shall be lawful for the Government to grant to any person or persons on such conditions and for such period as they may deem fit, the exclusive or other privilege—

(i) of manufacturing or supplying by wholesale; or

(ii) of selling by retail; or

(iii) of manufacturing or supplying by wholesale and selling by retail, any liquor or intoxicating drugs within any local area on his or their payment to the Government of an amount as rental in consideration of the grant of such privilege. The amount of rental may be settled by auction, negotiation or by any other method as may be determined by the Government, from time to time, and may be collected to the exclusion of, or in addition to, the duty or tax leviable under Sections 17 and 13.

(2) No grantee of any privilege under sub-section (1) shall exercise the same until he has received a licence in that behalf from the Commissioner.

(3) In such cases, if the Government shall by notification so direct, the provisions of Section 12 relating to toddy and toddy producing trees shall not apply."

11. It is clear from Section 18-A that the amount of rental may be settled by auction. The Rules are therefore applicable when the rental is to be settled by auction. Rule 3 in Chapter II gives the Collector of the District the power to put up by public auction the privilege of vending toddy, arrack and foreign liquor, shop by shop or in a lot. Clearly therefore the District Collector has the authority to direct that the auction should be shop by shop or in a lot or lots. Rule 5 (3) (b) gives the officer conducting the sale the liberty to exclude any intending bidder on the ground that the bidder is of doubtful solvency and he is unwilling to deposit such sum as is ordered to be deposited by the said officer. The officer has also the discretion to refuse or to accept the bid of any person on the ground that the bid is clearly speculative and he has the power to fix an upset price for a shop or shops. Further he can close the auction if he is satisfied that there has not been sufficient or fair competition.

12. According to the 1st respondent the petitioner was not excluded from the auction. He has repeatedly stated so in the counter affidavits. From the fact that Rule 5 (3) (b) (vii) has been referred to it was contended that the petitioner was excluded from the auction. This contention cannot be accepted for even according to the petitioner he was asked by the Collector during the course of auction to deposit 70% of Rs. 8,00,000 for the Calicut range and 70% of Rs. 13,10,000/- for the entire Calicut taluk. The 1st respondent has stated that the petitioner was invited specifically

again and again to bid. We see no reason to disbelieve these averments of the 1st respondent. So what has been done was only to reject the specific written offer contained in Ext. P-3. It has to be said that in a public auction, to make a written offer which was not apparently known to the other persons who had gone to the place to bid, at the time the offer contained in Ext. P-3 was made, is a somewhat peculiar procedure. A written offer handed over to the officer conducting the auction could not be known to the other bidders who were present at the place of auction. Why the petitioner has resorted to such a course instead of making an open bid is not known. Apparently this offer was made at the beginning of the auction before the Collector had determined whether there should be a shop by shop auction or an auction rangewise or an auction for the whole taluk. The amount offered was substantially above the total rental for the entire taluk for the previous year. It was therefore not arbitrary on the part of the 1st respondent to have scrutinised that offer and to have scrutinised the solvency certificate, Ext. P-1 produced by the petitioner. There was nothing wrong also in having asked the petitioner whether he was prepared to deposit 50% of the total amount as well as another 20% in lieu of a solvency certificate. The 1st respondent has asserted that the rejection of the bid and the reasons thereof were announced at the public auction and thereafter he proceeded to auction the shops in the Calicut range shopwise. There were no bidders and therefore all the shops in the Calicut range were put for auction in one lot and the upset price was reduced to as low a figure as Rupees 8,00,000/-. According to the 1st respondent, nobody bid the shops in the Calicut range even for Rs. 8,00,000/-, not even the petitioner who was prepared according to Ext. P-3 to pay Rs. 15,00,000/- for those shops. The petitioner does not say either in his petition or in his reply affidavit that he offered any bid other than what is contained in Ext. P-3. His only case is that the 1st respondent sent for him and asked him whether he was willing to deposit 70% of Rs. 8,00,000/- and that he agreed to deposit 70 per cent. of Rs. 8,00,000/-. The 1st respondent however denies in para. 8 of the counter affidavit dated 4th April, 1975 that he asked the petitioner "whether he would take the arrack shop in Calicut range for 8 lakhs after depositing 70%". The 1st respondent also denied having asked the petitioner whether he would deposit 70% of the bid amount of Rs. 13,10,000/- for all the arrack shops in the four ranges of Calicut taluk.

13. In the light of the above averments and counter averments certain facts clearly emerge. The only bid made by the petitioner at the auction is that contained in Ext. P-3. The petitioner did not make any

further bids during the course of the auction. He was not actually excluded from the auction. According to the 1st respondent he had been repeatedly invited to bid which he declined to do. Even according to the petitioner he was asked by the 1st respondent whether he would accept the Calicut range for Rs. 8,00,000/- and the shops in the entire Calicut taluk for Rs. 13,10,000/- indicating by that that he was not excluded though this version of his cannot be accepted for, it is most unlikely that the 1st respondent would have asked the petitioner whether he would take the Calicut range or or the Calicut taluk when he had declined to make any bid after handing over Ext. P-3. It is more probable that what transpired was in accordance with the version given by the 1st respondent that the petitioner was asked to bid but he did not. The bid that was accepted was that of the 5th respondent. There is nothing to indicate that this bid was on behalf of the 4th respondent.

The position being as stated above the only question that arises is whether the Collector was justified in not accepting Ext. P-1 solvency certificate and whether he was justified in demanding a deposit of 70% of the offer contained in Ext. P-3 with a view to ascertain whether the bid contained in Ext. P-3 is a speculative bid or not. A perusal of Ext. R-1 produced by the 2nd respondent along with the 2nd respondent's counter-affidavit would show that Ext. P-1 is not in accordance with the form prescribed for solvency certificates. A statement that 'there are no encumbrances in the property' is a vital one. Without knowing whether there are encumbrances and the extent of the encumbrances it would be impossible to ascertain the real value of the properties offered as security. The 1st respondent, we think, has also the authority to determine whether any particular bid is speculative one or not. Rule 5 (5) of the Rules specifically gives the power to the authority conducting the auction to reject any speculative bid. To test whether the bid is speculative or not, we conceive, the 1st respondent can ask a bidder whether he would be prepared to deposit a larger percentage of the bid amount. These powers, we think, are implied from those specifically contained in the Rules. There is nothing therefore illegal in the 1st respondent not accepting the solvency certificate Ext. P-1 and in not accepting the bid of Rs. 15,00,000/- contained in Ext. P-3. No doubt, there is no specific provision in the Rules other than what is contained in Rule 5 (5) which enables the 1st respondent to reject the bid but what has been done would fall within Rule 5 (5) of the Rules. The 1st respondent has a large discretion in the matter. It is not for this Court to substitute its assessment of the situation by an assessment of what this Court may consider to be more proper or

more advantageous to the revenue. If the officer had acted within his authority and in a bona fide manner and in accordance with the Rules which has the force of law (vide Section 69 of the Abkari Act, 1 of 1077) the auction cannot be set aside by this Court in proceedings under Art. 226 of the Constitution.

14. The petitioner normally ought not to be allowed to raise additional points in a reply affidavit in support of his prayers in the Original Petition. However for the sake of completion we shall deal with the additional contentions as well. The reliance by the petitioner in the reply affidavit on the letter dated 12-3-1975 addressed to the District Collectors by a Member of the Board of Revenue does not advance his case. As we pointed out the officer conducting the auction has a discretion to determine the manner in which the auction should be conducted. We have already referred to Rule 3. Sub-rule (5) of Rule 5 also enables the officer conducting the sale to put up to auction separately or if necessary in lot or lots the several items in the notice of sale. What is restricted is only clubbing of shops in more than one taluk and clubbing of different categories of shops. These rules must have precedence over the letter addressed by the Board of Revenue and as long as the 1st respondent has not violated the Rules even assuming there has been any violation of the terms of the letter, that would not be a sufficient ground to set aside the auction in proceedings under Article 226 of the Constitution.

15. Counsel for the petitioner relying on the second contention raised in the reply affidavit referred to, relied on sub-rule (10) of Rule 5 and emphatically contended that the demanding of the 70% security for the offered amount of Rs. 15,00,000 for the shops in the Calicut range even before the bid contained in Ext. P-3 was accepted and he was asked to execute an agreement, was unwarranted by the Rules, and that if there were no proper bidders, the procedure adopted in other cases of auction conducted on the same day of adjourning the sales, should have been followed. Sub-rule (10) of Rule 5 no doubt enables the officer conducting the sale to demand 30% cash deposit of the bid amount or such other higher amount as being fixed by the officer conducting the sale in addition to the requirement that the bidder shall furnish personal surety if so required by the officer. This rule further insists that the successful bidder shall produce a solvency certificate for an amount not less than 20% of the bid amount or in lieu of solvency certificate shall furnish additional cash security for an amount not less than 20% of the bid amount. What the 1st respondent did in this case apparently was to test the speculative nature or otherwise

objection, if any, shall be received by the State Government".

It is clear beyond doubt that this section applies only to those cases which fall within the purview of sub-sec. (1). To the present case, so far as Annexure F is concerned, none of these three applies. It was not as if the limits of the Gram Sabha area were to be altered by including within it any local area; or by excluding therefrom any local area; nor was this a case where two or more Gram Sabhas were to be amalgamated; nor was this a case where this particular Gram Sabha was to be split up so as to constitute two or more Gram Sabhas in its place. Here, the entire area comprising the said Gram Sabha was being included in the area of the municipality. To such a case, section 360 (1) of the Act is inapplicable. That being so, the petitioner's contention that in this case also (i. e. annexure F), it was obligatory for the State Government to issue a notification in the manner prescribed by Section 360 of the Act, cannot be accepted.

7. Sections 360 and 361 of the Act being out of the way, all that is now to be seen is whether the requirements of Section 12 of the Act are satisfied. There are three requisites:—

(1) An intention which falls within the purview of the proviso to Section 12 (2) of the Act must be expressed by a notification;

(2) the intention must be in public interest; and

(3) reasons must be recorded in writing. In the present case, (1) declaration of the intention of the State Government was by notification, (2) it was said in the notification that it was being made in public interest; and (3) reason was recorded, namely, for better administration.

8. Shri Mittal vehemently argues that 'intention' is different from 'decision'. The concept of intention is that it is a preliminary step. It necessarily postulates a further action and where the law requires an intention to be expressed by a notification in the gazette, it necessarily implies an opportunity to be given to persons interested to file objections and it further contemplates a decision on those objections. As a broad proposition, perhaps, Shri Mittal may be right, but, having regard to the context in which Section 12 (2) of the Act has been enacted, along with its proviso, and having regard to the scheme of the Act, we are not persuaded to accept this contention. We may at the most say that word 'intention' is not an appropriate expression in view of the meaning and the sense in which it is generally used in legal parlance. However, before we can accept the contention, it must be shown whether any other manner is prescribed for the expression of such intention, or that the intention is further to be followed by a decision after, or without, an enquiry into the objections which may be filed. Section 360 of the Act is enacted for different situations. That section is not apposite

here; nor can its provisions be engrafted on Section 12 by analogy.

9. It was an argument for the petitioner that on the earlier notification (annexure C), the Gram Sabha filed objections, but nothing further was done, although the provisions of Section 361 of the Act are mandatory. In our opinion, the State Government was entitled to change its mind and for giving better administration to the people, the State Government could take action under Section 12 (2), with the aid of its proviso. The relevant portion of the notification (annexure F) reads thus:—

“चूँकि नीचे दी गई अनुसूची के कालम (२) में विनिर्दिष्ट की गई ग्रामसभा क्षेत्रों के भीतर स्थानीय कारबार के प्रशासन हेतु अच्छी व्यवस्था करने के लिये ऐसे क्षेत्रों को नगरपालिका प्रशासन के अधीन लाना इष्टता है।”

We have no doubt that publication of an intention under Section 360 (1) of the Act is by no means a bar to an action being taken under Section 12. Having regard to its nature and scope, the earlier notification (annexure C), ipso facto, became ineffective and infructuous, when the notification (annexure F) was issued.

10. It was alleged in the petition that the action of the State Government in issuing the notification (annexure F) was mala fide inasmuch as out of 19 members constituting the Gram Panchayat, 18 belonged to the Congress 'O' and only 1 to Congress 'R', so that the State Government, under one pretext or another, wanted to cancel the election. In their return, the State Government have unequivocally denied this insinuation. They have reiterated that the action has been taken in public interest and for better administration of that area. This is not a case where we can accept the charge of mala fide, just because most of the Gram Sabha members belonged to a political party which is opposed to the ruling party. Furthermore, we find that it is not as if there will be any other election after the cancellation of the present election. The impugned notification not only cancels the election of the Gram Sabha but also takes away the entire area of the Gram Sabha for the purpose of being included in the area of the municipality. In other words, the Gram Sabha will be extinct for that area.

11. The learned Government Advocate pointed out that this petition was filed five years ago and because, on the petitioners' application a Division Bench of this Court, by its interim order, stayed the operation of the notification (annexure F), matters have been standing still. The Gram Sabha has practically lived almost its whole life of five years because of the stay order.

12. The petition is dismissed. The petitioner shall pay to the respondent Rupees 150/- as costs out of the security amount,

and the balance, if any, shall be refunded to the petitioners.

Petition dismissed.

AIR 1976 MADHYA PRADESH 18

R. K. TANKHA AND M. L. MALIK, JJ.

M/s. M. M. Asati & brothers, Petitioner v. State Transport Appellate Authority and others, Respondents.

Misc. Petn. No. 770 of 1973, D/- 3-3-1975.

(A) Motor Vehicles Act (1939), S. 68-F — Application by a new private permit holder — Route intra-regional and excluded from purview of the scheme — Nothing prohibits R. T. A. from granting a fresh stage carriage permit to a new private permit holder. AIR 1971 SC 1986, Rel. on.

(Para 4)

Cases Referred: Chronological Paras
AIR 1972 SC 1674 = (1973) 1 SCR 562 4
AIR 1971 SC 1986 = 1971 SCD 901 4
(1971) Misc. Petn. No. 157 of 1970, D/- 16-7-1971 (Madh Pra) 4

B. K. Rawat, for Petitioner; V. S. Dabir, for Respondent No. 3.

TANKHA, J.:— The petitioner by this writ petition under Articles 226 and 227 of the Constitution is seeking a prayer for the quashing of the order dated 6-6-1970 (Annexure-A) passed by the Regional Transport Authority, Jabalpur (respondent No. 2) and the order dated 21-5-1973 (Annexure-E) passed by the State Transport Appellate Authority, Gwalior (respondent No. 1).

2. Brief facts leading to the present petition are that the Regional Transport Authority, Jabalpur (respondent No. 2) after determination of the scope for the grant of one return trip permanent stage carriage permit for Balaghat Lanji via Rajegaon and Kirnapur route invited applications for the purpose under Section 57 (2) of the Motor Vehicles Act (hereinafter referred to as "the Act"). It may be mentioned here that the said route is intra-regional lying wholly within the State of Madhya Pradesh. In pursuance of the notification, the petitioner and two others applied for the fresh grant and their applications were published in accordance with law under Section 57 (3) of the Act. The respondent No. 3, Madhya Pradesh State Road Transport Corporation did not furnish any objection to the grant of stage carriage permit under Section 57 (4) of the Act. On 6-6-1970, when the applications came up for hearing before respondent No. 2, the respondent No. 3 raised a preliminary objection to the effect that the authority has no jurisdiction to grant permit to a private operator on the route as a

Scheme No. 66 prepared by respondent No. 1 for inter-statal route Balaghat-Amgaon lying within the territories of the States of Madhya Pradesh and Maharashtra has been published as approved scheme under Section 68-D of the Act which was coming into operation with effect from 15-7-1970 and the route for which applications were being considered although lay exclusively within the State of Madhya Pradesh was a part of the said inter-statal route. The objection prevailed with the authority and all the applications for the fresh grant were rejected vide order dated 6-6-1970 (Annexure-A). Out of the three applicants, only the petitioner preferred appeal No. 333 of 1970 before respondent No. 1. The appellate authority dismissed the appeal on the ground that the order of respondent No. 2 would be deemed to be under Section 68-F (2) of the Act, and, therefore, no appeal lay against such an order in view of the provisions of Section 68-F (3) of the Act. The petitioner has now come up before this Court challenging both the orders passed by the transport authorities.

3. Learned counsel appearing for the petitioner contended that the Scheme No. 66 as approved and published relates to inter-statal route and operation by private operators on the route lying exclusively within the State of Madhya Pradesh has been saved. That is to say, in other words the scheme does not relate to intra-regional route like the present one-Balaghat-Lanji, which lies exclusively within the State of Madhya Pradesh. That being so, both the transport authorities committed an error in the exercise of their jurisdiction in refusing to consider the application of the petitioner on merit but rejecting the same on the basis that in view of the Scheme No. 66 having been approved and coming into operation with effect from 15-7-1970 no stage carriage permit can be granted for the route to a private operator. On the other hand learned counsel for the respondent No. 3 contended that the orders passed by the transport authorities are correct. According to him, although the Scheme No. 66 is with regard to inter-statal route, it excludes operation by private operators on the basis of a fresh grant by the respondent No. 2. The scheme has allowed operation of the route by the existing private operators only.

4. Having heard learned counsel of the parties, we are of opinion that the present petition has substance and must be allowed. The first point that arises for consideration is the determination of the nature of the Scheme No. 66. All that we have to see is what the scheme says? Whom does it exclude? We are supported for taking this approach by a decision of the Supreme Court in D. M. Thippeswamy v.

Mysore Appellate Tribunal, Bangalore, AIR 1972 SC 1674. In this connection, we will advert to the order dated 5-5-1967 Annexure-D) passed by the Special Secretary (Home), Government of Madhya Pradesh, under Section 68-D (2) of the Act, who has approved the scheme. The relevant paragraphs of the said order read as under:—

"This scheme relates exclusively to seven inter-statal routes of Jabalpur Division, as given in clause 2 of the Scheme. The M. P. State Road Transport Corporation (hereinafter called Corporation) has not included any intra-statal route partially overlapping the aforesaid inter-statal routes. The neighbouring State territory involved is Maharashtra."

"The exclusion of M. P. operators who run only within the M. P. territory but overlap the aforesaid inter-statal routes is discriminatory. For instance, the route from Balaghat to Lanji lies wholly within the inter-statal route Balaghat-Amgaon and yet the operator concerned will continue to ply while the inter-statal operator will have to go."

The scheme was published in the M. P. Rajpatra dated 21-2-1970 as the approved scheme under Section 68-D (3) of the Act (Annexure-D). The relevant paragraphs 4 and 5 read as under:

"The nature and extent of the State Road Transport Service to be provided on the routes mentioned in clause (2) above, are specified in the schedule annexed hereto. The provision of the Transport Services otherwise than under the scheme is prohibited except that (i) the vehicles of Maharashtra State Nominees plying under the terms of Reciprocal Transport Agreement between the States of Madhya Pradesh and Maharashtra covering the routes or portions of the routes mentioned in clause (2) above; (ii) the vehicles of Maharashtra State operators plying on the routes in Maharashtra State only covering portions of the routes mentioned in clause (2) above, and (iii) the vehicles of Madhya Pradesh State operators plying on the routes in Madhya Pradesh only, not included in the scheme, shall be allowed to ply as before."

"All Road Transport Services will subject to the provisions made in the subsequent clauses, be provided by the Madhya Pradesh State Road Transport Corporation 'State Transport Undertaking' exclusively on these inter-statal routes except as provided in clause (3) above."

A bare perusal of the paragraphs of the order and the published scheme make it quite clear that the scheme does not relate to intra-regional route lying within the State of Madhya Pradesh and the route Balaghat-Lanji was accordingly excluded from its operation. It would also be incorrect to

say that the route Balaghat-Lanji has been saved to the extent of the existing permit holders only as contended on behalf of the respondent No. 3. We are unable to see any distinction between the existing private operators or those who may be granted fresh permits on the increase of the scope on the route. Even in the case of renewal of permits of an existing private operators, fresh applicants can compete and can secure fresh grant in place of the one seeking renewal of his permit under Section 53 of the Act. Therefore, if the route is not of exclusive operation by the respondent No. 3 and is excluded from being taken over under the operation of the scheme, then there is no restriction on the powers of the Regional Transport Authority (respondent No. 2) to grant a fresh stage carriage permit to a new private permit holder. We are supported in our view point by a decision of the Supreme Court in Samrathmal Keshrimal v. R. T. A. Indore, AIR 1971 SC 1986, which has been relied upon by a Division Bench of this Court in the M. P. State Road Transport Corporation v. The R. T. A. Raipur, Misc. Petn. No. 157 of 1970, D/- 18-7-1971 (Madh Pra).

5. Since we have held above that the scheme has no application to Balaghat-Lanji route, we are constrained to say that both the transport authorities completely misdirected themselves in appreciating the purport of the scheme which resulted in the wrong conclusion that the scheme is applicable for the route Balaghat-Lanji and, therefore, no fresh permit could be granted for the said route to any private operator and on that ground the appellate authority declined to entertain the appeal preferred by the petitioner. It is no doubt true that if the Regional Transport Authority passes an order or takes any action under Section 68-F (2) of the Act, no appeal shall lie against such an order or action in view of the provisions of Section 68-F (3). In the present case, the order passed by the Regional Transport Authority was prima facie illegal and exhibited an error in the exercise of its jurisdiction. Ordinarily we would have remanded the case to the appellate authority for consideration of the appeal on merits but we deem it proper to remit the application of the petitioner to the Regional Transport Authority (respondent No. 2) for consideration afresh as his application has not been considered at all on merit by both the authorities.

6. For the reasons stated above, the petition is allowed with costs and we issue a rule nisi directing the Regional Transport Authority, Jabalpur (respondent No. 2) to hear the petitioner's application alone on merit together with objectors to his application in accordance with law and then decide his claim for the grant. Counsel's fee

20 M. P. [Prs. 1-4] Mustaq Bai v. S. T. A. Tribunal (FB) (Tare C. J.) A. I. R.

Rs. 150/- shall be borne by respondent No. 3, if certified as also the costs. The outstanding amount of security shall be refunded to the petitioner.

Petition allowed.

**AIR 1976 MADHYA PRADESH 20
FULL BENCH**

**P. K. TARE C. J., N. C. DWIVEDI
AND C. P. SEN, JJ.**

Smt. Mustaq Bai, Petitioner v. State Transport Appellate Tribunal, Madhya Pradesh, Gwalior and others, Respondents.

Misc. Petn. No. 315 of 1973, Dt. 8-10-1975.

(A) M. P. State Transport Appellate Tribunal (Appeal and Revision) Rules, 1972, R. 4 (5) — State Transport Appellate Tribunal dismissing appeal in default on date prior to coming into force of Rules — Dismissal, held to be without jurisdiction.

When M. P. State Transport Appellate Tribunal (Appeal and Revision) Rules, 1972, R. 4 (5) of which enabled Tribunal to resort to Code of Civil Procedure came into force with effect from 11-8-1972, but the Tribunal prior to coming into force of those Rules i. e. on 4-4-1972 dismissed an appeal in default of appellant's appearance even in spite of notice, such a dismissal of appeal in default was without jurisdiction. The application for restoration of appeal as filed by appellant on 19-12-1972 and its rejection by Tribunal on 27-2-1973 was not material. Even on basis of M. B. Motor Vehicles Rules 1949, the appellate authority had no jurisdiction to dismiss an appeal in default. AIR 1970 Madh Pra 230 (FB), Followed.

(Paras 4 to 7)

(B) Constitution of India, Art. 226 — Relief — Order of State Transport Appellate Tribunal dismissing appeal in default found to be without jurisdiction — Absence of specific prayer to quash that order is of no significance — Neither question of limitation nor that of delay arises — By writ of mandamus, Tribunal directed to decide appeal on merits.

(Paras 6, 7)

Cases Referred: Chronological Paras
AIR 1970 Madh Pra 230 = 1970 MPLJ 4
253 (FB)

V. S. Dabir with A. S. Kutumbale, A. G. Dhande and O. P. Namdeo, for Petitioner; S. S. Agarwal with A. S. Jha, for Respondent No. 3.

P. K. TARE, C. J.— In this petition under Arts. 226 and 227 of the Constitution of India, the petitioner challenges the order of the State Transport Appellate Tribunal, dated 27-2-1973 (Petitioner's Annexure C).

By the said order, the petitioner's application for restoration of the appeal to file was rejected by the State Transport Appellate Tribunal on the ground that it was barred by limitation. At this stage, we might note that the petitioner has not made any prayer for quashing the order of the State Transport Appellate Tribunal, dated 4-4-1972, dismissing the petitioner's appeal in default.

2. The petitioner's husband, Nazir Ahmad, a bus operator, and other bus operators, namely, respondents 3 to 7, had applied for a stage carriage permit for the Sanjeet-Mandsaur route. The Regional Transport Authority, by order dated 12-12-1970, granted a permit in favour of the third respondent, namely, Motilal Phulchand. Against that order of the Regional Transport Authority, the petitioner filed an appeal before the State Transport Appellate Tribunal. A notice of the hearing on 4-4-1972 was issued to the petitioner, but in spite of that notice, she remained absent. Therefore, the Appellate Tribunal dismissed the appeal in default by an order of that date. Thereafter, the petitioner on 19-12-1972 filed an application for restoration of the appeal to file. No doubt that restoration application was unduly delayed and there is no explanation offered for the delay caused. The State Transport Appellate Tribunal, by order dated 27-2-1973 (Petitioner's Annexure-C), dismissed the restoration application on the ground that it was barred by limitation. Hence this writ petition.

3. Before considering the instant question arising in the present writ petition, it may be relevant to note that the Madhya Pradesh State Transport Appellate Tribunal (Appeal and Revision) Rules, 1972, came into force with effect from 11-8-1972. Sub-Rule (5) of Rule 4 of the said Rules provides as follows:

"Unless otherwise expressly provided in the Act or in these Rules, the procedure laid down in the Code of Civil Procedure, 1908 (V of 1908) shall, so far as may be, be followed in all proceedings under these Rules."

Therefore, by virtue of the said Rules, now after 11-8-1972, the State Transport Appellate Tribunal can resort to the provisions of the Code of Civil Procedure so far as they may be made applicable to a particular situation. But prior to the coming into force of these Rules on 11-8-1972, no procedure was prescribed for the Appellate Tribunal to follow any course of action. So far as the Regional Transport Authorities are concerned, the procedure has been prescribed by the Rules and there is no provision for application of the provisions of the Code of Civil Procedure.

4. As regards the procedure to be followed by the Regional Transport Authority,

city, a Full Bench of this Court in *Surendra v. State Transport Appellate Authority*, 1970 MPLJ 253 = (AIR 1970 Madh Pra 230) (FB), laid down that a Regional Transport Authority has no jurisdiction to dismiss an application in default and that in the absence of a party, the Regional Transport Authority is bound to consider the case on merits. That principle, in our opinion, would be applicable to the State Transport Appellate Tribunal as well before the new Rules were brought into force from 1-8-1972. We do not find any reason to depart from the reasoning of the said Full Bench which, in our opinion, would be applicable to the proceedings before the Appellate Tribunal as well before 11-8-1972. However, after the new Rules have been brought into force, the position so far as the Appellate Tribunal is concerned would altogether change and it is now open to the Appellate Tribunal to resort to the provisions of the Code of Civil Procedure so far as they can be found applicable. In this view of the matter, we are of the opinion that the State Transport Appellate Tribunal had no jurisdiction to dismiss the appeal in default on 4-4-1972.

It is true that the Rules in force then, namely, the Madhya Bharat Motor Vehicles Rules, 1949, permit the Regional Transport Authority or the Appellate Authority to refuse to grant relief to a person who would remain absent. It would be for the simple reason that the Regional Transport Authority or the Appellate Authority would not be in a position to decide the case on merits if some information was required from the applicant or the appellant. In that event, the decision would certainly be on merits analogous to the provisions of Order 17, Rule 3, of the Code of Civil Procedure. But on the basis of the said Rules, we are unable to conclude that the Regional Transport Authority or the Appellate Authority had any jurisdiction to dismiss an application in default on the lines analogous to Order 9, Rule 8 or Order 17, Rule 2, Civil Procedure Code.

5. In the view we take, we are clearly of the opinion that the order, dated 4-4-1972 passed by the State Transport Appellate Tribunal dismissing the petitioner's appeal in default was without jurisdiction. Consequently, the other proceedings that followed in the matter of restoration of the appeal to file would not be very material. Of course, if the provisions of the Code of Civil Procedure had been made applicable at that stage, the petitioner's restoration application would have been barred by time.

6. However, the learned counsel for the third respondent urged that there is no prayer for quashing the order of the State Transport Appellate Tribunal, dated 4-4-

1972, and if an amendment were to be sought now for quashing that order, the present petition would be unduly delayed. We are of opinion that this contention raised on behalf of the third respondent is of no significance in view of our finding that the order, dated 4-4-1972, passed by the State Transport Appellate Tribunal was without jurisdiction and that the Appellate Tribunal was bound to decide the question on merits. In this view of the matter, neither the question of limitation nor the question of delay arises and we cannot allow an order without jurisdiction to remain on record for a mere technicality. Therefore, we feel that it is necessary to quash the order of the State Transport Appellate Tribunal, dated 4-4-1972 and consequently all subsequent proceedings thereafter would automatically stand quashed.

7. As a result of the discussion aforesaid, this petition succeeds and is accordingly allowed. We hereby quash the order of the State Transport Appellate Tribunal, dated 4-4-1972, as also the subsequent proceedings in the matter of restoration of the appeal to file including the order of the Appellate Tribunal, dated 27-2-1973 and, by a writ of mandamus, we direct the State Transport Appellate Tribunal to decide the appeal on merits in accordance with law. Under the circumstances, we further direct that there shall be no order as to the costs of the present writ petition which shall be borne as incurred. The security amount deposited by the petitioner be refunded to her. The third respondent will be free to raise all questions in the appeal to be heard by the Appellate Tribunal which would be available to him and we do not wish to pronounce anything in that behalf.

Petition allowed.

AIR 1976 MADHYA PRADESH 21 FULL BENCH

P. K. TARE C. J., S. M. N. RAINA AND
S. S. SHARMA, JJ.

Smt. Shantabai, Appellant v. Chokhelal,
Respondent.

First Appeal No. 7 of 1971, D/- 6-10-1975.*

(A) Civil P. C. (1908), O. 17, Rr. 3, 2 — Whether Court can proceed under R. 3 in absence of a party — Order under R. 3 — Powers of Appellate Court — AIR 1972 Madh Pra 8; AIR 1973 Madh Pra 179, Overruled.

* (Reference made to Full Bench by S. M. N. Raina and C. P. Sen, JJ. on 25-3-1974.)

It is open to the Court to proceed under Order 17, Rule 3 in the absence of a party where the conditions laid down in the said rule are fulfilled and it appears just and proper to do so.

Where the Court has so proceeded it is not open to the party aggrieved by the decision to file an application for setting aside the decree under Order 9 of the Code.

Where the party aggrieved, prefers an appeal against the judgment and decree passed under Order 17, Rule 3, the appellate Court is not bound to allow the appeal, merely on the ground that the Court has no jurisdiction to pass an order under Order 17, Rule 3, against the party who was absent. The appellate Court, in such a case, will have to examine whether the lower Court properly exercised its jurisdiction in proceeding under Order 17, Rule 3. If it is of the view that the lower Court rightly proceeded under Order 17, Rule 3, in the circumstances of the case and the decree passed by it is otherwise proper, it may dismiss the appeal. But, if it is of the view that the lower Court should not have proceeded under Order 17, Rule 3, it may substitute an order under Order 17, Rule 2, leaving the defaulting party to take recourse to an appropriate remedy under Order 9 in the lower Court. AIR 1972 Madh. Pra. 8 and AIR 1973 Madh. Pra. 179, Overruled. Civil P. C. by Chitale (Eighth Edn.) Page 1233 (cited). (Para 13)

Cases Referred: Chronological Paras
AIR 1973 Madh Pra 179 = 1973 MPLJ 534

AIR 1972 Madh Pra 8 = 1971 MPLJ 916 2
AIR 1972 Madh Pra 198 = 1972 MPWR 290 2

AIR 1971 Delhi 183 5

AIR 1971 Guj 42 5

1967 Jab LJ (Short Note) 95 4

AIR 1964 SC 993 = (1964) 5 SCR 946 12

1964 Jab LJ 559 = 1964 MPLJ 919

1962 Jab LJ (Short Note) 169 5

1960 Jab LJ (Short Note) 174 5

AIR 1953 Nag 222 = 1953 Nag LJ 41 3

AIR 1943 Bom 321 = 45 Bom LR 697 (FB) 5

AIR 1933 Nag 370 = (1934) 30 Nag LR 94 3

AIR 1918 Mad 143 (2) = ILR (1918) 41 Mad 286 (FB) 3

B. L. Thakur, for Appellant; Y. S. Dharmadhikari, for Respondent.

RAINA, J.—The following questions have been referred to this Bench for opinion by a Division Bench while dealing with this appeal:

(1) Whether it is open to the Court to proceed under Order 17, Rule 3 of the Code of Civil Procedure in the absence of a party where the conditions laid down in the said rule are fulfilled and it appears just and proper to do so?

(2) Where the Court has proceeded to decide the case on merits under Order 17, Rule 3, of the Code of Civil Procedure in the absence of a party, is it open to the party aggrieved by the decision to file an application for setting aside the decree by an application under Order 9 of the Code?

(3) Where the party aggrieved prefers an appeal against a judgment and decree under Order 17, Rule 3 of the Code of Civil Procedure, is the Appellate Court bound to allow the appeal, merely on the ground that the Court had no jurisdiction to pass an order under Order 17, Rule 3, and to substitute an order under Order 17, Rule 2 of the Code, leaving the defaulting party to take recourse to an appropriate remedy under Order 9 in the lower Court; or whether the appellant cannot succeed unless he is able to show that there was sufficient cause for his non-appearance on the date of hearing?

2. This reference has been made apparently because of some conflict of authorities. In Madanlal v. Narayan, AIR 1972 Madh Pra 8, it was held by a Division Bench of this Court that it is not open to the Court to proceed under Order 17, Rule 3 of the Code of Civil Procedure in the absence of a party. In Sita Bai v. Vidyawati, AIR 1972 Madh. Pra. 198, another Division Bench proceeded upon the view that it is open to the Court to proceed under Order 17, Rule 3 of the Code even in the absence of a party. In Narbada Prasad v. Awadesh Narain, AIR 1973 MP 179, the view expressed in Sita Bai v. Vidyawati (supra) was ignored on the ground that the observations made therein were obiter dicta. It was to resolve this conflict that the Division Bench made this reference.

3. The answers to the questions before us depend upon the construction of Rules 2 and 3 of Order 17 of the Code of Civil Procedure which has been the subject of conflicting decisions not only in this High Court but in other High Courts as well. In Pichamma v. Sreeramulu, ILR (1918) 41 Mad 286 = (AIR 1913 Mad 143 (2)) (FB), it was held by a majority that Rule 2 applies to all cases of absence of parties whether time was granted or not to do any of the acts mentioned in Rule 3 while Rule 3 applies only to cases where parties are present and commit default of the kind mentioned in the Rule. Wallis, C. J., however, differing from the majority view expressed the opinion that Rules 2 and 3 are not mutually exclusive and Rule 3 may be applied even in the absence of the defendant. The aforesaid decision was relied upon by the Judicial Commissioner's Court at Nagpur in Bhivraj v. Janardhan, (1934) 30 Nag LR 94 = (AIR 1933 Nag 370). It was held therein that the proper way of interpreting Rules 2 and 3 of Order 17 is to treat the

disposal of the suit as having been made in accordance with Rule 2 in cases when, on account of the non-appearance of the party, the explanation of his failure to perform the acts referred to in Rule 3 was due but was not given on account of his absence. It was further observed that Rule 2 of Order 17 presupposes the appearance of the party at whose instance the case was adjourned. In *Dayalji v. Kedarnath*, AIR 1953 Nag 222. Mudholkar, J. held that where it is not clear whether a particular case is under Rule 2 or Rule 3 of Order 17, the Court must lean in favour of holding that the case falls under Rule 2.

4. The view that in the absence of a party, the Court should ordinarily proceed under Rule 2 of Order 17 and not under Rule 3 and where it is not clear under which provision the Court has acted, the disposal of the suit, in the absence of a party, must be construed as under Rule 2 has been generally accepted in a number of decisions of this Court. In *Maruti v. Gangadhar Rao*, 1964 Jab LJ 559. Dixit, C J., following the decision of the Nagpur Judicial Commissioner's Court in *Bhivraj v. Janardhan* (supra) held that Rule 3 of Order 17 presupposes the appearance of the party at whose instance the case was adjourned but who is unable to give proper explanation for his omission to perform the specific acts or acts for which the adjournment was granted at his instance. A similar view was expressed by Bhave, J. in *Lakhanlal v. Dasrolal*, 1967 Jab LJ (Short Note) 95. It appears that this line of reasoning was adopted by the Division Bench consisting of Shiv Dayal and K. K. Dube, JJ. in *Madanlal v. Narayan* (supra) holding that it is not open to the Court to proceed under Rule 3 of Order 17 in the absence of a party. It is not clear from the Judgment whether the contrary view expressed in some cases was taken into consideration or not.

5. In *Kanhaiyalal v. Usmanali*, 1960 Jab LJ (Short Note) 174, P. R. Sharma, J., expressed the view that the non-appearance of a party would not be a sufficient ground for holding that the provisions of Rule 3 of Order 17 are not attracted. A similar view was expressed by him in *Sunderlal v. Motilal*, 1962 Jab LJ (Short Note) 169. It was held in that case that the mere fact that the plaintiff absented himself would not be a ground for not applying the provisions of Rule 3 of Order 17 to the case. In *Basalingappa v. Shidramappa*, AIR 1943 Bom 321 (FB), the Bombay High Court considered a case where a party, at whose instance an adjournment had been granted, remained absent on the adjourned date. It was held that in such a case, if there are no materials on record, the appropriate procedure to follow would be that laid down in Rule 2 of Order 17; but if there are materials on re-

cord, the Court ought to proceed under Rule 3 of Order 17. The Gujarat High Court adopted a similar view in *Ismail Suliman v. State*, AIR 1971 Guj 42. It was held therein that where a suit has already begun and is part heard and for the further progress it has come to be adjourned at the instance of the party who commits default in appearance on the adjourned date, the Court has to proceed with the suit on merits under Rule 3 rather than under Rule 2 of Order 17. The Delhi High Court also took the same view in *Dayal Chand v. Sham Mohan*, AIR 1971 Delhi 183. In the Code of Civil Procedure by Chitaley, Eighth Edition, Vol. 2, at page 1233, the cases of other High Courts, which have adopted this view, have been mentioned and it is not necessary to refer to all of them here.

6. It is thus clear that a number of High Courts have adopted the view that it is open to the Court to proceed under Rule 3 of Order 17 even in the absence of the party at whose instance the case was adjourned, although it would not be proper to do so where there is no sufficient material on record to enable the Court to decide the case on merits.

7. As the matter turns on the construction of rules 2 and 3 of Order 17 of the Code of Civil Procedure, it is necessary to examine carefully the language of the said rules which are reproduced below:

"R. 2. Where, on any day to which the hearing of the suit is adjourned, the parties or any of them fail to appear, the Court may proceed to dispose of the suit in one of the modes directed in that behalf by Order IX or make such other order as it thinks fit."

"R. 3. Where any party to a suit to whom time has been granted fails to produce his evidence or to cause the attendance of his witnesses, or to perform any other act necessary to the further progress of the suit, for which time has been allowed, the Court may, notwithstanding such default, proceed to decide the suit forthwith."

8. It would be pertinent to notice that there is nothing in the language of Rule 3 to indicate that it comes into operation only where the party in default is present and that the powers conferred thereunder cannot be exercised in his absence. The reason is obvious. Where a party commits a default of the nature specified in Rule 3 after securing an adjournment for the purpose, Rule 3 empowers the Court to decide the suit on merits. If the Court can do so in the presence of the party at fault he cannot deprive the Court of this power merely by remaining absent even assuming that there is good cause for his absence. The view that Rule 3 of Order 17 presup-

poses the appearance of the party at whose instance the case was adjourned is apparently based on the consideration that it would not be proper for the Court to exercise its powers under the said Rule unless the party concerned is present and has thus an opportunity to offer an explanation for his default. But if we carefully analyse the scheme of the Code it would appear that wherever the Court has been empowered to pass a particular order on account of the default of a party, it is not necessary that the party should have an opportunity to offer an explanation for the default. For example, a suit may be dismissed by the Court in the absence of a plaintiff under Order 9, Rule 3 or under Order 9, Rule 8. There can be no doubt that the Court is competent to dismiss the suit merely on account of the absence of the plaintiff without waiting to find out whether he has a good reason to remain absent or not. What remedy a party may have to pursue when a suit is decided one way or the other on account of default is another matter. We are, therefore, unable to accept the view that the Court is not competent to decide a suit under Order 17, Rule 3 in the absence of the party concerned.

9. Rule 2 of Order 17 expressly deals with the procedure to be followed by the Court where the parties or any of them fails to appear on any day to which the hearing of the suit is adjourned. Under this rule the Court has a discretion either to dispose of the suit in one of the modes directed in that behalf by Order 9 or to make such other order as it thinks fit. The expression "or make such other order as it thinks fit" in the said rule is wide enough to include an order disposing of the case under Rule 3 of Order 17. It is, therefore, clear that where the case falls within the purview of Rule 3, the Court, in the absence of the party concerned, is not bound to dispose of the suit in one of the modes directed in that behalf by Order 9; but has a discretion to decide the suit on the material before it.

10. Thus it would appear that Rule 3 postulates a decision on merits upon material that may be available irrespective of the consideration whether the party in default is present or not. Where a party remains absent after obtaining an adjournment for producing evidence or doing any other act necessary for the progress of the suit the Court has a discretion to proceed either in one of the ways laid down in Order 9 or to proceed to dispose of the suit on merits under Rule 3. This discretion must, however, be exercised on sound judicial principles keeping in view the stage of the suit and the conduct of the party concerned during the trial. We find nothing in either Rule 2 or Rule 3 to fetter the discretion

of the Court from proceeding under Rule 3 merely because the party at whose instance the case was adjourned chooses to remain absent. There may be a case where the entire evidence has been recorded and at that stage the defendant seeks an adjournment for producing a document or a witness. In such a case, if the defendant remains absent on the adjourned date, the Court may proceed to dispose of the suit on merits and the decree passed cannot be treated as an ex parte decree. Thus, where the Court expressly decides a suit under Rule 3 of Order 17, the proper remedy for the party concerned would be to file an appeal. In such a case, if the appellate Court finds that the lower Court was not justified in proceeding under Rule 3 of Order 17, it may substitute the order of the lower Court by an order under Rule 2 of the said Order giving the party concerned an opportunity to make an application for setting it aside under the relevant provisions of Order 9; but it is not bound to do so where it is satisfied that the lower Court was justified in deciding the case on merits in the circumstances of the case.

11. We may here observe that the provisions of Rule 3 of Order 17 being of stringent nature should not ordinarily be applied by the Court in the absence of the party concerned unless there is sufficient material on record to give a decision on merits and the Court considers it just and proper to do so in the circumstances of the case. But we would like to make it clear that the Court has jurisdiction to proceed under Rule 3 of Order 17, even in the absence of a party and, where it chooses to exercise this jurisdiction — even though wrongly — the proper course for the party concerned would be to prefer an appeal. Where a suit has been decided in the absence of a party and it is not clear whether the Court has proceeded under Rule 2 or Rule 3 of Order 17, it must be assumed that the Court has proceeded under Rule 2.

12. We may here refer to the decision of the Supreme Court in *Arjunsingh v. Mohindra Kumar*, AIR 1964 SC 993, on which *Shri Y. S. Dharmadhikari*, learned counsel for the respondent, strongly relied in support of his contention that it is open to the Court to proceed under Rule 3 of Order 17 even in the absence of the party concerned. He pointed out that from the discussion in paragraph 22 of the judgment it is clear that their Lordships proceeded upon the view that absence of a party did not automatically make the provisions Rule 3 of Order 17 inapplicable. There seems to be some force in this argument.

13. We, therefore, answer the questions referred to us as under:

(1) It is open to the Court to proceed under Order 17, Rule 3 of the Code of

Civil Procedure in the absence of a party where the conditions laid down in the said rule are fulfilled and it appears just and proper to do so.

(2) Where the Court has proceeded to decide the case on merits under Order 17, Rule 3 of the Code of Civil Procedure in the absence of a party, it is not open to the party aggrieved by the decision to file an application for setting aside the decree under Order 9 of the Code.

(3) Where the party aggrieved prefers an appeal against a judgment and decree passed under Order 17, Rule 3 of the Code of Civil Procedure, the appellate Court is not bound to allow the appeal, merely on the ground that the Court had no jurisdiction to pass an order under Order 17, Rule 3, of the Code against the party who was absent. The appellate Court, in such a case, will have to examine whether the lower Court properly exercised its jurisdiction in proceeding under Order 17, Rule 3. If it is of the view that the lower Court rightly proceeded under Order 17, Rule 3, in the circumstances of the case and the decree passed by it is otherwise proper, it may dismiss the appeal. But, if it is of the view that the lower Court should not have proceeded under Order 17, Rule 3, it may substitute an order under Order 17, Rule 2 of the Code of Civil Procedure, leaving the defaulting party to take recourse to an appropriate remedy under Order 9 of the Code in the lower Court.

Answer accordingly.

**AIR 1976 MADHYA PRADESH 25
FULL BENCH***

P. K. TARE C. J., S. M. N. RAJIA
AND M. L. MALIK, JJ.

Ashok Kumar Mukherjee, Petitioner v.
The Registrar of High Court of Madhya
Pradesh and another, Respondents.

Misc. Petn. No. 421 of 1971. D/- 27-6-1975.**

*(Note: In this case, the Judges of the Full Bench differ in their views on question No. 3 out of the three questions referred to it. They concur on questions Nos. 1 and 2. The majority view on the third question referred is taken by Tare C. J. and Malik J. and the minority view by Rajia J. The judgments in the case are, however, printed in the order in which they are given in the certified copy.—Ed.)

** (Reference made to Full Bench by P. K. Tare and R. J. Bhawe JJ. on 6-4-1972.)

LS/LS/E260/75/DHZ

(A) Constitution of India, Arts. 14, 16 — Maintenance of separate List of Civil Judges Class I — Whether creation of new cadre — Whether Arts. 14 and 16 violated.

Maintenance of a separate list of Civil Judges, Class I, counting their seniority from the date they are appointed as Civil Judges, Class I, does not amount to creation of a new cadre. In considering the names of Civil Judges, Class I, in the order in which they are shown in the said list for promotion as Additional District Judges Articles 14 and 16 of the Constitution are not violated. AIR 1973 SC 1271. (Reversing 1972 Lab IC 95 (Madh Pra)), Foll. (Para 4)

(B) Constitution of India, Art. 311 (2) — Reduction in rank — Withdrawal of powers of Civil Judge Class I and asking him to exercise powers of Civil Judge Class II — No reduction in rank.

(Per Majority, Raina J., Contra):— In the State of Madhya Pradesh there is only one cadre of Civil Judges, governed by one set of service conditions, without any compartments or grades. The Madhya Pradesh Civil Courts Act, no doubt has created two types of Courts, the Court of Civil Judge, Class I, exercising a little wider pecuniary jurisdiction than that of the Court of Civil Judge, Class II, but classification of Courts would neither constitute a cadre within a cadre, nor would the cadre-strength be determined by the number of such Courts created. The High Court cannot, by adopting a resolution that the selection of a Civil Judge for exercising the power of a Class I Court would be deemed as promotion and that the further promotion of an Additional District Judge would be made from out of those Civil Judges exercising Class I powers in order of their seniority in that list, create a new cadre, or cadre within cadre, of a superior type. The Government has, by placing all Civil Judges under the same pay-scale, refused to recognize the two categories as separate entities for the purposes of rank. The Civil Judges form but one unit whether they function as Class II Courts or as Class I Courts. There is neither promotion nor reduction in rank upon conferral of powers or withdrawal of powers. The mere fact that a list of Civil Judges Class I is prepared would not give the person included in the list an indefeasible right to promotion as an Additional District Judge. Hence the withdrawal of powers of a Civil Judge, Class I, from a Civil Judge and asking him to exercise powers of Civil Judge, Class II does not amount to "reduction in rank". Where the chances of promotion recede, the same can never be equated with reduction in rank or where there is loss of seniority, the same can also

not be considered to be reduction in rank. AIR 1973 SC 1271, Foll.

(Paras 26, 30, 34, 35)

Cases Referred:	Chronological	Paras
AIR 1973 SC 1271 = 1973 MPLJ 680 =		
1973 Lab IC 849	4, 12, 42	
(1971) 2 Serv LR 458 = ILR (1971) 1		
Delhi 754	13, 14, 31	
1972 Lab IC 95 = 1971 MPLJ 973	3, 4, 11, 17, 22, 23, 42	
AIR 1967 SC 1864 = (1967) 3 SCR 627	15, 32	
AIR 1966 SC 1197 = (1966) 3 SCR 61	33	
AIR 1966 SC 1529 = (1966) 3 SCR 106	33	
AIR 1962 SC 1704 = (1963) 1 SCR 437	33	
AIR 1958 SC 36 = 1958 SCR 828	18, 25, 39, 43	

K. P. Munshi with Y. K. Munshi, for Petitioner; Y. S. Dharmadhikari, Advocate General with J. P. Bajpai, Dy. Advocate General, for Respondents.

RAINA, J.:— This is a petition under Articles 226 and 227 of the Constitution of India for quashing the reversion of the petitioner from the post of Civil Judge, Class I to the post of Civil Judge, Class II.

2. The petitioner was appointed as Civil Judge in 1962, and was confirmed in 1964. He was initially posted as Civil Judge, Class II and continued to occupy that post until he was appointed as Civil Judge Class I at Umaria on 24-5-1968. On 13-5-1969, he was transferred to Seoni as Civil Judge Class II vide Annexure 'B'. According to the petitioner, this amounted to reduction in rank. He, therefore, challenged the order dated 13-5-1969 on the ground that it was in contravention of Article 311 of the Constitution and also on the ground that it was in violation of Articles 14 and 16 thereof.

3. The Division Bench of this Court before which the petition came up for hearing referred the following questions for decision to a larger Bench in view of the decision of this Court in *B. A. Nigam v. Registrar, High Court of M. P.*, 1971 MPLJ 973 = (1972 Lab IC 95).

(1) Whether it is correctly decided in *E. A. Nigam v. Registrar, High Court of M. P.* (supra) that maintenance of a separate list of Civil Judges, Class I, counting their seniority from the date they are appointed as Civil Judges, Class I, amounts to creation of a new cadre?

(2) Whether in considering the names of Civil Judges, Class I, in the order in which they are shown in the said list, Articles 14 and 16 of the Constitution are violated?

(3) Whether the withdrawal of powers of a Civil Judge, Class I, from a Civil

Judge and asking him to exercise powers of Civil Judge, Class II, amounts to 'reduction in rank'?

4. Before we proceed to deal with the aforesaid questions it would be pertinent to take note of the fact that the decision of this Court in *B. A. Nigam v. Registrar, High Court of M. P.*, 1971 MPLJ 973 = (1972 Lab IC 95), has been set aside by the Supreme Court in *Registrar of High Court of M. P. v. B. A. Nigam*, 1973 MPLJ 680 = (AIR 1973 SC 1271). Learned counsel for both the sides frankly conceded that in view of the decision of the Supreme Court the first two questions have to be answered in the negative. We, therefore, do not consider it necessary to deal with this matter any further and answer the first two questions in the negative.

5. The controversy before us was confined to the third question. The point for consideration in connection with this question is whether the posting of a Civil Judge, Class I as Civil Judge, Class II amounts to reduction in rank. This question assumes importance particularly in the context of Articles 311 of the Constitution of India. The word 'rank' has not been defined in the Constitution. Its ordinary dictionary meaning is "an official grade or position". It also means "a relative position usually in a scale classifying persons or things." (Webster's New World Dictionary, Second College Edition page 1176). According to 'Black's Law Dictionary' Fourth Edition, page 1426 it signifies "grade of official standing".

In 75 C. J. S. at page 458 'Rank' is defined as meaning "grade of official standing". Bearing in mind the aforesaid meaning of the word "rank" we may examine the question referred to us. For a proper examination of this question it is necessary to take note of the following facts. There is one single cadre of Civil Judges borne on a uniform scale of pay. There are no separate cadres of Civil Judges Class I and Civil Judges Class II with different scales of pay.

6. Section 3 of the Madhya Pradesh Civil Courts Act, 1958 (hereinafter referred to as 'the Act') however, lays down that there shall be the following classes of Civil Courts, namely:—

- (1) the Court of the District Judge;
- (2) the Court of the Additional District Judge;
- (3) the Court of the Civil Judge (Class I); and
- (4) the Court of the Civil Judge (Class II).

Section 6 of the Act provides that the Court of Civil Judge (Class II) shall have jurisdiction to hear and determine any suit or original proceeding of a value not exceed-

ing Rs. 5,000/- while the Court of Civil Judge (Class I) shall have jurisdiction to hear and determine any suit or original proceeding of a value not exceeding Rupees 10,000/-.

7. A Civil Judge is originally appointed as Civil Judge, Class II and it is only after he has gained sufficient experience of judicial work that he is posted as Civil Judge, Class I. Usually a Civil Judge, Class II of 5 or 7 years standing is posted as Civil Judge, Class I.

8. Under Section 5 of the Act, the State Government is empowered to establish as many Courts of Civil Judges, Class I or Civil Judges, Class II for each Civil District as it may think fit. Thus there is only a limited number of Courts of Civil Judges, Class I as established by the State Government under the said section and the number of posts of Civil Judges, Class I available is equivalent to the number of Courts established by the Government. Under Section 8 of the Act, a Civil Judge may be appointed as Additional Judge to the Court of Civil Judge, Class I and thus additional posts of Civil Judges, Class I can be created under the said section. In any case the number of posts available for appointment as Civil Judge, Class I or Additional Civil Judge, Class I is limited. There being a single cadre of Civil Judges, usually the senior ones amongst them are posted as Civil Judges, Class I. It appears that originally, although some seniority was considered essential for posting as Civil Judge, Class I, the appointment to such post was not strictly in accordance with the seniority. Often such postings were made on the basis of practical convenience. For example, in a small place a Civil Judge, Class II may be appointed as Civil Judge, Class I to deal with suits upto the value of Rs. 10,000/- even though many Civil Judges senior to him may not be appointed to work as Civil Judges, Class I elsewhere. This did not, however, affect the chances of promotion of other Civil Judges who were senior, the appointment being treated as purely fortuitous.

9. On or about the 3rd May, 1968 a new principle was introduced by the High Court for promotion of Civil Judges to the post of Additional District and Sessions Judges. That principle was that for such promotion the seniority was to be counted from the date when he first exercised the powers of Civil Judge, Class I. Finally this was formally accepted and adopted on October 1, 1969 by the following resolution passed in a meeting of the Court:

"Resolved that selection of a Civil Judge, Class II, as a Civil Judge, Class I, shall be deemed as promotion and that being so, only

the cases of Civil Judges, Class I, shall be considered for promotion as Additional District and Sessions Judges in order of their seniority."

10. In our view, the effect of the aforesaid resolution was to sub-divide the cadre of Civil Judges into two parts—one consisting of posts of Civil Judge, Class II, and the other of posts of Civil Judges, Class I—even though the posts in both the parts carried the same scale of pay. In pursuance of the aforesaid resolution, there was a regular screening and selection of Civil Judges, Class II, for promotion as Civil Judges, Class I, and the date of appointment as Civil Judge, Class I, was treated as the material date for determining the inter se seniority of Civil Judges holding the posts of Civil Judges, Class I. The promotion to the post of Additional District Judge was exclusively from the posts of Civil Judges, Class I. No Civil Judge, Class II, could be directly promoted as Additional District and Sessions Judge.

11. Bearing in mind the dictionary meaning of the word "rank" as well as the legal connotation of this word, it would appear to us that the post of a Civil Judge, Class I, must be treated as one of superior grade or rank than that of Civil Judge, Class II, particularly after the adoption of the aforesaid resolution by the High Court. This conclusion is fully supported by the stand taken by the High Court in B. A. Nigam's case, (1972 Lab IC 95 Madh Pra). We may here refer to the following statements made in the return filed by the Registrar, High Court of Madhya Pradesh in Miscellaneous Petition No. 537 of 1969 vide Annexure E:

In paragraph 8 of the return it was stated as under—

"Before a Civil Judge, Class II, is appointed as Civil Judge, Class I, having higher pecuniary jurisdiction and carrying greater powers, his suitability, which is a matter of selection and screening, is considered."

In paragraph 11 of the said return it was stated as under:

"If a Civil Judge, Class I, is to be sent as Civil Judge, Class II, it would be derating his superior position, status and jurisdiction from a higher class to a lower class, hence it would further come in his way of being considered amongst Civil Judges, Class I for promotion to the cadre of Additional District and Sessions Judge." Further, in paragraph 12 it was stated as under:

"As submitted earlier, the distinction in the categories of Civil Judges, Class I, and II is real and substantial for a Civil Judge, Class II, who is found unsuitable to be

taken in the Class of Civil Judge, Class I, cannot be considered suitable for his promotion as Additional District and Sessions Judge."

It would be clear from the aforesaid assertions made by the Registrar on behalf of the High Court in that case that the posts of Civil Judges, Class I, are to be treated as of higher rank and grade, and as such reversion to the post of Civil Judge, Class II, amounts to reduction in rank.

12. An argument has been advanced on behalf of the State that posting of a Civil Judge as Civil Judge, Class I, merely implies that he is invested with higher powers and it cannot be construed as promotion to a post of higher rank. There might have been some force in this contention, if separate Courts of Civil Judges Class I, had not been established by the Government, and Civil Judges, Class II, could be invested with powers to deal with suits upto Rs. 10,000/- just as they can be invested with the powers of Small Cause Courts under Section 9 of the Act. Moreover, the resolution of the High Court has made all the difference. It clearly says that the selection of a Civil Judge, Class II, as Civil Judge, Class I, shall be deemed as promotion, and promotion means being raised to a higher position or rank. It is significant that their Lordships also used the word 'promotion' in the context of appointment of Civil Judges, Class II, as Civil Judges, Class I, twice in paragraph 3 of the judgment in Registrar of High Court of M. P. v. B. A. Nigam, (AIR 1973 SC 1271) (supra). Thus, keeping in view the scheme of the Act and the principle adopted by the High Court by the aforesaid resolution, it is quite clear to us that there is a regular selection of Civil Judges holding the posts of Civil Judge, Class II, for promotion and posting as Civil Judge, Class I, the post of Civil Judge, Class I, being treated as a post of superior rank. It, therefore, follows that if a Civil Judge holding the post of a Civil Judge Class I, is reverted and posted as Civil Judge, Class II, it clearly amounts to his reduction in rank.

13. It has been urged that the expression "reduction in rank" in clause (2) of Article 311 of the Constitution should be construed in a technical sense in which it is used in the Madhya Pradesh Civil Services (Classification, Control and Appeal) Rules, 1965. Reliance in this connection has been placed on the decision of the Delhi High Court in S. K. Shrivastava v. Union of India, (1971) 2 Serv LR 453. But, even if it is so construed, it would not make any difference in this case. Rule 6 of the said Rules classifies the Civil Services of the State into Class I, Class II, Class III and Class

IV; but this classification is not exhaustive. Moreover from sub-rule (2) of the said Rule it would appear that a service in a particular class may consist of more than one grade. Rule 9 of the said Rules specifies reduction to a lower service, grade or post as one of the penalties which may be imposed on a Government servant. The post of a Civil Judge, Class II, as pointed out above, is clearly a post of a lower grade than the post of a Civil Judge, Class I, even though both the posts are borne on the same scale of pay.

14. The learned Advocate General relied strongly on the observations of the Delhi High Court in paragraph 17 of the judgment in S. K. Shrivastava v. Union of India, (1971) 2 Serv LR 453 (supra) in support of his contention that the scale of pay of a post is the sole criterion to determine the rank of the post. The scale of pay is no doubt an important criterion; but there are other factors which are equally important.

15. In our view, it would be erroneous to assume that there is no reduction in rank so long as there is no loss of emoluments. In K. Gopaul v. The Union of India, AIR 1967 SC 1864, their Lordships, while considering the question whether any reduction in rank was involved took into account various factors, apart from the scale of pay itself. There can be posts of various grades in the same scale of pay. In such a case reversion of a person from the post of a higher grade to a lower grade would amount to reduction in rank even though no loss of emoluments is involved thereby. For purposes of illustration it may be pointed out that it is open to the Government to create in the State Education Service a single cadre on a uniform scale of pay which may cover the posts of teachers as well as Headmasters. Reversion from the post of Headmaster to the post of teacher may not in such a case involve loss of emoluments but it would certainly amount to reduction in rank.

16. We, therefore, hold that the withdrawal of powers of Civil Judge, Class I, from a Civil Judge and asking him to exercise the powers of a Civil Judge, Class II, amounts to reduction in rank, because he cannot be considered for promotion as Additional District and Sessions Judge unless and until he is again promoted as Civil Judge, Class I, and even then his chances of promotion will be based on his seniority as Civil Judge, Class I, as counted from the date of his second promotion.

17. We, therefore, answer the questions referred to us as under:—

Question

- (1) Whether it is correctly decided in *B. A. Nigam v. Registrar, High Court of M. P.*, 1971 MPLJ 973 = (1972 Lab IC 95), that maintenance of a separate list of Civil Judges, Class I, counting their seniority from the date they are appointed as Civil Judges, Class I, amounts to creation of a new cadre?
- (2) Whether in considering the names of Civil Judge, Class I, in the order in which they are shown in the said list, Articles 14 and 16 of the Constitution are violated?
- (3) Whether the withdrawal of powers of a Civil Judge, Class I, from a Civil Judge and asking him to exercise the powers of Civil Judge, Class II, amounts to 'reduction in rank'?

Answer

No.

No.

Yes.

18. Before we conclude, we would like to observe that it is settled law that Article 311 of the Constitution is not attracted in every case of reduction in rank. As pointed out by their Lordships of the Supreme Court in *Parshotam Lal Dhingra v. Union of India*, AIR 1958 SC 36, Article 311 is attracted only where such reduction amounts to punishment.

19. Shri K. P. Munshi, learned counsel for the petitioner, cited a number of decisions of the Supreme Court on the point to show that the reversion of the petitioner in this case amounted to reduction in rank by way of punishment. But we do not consider it necessary to go into the question whether the reduction in rank in this case was by way of penalty or not, as it has not been referred to us. That would be a separate question to be determined by the Division Bench on the basis of the material on record.

20. We answer the reference accordingly.

MALIK, J.:— 21. I had the advantage of reading the draft order prepared by Brother Raina, J. I regret, I am unable to agree with him that withdrawal of powers of Civil Judge, Class I, from a Civil Judge and asking him to exercise the powers of Civil Judge, Class II, would amount to "reduction in rank". In the view I have taken, the answer to the question should be in the negative, that is, withdrawal of powers would not amount to "reduction in rank."

22. Brother Raina, J. has lucidly stated the facts leading to the making of this reference to a larger Bench. The Division Bench hearing the matter was of the opinion that decision in *Nigam's case* *F. A. Nigam v. Registrar of the High Court of Madhya Pradesh, Jabalpur*, 1971 MPLJ 973 = (1972 Lab IC 95), required a reconsideration on the following points:

(i) Whether it is correctly decided in *B. A. Nigam v. Registrar, High Court of M. P.* (supra) that maintenance of a separate list of Civil Judges, Class I, counting their seniority from the date they are appointed as Civil Judges, Class I, amounts to creation of a new cadre?

(ii) Whether in considering the names of Civil Judges, Class I, in the order in which they are shown in the said list, Articles 14 and 16 of the Constitution are violated?

(iii) Whether the withdrawal of powers of a Civil Judge, Class I, from a Civil Judge and asking him to exercise powers of Civil Judge, Class II, amounts to "reduction in rank"?

23. Nigam's case, (1972 Lab IC 95 (Madh Pra), went up in appeal to the Supreme Court and the order of this Court was set aside. The said judgment of the Supreme Court is reported in *Registrar of High Court of Madhya Pradesh v. B. A. Nigam*, 1973 MPLJ 680 = (AIR 1973 SC 1271). The judgment of the Supreme Court came to be delivered after the order of reference was made. The task is now easy, since I find, all the three questions raised by the Division Bench have been expressly or by implication answered in that judgment. Brother Raina, J. has, however, answered the first two questions in the negative in view of the Supreme Court's pronouncements in Nigam's case. The answers are that maintenance of a separate list of Civil Judges, Class I, by the High Court, does not amount to creation of a new cadre, and that consideration of the Civil Judges, Class I, in the order in which they have been shown in that list, for promotion as Additional District Judges, does not violate Articles 14 and 16 of the Constitution.

24. Raina, J., does not read into the judgment the answer to the third question.

He says that the point is neither expressly nor by implication decided. For reasons given in his order, he is of the opinion that withdrawal of powers of Civil Judge, Class I, from a Civil Judge and to post him as a Civil Judge, Class II, would amount to "reduction in rank". And this is where I disagree and I propose to give my own reasons.

25. "Reduction in rank" has a technical meaning envisaged as a punishment. The expression is derived, very probably, from the Civil Services (Classification, Control and Appeal) Rules, 1930, and signifies "reduction to a lower post, or to a lower time-scale or to a lower stage in the same time-scale." That was the meaning attributed to the expression in Dhingra's case *P. L. Dhingra v. Union of India*, AIR 1958 SC 36. To the same effect is Fundamental Rule 15 which says that "the lien of a person cannot be transferred to a lower post or to a lower time-scale without his consent except for misbehaviour, that is, by way of punishment."

26. The admitted position in our State is that there is only one cadre of Civil Judges, governed by one set of service conditions, without any compartments or grades. The Madhya Pradesh Civil Courts Act, no doubt, has created two types of Courts, the Court of Civil Judge, Class I, exercising a little wider pecuniary jurisdiction than that of the Court of Civil Judge, Class II. But classification of Courts would neither constitute a cadre within a cadre, nor would the cadre-strength be determined by the number of such Courts created. Creation of cadre, that is, determining the unit of service and its strength, is a function which the State Government performs under Entry 41 of List-II read with Article 162 of the Constitution. That is essentially an executive function. The High Court cannot, by adopting a resolution that the selection of a Civil Judge for exercising the power of a Class I Court would be deemed as promotion and that the further promotion of an Additional District Judge would be made from out of those Civil Judges exercising Class I powers in order of their seniority in that list, create a new cadre, or cadre within cadre, of a superior type. It would again be wrong to suggest that the strength of the new cadre of Civil Judges, Class I would be the same as the number of Class I Courts created by the State Government under the Madhya Pradesh Civil Courts Act. The fallacy of the suggestion can be explained thus. The State Government creates 45 Courts of Civil Judges. But the cadre strength of Civil Judges is say, just 30. The work has to be managed by thirty Judges, some Courts functioning whole-time and some as Circuit Courts. The cadre strength and the number of Courts could thus be different.

27. The State Government have not agreed to create a separate cadre of Civil Judges Class I and to sanction a higher pay-scale to them. They have appointed Civil Judges under a uniform time-scale and have determined their strength, leaving the choice to the High Court as to which of them should preside over the Courts of Civil Judge Class II and which of them over the Courts of Civil Judge Class I. The unit of service, despite some exercising higher powers and some lower powers, remains but one integrated whole, insofar as their service conditions are concerned. Just because some Civil Judges are required to man Courts of higher jurisdiction and some of lower jurisdiction, those who man the higher Courts do not acquire any superior rank or status. Unless the service conditions recognized the exercise of higher powers, conferring on them higher rank, all those would but constitute one unit.

28. Our Civil Judges work as magistrates also and if classification were to be made on the basis of powers conferred upon them, they could be put in a number of categories, such as Civil Judge Class II-Magistrate 2nd Class, Civil Judge Class II-Magistrate 1st Class, Civil Judge 1st Class-Magistrate 1st Class, Civil Judge 1st Class-Chief Judicial Magistrate, Civil Judge Class II with small cause powers, aside Civil Judges who work as Railway Magistrates, Municipal Magistrates, Traffic Magistrates and Special Magistrates and so on. It would be a dangerous proposition to split up the unit of service on the basis of powers conferred on each individual Judge. Neither would conferral of powers upon a Civil Judge give him higher rank in the sense of promotion to higher grade or post, nor would withdrawal of powers be a reduction in rank in the sense that expression has to be understood.

29. The question to ask is this. Does a Civil Judge, when he functions as Presiding Officer of the Court of Civil Judge, Class I, officiate on a higher post? The word 'officiate' has a technical meaning of its own. While officiating on a higher post, the person is supposed to retain a lien on his substantive post. He is supposed to officiate to a higher post where the incumbent of that post has proceeded on leave or deputation and holds a lien, or where the post is lying vacant. Could we, by any stretch of imagination, say that the Civil Judge retained his lien on his substantive post of Civil Judge Class II, when he was posted to function as Civil Judge, Class I? We could not possibly say so unless the strength of that higher unit was determined by an express executive order and unless that unit was recruited directly or by promotion.

30. It logically follows that a Civil Judge, while presiding over the Court of Civil Judge, Class I, is not officiating on a higher post and his work cannot be deemed to involve the assumption of duties or responsibilities of any greater importance. The Government has, by placing all Civil Judges under the same pay-scale, refused to recognize the two categories as separate entities for the purposes of rank. The Government has recognized the first higher rank to that of a Civil Judge, to be that of an Additional District Judge. When powers are conferred on a Civil Judge to preside over a Class I Court, it is not in fact a promotion and transfer, either substantively or on officiating basis, on a post in a superior cadre. There is no cadre, no confirmation, no lien, no officiation, no permanency, as we understand by Service Rules, when Civil Judge is posted as Civil Judge, Class I. The Civil Judges form but one unit whether they function as Class II Courts or as Class I Courts. There is neither promotion nor reduction in rank upon conferral of powers or withdrawal of powers.

31. I may usefully reproduce here the placitum in *S. K. Srivastava v. Union of India*, (1971) 2 Serv LR 453 (Delhi), explaining the meaning of the word 'rank' as understood by service rules and the Constitution of India, Article 311 (2):

"The word 'rank' as used in Art. 311 (2) of the Constitution has not been defined. But it is well-established that the words 'dismissal, removal and reduction in rank' have a technical significance due to the special meanings attached to them historically from the very beginning. The meaning so attached to the word 'rank' is that it is a class or a grade of service. The classes or the grades relevant for this purpose are those which are arranged in an ascending or a descending order, that is to say they must be one above the other or one below the other.

The word 'rank' has, therefore, a strictly service law significance. One rank is distinguished from another only by the classification of services or of posts within which they respectively fall.

The concept of 'rank' being solely significant for the purposes of administration of services and the law relating to it, the Government has always applied the criterion of pay to distinguish one class or grade of service or post from another. In fixing the pay of a particular post or the scale of pay of a particular service, the Government considers the status and responsibility attached to a particular post or class of service.

The pay itself is determined by the Government after taking into account the nature of the duties involved in the post. As the Government would have already taken

into account the nature of duties, responsibilities and the status of different posts before classifying them and would have indicated the classification by the fixation of different salaries, or pay scales, the Courts should be well advised in regarding the pay or the scale of pay of a post as the principal criterion to determine the rank of the post. Further, the Courts are not in the same position as the Government is in determining the nature of duties, responsibilities and status of a particular post; and in comparing those with the nature of duties, responsibilities and status of another post. It would not be advisable, therefore, for the Courts to ignore the classification made by the Government as indicated by the emoluments fixed by the Government and try to determine afresh the rank of a particular post by having regard to consideration other than the pay specially because these considerations, have already been taken into account by the Government in fixing the pay or the pay-scale of a particular post."

The emphasis towards the end is that the Courts should not ignore the classification made by the Government which is indicated by the pay-scale, a particular grade carried, and try to determine afresh the rank of a particular post by having regard to the nature of duties performed and such other considerations.

32. Brother Raina, J. relying on the authority of *K. Gopal v. The Union of India*, AIR 1967 SC 1864, observed that the pay-scale was not the only factor to be taken into account in deciding whether a person had suffered reduction in rank. There could be posts of various grades in the same scale of pay. For instance, he says, the Head-Master and the other teachers could be borne on the same pay-scale but reversion of the Head-Master to the post of a teacher would be reduction in rank.

In my reading of the *K. Gopal's* authority, I find the ratio to be something different. *K. Gopal* was Inspector General of Registration. He was transferred to the post of 'Accommodation Controller', a post carrying the same scale of pay, both posts included in I. A. S. Cadre. *K. Gopal's* contention was that his transfer to the latter post was reduction in rank firstly because the latter post was not the post of the Head of the Department and secondly because the post of Inspector General was superior in rank to that of Deputy Secretary and that of Controller was not. Their Lordships observed:

"That the plea taken by *K. Gopal* was without force. The fact that the latter post was not designated as that of a head of department was of no consequence as rank in Government service did not depend upon the mere circumstances that the Government

servant in the discharge of his duties is given certain powers. In Government service, there may be senior posts, the holders of which are not declared Heads of the Department, while persons holding junior posts may be declared as such. Further, the post of I. G. could be filled up by transfer of a Deputy Collector or an Assistant Secretary and that showed that the post of I. G. is equated with them. The Accommodation Controller's post was not lower than that of a Deputy Collector or an Assistant Secretary."

The ratio seems to be that the rank does not depend upon the responsibilities an incumbent of a unit discharges, or whether he is the Head of the Department. So long the scale of pay is the same, he can be transferred to any post borne on the strength of that unit. The authority does not seem to support the view Raina, J. has taken.

33. I might as well cite the authority of the Supreme Court in *Amal Kumar Roy's case*, High Court, Calcutta v. *Amal Kumar Roy*, AIR 1962 SC 1704. The facts were these. The respondent was a Munsif in the West Bengal Civil Service (Judicial). When the cases of several Munsifs came up for consideration before the High Court for inclusion of names in the panel of officers to officiate as Subordinate Judges, the respondent's name was excluded. He was told by the Registrar of the Court, on a representation made by him, that the Court had decided to consider the case after a year. As a result of such exclusion, the respondent, who was then the seniormost in the list of Munsifs, lost eight places in the cadre of Subordinate Judges before he was actually appointed to act as an Additional Subordinate Judge. He filed a suit praying that a declaration might be made that he occupied the same position in respect of seniority in the cadre of Subordinate Judges as he would have done if no supersession had taken place. His case, in substance, was that as a result of the High Court's order he was reduced by eight places in the list of Subordinate Judges, and that in law amounted to reduction in rank within the meaning of Art. 311 (2) of the Constitution.

Their Lordships of the Supreme Court held:

"In our opinion, there is no substance in this contention because losing places in the same cadre, namely, of Subordinate Judges, does not amount to reduction in rank, within the meaning of Art. 311 (2). The plaintiff sought to argue that 'rank', in accordance with dictionary meaning, signifies 'relative position or status or place', according to Oxford English Dictionary. The word 'rank' can be and has been used in different senses in different contexts. The expression 'rank' in Art. 311 (2) has refer-

ence to a person's classification and not his particular place in the same cadre in the hierarchy of the service to which he belongs. Hence, in the context of the Judicial Service of West Bengal, 'reduction in rank' would imply that a person who is already holding the post of a Subordinate Judge has been reduced to the position of a Munsif, the rank of a Subordinate Judge being higher than that of a Munsif. But Subordinate Judges in the same cadre hold the same rank, though they have to be listed in order of seniority in the Civil List. Therefore, losing some places in the seniority list is not tantamount to reduction in rank. Hence, it must be held that the provisions of Art. 311 (2) of the Constitution are not attracted in this case."

The expression 'rank' has reference to person's classification in the hierarchy of service to which he belongs, and not to higher or lower responsibilities the incumbents of the same cadre discharge.

Amal Kumar Roy's decision has been quoted with approval in subsequent decisions of the Supreme Court in *The Divisional Personnel Officer, Southern Railway, Mysore v. S. Raghavendrachar*, AIR 1966 SC 1529 and *Shitla Sahai Srivastava v. General Manager, North Eastern Railway, Gorakhpur*, AIR 1966 SC 1197.

34. To revert to the decision of the Supreme Court in *Nigam's case*, it is implicit in their Lordships' judgment that there was no provision in the Service Rules for classifying Civil Judges as Class I and Class II and the power to make such classification vested with the Government and not with the High Court. Their Lordships, therefore, construed the resolution of the High Court in the following words:

"While it is true that the Service Rules do not provide for Civil Judges being classified as Class I Civil Judges and Class II Civil Judges, we cannot ignore the fact that the jurisdiction of the Class II Civil Judges is only upto Rs. 5,000 and that of Class I Civil Judges upto Rs. 10,000/-. The resolution of the High Court of May, 1968 should not be interpreted literally. If it is done in its proper background, it would be appreciated that what was done was not to create a new class of Civil Judges called Class I Civil Judges but to have a list of persons who were qualified to be posted as Class I Civil Judges and to provide that fitness for being posted as Class I Civil Judges and acting as such for some time should be considered as a qualification for promotion as Additional District and Sessions Judges."

Their Lordships have pointedly said that the resolution of the High Court could not be interpreted literally, clarifying further that the High Court had not created a new class

own account book. The court below rightly rejected the defendant's case in this behalf.

3. The second point that arises for determination is whether the partial discharge pleaded by the defendant is true. According to the defendant, he paid a sum of Rs. 1324 towards the suit bond on 1-2-1968 and at that time a further sum of Rs. 798 was surreptitiously collected by the plaintiff from the defendant on account of advance interest for a future period. The admitted endorsement on the bond shows that one Savarirajan paid a sum of Rs. 1824 to the plaintiff on 1-2-1968 and made an endorsement to that effect on the bond and that one Swaminathan wrote out this endorsement. Neither, Sowrirajan nor Swaminathan has been put into the witness box to speak to the story that a pie more than Rs. 1824 was paid by the defendant to the plaintiff on that date. The defendant's own account Ex. B.3 shows that only a sum of Rs. 1824 was paid towards the bond on 1-2-1968. When asked to explain why the alleged additional payment of Rs. 798 was neither endorsed on the bond nor entered in the defendant's own account book, the learned counsel for the appellant submitted that though it has not been entered in the account book on 1-2-1968, it has been entered on 4-7-1969, that is to say, one year and five months later. I find that the entry dated 4-7-1969 shows that a sum of Rs. 798 was paid, not to the plaintiff but to one A. M. S. Arunachala. Arunachala has not been examined. Further, there is no receipt to vouch the alleged payment. The entry Ex. B-3 does not show that it relates to the suit document, and even if it did, the belatedness of the entry remains unexplained. The entry being unilateral has been rightly rejected by the court below.

4. It is next contended that the defendant has paid a sum of Rs. 1000 towards the bond on 26-2-1969. One wonders why this payment has not been endorsed on Ex. A. 1 in the manner in which the payment of Rs. 1324 was endorsed. No receipt was also obtained from the plaintiff in respect of this payment. The uncorroborated and unilateral entry made by the defendant in his own account book has no evidentiary value, and it has been rightly discredited by the Court below. This point is answered against the appellant.

5. Learned counsel for the appellant raises for the first time before me a plea of law which was not raised either in the pleading or in the court below. According to the learned counsel, the hypothecation bond executed before the notaire was executable straightway under the French law without any suit being filed and any decree being obtained thereon, and the Court below therefore had no jurisdiction to entertain the suit on the mortgage. The suit was filed on 9-7-1970 after the introduction of the Indian Civil Procedure Code on 5-9-1968. The mortgage bond was executed on 29-9-1965, when the French Code Civil and the Code De Proce-

dures Civile were in full force. The law by which the Indian Civil Procedure Code and certain other Indian enactments were extended to Pondicherry is the Pondicherry (Extension of Laws) Act 1968. Section 4 (1) of that Act says that any law in force in Pondicherry or any area thereof corresponding to any Act referred to in sub-sec. (1) of Section 3 or any part thereof (except in so far as such law continues to be applicable to Renoncants) shall stand repealed as from the coming into force of such Act in Pondicherry. Clause (2) of Section 4 says that nothing in sub-section (1) shall affect (a) the previous operation of any law so repealed or anything duly done or suffered thereunder; or (b) (any right, privilege, obligation or liability acquired, accrued or incurred under any law so repealed; or (c) any penalty, forfeiture or punishment incurred in respect of any offence committed against any law so repealed; or (d) any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid, and any such investigation, legal proceedings or remedy may be instituted, continued or enforced and any such penalty, forfeiture or punishment may be imposed as if this Act had not been passed. The proviso to Sec. 4 runs as follows—

“Provided that anything done or any action taken (including any appointment or delegation made, notification, instruction or direction issued, from, bylaw or scheme framed, certificate obtained, permit or licence granted, or registration effected) under any such law, shall be deemed to have been done or taken under the corresponding provision of the Act extended to Pondicherry by this Act shall continue to be in force accordingly unless and until superseded by anything done or any action taken under the said Act.”

6. Under the French law, a grosse copy of a notarial mortgage deed could be executed as if it were a decree granted by a court of law. There was no need under the French system for the mortgagee to file a suit pay court fee on the plaint, obtain a preliminary decree and then a final decree and then put that final decree in execution against the hypotheca. The notarial mortgage deed could be entrusted straightway to a 'huissier' and executed in accordance with the French procedure, the details of which I need not go into now. The question arises whether after the French Procedure Code was repealed by the Indian Civil Procedure Code, a person in the situation of the plaintiff, holding a grosse copy of a notarial mortgage deed is disentitled under the Indian Law to file a plaint on foot of the deed paying court fee thereon and obtain a decree in accordance with the Indian Civil Procedure; but should proceed to enforce the notarial bond straightway. In fact, learned counsel for the appellant went the length of saying that the Civil Court would have no jurisdiction to entertain the suit filed by the holder of a

notarial mortgage deed on foot thereof. I am entirely unable to agree. The question whether the plaintiff was entitled to execute the notarial mortgage deed without obtaining a decree thereon is one which does not call for adjudication in this appeal, though it may not be irrelevant to refer to a Full Bench decision of the Calcutta High Court in *Susama Bala v. Bibhuti Bhushan* AIR 1973 Cal 295. There it has been held that a grosse copy of a notarial mortgage deed could be executed even after the Indian law has come into force without a decree being obtained. According to the Full Bench of the Calcutta High Court, the right obtained under the grosse copy of the notarial mortgage deed is a substantial right and not a procedural one and it must be preserved under the Indian law after the merger. According to the learned Judges, a person in the position of the plaintiff could execute Ex. A.1 as if it were a decree by filing an execution petition in the Indian court and praying for the sale of the hypotheca straightway. Upon this question, I do not wish to pronounce any opinion. The distinction between substantive rights recognised by French law and mere procedural rules of French law will have to be drawn sagaciously with regard to the relevant circumstances of each case and the distinction cannot be exhaustively illustrated in vacuo. For instance, the requirement of French law that notice of the deposit of 'Cashierdes charges' shall be served on the debtor and all the creditors and other persons mentioned in Article 692 of the Code de Procedure Civile is a matter of substance and ought to be complied with by the Indian courts acting within the frame work of the Indian Civil Procedure Code. But the requirement of the French law that the service of notice, shall be effected through huissiers is merely a procedural matter, which the Indian Courts can ignore. No litigant can be heard to say that service by process servers under the watchful supervision of the Indian courts is less efficacious than service by French huissiers. There may, however, be intermediate cases such as the imposition of time limits by French law with reference to service of notices. It is for the Judges to consider judicially whether such time limits affect the substance of the thing or are merely procedural in character. The 'substantive' may shade off imperceptible degrees into the 'procedural' and it is for the Court to draw the line between the two, remembering the purpose of the distinction. The right to execute a notarial mortgage deed straightway without filing a plaint, paying court fee, obtaining decree and exposing the claimant to the dilatory tactics of his opponent is, I fancy, a valuable right and a substantive right. But the question is whether the holder of a copy of a notarial mortgage deed is confined under the Indian law to the remedy which he had under the French law. What Section 4 (2) of the Pondicherry (Extension of Laws) Act, 1968, says is that nothing in sub-sec-

tion (1) shall affect any right, privilege, obligation etc. acquired or accrued under the French law that has been repealed. There is nothing in this section which shuts out the person who has acquired such a right under the French law from the portals of the Indian Courts and from the remedy to which, under the Civil Procedure Code and under the Indo-Anglian system of jurisprudence he would undoubtedly be entitled to. A holder of a mortgage, although it has been granted under the French law and procedure, is certainly entitled under the Civil Procedure Code to file a suit in accordance with the procedure thereof. Section 9 of the C. P. Code says that the Court shall (subject to the provisions herein contained) have jurisdiction to try all suits of a civil nature excepting suits of which their cognisance is either expressly or impliedly barred. It is not contended by the learned counsel for the appellant that the suit filed by the plaintiff in the court below is not a suit of a civil nature. What he contends is that inasmuch as the plaintiff had an alternative remedy under the French law to proceed to enforce the notarial mortgage deed without resort to a court of law, it is not competent for him to file a suit on Ex. A.1 in the Indian Court and obtain a decree in accordance therewith. It is indeed an irony that this argument should come out of the mouth of the defendant who has fully exploited the opportunity given to him by the plaintiff. If the plaintiff had chosen to enforce her privilege under the French law by putting the notarial mortgage deed in execution straightway, the defendant would not have had the opportunity of dragging on the proceedings for nearly five years and raising the defences which under the French law he could not raise. What Sec. 4 of the Pondicherry (Extension of Laws) Act, 1968 does is not to shut out the erstwhile French citizen from having resort to the Indian Civil Court, but to protect and preserve whatever rights and privileges he might have had under the French law, which has been repealed. When a person, who enjoyed such a privilege, filed a suit in the ordinary civil Court on foot of a notarial mortgage deed, it is the plain duty of the court to entertain it under Section 9 of the Indian Civil Procedure Code. The argument that the court has no jurisdiction to entertain the suit or that the plaintiff has no remedy open to her under the Indian law by way of enforcing the mortgage in an action of this kind is to disregard the nature and amplitude of the saving provisions of the Pondicherry (Extension of Laws) Act 1968. I have little hesitation in rejecting this contention of the appellant and in holding that even though the plaintiff might have had the alternative relief of enforcing the mortgage as if it were a decree without resorting to an action in a Civil Court, undoubtedly she shared with the other Indian citizens the right to file a suit on the mortgage deed in a Civil Court, obtain a decree and then proceed to execute it.

It was lastly argued by the learned counsel for the appellant that costs ought to have been awarded by the court below on an admission scale so far as the sum of Rs. 10000 is concerned and on the contested scale only in respect of the balance of the plaintiff's claim. Having regard to the nature of the pleas raised by the defendant in the Court below, I do not think it right to interfere with the discretion of the court below in awarding costs. Further, it is not as if the defendant confessed judgment in respect of the entire claim of the plaintiff. I am unable to hold that the court below exercised its discretion unjudiciously while fixing the scale and quantum of costs payable by the defendant.

7. In the result, the appeal fails and the same is dismissed with costs.

Appeal dismissed.

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VEERASWAMI C. J. AND
NATARAJAN J.

K. B. Anwar Basha, V. M. Motors, Chetpet, Petitioners v. The Regional Transport Authority Vellore and others, Respondents.

Writ Petns. Nos. 3081 of 1973 and 2375 of 1974, D/- 7-10-1974.

(A) Motor Vehicles Act (1939), S. 68-C — Proceeding under the Section is quasi judicial. AIR 1959 SC 308, Followed.

(Para 1)
(B) Motor Vehicles Act (1939), Sections 68-C and 68-D — Tribunal may summon witnesses or documents either suo motu or at parties' instance notwithstanding absence of such power — Non-production may result in adverse inference being drawn — Held on facts that failure to hear the body which was to run the scheme did not vitiate the proceedings. AIR 1967 SC 1315 Followed. AIR 1961 SC 1575 and AIR 1963 SC 1098. Referred. W. A. 240 of 1973 D/- 11-9-1974 (Mad), Confirmed. (Paras 1 and 2)

(C) Motor Vehicles Act (1939), Section 68-C — Scheme nationalising transport services covering distance more than 75 miles of route — Inclusion of distance covered by shuttle trips held valid — Definition of 'trip' supports the view. (Para 5)

Cases Referred: Chronological Paras
(1974) W. A. No. 240 of 1973, D/- 11-9-1974 (Mad) 1
AIR 1967 SC 1815 = (1937) 3 SCR 329 1
AIR 1963 SC 1098 = (1934) 1 SCR 229 1
AIR 1961 SC 1575 = (1932) 1 SCR 973 1
AIR 1959 SC 308 = 1959 Supp (1) SCR 319 1

V. A. Sadagopan, C. S. Prakasarao, T. V. T. Gopalan, Radhagopalani, P. Vedavali, K. Thirumalai, C. R. Krishnamurthi, K. K. Venugopal, M. Krishnappan, V. Subramaniam, for

IS/KS/D603/75/TVN

Petitioners; Govt. Pleader and R. Balasubramaniam, for Respondents.

VEERASWAMI C. J.:— These petitions and an appeal belong to the Pallavan Batch which we have dismissed by order D/- 11-9-74 in W. A. No. 240 of 1973 (Mad) — Sri Gandiban Bus Service Chingleput v. State of Tamilnadu represented by the Secretary to Government, Home Dept, Madras and others — and connected cases. These cases have been heard separately because of some other common points raised. It was said that there was uniform failure by the Home Secretary to summon and examine witnesses and documents in violation of Section 68-D of the Motor Vehicles Act, that there was a similar violation of the section inasmuch as it had already been practically decided that Pallavan transport system should implement the scheme, and that Section 68-C (2) was also violated inasmuch as to the Home secretary gave no finding as to whether the proposed scheme would be economical which was a pre-condition of approval of a draft scheme. The substance of these objections would have been somewhat serious but for capital M. P. Co-op. Societies Ltd. v. State of Madhya Pradesh AIR 1967 SC 1815. That the proceeding under Section 68-C is quasi judicial, has long been established since G. Nageswara Rao v. Andhra Pradesh State Road Transport Corporation AIR 1959 SC 308. But certain observations made in Malikram v. State of Rajasthan AIR 1961 SC 1575 and Nehru Motor Transport Co-operative Society v. State of Rajasthan AIR 1963 SC 1098 relating to summoning and examining witnesses and documents had somewhat lost their force in view of M. P. Co-operative Societies v. State of Madhya Pradesh, AIR 1967 SC 1815. There it has been pointed out that though the proceeding under Section 68-C is quasi-judicial, inasmuch as there is no provision having force of law to summon witnesses or documents, no approval of the scheme could be successfully attacked on the ground of failure to summon either witnesses or documents. But, at the same time, it was pointed out in that case that it was quite open to the authorities themselves or at the instance of the parties to summon witnesses or documents. This was not because there was any power. If the witnesses or documents summoned were not forthcoming, it would be open to the authorities to draw an adverse inference. That was the position of law as explained in M. P. Co-operative Societies v. State of Madhya Pradesh, AIR 1967 SC 1815. Bearing the observations in that judgment in mind, we are inclined to think that in relation to the facts of the present cases no interference with the approval of the scheme is called for.

2. Realising the position, counsel for the petitioner, Mr. Venugopal urged that the hearing was not effective because whereas the State Transport undertaking was heard by the Home Secretary, the real person to

work out the scheme was the Pallavan Transport system so that no opportunity was provided at the hearing to make representations against the Pallavan Transport System. But the whole question in the context of Section 68-D is to see whether in the scheme of nationalisation the requisite elements mentioned in Section 68-C have been satisfied. On that matter, the order of the Secretary shows satisfaction on his part.

3. The other ground urged was that no finding has been rendered by the Home Secretary in respect of the question whether the proposed scheme could be run economically. Reading the order as a whole, we are inclined to think that the Home Secretary was quite alive to the representation as well. His order shows that he has considered the entire material before him and come to the conclusion that approval of the scheme should be granted.

4. The petitions and appeal are, therefore, dismissed.

5. W. P. 2375 of 1974:— The only special point urged in this petition is that calculating the distance of 75 miles of the route in question, the distance covered by the shuttle trips has also been taken into account. In support of this contention, our attention, has been invited to the definitions of 'route' and 'shuttle trip'. There is also definition of 'trip' as meaning, in relation to the service performed by a vehicle on a route, the total distance in all its trips, including shuttle trips, if any, performed by the vehicle in a day. The point has, therefore, no substance. The writ petition is also dismissed.

6. In all the petitions and appeal there will be no costs between party and party. Counsel's fee for the purpose of adjustment of the fee as between counsel and party is fixed at Rs. 100 in each.

Petitions and appeal dismissed.

AIR 1976 MADRAS 36

N. S. RAMASWAMI, J.

A. Vadivelu, Appellant v. A. Munuswami, Respondent.

Appeal S. R. No. 80640 of 1974, D/- 8-4-1975°.

(A) Madras City Civil Court Act (1892), Section 15 — Value of the subject matter of the suit — Meaning. (Civil P. C. (1908), Order 20, R. 19).

The value of the subject matter contemplated in Sec. 15 cannot take in the value of the counter-claim made in the written statement. Only the value given by the plaintiff in respect of his claim in the plaint is the

°(Against decree of City Civil J., Madras in O. S. 6259 of 1971 D/- 23-7-1974.

value of the subject matter of the suit. The counter-claim is in the nature of an independent action and the value of the same cannot be mixed up with the value of the subject-matter of the suit. Case law discussed.

(Paras 5, 11)

The Civil P. C. makes specific provision for making a set-off in the written statement, and so there is also a specific provision with regard to the valuation under Order 20, R. 19. But the Civil P. C. does not make any provision with regard to making of a counter-claim in written statement. Therefore, the absence of a provision regarding the counter-claim, similar to the one contained in Order 20, Rule 19, which relates to set-off, is no ground to hold that the value of the counter-claim should also be clubbed with that of the plaintiff claim in arriving at the value of the 'subject-matter of the suit'. (Para 12)

Cases Referred: Chronological Paras
AIR 1967 Mad 300 = (1966) 1 Mad LJ 200 13
AIR 1965 Andh Pra 18 = (1964) 1 Andh WR 194 6
AIR 1964 SC 11 = (1964) 2 SCR 567 5
AIR 1949 Mad 630 = (1949) 1 Mad LJ 110 6
AIR 1941 Nag 258 = 1941 Nag LJ 382 7
AIR 1934 Rang 160 = 152 Ind Cas 552 8
AIR 1918 Mad 998 (2) = 32 Mad LJ 221 (FB) 10

D. C. Krishnamurthi, for Appellant; G. R. Lakshmanan, amicus curiae, for Respondent.

JUDGMENT:— The question in this S. R. Number is as to the correct forum for the appeal filed by the defendant in the suit. I have heard the arguments of the learned counsel for the appellant and those of Mr. G. R. Lakshmanan, appointed as an amicus curiae, and I am thankful to Mr. Lakshmanan for bringing to my notice the several decisions which have a bearing on the question to be decided.

2. The suit arose out of a dispute between the parties in the implementation of an agreement for sale. The plaintiff was the intending purchaser and the defendant, the seller. The plaintiff filed the suit claiming a sum of Rs. 9000 as damages on the averment that the defendant had committed breach of contract. The defendant contended in his written statement that the breach was committed only by the plaintiff and not by him and that therefore the plaintiff should be non-suited. Further he made a counter-claim of a sum of Rs. 4000 odd made up of Rupees 1500 as damages and Rs. 2500 odd as unpaid purchase money. The Court below held that it was the defendant who committed breach of contract. It further held that the plaintiff was entitled to damages, but restricted the quantum to the sum of Rs. 6000. On the above finding, the defendant's claim for damages of Rs. 1500 by way of counter-claim naturally stood negatived. As far as the remaining part of the counter-claim namely,

regarding the unpaid purchase money, the court below said that the defendant was entitled to only a sum of Rs. 700 odd from the plaintiff. Now the defendant has filed this appeal in this court whose value is given as Rs. 8600.

3. The Office returned the appeal memo stating that the value of the suit being only Rs. 9000, under Section 15 of the City Civil Court Act, the appeal lay to the Principal Judge, City Civil Court, and not to this Court. The learned counsel for the appellant did not agree and therefore the matter has been placed before court.

4. The contention of the learned counsel for the appellant is that as per Section 15 of the City Civil Court Act, the value of the subject-matter of the suit determines the forum and in the present case the value of the subject-matter of the suit must be taken to be not only the sum of Rs. 9000 claimed by the plaintiff but also the sum of Rs. 4000 odd claimed by the defendant by way of counter-claim. Thus according to him the value of the subject-matter of the suit is over Rs. 13000. If the contention of the learned counsel in this regard is right, then the appeal should lie to this court, for the relevant section in the City Civil Court Act says that where the value of the subject-matter of the suit exceeds Rs. 10,000, the appeal shall be to this court.

5. After hearing the learned counsel and Mr. Lakshmanan (*amicus curiae*), I am satisfied that the value of the subject-matter contemplated in Section 15 of the City Civil Court Act cannot possibly take in the value of the counter claim made in the written statement. Only the value given by the plaintiff in respect of his claim in the plaint is the value of the subject-matter of the suit. The counter-claim is really an independent claim, though on equitable principles the defendant is not driven to a separate suit but allowed to make his claim in the suit filed by the plaintiff. That the counter-claim is in the nature of an independent suit as has been recognised in several decisions. In *Laxmidas v. Nanabhai* AIR 1964 SC 11, what happened is this. In a suit by the plaintiff, the defendant made a counter-claim. The trial court converted the counter-claim into a separate cross suit. The Supreme Court held that the procedure adopted by the trial court was proper. This is on the basis that the counter-claim is an independent action.

6. In *Saraswathiswami v. Sivaramamurthi* AIR 1949 Mad 630, the question arose in a different form. The plaintiff filed the suit on the Original Side of this Court. The defendant made a counter-claim. But the cause of action for the counter-claim had not arisen within the jurisdiction of this Court. This court held that the counter-claim cannot be entertained in this court. This decision has been followed by the Andhra Pradesh High Court in *Imam Peer v. Khadija Bi*, AIR 1965 Andh Pra 18.

7. In *Jamnadas v. Beharilal* AIR 1941 Nag 258, the counter-claim made by the defendant was of small nature. It was held that the defendant had to make his claim only in a small cause suit separately and that cannot be entertained by the court which was trying the plaintiff's suit.

8. In *Moideen Baba v. Chettiar Firm* AIR 1934 Rang 160, the plaintiff in whose suit the defendant had made a counter-claim withdrew his suit; but it was held that in spite of such withdrawal of the suit by the plaintiff, the counter-claim was sustainable.

9. All these decisions proceed on the footing that the counter-claim by a defendant, though in the written statement, is in the nature of an independent suit. As I said, only on equitable grounds the defendant is allowed to put forward his claim, though it is really an independent one, in the suit filed by the plaintiff.

10. Even if the appeal in this case related to the entire plaint claim and that in the counter-claim, the value of the appeal exceeding Rs. 10,000, the forum would be only the court of Principal Judge, City Civil Court and not this Court, for the criterion is the value of the subject-matter of the suit and not that of the appeal. (*Vide Putta Kannayya Chetti v. Rudrabhatla Venkatanarasayya* 32 Mad LJ 221 = (AIR 1918 Mad 998 (2) (FB))

11. The learned counsel invited my attention to Sec. 53 of the Court-fees Act; but that has no relevance to the point to be decided. All that that section says is that in a suit as to whose value for the purpose of determining the jurisdiction of Courts, specific provision is not otherwise made, value for that purpose and value for the purpose of computing the fee payable under this Act shall be the same. From this provision it cannot be contended that the plaintiff has paid court fee on the sum of Rs. 9000, claimed by him and the defendant has paid court-fee on the sum of Rs. 4000 claimed by him and that therefore the value of the subject-matter of the suit itself is more than Rupees 10000. From what I said earlier, it is quite obvious that the counter-claim is an independent action and the value of the same cannot be mixed up with the value of the subject-matter of the suit.

12. The learned counsel also referred to Order 20 Rule 19 C, P. C. There sub-rule (2) says that any decree passed in a suit in which a set off is claimed shall be subject to the same provisions in respect of appeal to which it would have been subject if no set-off had been claimed. This is pointed out to show that there is no similar provision in respect of counter-claim and that therefore the value of the subject-matter of the suit for the purpose of the value of the appeal must be taken to be not only the value of the claim made by the plaintiff but also that of the claim made in the counter-claim. But the learned counsel forgets that there is a specific provision with regard to set-off under

Order 8, C. P. C. As the Code makes specific provision for making a set-off in the written statement, there is also specific provision with regard to the valuation under Order 20 Rule 19 C. P. C. Admittedly, the Code does not make any provision with regard to making of a counter-claim in written statement. Therefore, the absence of a provision regarding the counter-claim similar to the one contained in O. 20 R. 19 C. P. C., which relates to set-off, is no ground to hold that the value of the counter-claim should also be clubbed with that of the plaintiff claim in arriving at the value of the 'subject-matter of the suit'.

13. The learned counsel also referred to the observation of Ramamurti J. in *Subramania Chettiar v. Shanmugham* 1966-1 Mad LJ 200 at p. 202 = (AIR 1967 Mad 300 at p. 301), wherein the learned Judge draws the distinction between set-off and counter-claim. It is pointed out that set-off is a defence and counter-claim is not really a defence to the plaintiff's claim but is a weapon of offence. This really strengthens the view that I am taking, namely, that the counter-claim is really an independent claim and the value of the counter-claim cannot be clubbed with that of the plaintiff claim in arriving at the value of the subject-matter of the suit. I hold that the appeal lies to the principal Judge, City Civil Court, Madras, and not to this court. The appeal memo and the connected papers are to be returned (for presentation to the proper court) on 15th April 1975 forenoon.

Order accordingly.

AIR 1976 MADRAS 38

RAMAPRASADA RAO AND
RATNAVEL PANDIAN, JJ.

Panduranga Naicker, Appellant v.
Thirugnana Mudaliar and another, Respondents.

A. A. A. O. 158 of 1974, D/- 16-4-1975.*

(A) Tamil Nadu Agriculturists Relief Act (4 of 1938). Section 23-C (as amended by (Act 8 of 1973)) — Setting aside sale — Limitation — 'Whichever is later' — Meaning of. AIR 1954 Mad 368. Overruled.

The term 'whichever is later' undoubtedly has reference to a point of time and not to a situation. The term does not mean 'whichever is the case'. The main object of the legislature is to provide relief to the agriculturists. If a person who is entitled to the benefits under the Act seeks to set aside the sale of his property, then he has 90 days time to do so from

*(Against order of Sub. J., Tiruvannamalai, D/- 28-2-1974).

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the date of the publication of the Act in the local Gazette or from the date of confirmation of the sale, whichever is later. It is in this context that the expression 'whichever is later' has to be understood. As this parenthesis prescribes a time or a period within which a relief could be asked for and which is assured by the legislature under certain circumstances, it cannot be lightly denied by a narrow interpretation of the meaning of the words, which are clear and unambiguous, contained in a statutory provision. AIR 1954 Mad 368, Overruled. (Para 3)

Cases Referred: Chronological Paras
AIR 1954 Mad 368 = (1953) 2 Mad LJ 742
1, 3

D. Raju, for Appellant; T. R. Rajagopalan and T. R. Rajaraman, for Respondents.

RAMAPRASADA RAO, J.:— The appellant filed an application under Section 23-C Act IV of 1938 as amended by Madras Act 8 of 1973 to set aside a sale held on 17-1-1973 in execution proceedings R. E. P. 518 of 1973 in O. S. No. 421 of 1961 on the file of the District Munsif's Court, Tiruvannamalai. The first respondent decree-holder contended that that application filed by the judgment-debtor was beyond time and was barred by limitation. The learned District Munsif, after referring to the relevant statutory provisions, and after hearing the parties, rejected the application as out of time and the appeal in C. M. A. No. 20 of 1973 to the Court of the Subordinate Judge, Tiruvannamalai was unsuccessful. A Civil Revision Petition was filed as against the order of rejection of the learned Subordinate Judge. Justice V. Ramaswami considered two questions which arose for consideration in the Civil Revision Petition. The first question related to the maintainability of the appeal against the order passed by the learned District Munsif and the second question was whether the application filed by the petitioner on 5-6-1973 to set aside the court sale held on 17-1-1973 was within or beyond time and not in accord with Section 23-C of the Tamil Nadu Agriculturists Relief Act, 1938 as amended in 1973. The learned Judge felt that he was not inclined to accept the ratio in *Sethurama Thevar v. Kameetha Rowther*, 1953-2 Mad LJ 742 = (AIR 1954 Mad 368) and was of the view that that decision required reconsideration and directing the Civil Revision Petition as originally filed, but now converted into a Civil Miscellaneous Second Appeal bearing No. 158 of 1974 to be placed before a Division Bench.

Mr. T. R. Ramachandran appearing for the respondents before us in his anxiety to support the orders of the Courts below referred to a few events which are necessary for us to set out before consi-

dering the law. It is common ground that the property of the petitioner as judgment-debtor was brought to sale and was purchased by the second respondent on 17-1-1973. Before the sale could be confirmed, an amending Act 8 of 1973, which introduced Section 23-C of the Act, came into force from 24-1-1973. Thereafter on 5-6-1973, the appellant filed an application to set aside the sale taking advantage of the liberalised provisions as regards the point of time during which an application to set aside a sale in the above circumstances could be made. In fact, even on the date when the application for setting aside the sale was filed, the sale was not confirmed. It is said that such confirmation of the sale took place on 21-6-1973. Mr. Ramachandran's contention is that the application is barred by time, as it has not been filed within 90 days from the date of the publication of the amended Act in the Tamil Nadu Government Gazette. On a reading of Section 23-C it is said that the limit of 90 days provided for a litigant to file applications to set aside a sale are referable only to sales which took place on or after the 1st March, 1972 and the sale has not been confirmed before the publication of the Act. As the present sale has not been confirmed before the publication of the said Act, it is seriously contended that the outer limit by which an application to set aside the sale could be made is 90 days from the date of the publication of the Act. If the application under consideration was filed within 90 days from 24-1-1973, the learned counsel's contention is that it would be in time. But, as the application has been made on 5-6-1973 which is beyond 90 days from 24-1-1973, the application is beyond time. Reliance is placed upon the decision in *Sethurama Thevar v. Kameetha Rowther*, 1953-2 Mad LJ 742 = (AIR 1954 Mad 38).

On the other hand, the learned counsel for the appellant would say that so long as the sale has not been confirmed, the aggrieved person has 90 days time to set aside such sales from the date of confirmation and as the present application has been filed even prior to the date of the confirmation, the application is in time. It is said that the outer limit as provided under the section in the matter of filing such application falls under two broad situations. Firstly, an application has to be filed within 90 days from the date of the publication of the Act in the local Gazette and secondly within 90 days from the date of the confirmation of the sale whichever is later. If, therefore, the confirmation has not taken place on the date when the application has been filed, the question as to the bar of limitation would not at all arise. V. Ramaswami, J., while referring the subject to a Division Bench has summarised the five situations which might arise under Section 23-C. Before detailing them, we shall refer to the section. It reads as follows:—

"23-C. Power of court to set aside sales of immovable property in certain cases:—

Where in execution of any decree, any immovable property in which any person entitled to the benefits of the Tamil Nadu Agriculturists Relief (Amendment) Act, 1972, had an interest, has been sold or foreclosed on or after the 1st March, 1972, and the sale has not been confirmed before the publication of the said Act in the Tamil Nadu Government Gazette, or ninety days have not elapsed from the confirmation of the sale or from the foreclosure, at such publication, then, notwithstanding anything contained in the Limitation Act, 1963 (Central Act 36 of 1963), or in the Code of Civil Procedure, 1908 (Central Act V of 1908); and notwithstanding that the sale has been confirmed, any judgment-debtor claiming to be entitled to the benefits of the said Act, may apply to the court within ninety days of such publication or of the confirmation of the sale, whichever is later, to set aside the sale or foreclosure of the property, and the court shall, if satisfied that the applicant is a person entitled to the benefits of the said Act, order the sale or foreclosure to be set aside, and thereupon the sale or foreclosure shall be deemed not to have taken place at all;

Provided that no such order shall be made without notice to the decree-holder, the auction-purchaser, and other persons interested in such sale or foreclosure and without affording them an opportunity to be heard in the matter."

2. The five types of situations referred to by our learned brother are:— (1) No confirmation of the sale prior to the publication of the Act; (2) A confirmation of the sale prior to the publication of the Act and such confirmation was within three months of the Act; (3) Confirmation of the sale prior to the publication of the Act, but more than three months prior to the publication; (4) A confirmation subsequent to the Act but within 90 days after such publication; and (5) A confirmation of the sale more than three months subsequent to the publication of the Act. The learned Judge, no doubt, has very carefully scanned the various situations that are inbuilt in the section itself. We are concerned however in this case with a sale which has been confirmed more than 3 months subsequent to the publication of the Act and with reference to an application filed by the judgment-debtor to set aside such a sale under Section 23-C, but before the date the date of confirmation of the sale.

3. The first part of Section 23-C refers to the event of sale and its non-

confirmation before the publication of the Act and also to the situation when 90 days have not elapsed from the confirmation of the sale or from the foreclosure at such publication. These events, therefore, set down the hypothesis for the invocation of the rule of limitation provided for in Section 23-C. After setting down the data for the invocation of the principal object for which the legislature has inserted the new Section 23-C, the section itself provides thus:—

"then, notwithstanding anything contained in the Limitation Act, 1963 (Central Act 36 of 1963), or in the Code of Civil Procedure, 1908 (Central Act V of 1908); and notwithstanding that the sale has been confirmed, any judgment-debtor claiming to be entitled to the benefits of the said Act, may apply to the court within ninety days of such publication or of the confirmation of the sale, whichever is later".

The term 'whichever is later' undoubtedly has reference to a point of time and not to a situation. Chandra Reddi, J., in *Sethurama Thevar v. Kameetha Rowther*, 1953-2 Mad LJ 742 = (AIR 1954 Mad 368) while considering a case though not in pari materia with the one under consideration before us had occasion to consider a similar provision, Section 23-A of the earlier Act and observed:—

"It looks to me that the expression 'whichever is later' means only 'whichever is the case'."

We are unable, with great respect, to agree with this equation of the phrase 'whichever is later'. As we said, 'whichever is later' connotes a point of time and 'whichever is the case' obviously relates to a situation. Both connote two different aspects. As Justice V. Ramaswami said while referring the matter to a Division Bench,

"With great respect to the learned Judge this interpretation seems to unduly narrow down the application of the benevolent provision contained in that section."

As Courts cannot declare the law, but only interpret it, such interpretation is usually undertaken by Courts with reference to the object of the legislature. The main object of the legislature is to provide relief to the agriculturists. If a person who is entitled to the benefits under the Act comes forward and seeks to set aside the sale or foreclosure of his property, then he has 90 days time to do so from the date of the publication of the Act in the local Gazette or from the date of confirmation of the sale, whichever is later. It is in this context that the expression 'whichever is later' has to be understood. As this parenthesis prescribes a time or a period within which a

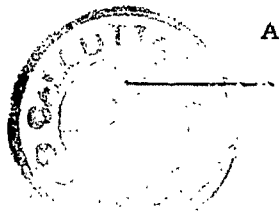
relief could be asked for and which is assured by the State Legislature under certain circumstances, it cannot be lightly denied by a narrow interpretation of the meaning of the words, which are clear and unambiguous, contained in a statutory provision. We are therefore of the view that the words 'whichever is later' which have an impact on time should be interpreted liberally and beneficially in favour of the agriculturists for whose sole benefit the legislation has been undertaken. We are unable to agree with Mr. T. R. Ramachandran that the word 'then' appearing as a conjunction between the earlier and the later parts of Section 23-C has a significance and that word taken in conjunction with the expression 'whichever is later' should be understood as meaning 'whichever is the case' as was said by Chandra Reddi, J. Again, this contention besides serving only a narrow interpretation of the Act, would only compel us to introduce certain provisions in between the lines of the Section which would mean that we are not interpreting the law, but declaring law. The Courts have no jurisdiction to do so.

Even otherwise, it appears to us that the earlier portion of Section 23-C has a purpose to serve which is distinct and different from the purpose which the second part of Section 23-C serves. As all enabling provisions should not only be beneficially interpreted, but also be liberally considered, we are of the view that the term "notwithstanding that the sale has been confirmed" appearing in the later part of Section 23-C would mean that the confirmation might be even after the date of the publication. So long as the application to set aside the sale is within 90 days from the date of such confirmation or within 90 days from the date of the Act whichever is later, then, such an application would not be barred. In the instant case, the sale was confirmed on 21-6-1973. The petitioner, therefore, had 90 days time from 21-6-1973 to file an application. But he has filed it even earlier apprehending possibly such confirmation. A fortiori, therefore, the application is within time.

4. The Civil Miscellaneous Second Appeal is allowed and the order of the Lower Court is set aside and the subject matter is remanded to the file of the District Munsif, Tiruvannamalai, for a full hearing on the merits.

5. There will be no order as to costs.

Appeal allowed.



AIR 1976 MADRAS 41
VEERASWAMI, C. J. AND
NATARAJAN, J.

Y. Venkanna Choudhary, Appellant v. Government of India by Military Estates Officer, Madras and another, Respondents.

A. A. O. S. R. No. 68137 of 1971, D/-18-3-1975.*

(A) Tamil Nadu Court-fees and Suits Valuation Act (14 of 1955), Sections 51 and 43 — Requisitioning and Acquisition of Immovable Property Act (30 of 1952), Section 11 — Appeal under Section 11 against compensation for requisitioning property — Section 51 and not Section 43 of T. N. Court Fees Act applies to Memorandum of appeal.

The difference which the Requisitioning Act makes between requisition and acquisition of immovable property should not be carried into Section 51 of the Tamil Nadu Court Fees Act. The word acquisition in Section 51 is used in the proper sense of taking, which may mean any one or more of the elements, which as a bundle constitute property. Therefore, Section 51 of the Court Fees Act covers the memorandum of appeal which relates to compensation for requisitioning of property. (Para 3)

Section 43 of the Tamil Nadu Court Fees Act cannot be applied to the memorandum of appeal because requisitioning under the Requisitioning Act does not involve bringing into existence the relationship of landlord and tenant. (1974) 2 Mad LJ 313 and AIR 1971 SC 1887, Distinguished. (Para 4)

Cases Referred: Chronological Paras
 1974-2 Mad LJ 313 = 87 Mad LW 791 5
 AIR 1971 SC 1887 = (1971) 1 SCR 14 5

R. G. Rajan, for Appellant; The Advocate-General assisted by Govt. Pleader, for Respondents.

VEERASWAMI, C. J.:— The matter is placed before us by the Master for a decision on the proper Court-fee payable on the Memorandum of Appeal. The appellant's land was requisitioned under the Requisitioning and Acquisition of Immovable Property Act, 1952. Aggrieved by the alleged inadequacy of compensation under Section 8 as determined by the Arbitrator, the appeal has been preferred under Section 11. The contention is that as this Act makes a difference between requisitioning and acquisition, it should be borne in mind in determining the scope of Section 51 of the Tamil Nadu Court Fees and Suits Valuation Act.

2. Section 3 of the Requisitioning Act provides for the power to requisition

*(Against decree of the Court of Arbitrator (Dist. Judge), Chingleput, in A C. No. 1 of 1971).

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any immovable property and on such requisitioning, the appropriate authority can under Section 4 take possession. Rights over the requisitioned property are defined by Section 5. Release from requisitioning is made under Section 6. Where the property requisitioned needs to be acquired for a public purpose, power therefor is found in Sec. 7. Section 8 provides the principles and method of determining the compensation and in this section no difference is made between requisitioning and acquisition, though clause (c) of subsection (1) does refer to the property requisitioned or acquired. Section 11 which provides for appeals is common to both compensation for requisitioning and acquisition. It is clear, therefore, that, so far as the Requisitioning and Acquisition of Immoveable Property is concerned, the concepts of requisitioning and acquisition are distinct and different with different results and the quantum of compensation vis-a-vis Section 8 may also be not identical.

3. But the question is whether this difference, as is contended for, should be carried into Section 51 of the Court-fees Act. In our opinion, there is no warrant for it. The plain dictionary meaning of acquisition as given in the Shorter Oxford Dictionary is 'come into possession of'. The object of the Court Fees Act is to assess court-fee on certain principles and, so far as compensation is concerned, the ad valorem rate applies to a memorandum of appeal relating to such a claim. Is there any substantial reason why for purposes of assessing court-fee, compensation for requisitioning and that for acquisition should be treated differently? As far as we are able to see from the standpoint of court-fee on a memorandum of appeal, no justification on any conceivable ground presents itself for acceptance. The section deals with compensation in respect of acquisition of property for public purposes. Acquisition is a very broad term which may comprehend within itself mere taking of possession or short of it, for use as in the case of a licence, or it may result in deprivation of property in the sense that the title itself is extinguished and vested in the acquiring authority. The word acquisition in Section 51 in our opinion is used in the proper sense of taking, which may mean any one or more of the elements, which as a bundle constitute property. So long as the power of getting at the property is in exercise of the power of eminent domain, it does not matter for purposes of Section 51, whether it is the prime domain on the property or any part or element which goes into the concept of property as generally understood. We are, therefore, inclined to think that Section 51 of the Court-fees Act covers the memorandum

of appeal which relates to compensation or requisitioning of property.

4. It is argued for the appellant that though the Requisitioning and Acquisition of Immovable Property Act speaks of compensation for requisitioning, in fact, such compensation is (nothing) but rent and therefore the proper section in the Court-fees Act to be applied is Section 43. We are unable to accept this stand because requisitioning under the Act does not involve bringing into existence the relationship of landlord and tenant. Section 43 therefore cannot be applied to the appeal memorandum.

5. Our attention was invited to *Ramachandra v. State of Madras* 1974-2 Mad LJ 313, a decision of a learned single Judge of this Court. But that case did not decide the point which we are called upon to settle. It is one on a different basis. So too *S. G. Bhagade v. Special Dy. Collector, Ahmednagar*, AIR 1971 SC 1887, is not of assistance in deciding the above point.

6. It is true that this Court has struck down Article 1 Schedule I of the Court-fees Act as invalid in a recent judgment. But, at the moment, what will be the quantum of fee that will be payable, we are not concerned with. All that we hold at the moment is that Section 51 of the Court-fees and Suits Valuation Act applies to the appeal memorandum.

Answered accordingly.

AIR 1976 MADRAS 42

ISMAIL, J.

Special Deputy Collector, Land Acquisition, Defence Equipment Factory, Tiruchirapalli, Appellant v. Karuppayee Ammal and others, Respondents.

Appeals Nos. 197 to 206 of 1969, D/- 6-2-1975.

(A) Land Acquisition Act (1894), Section 25 (1) — Compensation — Rate fixed by Land Acquisition Officer and agreed to by claimants — Enhancement of rate by court is without jurisdiction. AIR 1970 Mad 184 and AIR 1964 Punj 68, Followed. (Paras 3, 4)

Cases Referred: Chronological Paras
AIR 1970 Mad 184 = 82 Mad LW 661 3
AIR 1964 Punj 68 = 65 Pun LR 683 4

JUDGMENT:— These appeals are by the State and they have been preferred against the judgment and decrees of the learned Principal Sub-ordinate Judge, Tiruchirapalli, in O. P. Nos. 176 to 184 and 186 of 1966 respectively. They are concerned with the question as to proper compensation payable in respect of the lands belonging to the respondents here-

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in, situate in Palanganangudi village, in Tiruchirapalli, District, and acquired under the Land Acquisition Act, for the Defence Equipment factory, Tiruchirapalli. Those lands were acquired pursuant to the notification under Section 4 (1) of the Land Acquisition Act, dated 4-12-1963. In all these cases, the Land Acquisition Officer awarded compensation at the rate of Rs. 4 per cent. The court on reference made under Section 18 of the Land Acquisition Act, enhanced the same to Rs. 5.50 per cent. In three cases, namely, A. S. No. 200 of 1969, A. S. 203 of 1969 and A. S. 205 of 1969, in addition to the compensation for the lands at the rate mentioned above, the court also awarded compensation for the wells situate in the respective lands in question at the rate of Rs. 1308.35, Rs. 1338.35 and Rs. 1340.02 respectively. In these appeals, the enhancement of the compensation from Rs. 4 to Rs. 5.50 per cent, as well as the award of compensation for the wells in the lands involved in the three appeals referred to above are being challenged.

2. The first point that is taken with regard to the enhancement of compensation is that the claimants themselves in the enquiry held pursuant to the notice under Section 9 of the Land Acquisition Act, agreed to receive compensation at the rate of Rs. 4 per cent, that in view of that, it is not open to them to claim any enhanced compensation and that equally it is not open to the court to enhance the compensation in exercise of its powers on a reference under Section 18 of the Land Acquisition Act. Having regard to the facts of these cases as well as the legal position, this stand of the State is well-founded. Ex. B-2 is a statement given by Karuppayee Ammal, the claimant in O. P. 176 of 1966 and the respondent in A. S. No. 197 of 1969, before the Land Acquisition Officer on 24-7-1964, agreeing to receive compensation at Rs. 400/- per acre. Ex. B-3 dated 24-7-1964 is a statement given by Janakiammal, claimant in O. P. 181 of 1966 and respondent in A. S. 202 of 1969, before the Land Acquisition Officer agreeing to receive compensation at the rate of Rs. 400/- per acre. Ex. B-4 dated 24-7-1964 is a similar statement given by the claimant in O. P. 182 of 1966 and respondent in A. S. No. 203 of 1969. Ex. B-5 dated 24-7-1964 is a similar statement given by the claimant in O. P. No. 183 of 1966 and respondent in A. S. No. 204 of 1969. Ex. B-6 dated 24-7-1964 is a similar statement given by the claimant in O. P. 184 of 1966 and respondent in A. S. No. 205 of 1969 and Ex. B-7 dated 24-7-1964 is a similar statement given by the claimant in O. P. No. 186 of 1966 and respondent in A. S. No. 206 of 1969. In the other four cases no such statement recorded from the claimants has been pro-

duced before the court. On the other hand in the statements of the Land Acquisition Officer made to the court, it was expressly stated that in all these cases at the time of the award enquiry on 24-7-1964, the interested persons had agreed to the rate of Rs. 400/- per acre, when the Land Acquisition Officer informed them of the above rate at which compensation was proposed to be paid to the land owners. Even in the awards passed by the Land Acquisition Officer, it is clearly and categorically mentioned that the interested persons had agreed to the rate of Rs. 400/- per acre. Notwithstanding this, in the claim statements made by the claimants before the court, they did not dispute the correctness of the statement contained in the awards as well as the statements forwarded by the Land Acquisition Officer to the court stating that the interested persons had agreed to receive compensation at the rate of Rs. 400/- per acre. Consequently, the position before the learned Principal Subordinate Judge was that in all these cases the claimants had agreed at the time of the award enquiry, to receive compensation at the rate of Rs. 400 per acre and therefore Section 25 (1) of the Land Acquisition Act came into operation.

3. According to that statutory provision, Section 25 (1),

"When the applicant has made a claim to compensation, pursuant to any notice given under Section 9, the amount awarded to him by the court shall not exceed the amount so claimed or be less than the amount awarded by the Collector under Section 11."

Prima facie, in view of this statutory provision, the learned Principal Subordinate Judge had no right to award compensation at the rate of Rs. 5.50 per cent. as against Rs. 4 per cent. fixed by the Land Acquisition Officer and agreed to by the claimants. However, Mr. P. Raghaviah, learned counsel for the respondents-claimants in these cases, put forward two contentions before me. One is that he said point was not argued before the learned Principal Subordinate Judge and it has not also been taken in the grounds of appeals before this court and that therefore the appellant should not be allowed to raise the same at this stage. The second which is more or less corollary to the first is that the failure on the part of the appellant to urge the point before the learned Principal Subordinate Judge must be taken to be a waiver on the part of the appellant to put forward such a claim. I am unable to accept either of these contentions of the learned counsel for the respondents. A Bench of this court in *State of Madras v. Alameluthayammal*, AIR 1970 Mad 134, had occasion to consider this question and

with reference to the language of Section 25 (1) of the Land Acquisition Act, the Bench has pointed out that under sub-clause (1) of Section 25 of the Act, the court has no jurisdiction to award anything more than what has been claimed pursuant to any notification given under Section 9 of the Act. Consequently, if the matter is one of jurisdiction, the fact that the appellant had not argued the point before the lower court would not clothe the court with the jurisdiction to do something which, it is prohibited from doing by the statutory provisions themselves. As I have pointed out already, the factual basis was there before the court and all that could be said was that the legal position based upon that factual position was not argued before the lower court. Once it is held that the lower court has no jurisdiction to enhance the compensation in view of the fact that the claimants themselves have agreed to receive compensation at the rate of Rs. 4 per cent., the mere fact that that point was not argued specifically before the lower court will not enable or empower the learned Principal Subordinate Judge to enhance the compensation.

4. With regard to the second aspect, a Bench of the Punjab High Court in *Punjab State v. M/s. Lachhman Dass Mukundlal*, AIR 1964 Punj 68, observed: served:

"The next question that requires to be settled is whether the objection on the basis of Section 25 of the Act should be deemed to have been waived by the State, and, therefore, the State is not entitled to raise this objection at this stage. Section 25 prescribes rules as to amount of compensation. I have already held that this provision is mandatory and there is no option left with the court to give effect to it. The provisions of Section 25 really limit the jurisdiction of the court in the matter of enhancement of compensation and thus there can be no question of waiver of these provisions. A court cannot do what the statute expressly forbids. Neither by consent nor by waiver the mandatory provisions of the statute can be either modified or waived. Therefore, in my view, no question of waiver can arise. It is a statutory duty which is cast on the court and effect must be given to it."

Consequently, notwithstanding the fact that there was no specific contention advanced before the trial court, on the basis of the factual position referred to above, the court had no jurisdiction whatever to enhance the compensation from Rs. 4 per cent. to Rs. 5.50 per cent.

5. The second point raised in three of the appeals is about the value for the wells awarded by the learned Principal Subordinate Judge. The learned Princi-

pal Subordinate Judge has pointed out in paragraph 10 of his judgment that even the award proceedings clearly showed that the amounts referred to above had been spent for the digging of the wells in the respective survey numbers, S. Nos. 129/3, 129/12 and 139/3. The awards themselves showed that the amounts in question were borrowed by the respective claimants from the Government under the New Well Subsidy Scheme. If so, the inference is irresistible that the said amounts borrowed by the respective claimants from the Government under the New Well Subsidy Scheme were spent by them in digging the wells and that consequently they were entitled at least to the said amounts by way of compensation. Therefore, the award of the amounts referred to above for the wells involved in the three appeals, namely, A. S. Nos. 200, 203 and 205 of 1969 cannot be challenged.

6. The result is A. S. Nos. 200, 203, and 205 of 1969 are allowed in part, and the other appeals, namely, A. S. Nos. 197 to 199, 202, 204 and 206 of 1969 are allowed in full and the enhancement of compensation ordered by the learned Subordinate Judge from Rs. 4 per cent. to Rs. 5.50 per cent. is set aside and the value fixed by the Land Acquisition Officer will stand restored. The award of compensation for the wells involved in A. S. Nos. 200, 203 and 205 of 1969 will stand. There will be no order as to costs in any of the appeals.

Order accordingly.

AIR 1976 MADRAS 44

K. VEERASWAMI, C. J. AND
NATARAJAN, J.

Venkatamuniappa Chettiar, Appellants v. M. G. R. Lakshminarasmihan and others, Respondents.

Letters Patent Appeal No. 101 of 1966, D/- 28-1-1975.*

(A) T. P. Act (1882), Sections 92, 59-A and 91 (a) — Right of subrogation — Who has — Purchaser of equity of redemption in execution of money-decree — Not a 'mortgagor' under Section 91 (a) — He can be subrogated.

Held on consideration of Sections 59-A, 91 and 92 that either on the ground that Section 91 provides otherwise as contemplated by Section 59-A or on an interpretation of Section 91 itself, a purchaser of the equity of redemption from the mortgagor, either in invitum or by private treaty, will be a person who has an interest in the property mortgaged within the

*(Against Judgment of Venkatadri, J., in S. A. No. 839 of 1953, D/- 27-8-1965.)

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meaning of Section 91 (a) so that he will not be a mortgagor within the meaning of the first part of Section 91. Such a person is not excluded from the right to subrogate under Section 92. AIR 1934 All 1035 and AIR 1942 Bom 98, Relied on; AIR 1965 Mad 142, Disting. (Para 2)

Cases Referred: Chronological Paras
AIR 1965 Mad 142 = (1964) 2 Mad LJ 448 2

AIR 1942 Bom 98 = 44 Bom LR 20 1, 2, 3

AIR 1939 All 190 = 1939 All LJ 228 2, 3

AIR 1934 All 1035 = 1934 All LJ 887 1, 2, 3

AIR 1933 Pat 33 = 13 Pat LT 686 1

(1884) ILR 10 Cal 1035 = 11 Ind App 126 (PC) 1

K. VEERASWAMI, C. J.:— This appeal under Letters Patent from a judgment of Venkatadri, J., raises an interesting question of law, to wit, whether a transferee from a decree-holder-purchaser in execution of a money decree in his favour of the equity of redemption of a mortgagor is entitled to be subrogated under Section 92 of the Transfer of Property Act. The properties in question were subject to five mortgages executed one after the other. The suit out of which the appeal before us by the plaintiff arises, was to enforce the 5th mortgage in his favour. The 4th defendant, who was a transferee from the court auction purchaser of the equity in execution of the money decree, claimed priority on the ground that he had redeemed the first four mortgages. The first two courts agreed in decreeing the suit and declined to allow the claim of priority by the 4th defendant. Venkatadri, J., in the second Appeal was of the view that the 4th defendant could not be regarded as a mortgagor within the meaning of Section 59-A, but as a person, who had an interest in the properties, was entitled to redeem the earlier mortgages and as such he could claim subrogation in respect of them under Section 92. In taking that view, he followed Umed Singh v. Babu Ram, AIR 1934 All 1035, Narayan v. Parameshvarappa, AIR 1942 Bom 98 and Jhum Lal v. Sham Narayan, AIR 1933 Pat 33. He also made a reference to Gokaldas v. Puranmal, (1884) ILR 10 Cal 1035 (PC) which was, however, a case decided prior to the introduction of Section 59-A, and amendment of Sections 91 and 92 in 1929. The learned Judge reversed the decrees of the first two courts and granted a decree dismissing the appellant's suit.

2. On behalf of the appellant, reliance was placed on Guruswamiah v. Ramakrishna, (1964) 2 Mad LJ 448 = (AIR 1965 Mad 142). It seems to us that the present question did not arise there in the precise form, though of course the view

in *Piarey Lal v. Dina Nath*, AIR 1939 All 190 was followed. We find that there is a direct conflict of view between *Piarey Lal v. Dina Nath*, AIR 1939 All 190 and *Umed Singh v. Babu Ram*, AIR 1934 All 1035, both being decisions of Division Benches and the latter decision taking the view that a person like the 4th defendant here would be entitled to subrogation. On a careful consideration of Sections 59-A, 91 and 92, we are inclined to share the view in *Umed Singh v. Babu Ram*, AIR 1934 All 1035 and *Narayan v. Parameshvarappa*, AIR 1942 Bom 98, Section 59-A, being an interpretation section, it naturally governs the scope of the term "mortgagor" as applied to the provisions in Chap. IV of the T. P. Act. That section says that unless otherwise expressly provided references in the chapter to mortgagors and mortgagees shall be deemed to include references to persons deriving title from them respectively. A purchaser of equity of redemption from a mortgagor either by private treaty or in execution of a money decree obtained against the mortgagor, will definitely be a person deriving title from the mortgagor. Therefore, the purchaser can also be considered as a mortgagor within the meaning of Section 59-A. But the section opens with the words "unless otherwise expressly provided", of which Section 68 (1) (a) may be an instance. The point is whether there is a provision otherwise made in Sections 91 and 92 read together. Section 91 relates to redemption and the category of persons entitled to redeem a mortgage. A mortgagor is one of them. In addition, under clause (a) of Section 91, any person who has any interest in or charge upon the property mortgaged or in or upon the right to redeem the same, will be entitled to redeem. Within this category, may fall a person who was a purchaser of equity of redemption from the mortgagor. But, when the section makes a distinction between a mortgagor and a person of the type who may fall within the ambit of clause (a) of that section, we have necessarily to read the expression "mortgagor" as any person besides the mortgagor in a restricted manner. In other words, any person who may fall within the ambit of clause (a) is not entitled by Section 91 to be included within the expression "mortgagor". Interpreting that way, a mortgagor for purposes of Section 91 would include a person who has derived title from the mortgagor to the equity of redemption by inheritance or by a will or in any manner otherwise than the means by which any person came to have an interest in the property mortgaged under clause (a) of Section 91. Either on the ground that Section 91 is a provision which provides otherwise as contemplated by Section 59-A or on an interpretation of Section 91 itself, we are

inclined to think that a purchaser of the equity of redemption from the mortgagor either in invitum or by private treaty will be a person who has an interest in the property mortgaged within the meaning of clause (a), so that he will not be a mortgagor within the meaning of the first part of Section 91. If that be so, such a person is not excluded from the right to subrogate under Section 92. We are of opinion, therefore, that Venkatadri, J., was right in the view he took.

3. As we said earlier, *Umed Singh v. Babu Ram*, AIR 1934 All 1035 a decision of Sulaiman, C. J., and King, J. is directly in point. They held that a purchaser of equity of redemption from the original mortgagor was entitled to the benefit of subrogation under Section 92, if he redeemed a prior mortgage. Unfortunately, the earlier decision in *Umed Singh v. Babu Ram*, AIR 1934 All 1035 which was binding, was not referred to in *Piarey Lal v. Dina Nath*, AIR 1939 All 190. *Narayan v. Parameshvarappa*, AIR 1942 Bom 98 also decided by a Division Bench, followed *Umed Singh v. Babu Ram*, AIR 1934 All 1035. We are, with respect, in agreement with the reasoning in *Umed Singh v. Babu Ram*, AIR 1934 All 1035 and *Narayan v. Parameshvarappa*, AIR 1942 Bom 98 and it is unnecessary to reiterate the same. It follows that on that view, the 4th defendant is entitled to be subrogated to the rights of the first four mortgagees.

4. Venkatadri, J., had dismissed the suit, as we see from his decree. But he was not right in doing so. The 5th mortgagee who is the plaintiff-appellant, was entitled to a mortgage decree, but only subject to the first four mortgages in respect of which the 4th defendant would be entitled to the right of subrogation and priority over the appellant. Subject to this priority declared, we modify the decree of Venkatadri, J., and grant a decree to the appellant on the basis of the 5th mortgage. In the circumstances, we make no order as to costs.

Order accordingly.

AIR 1976 MADRAS 45

RAMAPRASADA RAO AND
RATNAVEL PANDIAN, JJ.

Kazimar Periya Pallivasal and others,
Appellants v. K. A. S. Arumugam and
others, Respondents.

Appeal No. 790 of 1970, D/- 22-1-1975.

(A) Civil P. C. (1908), Section 94,
Order 40, Rule 1 — Bare suit for appointment of a receiver — Land vesting in Government under Inam Abolition Act — Question of grant of ryotwari patta pending

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ing before Tribunal — Suit is not maintainable.

No relief can be asked on rights which are in the nature of expectancies or bare anticipations. No one could be sure whether the plaintiffs or the defendants lessees would get the ryotwari patta in accordance with the provisions of the Madras Minor Inams (Abolition and Conversion into Ryotwari) Act, 1963 when the land has vested in the Government and the question of entitlement to a patta could only be investigated and decided by the Tribunal constituted under the Act. The plaintiffs cannot seek for a relief in a Civil Court on the projection of such inchoate and incomplete rights. If the civil court cannot grant a patta it cannot also grant the relief of appointment of a receiver. (Paras 6, 21)

If any person seeks relief under Section 94 and inter alia asks for the appointment of a receiver, the condition precedent for making such a request is the existence of a main action which was already initiated by the person seeking the interlocutory relief. Such is not the case here. (Para 13)

It would also be improper in view of provisions of Section 94 and O. 40, R. 1 to invoke the inherent jurisdiction of the Code under Section 151 to entertain a bare suit for the appointment of a receiver and hold that such interlocutory orders can be made in the absence of a request for any other main relief. (Para 14)

Cases Referred: Chronological Paras
 (1969) 2 Mad LJ 281 = ILR (1969) 2 Mad 742 6
 (1968) 2 Mad LJ 58 = (1967) 80 Mad LW 424 8
 AIR 1964 SC 685 = (1964) 1 SCWR 186 15
 AIR 1964 Ker 86 22
 AIR 1955 NUC 3355 = Madh Bha LR 1955 Civil 244 17
 AIR 1950 Pat 184 = ILR (1949) 28 Pat 989 19
 AIR 1926 Mad 155 = (1925) 22 Mad LW 579 20
 AIR 1920 Pat 501 = 58 Ind Cas 405 18
 (1853) 4 HLC 997 22

RAMAPRASADA RAO, J.:— The Kazimar Periya Pallivasal, Kazimar Street, Madurai, represented by its trustees, who are the plaintiffs in O. S. 388 of 1968 on the file of the Subordinate Judge, Madurai, are the appellants. The plaintiffs filed a bare suit for the appointment of a receiver for the suit lands for certain ancillary directions in the following circumstances. The Pallivasal owns properties in Iruvathanallur limits, Madurai, District, and the defendants are said to be the lessees in occupation of such lands belonging to the Pallivasal which they have been cultivating on a waram

basis. After the passing of the Madras Minor Inams (Abolition and Conversion into Ryotwari) Act, (Madras Act 30 of 1963), the inams came to be vested in the Government under Section 3 of Act 30 of 1963 and in consequence thereof and as ordained by the provisions of the Act there was an enquiry as to the nature of the rights to which the plaintiffs and the defendants would be entitled to. In the first instance, the Settlement Tahsildar granted a ryotwari patta in favour of the defendants. On appeal, the Appellate Tribunal set aside the order; and a re-enquiry was directed to be made by the Settlement Tahsildar. It is now reported that on such re-enquiry patta was granted in favour of the Pallivasal, but the defendants have taken up the matter on appeal to the Tribunal (Land Tribunal, Madurai) and the same is pending there.

2. According to the plaintiffs, the defendants who were the lessees and who were cultivating the lands on a waram basis are bound to pay the waram for the lands and cash rent for the coconut tope and they having failed to pay the same after the date on which the above Act was notified and as the defendants have no properties of their own it would be just and convenient to grant the only relief of appointment of a receiver who could be directed by the court to harvest and pay half of the produce to the plaintiffs as also the usual cash rent towards the use of the coconut topes.

3. The defendants through the 15th defendant claimed that the plaintiffs are not Iruwaramdars; but on the other hand, they are entitled to Kudiwaram right in the lands and they are in lawful possession of the suit properties in exercise of their right as kudiwaramdars and that the Government had collected the kist from them and so the plaintiffs are not even entitled to receive kudiwaram produce for the lands as also the rent for the tope. Effectively the defence is that a bare suit for the appointment of a receiver, which would impliedly oust the lawful possession of the defendants from the properties, is not maintainable and that the suit is barred by provisions of the Madras Act 30 of 1963.

4. On the above pleadings the following issues were framed:

1. Whether the suit as framed is maintainable?

2. Whether the plaintiff is entitled to melwaram?

3. Whether the suit is barred by Act 30 of 1963?

4. To what relief is the plaintiff entitled?

Additional Issues:

Whether the plaintiff is entitled for the appointment of a receiver for the suit properties as prayed for in the plaint?

The court below held that the defendants are in actual possession of the suit lands and their possession is admittedly lawful. It also found that no receiver could be appointed on the only ground that the defendants are poor and they may not be able to pay all the arrears of rent in one lump sum. On the question of maintainability of the action, the court held that it was not maintainable and in its discretion expressed the view that as there was no complaint of acts of waste on the part of the defendants, it was neither just nor convenient to appoint a receiver. In the result the suit was dismissed. It is as against this, the present appeal has been filed.

5. Mr. Sundaram Iyer, learned counsel for the appellants, based on the analogy of a similar sister enactment viz., the Madras Estates (Abolition and Conversion into Ryotwari) Act, (Madras Act 26 of 1948) contends that the plaintiffs as landholders should be deemed in law to be in possession of the suit lands; and fictionally and notwithstanding the induction of Act 30 of 1963 their possession as landholders should be deemed to be continuous and in that view they have a present right to seek for the relief of appointment of a receiver so as to protect and safeguard their interests. On the question of maintainability he would say that though the relief is not one normally sought for, yet, the arm of justice could be extended in deserving cases by such appointment of receiver, though the relief asked for is the only relief in a lis. Contending contra, Mr. Parasaran, learned counsel for the respondents brought out the main distinction between the working of the two enactments and urged that though the purpose of both the legislations is similar, yet the manner and the modus operandi of its working is distinct and separate. Whilst under Madras Act 26 of 1948, there is no forum prescribed in the matter of adjudication of the rights to obtain patta in so far as a ryot is concerned, he points out that under Madras Act 30 of 1963 a special Tribunal is created for such enquiries and for the ultimate grant of such patta to the tenant in occupation; and when this distinction is borne in mind, the point in controversy could easily be visualised and appreciated. Furthering his contention, the learned counsel would say that as on the date of institution of the present action neither the respondents nor the appellants could project an existing right which is comprehensible in law as an enforceable right, it would be a travesty of the exercise of jurisdiction by courts if a receiver is appointed for the mere asking of it. Relying upon precedents of this and other courts the learned counsel submits that a suit for the appointment of a receiver simpliciter is unknown to law and is a

strange and a queer request. He therefore sustains the ultimate conclusion of the court below that the suit is not maintainable not only under the common law but also because of the special provisions contained in Madras Act 30 of 1963.

6. It is common ground that the civil courts have no jurisdiction to grant a patta either under Madras Act 26 of 1948 or under Act 30 of 1963. Though a forum has not been created for such grant of pattas to persons in occupation of the land under Act 26 of 1948, yet by practice, the tribunals created by the statute for the grant of such pattas to the landholder, were enabled to enquire into the competence of an individual in possession of the land to secure such a patta from the same tribunals which were constituted under that Act to grant such pattas under Sections 12 to 14 to the landholder. In juxtaposition to this, we have a special provision in Act 30 of 1963. Section 8 of Act 30 of 1963 says that subject to the provisions of sub-section (2), every person who is lawfully entitled to the kudiwaram in an inam land immediately before the appointed day whether such person is an inamdar or not shall, with effect on and from the appointed day, be entitled to ryotwari patta in respect of that land. In order to effectuate this provision, certain hierarchy of officers is created by it who are ordained and enabled to determine the lands in respect of which any person is entitled to a ryotwari patta. Section 11 says so and authorises the Assistant Settlement Officer to enquire into the claims of any person for ryotwari patta under this Act in respect of any inam land and render a decision thereon. Further appeals as against his decision are provided for as is seen from clause (3) of Section 11 and Section 30 of the Act. It is therefore clear, as was pointed out by a Bench of our court in *State of Madras v. Ramalingaswami Madam*, (1969) 2 Mad LJ 281 at p. 298, "We have already pointed out that the grant of a ryotwari patta under the Act is a right created under the Act and that the machinery provided under the Act is the only remedy for obtaining ryotwari patta". The plaintiffs, when they came to court, were not clothed with any right known to law to seek for a relief in civil courts. Under Section 3 of Madras Act 30 of 1963, with effect on and from the appointed day and save as otherwise expressly provided in the Act, every inam shall stand transferred to the Government and vest in them free of all encumbrances. We are not quoting Section 3 in extenso. A proviso, however, added by Section 2 of the Tamil Nadu Act 29 of 1971 says that the Government shall not dispossess any person who is personally cultivating any land in a minor inam until the Assistant

Settlement Officer and Tribunal and the other appellate tribunal for appeal if any decided that such person is not actually entitled to a ryotwari patta in respect of that land under the provisions of the Act. This basic provision in Act 30 of 1963 positively makes out that on and after the notified date the quondam rights of the inamdar as well as the rights of the person in possession of the lands whether as a kudiwaramdar or otherwise got postponed and suspended as if by an automatic operation of the notification under which the Act is notified. During this interregnum or period of suspension as we characterise it, it is difficult for either an inamdar or any person in occupation to assume and vest in him any right known to law. The Civil Court cannot adjudicate or determine whether one or the other is entitled to a patta. Such an investigation is admittedly pending. Until that stage is reached and the determination made by the statutory tribunals, neither the plaintiffs nor the defendants could come to a civil court and seek for relief which on the date of such asking is in the nature of an expectancy or a bare spes successionis. It is elementary that no relief can be asked on rights which are in the nature of expectancies or bare anticipations. No one is sure whether the plaintiffs or the defendants would get the ryotwari patta in accordance with the provisions of the Act. But one thing however is clear that on and from the notified date the inam has vested in the Government free from all encumbrances. Such being the legal as well as the statutory position, it would be idle for the plaintiffs to seek for relief on the basis of a bare expectancy and ask for the sole and the only remedy of appointment of a receiver. Mr. Subramania Iyer however, says that the courts have the power dehors the common law to appoint a receiver in certain situations.

7. Reliance is placed upon a passage in Halsbury's Laws of England, Volume 32, Simonds Edn. para. 633, at page 394, which runs thus—

"Receivers are constantly appointed pending the trial of an action or pending the Constitution of a legal representative of a deceased person, or, if necessary, pending a reference to arbitration or the trial of an interpleader issue or pending proceedings in another court."

The last sentence is pressed into service. According to the learned counsel as proceedings are pending in another forum, though of course the creature of a statute, yet it cannot be said that the civil court has no jurisdiction to appoint a receiver.

8. Again referring to a passage in Kerr on Receivers, 13th Edn. at page 5, the learned counsel says that the object sought by such appointment is to safe-

guard the property for the benefit of those entitled to it. It would not be out of place for a Civil Court to exercise jurisdiction even at the threshold if it is satisfied that in another forum, though not a civil court, disputes are pending in the matter of the recognition of rights of parties to the property in question or to be more specific in the instant case when an investigation as to the grant of a patta is pending before the tribunals created under Act 30 of 1963. There is a fallacy in this argument. It is not as if that as on the date when the suit was instituted and even so as on date, there is a dispute as regards the ownership of the property or its possession. What is sought to be agitated before the statutory tribunals is as to who is entitled to a ryotwari patta to the lands in question. Strong reliance, however, is placed upon a passage in *Md. Mustafa Marakayar v. Udayanachiammal*, (1968) 2 Mad LJ 58 at p. 62. Veeraswami, J. (as he then was) while considering the scope of similar provisions under the Madras Estates Abolition Act, 26 of 1948, expressed his opinion in the following lines—

"In effect both possession and title of person who is entitled to a ryotwari patta are saved from the effect of the notification under Section 3 (b) and the ownership in such lands continues in the quondam landholder notwithstanding the notifications and the fact that it is subject to determination of the character of the land for which he will be entitled to a ryotwari patta."

In our view, this passage is being torn out of its context so as to serve the interests of the plaintiffs. No doubt, if the landholder obtains a patta on the completion of the enquiry by the statutory tribunals then if he were in possession of the lands on the notified date he would certainly continue in possession thereof as quondam landholder. But if, on the other hand, the land is in the possession of lessees or tenants the position is different. In view of Section 3 of Act 30 of 1963 the ownership of an inam is automatically transferred to the State and it vests in them free from all encumbrances. The vesting of the inam and the lands comprised therein rests as it is on a statutory fiction by which both the ownership and the possession become automatically transferred on such notification, only to slope down on the shoulders of the person entitled to a ryotwari patta which entitlement could be found only after investigation by the tribunals. It is in this light we state that the right, if any, which either the landholder or the person in occupation has obtained under the provisions of Act 30 of 1963, is postponed and that there is an interregnum between a notified date and the date when the tribunals determine as to who is entitled to

a ryotwari patta. During the nebulous period, neither the plaintiffs nor the defendants could, in a manner known to law, project any right known to law and seek relief as if such rights are existing enforceable rights.

9. The learned author Kerr in the same edition referred to above at page 7 contemplated a difficult case like the one under consideration. He says "Where the object of the plaintiff is to assert a right to property of which the defendant is in enjoyment the case presents more difficulty. The court by taking possession at the instance of the plaintiff may be doing a wrong to the defendant; in some cases an irreparable wrong. If the plaintiff should eventually fail in establishing his right against the defendant, the court may by its interim interference have caused mischief to the defendant for which the subsequent restoration of the property may afford no adequate compensation." (Reliance has been placed upon *Marshall v. Charteris*, 1920-1 Ch 520).

10. If, therefore, the plaintiffs seek for a relief at a time when they are not clothed with an enforceable legal right and when they could obtain such a right only on the completion of an enquiry by the statutory tribunals, and when admittedly such an enquiry is still pending, the plaintiffs cannot seek for relief in a Civil Court on the projection of such inchoate and incomplete rights. In our view, he has merely a bare expectancy in his favour and that is not equated generally in a civil court to an enforceable right.

11. This leads on to the question whether a bare suit for receivership is maintainable at all. Under the Civil P. C., an application for appointment of a receiver is generally made as an interlocutory measure when a main relief is pending adjudication by the court. It is made either under O. 40, Rule 1 or under Section 94 C. P. Code. There can be no doubt whatsoever that even Section 94 Civil Procedure Code is not a substantive provision but a provision which speaks of the existence of a main relief for the grant of a supplemental relief by the appointment of a receiver. Undoubtedly, Order 40, Rule 1, contemplates a present action for one or the other of the parties to it to seek for the appointment of a receiver. That is not the case here. The question is whether Section 94, Civil Procedure Code by itself would enable the plaintiff to obtain the relief of appointment of a receiver without a substantive suit laid by him for any comprehensive purpose otherwise. Section 94 appears in Part VI of the Civil Procedure Code, under the caption 'Supplemental proceedings'. The relevant portion reads thus:—

"In order to prevent the ends of justice from being defeated the court may,

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if it is so prescribed appoint a receiver of any property and enforce the performance of his duties by attaching and selling his property and make such other interlocutory orders as may appear to the court to be just and convenient."

12. The use of the word 'other' in clause (e) of Section 94 is very significant. That word gives the clue to the content of Section 94. Though prima facie part VI appears to be substantive in nature and original in application; yet clause (e) of Section 94 makes it clear that the relief enumerated in clauses (a), (c) and (d) are only interim in nature meaning thereby that these reliefs mentioned in Section 94 could only be granted as an aid or ancillary to a main relief sought for by the person seeking the interlocutory order.

13. In Ramanatha Iyer's Law Lexicon, the word 'supplementary proceeding' has been explained thus—

"A supplementary proceeding is a separate proceeding in an original action in which the court where the action is pending is called upon to exercise its jurisdiction in aid of the judgment in action." It appears to us that if any person seeks relief under Section 94 and inter alia asks for the appointment of a receiver, the condition precedent for making such a request is the existence of a main action which was already initiated by the person seeking the interlocutory relief. This situation is absent in the instant case.

14. It cannot be said that Section 151, Civil Procedure Code could be invoked in such circumstances. The special excludes the general is elementary principle of law. When the Civil P. C. has provided for grant of such a relief of appointment of receiver both under Section 94 and under Order 40, Rule 1, it would be improper to invoke the inherent jurisdiction of the Code under Section 151 to entertain a bare suit for the appointment of a receiver and hold that such interlocutory orders can be made in the absence of a request for any other main relief.

15. In *State of Orissa v. Ramchandra*, AIR 1964 SC 685 the Supreme Court said that an interim relief can be granted only in aid of and as auxiliary to the main relief which may be available to the party on final determination of his rights in a suit.

16. It therefore follows that it would be difficult for the plaintiff to ask for a bare interlocutory relief of appointment of a receiver. Again there is abundant authority of both our court and other courts for the proposition that such a request in the abstract and solely for the purpose of wresting property from the person in lawful possession ought not to be encouraged.

17. A learned Single Judge of the Madhya Pradesh High Court in *Jhatalo-*

mel Khundromal v. Bhagwan Prasad Tiwari, AIR 1955 NUC 3355 (Madh Bha) strongly expressed the view that to file a suit only for the appointment of receiver is queer on the face of it and proceedings for the appointment of a receiver are termed supplemental proceedings in Civil P. C. and Section 94 contains provisions for general powers of the court in regard to various kinds of interlocutory orders which it can pass in course of proceedings before it and supplemental proceedings are a means to an end and not an end in themselves.

18. In Chandreshwar Prasad Narain Singh v. Bisheshwar Pratap, (1920) 58 IC 405 = (AIR 1920 Pat 501), a Division Bench of the Patna High Court said that a court has no jurisdiction to appoint a receiver in respect of property regarding which no litigation is pending.

19. In Ramsarup Das v. Rameshwar Das, AIR 1950 Pat 184, another Division Bench of that court observed—

"The power conferred on the court by Order 40, Rule 1 (a) to appoint a receiver refers only to the appointment of a receiver in respect of property in regard to which litigation is pending, that is to say, as long as the suit remains pending. The court has no power to direct the appointment of a receiver, or the continuance of the receiver already appointed, to hold charge of the property after the litigation is determined."

Obviously the learned Judges had in view the situation in respect of property in regard to which litigation is pending in the same court in which the application for receiver is made when they said 'in respect of property in regard to which litigation is pending'. The litigation should be pending in the same court in which the interlocutory relief is asked for.

20. In Chockalingam Pillai v. Pichappa Chettiar, (1925) 22 Mad LW 579 = (AIR 1926 Mad 155), Coutts Trotter, C. J., accepted the contention raised before him that a civil court cannot by way of receivership do what it cannot do by way of decree in the suit.

21. In this case, the court cannot grant a patta when the pending litigation before the statutory tribunals is in relation to grant of patta. If the civil court cannot grant a patta, it cannot grant the relief of appointment of receiver.

22. In Kochunni v. Kunnukuttapuni, AIR 1964 Ker 86, the learned Judges after referring to a passage of the House of Lords in *Owen v. Homen*, (1853) 4 HLC 997, observed thus—

"Though the issue of injunction and the appointment of receivers are two forms of specific relief under Section 5 of the Specific Relief Act, 1877, a stronger case is required for the latter than for the former. In appointing a receiver the

court wrests the possession from the defendant and assumes management of the property."

Hence in cases invoking ouster of a person in exclusive possession, the applicant has to make out special circumstances necessitating special protection of his rights by the appointment of a receiver; and as such dispossession may be a wrong done to the defendant, the court ought to be very reluctant to grant such a prayer. A fortiori in a case where the plaintiff has no rights in praesenti but has only a bare expectancy in future for obtaining patta he cannot prematurely ask for the appointment of a receiver, resulting in the disturbance of certain rights in the person who is in lawful possession of the property.

23. On the ground that the suit is not maintainable and on the basis that no edifice could be put up without a foundation and as there is no enforceable substantial right in the plaintiff for him to enforce it in a substantive action and as no interlocutory relief by way of appointment of a receiver can be asked without a pre-existing action in which the substantial right is being agitated, we are of the view that the suit is not maintainable and the relief asked for is not only premature but misconceived. The appeal therefore fails and is dismissed. There will be no order as to costs.

24. We are compelled to before parting with this case to give a direction to the Minor Inam Abolition Tribunal to dispose of C. M. A. 82 to 95 of 1972 on its file before the end of March 1975, and to report the same to this court.

Order accordingly.

AIR 1976 MADRAS 50

KAILASAM AND VARADARAJAN, JJ.

Commissioner, Pattukottai Municipality, Appellant v. Chandrasekaran (Minor), Respondent.

Writ Appeal No. 311 of 1972, D/- 31-1-1975.*

(A) Tamil Nadu District Municipalities Act (5 of 1920), Sections 216, 317 and 339 — Scope — Construction of building without sanction — Final order under Section 216 (3) for demolition — Failure to comply — Executive authority can still take action under general provisions of Section 339.

While Section 216 provides for a provisional order requiring the owner to de-

*(Appeal under Clause 15 of Letters Patent against Judgment of Ramaprasada Rao, J., in W. P. No. 148 of 1972, D/- 3-4-1972.)

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molish the work done followed by a final order confirming the provisional order. Section 339 which is a general provision provides steps to be taken when the owner does not comply with the notice. When the owner neglects to obey the order under Section 216 (3) there could be no further obstruction to the executive authority for taking action under Section 339. Section 317 relates to prosecution for failure to comply with the order under Section 216. But that does not in any way affect the right of the executive authority to take action under Section 339 for giving effect to the notice under Section 339. AIR 1941 Mad 259 and 1955-1 Andh WR 384 and AIR 1958 Ker 279, Discussed. (Para 9)

(B) Constitution of India, Article 226 — Construction of building on Government Land without prior sanction of Municipality — Building rules not alleged to be violated — Order for demolition of construction by Municipality — Writ issued by Single Judge against Municipality restraining it from demolishing construction not interfered with in Letters Patent Appeal — (Letters Patent (Mad), Clause 15). (Paras 14, 15)

Cases Referred: Chronological Paras
AIR 1958 Ker 279 = 1958 Ker LT 116 12
(1955) 1 Andh WR 384 11
AIR 1941 Mad 259 = (1940) 2 Mad LJ
1032 10 12

G. Ramaswami for R. Balasubramaniam, for Appellant; K. Alagiriswami, for Respondent.

KAILASAM, J.— This appeal is preferred by the Commissioner of Pattukottai Municipality against the judgment of Ramaprasada Rao, J., in W. P. 148 of 1972. The writ petition was filed by minor Chandrasekharan, represented by his father and guardian Natanam Chettiar for the issue of a writ in the nature of Mandamus or any other appropriate writ directing the respondent-Municipality to forbear from demolishing the petitioner's building in S. No. 68/A-5 of Pattukottai village.

2. The respondent herein commenced putting up a construction in S. No. 68/A-5 within the Municipal limits of Pattukottai village. On 4-12-1970 he applied to the Municipality for permission to put up a godown over the land and submitted building plans for the purpose. Before sanction of the plan, the respondent started construction on 4-12-1970, and a door frame on the site was fixed on 15-12-1970. As the respondent had commenced building without getting a sanction, a notice under Sec. 216 (1) (i) (a) of the Tamil Nadu District Municipalities Act, dated 19-12-1970, was served on him calling on him to demolish the unauthorised construction. This notice was acknowledged by him on 22-12-1970. On

3-12-1971 the first plan submitted for consideration was rejected on the ground that there was a violation of the specific building requisition. The respondent applied for a second time for approval of the site and for further construction and forwarded fresh plans. The second application was made on 5-4-1971. On 21-4-1971, the provisional order issued under Section 216 (1) (i) (a) of the Act calling upon the respondent to demolish the construction was confirmed under Section 216 (3). The second plan submitted by the respondent on 5-4-1971, was also rejected on the ground that the respondent proceeded to construct without permission and he did not obey the provisional order made under Section 216 (1) (i) (a) of the Act. The rejection of the first plan was acknowledged by the respondent on 24-4-1971. The respondent filed a third plan for sanction of the building plan and approval of the site and furnished fresh plans on 27-4-1971, but the third plan was returned on 30-4-1971, on the ground that the building would be an encroachment upon the Government land.

3. It is not in dispute that the site on which the building was sought to be built was kottai poromboke and is Government land. Proceeding for non-compliance with the direction of the Municipality was taken and the provisional order under Section 216 (1) was confirmed under Section 216 (3) of the Act. The respondent was then prosecuted before the Special First Class Magistrate, Pattukottai for an offence under Section 216 (1), (2) and (3) and Section 317 of the Act and the case is pending. An appeal was filed by the respondent but no order was passed by the Municipal Council. In the writ petition the respondent contended that after the Municipality initiated the criminal proceedings as contemplated under the Act, the Municipality is not entitled to pull down the building as it had no jurisdiction to demolish it by itself. According to the respondent the only course open to the Municipality for the non-compliance of the direction under Section 216 is to prosecute for an offence under Section 317.

4. Before the learned Judge and before us it was contended that a direction under Section 216 (1) to (3) to demolish an unauthorised construction, if not complied with, can only be dealt with as an offence punishable under Section 317 and the Municipality cannot on its own force demolish the unauthorised construction. The learned Judge held that the Municipality had the power to prosecute a delinquent person but had no power to enforce the demolition of that building because they did not sanction the plan and in the particular case they could not sanction the plan as the building was sought to be put up in a kottai poromboke.

The learned Judge was also of the view that if the Municipality intended to demolish a construction put up within its precincts then it should initially possess the authority to permit such a construction or in the alternative be of the view that the construction is not in accordance with the content of the permission granted by it to build and if it has no power to give such permission to construct then it follows that it has equally no power to direct a demolition of such a structure unless the Act specially empowered it to do so. The learned Judge further observed that as the land in which a building was put up is kottai poromboke, it is not for the municipality to feel aggrieved about it whatever rights the Government may have as against the encroacher and the Municipality cannot take proceedings.

5. Chapter X of the Act deals with building regulations and Sections 197 to 206 deal with buildings other than huts. Section 197 provides that if any person intends to construct or reconstruct a building other than a hut, he shall send to the executive authority an application in writing for the approval of the site, together with a site plan of the land and an application in writing for permission to execute the work together with a ground plan, elevations and sections of the building, and a specification of the work. Section 199 provides that the construction or reconstruction of a building shall not be begun unless and until the executive authority has granted permission for the execution of the work. Section 216 confers powers on the executive authority to take certain action if the construction or reconstruction of the building had been commenced without obtaining the permission or carried out or completed contrary to the permission granted or any alternative mode contrary to the notice issued. He, the authority, may make a provisional order requiring the owner or the builder to demolish the work done in order to bring the construction work in conformity with the Act, bye-laws or rules. Section 216 (2) requires the executive authority to serve a copy of the provisional order made under sub-section (1) on the owner of the building together with a notice requiring him to show cause within a reasonable time to be named in such notice why the order should not be confirmed. Under sub-section (3) if the owner fails to show cause to the satisfaction of the executive authority, the executive authority may confirm the order with any modification he may think fit to make, and such order shall then be binding on the owner. This section as is seen, enables the executive authority to require the owner to demolish the work done.

6. Section 317 of the Act enables the executive authority to take action against a person who had failed to obey

the direction given to him under Section 216 and prosecute him. The person who failed to obey may be fined by the Criminal Court upto a sum of Rs. 500/- in the case of a building as also a sum of Rs. 100/- for each day during which the offence is proved to have continued after the first day. Thus in addition to action taken under Section 216 by passing an order directing the owner to demolish the work done, criminal prosecution can also be taken.

7. Section 339 which comes under Chapter XVI and relates to power to enforce licensing provisions, orders etc., and sub-section (1) provides that whenever by any notice, requisition or order under this Act, or under any rule, bye-law or regulation made under it, any person is required to execute any work or to take any measures or do anything a reasonable time shall be named in such notice, requisition or order within which the work shall be executed, the measures taken, or the thing done. Under sub-section (2), if such notice, requisition, or order is not complied with within the time so named the executive authority may cause such work to be executed or may take any measures or do anything which may in his opinion, be necessary for giving due effect to the notice, requisition or order as aforesaid.

8. Section 339 is a general provision which refers to any notice that may be given under the Act or any rule, bye-law or regulation to execute any work or to take any measure or do anything within a reasonable time to be named in such notice. If such notice, requisition or order is not complied within the time so named, the executive authority may cause such work to be executed or may take any measures or do anything which may, in his opinion, be necessary for giving due effect to the notice, requisition or order as aforesaid. Section 339 (2) confers the power on the executive authority to cause such work to be executed or to take measures or do anything which may, in his opinion, be necessary for giving due effect to the notice etc.

9. Under Section 339 a notice and order under the Act was given and reasonable time was also given requiring the respondent to enable him to carry out the work. The provision of Section 339 has been satisfied; and under Sec. 339 (2) the executive authorities have the right to cause work to be executed or to take any measures or do anything which may, in their opinion, be necessary for giving due effect to the notice. The attack of the learned counsel for the respondent against the legality of the order is that the rules relating to building are found under Section 216 which are special provisions and as the special provisions always override

the general provisions resort could not be made to the general provisions when there are special provisions in regard to a matter. This contention overlooks the fact that while Section 216 provides for a provisional order requiring the owner to demolish the work done followed by a final order confirming the provisional order, Section 339 provides steps to be taken when the owner does not comply with the notice. When the owner neglects to obey the order under Section 216 (3) — there could be no further obstruction to the executive authority for taking action under Section 339. Section 317 relates to prosecution for failure to comply with the order under Section 216. But that does not in any way affect the right of the executive authority to take action under Section 339 (2).

10. The learned counsel for the respondent relied on a decision of the Bench of this court in *Mayandi v. Madura Municipality*, AIR 1941 Mad 259. The facts of the case are that the owner applied to the Municipality for sanction on 25-6-1931 to erect a building and on 17-7-1931 the sanitary inspector reported no objection to the erection of the building, but without waiting for the sanction of the executive engineer, the appellant-owner commenced the building and completed the work. On 20-7-1931, the executive authority called upon the appellant to submit a plan of the lay-out of the whole survey number. This requirement was, however, not complied with until 9-5-1932. After the executive engineer had on 20-7-1931 called for a plan of the lay-out of the whole survey number, no further communication was addressed to the appellant until 5-5-1932, when the Special Officer issued a notice purporting to be pursuant to Sections 338 and 339, by which he required the appellant to demolish his building within four days on the ground that it had been erected without municipal licence. On 7-6-1932, the Special Officer sent men to the site for the purpose of demolishing the building and this work was carried out in the presence of officials of the municipality. On the facts the Bench after considering the provisions of Section 216 (1), (2) and (3) held that an order passed under Section 216 (3) would be binding on the owner, for if an order under sub-section (3) becomes effective, it can be enforced by virtue of the provisions of Section 339. The learned counsel for the respondent relied on the following passage in the aforesaid Bench decision which runs as follows:—

"The Act does not direct any special procedure to be followed for remedying breaches of the law with regard to licences, permissions, registrations, apart from that to be found in the chapter relating to building regulations. Therefore, except in the case of buildings, direct ac-

tion may be taken under Sections 338 and 339."

We do not find this passage, in any way, helps the respondent for what is stated is that except in the case of buildings, direct action may be taken under Section 339; but in the case of buildings, action should be taken under Section 216 before proceedings were taken under Section 339. This is made specific by the observation, "if an order under sub-s. (3) becomes effective, it can be enforced by virtue of the provisions of Section 339." This decision therefore not only does not support the respondent's contention but clearly negatives his contention.

11. The learned counsel for the respondent also relied on the decision of the Andhra Pradesh High Court in *Kakinada Municipality v. Satyanarayana*, 1955-1 Andh WR 384. In that case the court held that the provisions of Section 216 do not enable the municipality to direct demolition of a building merely because the building ultimately erected is not in accordance with the approved plan. It held that it is necessary for the municipality, and if the matter comes to the court — for the court, to satisfy itself whether the building is not in conformity with the Act, bye-laws, rules, direction or requisition as aforesaid. These observations do not help the respondent, for the decision was based on the facts of that case.

12. In *Kalianikuttu Amma v. State of Kerala*, AIR 1958 Ker 279 the court held that Chapter X of the Act contains what are called building regulations and so long as that chapter contains provisions as to how contraventions thereof should be dealt with, the Municipality cannot have recourse to the general provisions in Section 338, for such contraventions. In coming to the conclusion the learned Judge relied on the decision of the Bench of this court (already referred to) in *Mayandi Chettiar v. Madurai Municipality*, AIR 1941 Mad 259, but the passage which we have underlined, namely, that proceedings under Section 339 can be taken after action was taken under Section 216 (1) to (3) has not been noticed by the learned Judge. We therefore, find that the three decisions cited by the learned counsel for the respondent do not support his contention.

13. It was next urged that when several persons are allowed to put up buildings in kottai poromboke, the respondent was denied permission. The respondent has alleged in para. 6 of his affidavit that the municipality had declined to grant him permission while various owners were given permission to build about 40 houses in S. No. 68-A.5. This allegation was denied in the counter-affidavit. But in the reply affidavit, the res-

pendent had given particulars about 40 houses; but as the municipality had no opportunity to deny the specific allegations, nothing was done further. On the allegations on record we are unable to say that the respondent was discriminated against.

14. We feel, therefore, that under Section 339 the executive authority have the right to cause such work to be executed or to take any measures or do anything which may, in their opinion, be necessary for giving due effect to the notice. Having found so, we asked the learned counsel for the Municipality to inform us whether the building rules had in any way been contravened. The learned counsel informed us that the building rules had not been contravened. The only contravention is that the building is put up on a poromboke. As the building rules have not been contravened, we do not think we would be justified in interfering with the order of the learned Judge to enable the municipality to demolish the building.

15. In the circumstances, while setting out the position of law so far as the powers of the municipality are concerned we refrain from setting aside the order of the learned Judge granting a writ directing the Municipality to refrain from demolishing the building, as on the facts that step is not called for. The only objection is that the building is on a poromboke. It will be open to the Govt. which will be the affected party to take such steps as are open to it to redress their grievances if any. The prosecution that is filed by the Municipality will go on and will be disposed of according to law. With these observations, we dismiss the writ appeal. There will be no order as to costs.

Appeal dismissed.

AIR 1976 MADRAS 54
VEERASWAMI, C. J. AND
NATARAJAN, J.

State of Tamil Nadu and another, Appellants v. Sri-la-Sri Ambalavana Pandare Sannadhi, Respondent.

Writ Appeal No. 150 of 1973. D/- 9-1-1975.*

(A) Madras Inams (Supplementary) Act (31 of 1963), Section 5 — Tribunal's power under — If extends to deciding whether land in question is non-ryotwari. W. P. No. 3795 of 1969, D/- 25-3-1971 (Mad), Reversed.

*(Against order of Palaniswami J., in W. P. No. 3795 of 1969, D/- 25-3-1971.)

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Where the jurisdiction of a tribunal depends on certain preconditions, it has the power to determine as preliminary issue the existence of those conditions. As such when there is a dispute as to whether the land in question is non-ryotwari the tribunal under the section has the power to decide that question as also the further question whether that land is a minor inam. It cannot be said the tribunal's jurisdiction is restricted only where the land is admittedly non-ryotwari. W. P. No. 3795 of 1969, D/- 25-3-1971 (Mad), Reversed. (Para 2)

(B) Constitution of India, Article 226 — Writ jurisdiction — If and how far available to decide questions as to a notification under Madras Act 30 of 1963. (Madras Inams (Supplementary) Act (31 of 1963), Section 5).

Though the power under the Article is not subject to limitations, it cannot be used to allow parties to skip prescribed statutory remedies available in specific cases. Thus questions as to a notification issued under the Madras Act 30 of 1963 on the ground that certain lands were minor inams will have to be decided only under the Madras Act 31 of 1963. This is clear from the scheme of the Madras Act 31 of 1963 also. (Para 2)

Govt. Pleader, for Appellants; S. Gopalan and B. Kumar, for Respondent.

VEERASWAMI, C. J.:— This is an appeal by the State from a judgment of Palaniswamy J, which is capable of disposal on a short ground, though the learned Judge had gone into the merits of the question whether the lands notified under Madras Act 30 of 1963 constituted minor inams or not. He answered that question in the negative. The State's objection based on the Madras Inams (Supplementary) Act, 1963, did not find favour with him, which, in our opinion, and with due respect to the learned Judge, was not right.

2. The Madras Inams (Supplementary) Act, 1963 was enacted, as seen from the Preamble to the Act, to provide for the determination of the question whether any non-ryotwari area in the State of Madras is or is not an existing inam estates, a part village inam estate, a minor inam or a whole inam village in Pudukot-fal. Madras Act 30 of 1963 which deals with the abolition of minor inams, did not provide for a machinery to decide whether an inam is a minor inam to which that Act would have application. Madras Act 31 of 1963 which is the Madras Inams (Supplementary) Act 1963, provides for the machinery.

Section 5 starts with non-obstante clause and confers jurisdiction upon the Settlement Officer to decide whether 'the non-ryotwari' area specified in the application is or is not among other things a

minor inam. The definition in Section 2 read with non-obstante clause in Section 5, shows that Section 5 is overriding and under the former section an existing inam estate shall have the same meaning as in clause (4) of Section 2 of the Inam Estates Abolition Act and minor inams, as in Clause 2 of the Minor Inams Abolition Act. The whole object of Section 5 is to enable to decide when a dispute arises as to the character of the land. If it is non-ryotwari, the question would be whether it would constitute one or the other forms of estates listed in Section 5. If it is ryotwari, it would at once be clear that it would not constitute any one of those estates in the list. Palaniswami, J. proceeded upon the view that section 5 would confine only to non-ryotwari area and only if on application, Section 5 involves such land, a question as to whether it constituted the other form of estate mentioned therein would arise. We are unable to accept this construction.

It is a well-accepted principle that, where the jurisdiction of a Tribunal or court is depended on certain characteristics, it would be incidental to the jurisdiction of the tribunal to find out as a preliminary issue whether the elements are present in order to assume or not assume jurisdiction to proceed further. Where one party says that the land is non-ryotwari and it constitutes a minor inam and the other party claims, as in this case, that the land is ryotwari, the tribunal under Section 5 would certainly have jurisdiction to decide that issue and, once the tribunal decides that the land is non-ryotwari, the further question would arise whether it would be a minor inam. These two questions are well within the power of the Tribunal under Section 5 to decide. We cannot subscribe to the view that the jurisdiction is confined only where the land is admittedly non-ryotwari. To take that view, would defeat the very purpose of the Act. We find that the decision of the Tribunal is subject to an appeal and a further revision to this court. The decision arrived at by the application of the Act is made binding upon the parties — vide Section 8.

Also, the jurisdiction of civil court and revenue courts is barred by Section 10 to adjudicate upon the questions adumbrated therein. Having regard to the scheme of the Act, we are of opinion that the question whether the notification made in 1965 under Madras Act 30 of 1963 on the footing that the lands were minor inams would have to be decided only under the provisions of Madras Act 31 of 1963. It is true that Article 226 is not subject to any limitation as to the jurisdiction of this court. However wide the power thereunder is, it is plain that in exercising that power this court would not allow the parties to by-pass or circumvent or defeat any of the statutory provisions providing for other remedies in specific cases. On that view of the matter, we allow the appeal with costs. Counsel's fee Rs. 150/-.

3. But in the circumstances of the case, in order to serve the ends of justice, we direct that if the respondent files an application under Section 5 within 60 days from this date, no question of limitation will be permitted to be raised. The application will be taken on file and the Tribunal will deal with it on that basis. In disposing of such application the tribunal will not in any way be guided by the observations or conclusion of the learned Judge expressed in the petition from which this appeal arose which we allowed.

Appeal allowed.

AIR 1976 MADRAS 55

ISMAIL, J.

M/s. Bright Bros. (Pvt.) Ltd., Bombay.
Appellant v. J. K. Sayani, Respondent.

Appeal No. 872 of 1970, D/- 2-1-1975.*

(A) Contract Act (1872), Section 206 — Expression "such revocation or renunciation" — Word "such" — Meaning — Word used by Legislature, if to be ignored — Requirement of reasonable notice under Section 206, when available — (i) Interpretation of Statutes — (ii) Words and Phrases — 'Such'. AIR 1931 Cal 676 (SB), Dissented from.

The word 'such' means "of that kind, of the same or like kind". The word 'such' always refers to something else and it generally and naturally refers to its last antecedent. The expression 'such revocation or renunciation' occurring in Section 206 will refer only to the 'revocation and renunciation' dealt with in Section 205. AIR 1931 Cal 676 (SB), Dissented from.

(Paras 11 to 14)

It is one of the cardinal principles of interpretation that no word used by the Legislature in a statute should be ignored or should be held to be meaningless, superfluous or otiose, unless the court is driven to such a conclusion, having regard to the scheme, object, and other relevant circumstances of the statutory provision. The courts cannot refuse to give the word its normal and ordinary meaning and hold that it is superfluous or otiose, particularly when the giving of such normal and ordinary meaning to the word, 'such' does not bring about any absurdity. (Para 13)

An agency being one based on mutual trust and confidence should be revocable

*(Against decree of City Civil Court, Madras, in O. S. No. 4905 of 1968).

JS/KS/D923/75/SSG

and terminable and there can be no question of permanency with regard to a contract of agency. If the parties enter into a relationship of principal and agent without there being any fixed period for the continuance of such relationship, neither party can complain against the action of the other in terminating the relationship at any time he liked, subject of course, to the restrictions imposed on the principal's authority to revoke the agency under Sections 202 and 204.

(Paras 16 to 18)

Hence, the requirements of reasonable notice of revocation or renunciation contemplated by Section 206 is applicable only to the 'previous revocation and renunciation' dealt with by Section 205, that is, it is applicable only to agencies in which the parties have contracted either expressly or by necessary implication that the agency should continue for a particular period of time and where there is no such contract, Section 206 has no application and therefore the agent in such a case is not entitled to a reasonable notice before the termination of the agency. (1955) 2 All ER 722, Distinguished; (1917) 2 Ch 297, Applied. (Para 20)

Cases Referred: Chronological Paras
 AIR 1957 Punj 226 = 32 ITR 418 12
 1955-2 All ER 722 = (1955) 2 QB 556 21
 AIR 1931 Cal 676 = 35 Cal WN 361 (SB) 10
 1917-2 Ch 297 = 86 LJ Ch 693 4
 1896 AC 146 = 65 LJ Ch 394 11
 (1873) 8 Ch A 942 = 42 LJ Ch 884 17

V. K. Thiruvengkatachari and Srinivasan, for Appellant; K. N. Balasubramanian and D. Trilokchand Chopra, for Respondent.

JUDGMENT:—The defendants in O. S. No. 4905 of 1968 on the file of the City Civil Court, Madras, are the appellants herein. Since the appeal was argued before me within a very narrow compass, it is unnecessary to refer to the facts of this case in great detail. The respondent is a wholesale dealer in plastic goods doing business at Madras, while the appellants herein are manufacturers of plastic goods, having their office and business premises at Bombay. In or about 1952, there was an arrangement between the appellants and the respondent under which the respondent became the sole selling agent of the appellants with regard to specified area. The terms of that arrangement admittedly had not been reduced to writing. The respondent had been purchasing the goods of the appellants as well as booking orders for the sale of the appellants' goods and forwarding those orders to the appellants for being executed. A commission of 6 1/4 per cent. was being paid by the appellants to the respondent in respect of the orders so executed as well as on the goods supplied

by the appellants to the respondent directly. An extra commission of 1 1/2 per cent. and concession regarding Central Sales Tax were also given to the respondent by the appellants.

This arrangement which was in force from 1952 onwards was modified by a letter dated 27-2-1964 written by the appellants to the respondent herein, marked as Ex. A-44. Under this arrangement, the nature of the relationship between the parties was not altered, but only the remuneration received by the respondent by way of commission was changed. Under the revised terms, the respondent was to get only 6 1/4 per cent. towards commission on all orders either booked in the name of the respondent or booked in the name of third parties and no additional commission or rebate regarding Central Sales Tax was payable to the respondent. However, a commission called, "Target Commission" of 1 1/4 per cent. was to be paid by the appellants to the respondent, if the annual turnover exceeded a particular limit. This agency of the respondent was terminated by a letter dated 28/30-9-1964, marked as Ex. B-56. It is, therefore, the respondent instituted the present suit for recovery of a sum of Rs. 50,000/- from the appellants herein.

The said sum of Rs. 50,000/- included the amount claimed by the respondent under three heads. One was that the respondent was entitled to a reasonable notice before his agency was terminated, that that reasonable notice would be a notice of 12 months, that the respondent was earning a commission of Rs. 4,000/- per month and that therefore the amount to which he would be entitled for the said notice period would be Rs. 48,000/-. The second was that he was entitled to a commission of Rs. 12,000/-, on the actual orders booked by him before the termination of his agency, which were subsequently executed, some of them directly and some of them after having been re-booked in the name of the new agent appointed in the place of the respondent. The third was that the respondent was entitled to compensation for the loss suffered by him in payment of salary etc., to the staff employed by him in connection with the agency business. Thus, the total of these three sums came to Rupees 75,000/-. The respondent admitted that as on the date of termination of the agency, he owed a sum of Rs. 13,432.41 to the appellants. Deducting the said sum of Rs. 13,432.41 from the sum of Rs. 75,000/-, the balance came to Rs. 61,567.59. However, the respondent restricted his claim in the suit to a round figure of Rs. 50,000/-.

2. The appellants contested the claim of the respondent in this behalf. They contended that the respondent was not their agent and that he was only a

stockists for their goods. They also denied that there was any need to give any notice before terminating the relationship that existed between the parties. There were certain other defences also put forward by the appellants as reflected in the following issues framed by the trial court—

1. Whether the plaintiff is the sole selling agent for the plastic goods manufactured by the defendants for the States of Tamil Nadu and Ardhra Pradesh or whether he was only a stockist?

2. What were the terms and conditions of the jural relationship between the plaintiff and the defendants?

3. Whether the termination of the agency of the plaintiff by the defendants is valid and binding?

4. Whether the settlement pleaded by the defendants in paragraphs 13, 14 and 15 of the written statement is true and valid and binding on the plaintiff?

5. Is the termination was (sic) in breach of the contract and the settlement pleaded is not true and valid?

6. To what relief is the plaintiff entitled?

The learned Principal Judge, City Civil Court, Madras, by his judgment and decree dated 26-3-1970, came to the conclusion that the relationship of principal and agent existed between the appellants and the respondent, that the respondent was acting as the agent of the appellants as far as Madras State was concerned and that he was the sole selling agent of the appellants' goods in that area. He further held that there was no express understanding between the parties that the respondent should not deal in the goods of other manufacturers, that there was no express understanding to the contrary and that therefore the fact that the respondent sold the goods of other manufacturers would not constitute a misconduct on his part so as to entitle the appellants herein to terminate the agency of the respondent giving a reasonable notice. The learned trial Judge also recorded a finding that there was no settlement as pleaded by the appellants herein.

Finally he came to the conclusion that under Section 206 of the Indian Contract Act, 1872, the respondent was entitled to reasonable notice, that the reasonable notice, having regard to the circumstances of the case, will be one of four months and that in this case admittedly there being no such notice, the respondent was entitled to the commission for the notice period, which was determined by the learned trial Judge at Rs. 16,000/- at the rate of Rs. 4,000/- per month. With regard to the claim of the respondent that he was entitled to a commission of Rupees 12,000/- on the orders booked by him prior to the termination of the agency,

but executed later, the learned trial Judge fixed the amount at Rs. 6,250/-. He rejected the claim of the respondent for a sum of Rs. 15,000/- referred to already. In the result, he came to the conclusion that the respondent was entitled to a sum of Rs. 16,000/- plus Rs. 6,250/- totalling Rs. 22,250/- from the appellants herein. Deducting therefrom a sum of Rs. 13432.41 which admittedly the respondent owed to the appellants herein, the learned trial Judge passed a decree for a sum of Rupees 8817.59 in favour of the respondent in the present suit. It is against this judgment and decree that the present appeal has been filed by the defendant in the suit.

3. Mr. V. K. Thiruvengkatachari appearing for the appellants did not seriously challenge the finding of the learned trial Judge that the respondent would be entitled to a sum of Rs. 6,250/- by way of commission on the orders booked by him prior to the termination of the agency but executed later. However, he contended that the conclusion of the learned trial Judge that the respondent was entitled to a reasonable notice before termination of the agency is erroneous and that therefore the award of Rs. 16,000/- by way of damages for the termination of agency without notice is unsustainable, and if that conclusion of the learned trial Judge is set aside, the result would be that the appellants would be liable to pay a sum of Rs. 6,250/- to the respondent and the respondent would be liable to pay a sum of Rs. 13432.41 to the appellants with the result no decree could be passed in favour of the respondent herein for any amount in the present suit. Consequently, the only question for consideration before me in the appeal is, whether the respondent was entitled to a reasonable notice before termination of his agency as held by the learned trial Judge.

4. The argument on behalf of the appellants in this behalf is two-fold. One is that the respondent was merely a selling agent for the appellants herein and that such a selling agency can be terminated summarily without any notice. In support of this contention, reliance was placed on the following statement found in paragraph 878 of Halsbury's Laws of England, IV Edn. Volume 1, pages 527-528:

"In the case of an agent who is a mere commission agent with no obligation to seek orders for the principal and who is in no other sense 'employed' by the principal, the agency may be terminated summarily."

The above statement of law in Halsbury's Laws of England, is based upon certain decisions which included *Levy v. Goldhill*, 1917-2 Ch 297. However, it is unnecessary to consider this contention for the reason that it does not appear to have

been put forward in that form before the trial court. On the other hand, the learned trial Judge in paragraph 14 of his judgment points out that in paragraph 6 of the written statement filed by the appellants herein it was stated that the relationship between the respondent and the appellants was that of principal to principal in respect of goods purchased by him from the appellants and del credere agent in respect of orders placed by him on behalf of other dealers. Whether the above statement of law contained in the Halsbury's Laws of England will apply even to a case of a del credere agent is not clear. In any event, since I am accepting the other argument advanced on behalf of the appellants, it is unnecessary to pursue this contention further.

5. The other ground which is substantial is that under the provisions of the Indian Contract Act 1872, hereinafter referred to as the Act, the respondent herein was not entitled to a reasonable notice, as held by the learned trial Judge and Section 206 of the Act on which reliance has been placed by the learned trial Judge does not apply to a case like the present one, where no period for agency has been agreed to between the parties either expressly or by necessary implication and it is this contention which I am considering in this appeal.

6. Chapter X of the Act deals with agency and contains Sections 182 to 238. Ten sections commencing from Section 201 to Section 210 fall under a sub-heading, 'Revocation of authority'. As will be clear from the discussion that follows, even the expression 'Revocation of authority' may not be appropriate and the appropriate sub-heading could be only 'Termination of authority' or 'Termination of agency', because revocation is only one mode of terminating an agency. Section 201 deals with the methods in which an agency can be terminated. It says that an agency can be terminated by the principal revoking his authority; or by the agent renouncing the business of the agency; or by the business of the agency being completed; or by either the principal or agent dying or becoming of unsound mind; or by the principal being adjudicated an insolvent under the provisions of any Act for the time being in force for the relief of insolvent debtors. Having enumerated various methods by which an agency can be terminated, Section 202 deals with a specific case of what is generally called, 'an agency coupled with interest.' According to that section, where the agent has himself an interest in the property which forms the subject-matter of the agency, the agency cannot, in the absence of an express contract, be terminated to the prejudice of such interest.

Section 203 provides that the principal may, save as is otherwise provided by the last preceding section, revoke the authority given to his agent at any time before the authority has been exercised so as to bind the principal. Thus, it will be seen that Section 202 deals with the termination of an agency coupled with interest, that is, it is not confined to any particular mode of termination, but to all methods of termination. On the other hand, Section 203 deals with revocation only and provides that the principal is entitled to revoke the authority given to his agent at any time before the authority has been exercised so as to bind the principal. But this right of the principal is subject to Section 202. Section 204 again deals with the revocation of the authority of an agent by a principal and according to that section, the principal cannot revoke the authority given to his agent, after the authority has been partly exercised so far as regards such acts and obligations as arise from acts already done in the agency. Thus, it will be seen that Sections 203 and 204 are connected in the sense that while the former entitles the principal to revoke the authority given to his agent at any time before the authority has been exercised so as to bind the principal, the latter disables the principal from revoking the authority given to his agent after the authority has been partly exercised so far as regards such acts and obligations as arise from acts already done in the agency.

7. Then follow two sections which are immediately relevant for the consideration of the question arising in this appeal, namely, Sections 205 and 206 which are as follows—

"205. Where there is an express or implied contract that the agency should be continued for any period of time, the principal must make compensation to the agent, or the agent to the principal, as the case may be, for any previous revocation or renunciation of the agency without sufficient cause.

206. Reasonable notice must be given of such revocation or renunciation; otherwise, the damage thereby resulting to the principal or the agent, as the case may be, must be made good to the one by the other."

8. Section 207 states that revocation and renunciation may be expressed or may be implied and the section reads—

"Revocation and renunciation may be expressed or may be implied in the conduct of the principal or agent respectively."

Sections 208 to 210 dealing with termination of the agency are not relevant for the present discussion.

9. Section 205 provides that if the principal and the agent agree that there

should be a fixed term for the agency, whether the agreement is express or implied, neither party can terminate the agency prematurely, that is, prior to the expiration of that period without paying compensation to the other party, unless such termination is for a sufficient cause. There is no dispute before me that this section will apply only when the parties have agreed on the agency continuing for a specified period of time. As far as the present case is concerned, it is common ground that the appellants and the respondent had not agreed that the agency should continue for any particular period of time.

10. It is Section 206 alone that deals with the requirement of a reasonable notice and the immediate point for consideration is when that section uses the expression 'such revocation or renunciation,' does it relate only to the 'previous revocation or renunciation' mentioned in Section 205 or it covers any revocation or renunciation. If Section 206 is correlated to Section 205, it is not disputed before me that the requirement of reasonable notice will apply only to a case of agency where the principal and the agent had contracted that the agency should be continued for any period of time and that if they had not agreed on any such period of time for the agency, Section 206 will not apply.

The argument of the learned counsel for the appellants is that the expression, 'such revocation or renunciation' occurring in Section 206 necessarily makes that section applicable to the cases governed by Sec. 205 only that in the present case admittedly the agency being not for a prescribed period, Section 206 is not attracted and that therefore the respondent was not entitled to a reasonable notice. On the other hand, the argument of the learned counsel for the respondent is that the expression, 'such revocation or renunciation' occurring in Section 206 will take in every revocation or renunciation dealt with by the relevant provisions of the Act relating to agency and it is not confined only to the agency falling within the scope of Section 205. It is admitted before me that barring certain observations of the High Court of Calcutta in the matter of Shaw Wallace and Co., AIR 1931 Cal. 676 (SB), there is no authority of any court in this country on this point, namely, whether Section 206 covers only the revocation and renunciation mentioned in Section 205 or it takes in every revocation and renunciation of agency dealt with by the Act.

11. Before referring to the decision of the High Court of Calcutta referred to above, I shall attempt to construe the sections according to the ordinary plain language. The word 'such' means,

'of that kind; of the same or like kind.' The word 'such' always refers to something else and it generally and naturally refers to its last antecedent. Lord Halsbury, L. C., in *Ex parte George Staplyton Barnes*, 1896 AC 146 stated that the word 'such' referred to the last preceding provision.

12. In *Commr. of Income-tax Punjab, Himachal Pradesh etc. v. Jagannath*, 32 ITR 418, 431 = (AIR 1957 Punj 226 (at p. 232)), the High Court of Punjab observed—

"In its grammatical usage, and in its natural and ordinary sense, the word 'such' is understood to refer to the last antecedent, unless the meaning of the sentence would thereby be impaired, which does not seem to be the case here. The word 'such' indicates something 'just before specified, or spoken of, that is proximately, and not merely previously. It particularises the immediately preceding antecedent, and not everything that has gone before. It signifies what has preceded proximately and not just previously or formerly."

Thus, it is clear that the expression 'such revocation or renunciation' occurring in Section 206 will refer only to the 'revocation and renunciation' dealt with in Section 205.

13. This conclusion of mine gets confirmed from certain other features also. I have already referred to Section 201 which dealt with the termination of agency in general and enumerated the methods in which such termination can be brought about, two of them being revocation and renunciation. Sections 203 and 204 deal with revocation and they do not deal with renunciation. The only section, preceding Section 206, which deals with revocation and renunciation together and as a matter of fact uses the expression 'revocation or renunciation' in the section itself, is Section 205. Therefore the expression 'such revocation or renunciation' occurring in Section 206 must really relate back to Section 205 and to no other section. Secondly, if the argument of the learned counsel for the respondent is to be accepted the word 'such' in Section 206 will have no meaning whatever. It is one of the cardinal principles of interpretation that no word used by the Legislature in a statute should be ignored or should be held to be meaningless, superfluous or otiose, unless the court is driven to such a conclusion, having regard to the scheme, object and other relevant circumstances of the statutory provision.

In this context, there is absolutely nothing warranting the conclusion that the word 'such' in Section 206 is superfluous or otiose. By giving the word 'such' the normal and natural meaning as

referred to above, the section is clearly intelligible and there is no difficulty in working or applying that section. Simply because, if the word, 'such' is given its due meaning, the section will have one effect and if the word 'such' is held to be superfluous or otiose, it will have another effect, the courts cannot refuse to give the word its normal and ordinary meaning and hold that it is superfluous or otiose, particularly when the giving of such normal and ordinary meaning to the word, 'such' does not bring about any absurdity. It is a well-known rule of construction that if there is nothing to modify or qualify a language which a statute contains, it must be construed in the ordinary and natural meaning of the words it contains. Therefore, I am unable to accept the contention of the learned counsel for the respondent which will have the effect of ignoring the word 'such' occurring in Section 206 or holding that the said word is superfluous or otiose.

14. There is yet another ground for holding that the contention of the learned counsel for the respondent is not sound. I have already extracted Section 207. That section uses the expression 'revocation and renunciation' without any adjective before the same. That section states that revocation and renunciation may be expressed or may be implied in the conduct of the principal or agent respectively. Thus, on the face of it, the provision contained in the section is general and it applies to all revocations and renunciations of agency dealt with by the Act. Contrasting the language of Section 206 with the language of Section 207, it is clear that the legislature itself did not intend Sec. 206 to apply to every revocation and renunciation of agency dealt with by the Act and if that was the intention of the legislature, it would not have used the word 'such' in S. 206 and it would have used the language of Section 207 by providing 'reasonable notice must be given of revocation and renunciation'. This is yet another circumstance for holding that the Legislature intended Section 206 to apply to revocations and renunciations contemplated in Section 205 of the Act.

15. On such a construction, the combined effect of Sections 205 and 206 will be as follows:

1. Where there is an express or implied contract that the agency should be continued for any period of time, the previous revocation or renunciation by the principal or the agent will render him liable to pay compensation to the other party.

2. If such previous revocation or renunciation is for a sufficient cause then the liability to pay compensation will not arise.

3. If the principal wants to revoke the agency or the agent wants to renounce the authority before the expiry of the period prescribed and there is no sufficient cause for such revocation or renunciation, the principal or the agent, as the case may be, shall give reasonable notice of such revocation or renunciation to the other party.

4. If no such reasonable notice is given, then the principal or the agent, as the case may be, will have to make good the damage resulting to the other by such previous revocation or renunciation.

16. The above construction of mine of Sections 205 and 206 of the Act is not opposed to any principle or authority. It has always been held that an agency being one based on mutual trust and confidence should be revocable and terminable and there can be no question of permanency with regard to a contract of agency. The only question that may arise for consideration will be, if a contract of agency is terminated by either of the parties to the same, does such termination give rise to any right in favour of one party against the other party so terminating the contract of agency.

17. As early as 1875 James, L. J., said in *Llanelly Rly. and Dock Co. v. London and North Western Rly. Co.*, 1873-8 Ch A 942 at pp. 949-950—

"I start with this proposition, that prima facie every contract is permanent and irrevocable, and that it lies upon a person who says that it is revocable or determinable to shew either some expression in the contract itself, or something in the nature of the contract, from which it is reasonable to be implied that it was not intended to be permanent and perpetual, but was to be in some way or other subject to determination. No doubt, there are a very great many contracts of that kind; a contract of partnership, a contract of master and servant, a contract of principal and agent, a contract of employer and employee in various modes — all these are instances of contracts in which from the nature of the case, we are obliged to consider that they were intended to be determinable. All the contracts however in which this has been held are, as far as I know, contracts which involve more or less of trust and confidence, more or less of delegation of authority, more or less of the necessity of being mutually satisfied with each other's conduct, more or less of personal relations between the parties."

Thus, a contract of agency being one involving mutual trust and confidence is terminable.

18. The only question that may arise in this context is that if the parties themselves have prescribed a period for the continuance of the agency, whether

the agency can be terminated before the expiry of the period so prescribed. It is that situation which has been dealt with in Sections 205 and 206 of the Act, by providing that it can be terminated for a sufficient cause or on a reasonable notice. On the other hand, if no period is prescribed for the continuance of the agency, there is nothing to prevent either of the party putting an end to the agency at any time, subject to the restrictions contained in Sections 202 and 204 already referred to, on the right of the principal to revoke the agency.

If the parties themselves want to avoid and provide for a safeguard against abrupt or arbitrary termination of the relationship there is nothing to prevent them from contracting between themselves that the relationship should not be terminated until the expiry of a particular period. In such a situation if the agency is terminated before the expiry of the prescribed period, the party guilty of such termination should be liable to pay damages to the other in the absence of sufficient cause or reasonable notice. Notwithstanding this facility available to the parties, if they do not contract to that effect and enter into a relationship of principal and agent without there being any fixed period for the continuance of such relationship, neither party can complain against the action of the other in terminating the relationship at any time he liked, subject of course, as I have pointed out already to the restrictions imposed on the principal's authority to revoke the agency under Sections 202 and 204.

19. It will be now appropriate to refer to the decision of the High Court of Calcutta mentioned already, that is, *In re Shaw Wallace and Co.*, AIR 1931 Cal 676 (SB). That case arose out of a reference made under the I-T. Act, 1922. The assessee, Messrs. Shaw Wallace and Co., where the distributing agents in India for the Burmah Oil Co., and sole agents in India and Aden for the marketable products of the Anglo-Persian Oil Co. The assessee had at no time had any formal agency agreement with either of the oil companies. The agency was transferred to some other body and the assessee were paid compensation for the termination of the agency. The question for consideration was, whether the compensation received by the assessee was in the nature of a capital receipt and therefore not 'income, profits or gains', within the meaning of the Income-tax Act. One of the arguments that was advanced before the court was that it was an *ex gratia* payment. In considering that argument, the learned Chief Justice (Rankin C. J.) referred to Section 206 of the Indian Contract Act. For the purpose of understanding the context in which the reference was made, it is desirable to extract the en-

tire paragraph in which the discussion occurs, which is as follows:

"We are only concerned with the legal rights of the parties in so far as they assist us to appreciate the nature or character of the receipt upon which tax is claimed. If the parties make an amicable arrangement according to their own notions of what is fair or their own view of their legal rights, we are concerned merely to appreciate what their bargain or settlement was. If the principal really means to compensate the selling agent for a sudden 'dismissal' or more properly a sudden determination of the agency it is only in very exceptional circumstances that anything is to be gained by considering whether the agent would have enforced a claim for damages and whether he could thereby have obtained the same amount. I see nothing in the facts of the present case to suggest that the large sum now in question were handed over to the assessee upon the footing that there was no real liability. The principals may have been generous and wisely generous in dealing with their obligations but talk of 'ex gratia payment' is singularly unimpressive in this case. I should be very much astonished to be told, and I should in any case require from the Commissioner a clear finding based upon proper evidence before I would accept it; that the agency of the assessee with their establishments all over India and elsewhere could be revoked suddenly without the principals becoming liable to indemnify their agents in respect of any obligations incurred by them in connection with the discharge of the agency. Assuming that in English law there is no general doctrine that agents are entitled to notice before the agency is terminated by the principal, yet this rule is subject to exception arising from the particular circumstances of the case; and in India the matter has been dealt with by the Contract Act. Section 206 lays down:

'Reasonable notice must be given of such revocation and renunciation; otherwise the damage thereby resulting to the principal or agent, as the case may be, must be made good to the one by the other.'

If the phrase 'such revocation or renunciation' is to be taken as referring back to S. 205, I confess that I find no meaning in the section; and it is at least arguable that what the draftsman meant to say is that when there is no express or implied contract that the agency should continue for any fixed period reasonable notice must be given of the revocation or renunciation of the agency &c. The question of damages and the question of indemnity doubtless would overlap in the circumstances of these agencies and in the case of the Burmah Oil Co. we knew that the

sum of Rs. 12 lakhs, was in a sense to cover work done and to be done by the assessee until the new agent could take over completely."

From what I have extracted above, it is clear that the interpretation of Section 206 was not strictly for the point to be considered in the reference made under the Indian Income-tax Act. Secondly, with very great respect to the learned Chief Justice, I am unable to agree that if the phrase 'such revocation or renunciation' occurring in Section 206 of the Act is to be taken as referring back to Section 205, there is no meaning in the section. I have already pointed out what the meaning of that section is, if the expression, 'such revocation or renunciation' is to be taken as referring back to Section 205 and I have also given reasons as to why the court is not entitled to hold the word 'such' as superfluous or otiose in Section 205, which will be the result, if Section 206 is held not to refer back to Section 205.

20. For the above reasons, I hold that the requirements of reasonable notice of revocation or renunciation contemplated by Section 206 is applicable only to the 'previous revocation and renunciation' dealt with by Section 205, that is, it is applicable only to agencies in which the parties have contracted either expressly or by necessary implication that the agency should continue for a particular period of time and in this case admittedly there being no such contract, Section 206 has no application and therefore the respondent is not entitled to a reasonable notice before the termination of the agency.

21. Mr. K. N. Balasubramanian learned counsel for the respondent, contended that on the basis of the following observation of McNair, J., in *Martin Baker Aircraft Co. Ltd. v. Canadian Flight Equipment Ltd.*, 1955-2 All ER 722 at p. 735, the respondent is entitled to a reasonable notice:—

"If it were a pure agency agreement and nothing more, there is much to be said for the view that it would be determinable summarily at any moment. An agreement of this nature, however, has to be looked at as a whole and the whole of its contents considered and if one finds (as one finds here) that the person who is described as sole selling agent has to expend a great deal of time and money and is subject to restrictions as to the sale of other persons' products which may be competitive, it seems to me that it is a form of agreement which falls much more closely within the analogy of the strict master and servant cases where, admittedly, the agreement is terminable by reasonable notice, though not determinable summarily except in the event of misconduct."

I am unable to hold that the above observation of the learned Judge is of any assistance to the respondent in the present case. The above statement proceeds on the basis of the relationship between the parties being more in the nature of master and servant than of principal and agent, and stress is laid on the existence of restrictions imposed on the agent in dealing with the products of other persons. As far as the present case is concerned, by no stretch of imagination it can be contended that the relationship of the appellants and the respondent was in the nature of master and servant. I have already referred to the fact that the respondent even before he entered into the arrangement with the appellants was himself a wholesale dealer in plastic goods.

Equally I have referred to the contention of the respondent himself that there was no understanding between the appellants and the respondent that he ought not to deal in the goods of other people. As a matter of fact, one of the grounds put forward by the appellants before the trial court was that the respondent was dealing in the goods of other people, that that was the reason why he did not purchase goods sufficiently from the appellants and book sufficient orders for the goods of the appellants, and that the act of the respondent constituted a misconduct on his part entitling the appellants to terminate the agency. The respondent denied this claim of the appellants and the learned trial Judge himself, has found that the respondent was not guilty of misconduct in dealing with in the goods of other people, since there was no express restriction imposed on the respondent to that effect.

22. Apart from these features, there is another aspect to be taken note of. I have already referred to the terms for payment of commission to the respondent herein. Those terms did not impose an obligation on the respondent to buy goods from the appellants or to book orders for the goods of the appellants. If the respondent bought goods from the appellants or booked orders for the goods of the appellants, he was entitled to commission on the basis of the value of the goods. But if he did not buy any goods or did not book any order, he would not be entitled to any commission and there was no penalty attached in this behalf. When the revised terms were brought into force by Ex. A-44, dated 27-2-1964, the respondent became entitled to an additional commission of 1 1/4 per cent. over and above 6 1/4 per cent. by way of target commission, if the respondent's annual turnover exceeded a particular limit. On the other hand, there was no arrangement that the respondent should do any minimum business with the appellants to earn commission. Thus, there was no ob-

ligation at all on the part of the respondent to buy goods from the appellants or to book orders for the goods of the appellants. Under such circumstances, it cannot be held that the relationship between the appellants and the respondent was that of master and servant so as to attract the observations of McNair, J., quoted already.

23. In this context, the following observations of Peterson, J., in *Levy v. Goldhill*, 1917-2 Ch 297 will be relevant:

"The plaintiff's second claim in the present action is for damages for wrongful dismissal on the ground that he was entitled to reasonable notice. It was not attempted to prove a custom of the trade, but it was said that the plaintiff was entitled to reasonable notice. Now in this case there was in my opinion no employment in the strict sense of the term. The plaintiff was not the servant in any way of the defendant; he was not bound to do any work whatever. The agreement merely provided that, if the plaintiff introduced customers and if the orders were accepted by the defendant then the plaintiff should be entitled to half of any profits which were derived from those orders. There was no obligation on the part of the plaintiff to do work for the defendant, nor was there any obligation on the part of the defendant to provide work for the plaintiff, but there was merely a provision that the defendant would in a certain event pay certain remuneration to the plaintiff."

24. Under these circumstances, I hold that the conclusion of the learned Principal Judge, Civil Civil Court, Madras, that the respondent was entitled to reasonable notice of four months and on that account was entitled to a compensation of Rs. 16,000/- for the notice period is not correct. If the respondent was not entitled to the said sum of Rupees 16,000/- under the head referred to above, the respondent himself admittedly owing a sum of Rs. 13,432.41 to the appellants as against the sum of Rs. 6,250/- due by the appellants to the respondent, the respondent will not be entitled to any decree in the present suit. Hence, the appeal is allowed and the judgment and decree of the learned Principal Judge, City Civil Court, Madras, in so far as he decreed the suit of the respondent against the appellants for a sum of Rs. 8817.59 are set aside. Having regard to the nature of the question raised and discussed by me above, admittedly there being no decision of any High Court on the point, I do not make any order as to costs either here or in the trial court.

Appeal allowed.

AIR 1976 MADRAS 63

N. S. RAMASWAMI, J.

Ramaswamy Reddiar and others, Appellants v. Chinna Sithammal and others, Respondents.

A. A. O. Nos. 362 and 393 of 1974, D/- 6-12-1974.*

(A) Civil P. C. (1908), Section 104 (2) — Order under Order 41, Rule 19 made in appeal under Section 96 — Order is appealable one. (Ibid, Section 96, Order 41, Rule 19; Order 43, Rule 1 (t).)

In order to attract Section 104 (2), the appeal should be one falling under Section 104. If the appeal is one under Section 96, Section 104 (2) is not applicable. Order 43, Rule 1 (t) and (u) provide for appeals against orders passed under one provision or other of Order 41, which governs appeals coming under S. 96. The said two sub-clauses cannot possibly refer to any order by a trial court. These two provisions would become meaningless if Section 104 (2) is made to apply to appeals under Section 96. (Paras 3, 4) Cases Referred: Chronological Paras AIR 1975 Mad 3 = 1974 TNLJ 243 2

JUDGMENT:— These two civil miscellaneous appeals are against the dismissal of two applications to have two appeals restored. A. S. Nos. 37 of 1971 and 56 of 1971 are connected appeals as they arise out of a common judgment. In A. S. 56 of 1971 there was deficiency of court-fee and the court ordered the same to be paid by 17-2-1973. To that date A. S. 37 of 1971 also stood posted as it is connected with the other appeal. The appellants in both the appeals did not appear on 17-2-1973 and the deficit court-fee had not been paid. Therefore, the counsel reported 'no instructions' and both the appeals came to be dismissed on that day (17-2-1973). Later, the two applications were filed for having the appeals restored on the ground that the first appellant in A. S. 56 of 1971, who was in charge of the matter, had been laid up and that therefore, proper instructions could not be given to the counsel regarding the payment of court-fee. This case was not accepted by the court below and the applications have been dismissed. These appeals are filed challenging the abovesaid orders of dismissal.

2. Mr. O. V. Baluswami, the learned counsel for the first respondent in both these appeals who is the contesting respondent, raises a preliminary objection that the appeals do not lie. Reliance is placed on the decision of Natarajan, J., D/- 2-5-1974 in C. M. A. No. 130 of 1973 C. Kalahasti, President of the Mg. Com-

*(Against order of Sub-J., Salem in I. A. No. 14 of 1973, D/- 18-7-1973).

mittee of Thyagaraya Chettiar Education Institution Madras v. Munuswami Chettiar — short noted in 1974 TNLJ 243 = (AIR 1975 Mad 3). That was a case where the first court refused to grant a temporary injunction under Order XXXIX, Rule 1, C. P. Code. Against that order, a civil miscellaneous appeal was filed and in that appeal, a petition for temporary injunction under Order XXXIX, Rule 1, C. P. Code was filed. The appellate court dismissed the said petition. As against that order, an appeal was filed to this court and Natarajan, J., held that the appeal does not lie. It is pointed out that even though an order under O. XXXIX, R. 1, C. P. C. is an appealable order under O. XLIII R. 1, the order having been made by an appellate court, sub-sec. (2) of Section 104 of the Code applied and that, therefore, the appeal was not competent. On the facts of that case, if I may say so with respect, the decision of Natarajan, J., is unexceptionable. As seen above, the order which was appealed against, though made under Order XXXIX, Rule 1, had been passed in an appeal which itself was one against an appealable order. The appeal before the court which passed the order questioned before Natarajan, J., was really one coming under Section 104, that is, an appeal against an appealable order. But, the observations of the learned Judge are sought to be construed as laying down the law that no appeal lies against an order passed in any appeal even though the order is an appealable one, under one or other of the clauses of Order XLIII, Rule 1, C. P. Code. The learned Judge could not have possibly meant it so. If the learned Judge has really stated that an order passed even in a regular appeal coming under Section 96 of the Code is not appealable, it would be purely obiter, for, in the matter before the learned Judge, the order had been passed, not in an appeal coming under Section 96, but in an appeal coming under Section 104.

3. Section 104 (2) says that no appeal shall lie from any order passed in appeal under the said section. In order to attract sub-section (2), the appeal should be one falling under Section 104. If the appeal is one under Section 96, and not under Section 104, sub-section (2) of the latter section is not applicable. If Section 104 (2) is construed otherwise, that is, as applying to appeals coming under Section 96, also the position would be anomalous. Sub-clauses (t) and (u) of Rule 1 of Order XLIII provide for appeals against orders passed under one provision or other of Order XLI, which governs appeals coming under Section 96. The said two sub-clauses cannot possibly refer to any order by a trial court. While clause (t) relates to an order refusing to re-admit (or to re-hear) an appeal (as in

the present case), clause (u) relates to an order of remand made by an appellate court under Rule 23 of Order XLI. These two provisions would become meaningless if sub-section (2) of Section 104 is made to apply to appeals under Section 96. No one can suggest that no appeal lies against an order of remand made under Order XLI, Rule 23.

4. In the present case, the order of the court below is one under Order XLI, Rule 19 of the Code, made in appeals under Section 96. That order is certainly an appealable one, as per Order XLIII, Rule 1 (t) of the Code. I am quite clear that sub-section (2) of Section 104 has no application to an order made in an appeal coming under Section 96.

5. Then, the learned counsel contends that the subject-matter of the appeals being less than Rs. 10,000/-, in value in each case, the appeals ought to have been filed in the District Court, the order being by the court of the Subordinate Judge, Salem. I agree that the appeals do lie to the District Judge, Salem. But the appeals having been entertained in this court, and having been kept pending all these days, I do not think it is necessary to return the appeal memoranda at this stage directing the appellants to represent the same in the court of the District Judge of Salem. Therefore, I heard the appeals on merits.

6. Even though the appellants had not produced any medical certificate about the illness of the first appellant in A. S. 56 of 1971, the affidavit filed by her in support of the applications has not been seriously challenged. Therefore, it cannot be said that there was no justification at all for the appellants for not having instructed their counsel properly. At the same time, the appellants are certainly guilty of laches as, in spite of the illness of the first appellant, they could have made some arrangements for giving the necessary instructions to the counsel in the matter. Under these circumstances, I think the appeals ought to be restored on terms. Accordingly, the civil miscellaneous appeals are allowed and I. A. 14 of 1973, in A. S. 37 of 1971 and I. A. 15 of 1973 in A. S. 56 of 1971 shall stand allowed on condition that the appellants pay the counsel for the first respondent a sum of Rs. 50/- in each matter within two weeks from this date, failing which the appeals shall stand dismissed with costs.

On restoration of the appeals, the appellants in A. S. 56 of 1971 will have two weeks time for paying the deficit court-fee from the date of restoration. The appeals themselves ought to be disposed of within three months from this date.

Appeals allowed.

In Ex-79, defendant informed the plaintiff that:—

"We are in a position to allot you one Tata Mercedes-Benz Chassis Model L-312.42-165 WB against your order. We shall be pleased if you will kindly furnish us with the following within 7 days from the date hereof in order that we may be able to allot you the chassis from the current incoming consignment."

In para 4 of that letter it was mentioned that:—

"We shall be able to arrange delivery of the chassis to you from the current consignment."

From above recitals, the learned Single Judge has come to the conclusion that defendant was already in possession of a truck. This letter clearly shows that defendant had not received the consignment from the manufacturer and was expecting the consignment.

9. Burden of proof is on the plaintiff to establish that defendant had received the second truck but did not supply. It is stated in para 19 of the plaint that the defendant has already supplied trucks to others whose names have been registered long after the date of his contract, but in his statement in court the plaintiff (P. W. 7) states that he does not know if any body had been supplied with trucks whose name was registered afterwards. So the averment in the plaint is not established. Plaintiff issued summons to the defendant (Vide Ex. 86) to produce documents to the following effect:—

"You are directed to produce your register maintained regarding registration of Tata Mercedes Benz Truck for the years 1961, 1962, 1963 and 1964."

In response to this notice (Ex. V) the register of bank guarantee chronologically arranged and supply of trucks to the persons placing orders was produced by defendant. It is contended by the defendant that plaintiff had not called for the stock register which is at the head office at Rourkela and as such no adverse inference is to be drawn against defendant for non-production of the stock register. It is argued by Mr. Dey that from the evidence of D. W. 1 it appears that when any truck is received, it is entered in the stock register which is at the head office at Rourkela and the stock register would show how many trucks were received by defendant and as such adverse inference is to be drawn against the defendant for non-production of the stock Register.

In the case of Ahmad Ali v. Mohammad Hanif, AIR 1958 Madh Pra 129 it is held:—

"The case had to be decided primarily upon the evidence led by the plaintiff and unless that evidence was good the defendants were not called upon to produce their own books without the plaintiff having asked for them. If the plaintiff wanted to see their books of account he could have asked them

to make an affidavit of documents in their possession or power and also could have asked for inspection and discovery of documents. Without the plaintiff doing that we do not think he was entitled to rely upon a presumption arising from the failure of the defendants to produce their books of account in court."

It has also been held in the case of Ramrati Kuer v. Dwarika Prasad Singh, AIR 1967 SC 1134:—

"An adverse inference could only have been drawn against the plaintiffs respondents if the appellant had asked the Court to order them to produce accounts and they had failed to produce them after admitting that Basekhi Singh used to keep accounts. But no such prayer was made to the Court, and in the circumstances no adverse inference could be drawn from the non-production of accounts."

In the case of Khalil Adalkah v. Great American Insurance Co., (1969) 73 Cal WN 279 it is held that:—

"If I am to draw any adverse inference against the defendant as suggested by Mr. Ghosh I will also have to draw adverse inference against the plaintiff."

It is further held that:—

"Where both the parties had filed their respective affidavits of documents long before the hearing of the suit and each party had opportunity of obtaining order for discovery of documents, the Court will not draw any adverse inference under Section 114, illustration (g) of the Evidence Act against a party for not disclosing a document."

10. Contentions of both sides are to be considered on the above principles. TELCO is the manufacturer and supplier of trucks to defendant. The best document for the supply of truck is available with TELCO which is a renowned concern. Plaintiff did not take any step for production of the document by TELCO to show that in fact truck was supplied to the defendant in the relevant period. There is absolutely no evidence from the side of the plaintiff that defendant, received any truck from TELCO. In view of the principles laid down above we hold that no adverse inference can be drawn against the defendant for non-production of the stock register inasmuch as the same was not called for by the plaintiff. Adverse inference can also be drawn against the plaintiff for not calling for the best document from TELCO.

There was correspondence between the plaintiff and defendant relating to supply of second truck and plaintiff sent copies to the TELCO. The latter wrote a letter (Ex. Q) to the defendant. The Director of the Company visited Cuttack and had discussion with plaintiff and thereafter sent a reply (Ex. R) to TELCO. In this letter it has been clearly mentioned that:—

"We did not get any vehicle of this model for a considerable time now, and we even do not know, when we will get one."

This letter is dated 28-11-1963. From this letter it appears that no vehicle was received by defendant from TELCO. It is evident from this letter that the stock register of the defendant at Rourkela would not have shown supply of any truck to defendant by TELCO. No useful purpose would have been served if the stock register would have been produced. Accordingly, we hold that no adverse inference can be drawn against the defendant for non-production of the stock register on which defendant does not place reliance.

11. It is contended by Mr. Dey that in Ex. 70 defendant wrote to plaintiff on 30-4-1962 asking him to inform within 7 days whether the plaintiff was interested to take delivery of the chassis offered to him. In this connection our attention was drawn to the statement of D. W. 1 to the following effect:

"We were in a position to supply truck to the plaintiff by the time we wrote Ex. 70."

It is argued that defendant had already received the truck from the manufacturer. D. W. 1 has clearly stated in examination-in-chief that the second truck could not be supplied as the manufacturer did not release it. Also to the question by the court he has stated to the following effect:—

"We had no truck when we wrote Ex. 70. Ex. 70 is an allotment letter. Had TELCO released any truck in our favour, we would have supplied it to the plaintiff." Ex. 70 has thus been explained and it is clear that no truck had been received from the manufacturer by the defendant and this letter related only to allotment.

12. It is also an admitted fact that National emergency was declared in 1962 and the Commercial Vehicles (Distribution and Sale) Control Order, 1963 was promulgated. A telegram was sent on 27-10-1962 (Ex. T) by TELCO to all dealers to suspend delivery of truck and the head office of the defendant in its turn informed accordingly all its branches by Ex. C dated 31-10-1962. By Ex. H dated 8-11-1962 defendant was informed that restrictions have been imposed by Government of India on sale of trucks. Due to this ban no supply could be made to the plaintiff on priority basis. Admittedly priority positions were cancelled by order of the Government of India and therefore the plaintiff cannot claim priority of supply. This is not disputed by plaintiff.

On the aforesaid analysis we hold that no truck was supplied by the manufacturer to the defendant during the relevant period and as such there is no breach of contract on the part of defendant. Therefore, plaintiff is not entitled to the relief claimed.

13. In the result, the judgment of the learned single judge is set aside and that of the trial court is restored. The appeal is allowed with costs throughout.

G. K. MISRA, C. J.:— 14. I agree. An interesting question of law arises

in this case. Plaintiff did not call for the stock register of the defendant which might have shown whether the second truck had been supplied by the manufacturer to the defendant. Yet, Mr. Dey for the defendant contended that adverse inference is to be drawn against the defendant for non-production of the stock register. The soundness of this contention is to be examined.

15. The law on the point seems to be quite well settled. When a party wants a certain thing to be proved in order to succeed in a case it is for that party to bring that evidence into record. In this case plaintiff would be entitled to damages if he proves that defendant did not supply the truck though it received the same from the manufacturer. The onus is on the plaintiff to establish by satisfactory evidence that defendant received the truck but did not give delivery of the same to the plaintiff in breach of the contract. Plaintiff can discharge this onus by producing evidence in his possession or in the possession of third parties. He can also prove his case by calling for evidence in the possession of the defendant. It was open to the plaintiff to call for the stock register of the defendant to utilise it in evidence that entries therein proved his case. Where, however, the plaintiff did not call for the stock register, no obligation is cast on the defendant to produce the same unless he considered that the production of such evidence would materially advance the defence case. Defendant's stand is that the stock register does not contain any entry of receipt of a truck from the manufacturer. The stock register could, however negatively prove the defence version by the absence of an entry. It was however, open to the defendant to choose as to what evidence would support its case. Plaintiff cannot compel the defendant to produce particular types of evidence unless plaintiff takes appropriate steps through court for production of the same. No adverse inference is to be drawn against the defendant for non-production of the stock register.

Illustration (g) to Section 114 of the Evidence Act runs thus:

"The court may presume that evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it."

In this case the stock register was not called for by the plaintiff from the defendant. It cannot be said that the defendant withheld such document.

16. Each party is to produce the best evidence in support of his case. In this case the best evidence was in the possession of the manufacturer. Plaintiff could have called for relevant documents from the manufacturer to establish that the second truck had been despatched to the defendant for supply to the plaintiff. As the plaintiff did not call for the best evidence adverse inference will be drawn against him under Illustration (g) to Section 114 of the Evidence Act.

17. Even assuming that adverse inference could be drawn against the defendant for non-production of the stock register though not called for, the adverse inference to be drawn against the plaintiff for not calling for the relevant document from the manufacturer would counterbalance the adverse inference to be drawn against the defendant for non-production of its stock register. (1969) 73 Cal WN 279, (Khalil Adalkhah v. Great American Insurance Co.) throws some light in support of this view.

Appeal allowed.

AIR 1976 ORISSA 19

S. ACHARYA, J.

State of Orissa, Appellant v. Rajballav Misra, Respondent.

Second Appeal No. 39 of 1972, D/- (S-1975).

(A) Contract Act (1872), S. 65 — Contract with Government to construct godown — Contract not in conformity with Art. 299 (1) of Constitution void from inception — Yet Government held could recover amounts advanced under contract — Constitution of India, Art. 299 (1). AIR 1955 Cal 626, Dissented from.

Where the contractor entered into an agreement with the Government to construct a godown room and received advance payments for the same and as he did not complete the work the Government determined the contract and filed a suit for realisation of the amounts advanced, it was held that though the contract not being in conformity with Art. 299 (1) of the Constitution of India was void from its inception the Government under Section 65 could recover the amount advanced to the contractor under the contract. AIR 1922 PC 403, Rel. on; AIR 1955 Cal 626, Dissented from. (Para 8)

Cases Referred: Chronological Paras
AIR 1955 Cal 626 = 97 Cal LJ 9 8
AIR 1922 PC 403 = 50 Ind App 69 8

B. L. N. Swamy (Addl. Standing Counsel), for Appellant; S. C. Sahu, for Respondent.

JUDGMENT:— The unsuccessful plaintiff in both the courts below is the appellant in this second appeal.

2. The plaintiff's case, in short, is that the defendant entered into a contract with the plaintiff through Sub-divisional Officer Hindol for the construction of a godown-cum-inspection room in village Banamalipur at an estimated cost of Rs. 5,000/- and he executed an agreement (Ext. 1/A, dated 2-3-1952) to that effect, and on 23-5-1952, 2-3-

(From decision of G. H. Panda Dist. J., Dhenkanal, in Money Appeal No. 7 of 1971, D/- 19-11-1971).

GS/HS/C458/75/GNB

1952 and 6-1-1953 he received advance payments in cash and also received 20 bags of cement priced at Rs. 105-15-0 on that account. Thus in all the plaintiff advanced Rupees 1305-15-0 to the defendant for the construction of the aforesaid work. The defendant after receiving the aforesaid payments did not complete the said construction work, and so by a notice dated 19-2-1953 the said contract was determined by the plaintiff. By the time the contract was determined, the defendant had done only a portion of the work, the value of which was estimated at Rupees 379-11-0. The plaintiff demanded the balance amount of Rs. 926-4-0 but the defendant did not pay the same. The plaintiff, therefore, instituted the suit for the realisation of the aforesaid amount of Rs. 926-4-0 with interest at the rate of 6¼ per cent. per annum, all told amounting to Rs. 1816/-.

3. The defendant's case is that he did not execute the aforesaid agreement in his personal capacity but he did so as the Naib Sarpanch of the Gram Panchayat. According to the defendant, as the said agreement had been executed by him in the capacity of a Naib Sarpanch of the Gram Panchayat, the plaintiff could not realise any amount personally from the defendant without impleading the Gram Panchayat in the suit.

The defendant admits that he had received Rs. 1,200/- in cash and 20 bags of cement from the Sub-divisional Officer, Hindol on account of the said work, but he claims that he spent a sum of Rs. 1298-12-0 on the portion of the work done by him and so he demands Rs. 98-12-0 from the plaintiff. The defendant pleads that proper valuation and accounts of the construction work done by him should be made. It is vaguely pleaded that there was no contract between the plaintiff and the defendant. The other pleas taken by the defendant in his written statement are not relevant for our purpose, and so they need not be stated in detail.

4. The trial court found that the defendant in his personal capacity executed the aforesaid agreement as a contractor and in this respect he did not act on behalf of the Grama Panchayat; that there was subsisting contract between the parties and the defendant committed breach of his obligation and that the accounts given by the plaintiff in connection with the work in question were correct. But it found that as the plaintiff had filed (a claim?) before the Certificate Court, the suit was barred under the provisions of Section 45 of the Orissa Public Demands Recovery Act.

5. On appeal by the plaintiff, the court below held that there was no contract between the plaintiff and the defendant in accordance with Article 299 (1) of the Constitution of India and hence the alleged contract was void and so the plaintiff was not entitled to claim any relief in accordance with the said void contract. It also found that the contract was one between the Sub-divi-

sional Officer, Hindol and the defendant and not between the Government of Orissa and the defendant, and so the suit was one under Art. 115 of the old Limitation Act and as the suit was filed beyond the period of 3 years it was barred by time.

6. Mr. Swamy, the learned counsel for the State, has very seriously challenged the above mentioned findings of the court below. He contends that on the pleadings of the parties it is evident that the Sub-divisional Officer, Hindol in entering into the contract in question and in advancing money to the defendant in that connection acted on behalf of the State of Orissa, and so the plaintiff's suit clearly comes under Article 149 of the old Limitation Act, and the decision of the court below that the suit is one under Article 115 of the old Limitation Act is incorrect and illegal.

7. The suit has been filed by the State of Orissa represented by the Collector of Dhenkanal. In the plaint it has been averred that the defendant entered into a contract with the plaintiff to make the construction in question and the Sub-divisional Officer, Hindol paid different amounts of money to the defendant on that account on behalf of the plaintiff. The defendant has not denied that aspect of the plaint case. Rather in paragraph 10 of the written statement it is stated that the terms of the agreement as mentioned in the plaint are no doubt binding on both the plaintiff and the Gram Panchayat. Again in paragraph 11 it has been stated that the plaintiff or on their behalf the S. D. O. Hindol was to allot site for the aforesaid work. In the written statement it is nowhere stated that the Sub-divisional Officer, Hindol did not act on behalf of the State of Orissa. From the plaint and the written statement it is clearly evident that the Sub-divisional Officer, Hindol, acted on behalf of the State of Orissa, and the defendant agreed with the Sub-divisional Officer, Hindol to do the job in question for the State of Orissa and in that connection he received advance payments from the said S. D. O. who paid that amount on behalf of the State. That being so, the State of Orissa has rightly instituted this suit for the realisation of the amount advanced to the defendant and so this suit clearly comes under Article 149 of the old Limitation Act, and as the same was filed within 60 years of the payment of the advance money it is not barred by limitation.

8. The finding of the court below that as the contract between the plaintiff and the defendant is not in accordance with Article 299 (1) of the Constitution and is accordingly void, the plaintiff is not entitled to any relief in this suit, is legally incorrect. The court in arriving at that finding has lost sight of the provisions of Section 65 of the Contract Act. In *Thakurain Harnath Kuar v. Thakur Indar Bahadur Singh*, (AIR 1922 PC 403) their Lordships of the Privy Council have held:

"Section 65 deals with (a) agreements enforceable by law and (b) with agreements not so enforceable. By clause (g) of Section 2 an agreement not enforceable by law is said to be void. An agreement, discovered to be void, is one discovered to be not enforceable by law, and, on the language of the section, would include an agreement that was void in that sense from its inception as distinct from a contract that becomes void."

In the present case the contract in question is no doubt a void one as it is not in conformity with the provisions of Art. 299 (1) of the Constitution of India. Though the said contract is void from its inception, the plaintiff can recover any amount paid to the defendant in accordance with the said void contract as per the provisions of Section 65 of the Contract Act. Mr. Sahu, the learned counsel for the respondent, cited the single Judge decision reported in AIR 1955 Cal 626, (*Anath Bandhu v. Dominion of India*) wherein the learned Judge in effect disagreeing with the above-mentioned Privy Council decision has held:

"The word 'discovered' must in my view mean that with available materials at the time of the agreement it could not be known that the agreement was void but subsequent materials or events not available at the time of the agreement disclose that it was void, and even void to such an extent as renders it void ab initio.

But I cannot persuade myself to believe that an agreement at its very inception in outright disregard of express statute or constitutional provision which renders the agreement unenforceable against the Government can be said to be discovered to be void within the meaning of Section 65, Contract Act. If that was the intention then all that Section 65, Contract Act, need have said is "whether an agreement is void" and not "discovered to be void."

With respect I do not agree with the above view taken in the aforesaid Calcutta decision and I prefer to follow, nay I feel bound by the Privy Council decision mentioned above on this point.

9. Thus both the findings of the court below on which the plaintiff's suit has been dismissed are legally incorrect and are accordingly set aside.

10. In the present case, the defendant has admitted to have received Rs. 1,200/- in cash and 20 bags of cement for the work in question. For reasons stated above he cannot seek shelter under the plea that as the agreement under which he received the said amount is void he is not to repay the said amount or any part thereof. The court below has not directed its attention to decide as to what amount of money the defendant has to pay to the plaintiff as he did not complete the work in question as per the aforesaid agreement. According to the plaintiff, the value of the work done by the defendant was only Rs. 379-11-0 but according to the de-

fendant the value of the said work was Rs. 1298-12-0. So the court has to assess the actual amount of money, if any, to be refunded by the defendant to the plaintiff out of the advance payments made to the defendant for the aforesaid work in question.

11. The second appeal is accordingly allowed. The case is remanded to the court below for proper assessment on the above mentioned aspect of the matter and for disposal in accordance with law within as short a time as possible. The court below may, if it thinks necessary, allow both the parties to adduce additional evidence on the above aspect of the matter.

12. Costs of this appeal will abide the final decision.

13. The L. C. R. be sent back immediately.

Appeal allowed.

AIR 1976 ORISSA 21

S. ACHARYA, J.

Life Insurance Corporation of India, Appellant v. Karthiyani and others, Respondents.

Misc. Appeal No. 15 of 1972, D/- 31-3-1975*.

(A) Motor Vehicles Act (1939), Sec. 35 (1) (b) (i) read with Section 2 (24) — Public place — Meaning of — Accident taking place in private place — Insurance Company, held not liable.

A place 'to which the public have a right of access' would mean the place where members of the public have admission as of right that is, where they can go without any hindrance or without being required to take any permission from anybody. If members of the public do not, as of right, have access to a particular place that place cannot be said to be a public place as per the said definition. It is well known and judicial notice can be taken of the fact that members of the public cannot go as of right inside the plant and factory area of Hindustan Steel Limited, Rourkela. Hence it cannot be a public place. When accident takes place in private place (in factory area) the Insurance Company held was not liable. (Para 17)

(B) Motor Vehicles Act (1939), Sections 110, 94 (1) — Jurisdiction of Claims Tribunal — Not limited to compensation arising out of accidents taking place in public places.

The provisions of Section 110 are wide enough to include claims for compensation arising out of accidents taking place both in the public and private places. Section 94 (1) merely makes it imperative to insure all vehicles which are to be used in public places.

*(Against order of R. N. Dhal Samanta, Dist. J., and Member, Motor Accidents Claims Tribunal, Sambalpur, in Misc. (Accident) case No. 18 of 1970, D/- 25-11-1971).

ES/FS/B808/75/RSK

The object is to ensure insurance of all vehicles which are to be used in public places so that if a third party suffers any damage due to the use of the said vehicle in a public place he would be able to get damages for the same straightway from the Insurance company, and the recoverability of such damage would not depend upon the financial condition of the driver or the owner of the vehicle.

(Para 13)

(C) Motor Vehicles Act (1939), Section 110-A — Compensation — Tribunal calculating loss of benefit for 15 years in case of deceased aged 38 years — Compensation directed to be calculated at least for 22 years. (Para 14)

(D) Motor Vehicles Act (1939), Section 110 — Payment of interest — Order granting or refusing interest has to be a reasoned orders.

As discretionary power for the payment of interest has been vested in the courts and Tribunals adjudicating upon claims of this nature, a reasoned order either in the positive or in the negative has to be passed to that effect or else it would amount to a failure on the part of the court or the Tribunal to exercise a beneficial jurisdiction vested in them under the law. (Para 17)

Cases Referred: Chronological Paras
AIR 1974 Orissa 216 = 40 Cut LT 501 17
1970 A. C. J. 44 = (1969) 2 Mad LJ 620 10

S. S. Basu, for Appellant; B. B. Rath, S. N. Satpathy; S. C. Rath and S. Misra (2), for No. 5, and S. C. Sinha, for Respondents Nos. 1 to 4.

JUDGMENT:— This is an appeal under Section 110-D of the Motor Vehicles Act, 1939 (hereinafter referred to as the 'Act') against the award passed by the Motor Accidents Claims Tribunal, Sambalpur in Misc. (Accident) Case No. 18 of 1970 awarding a sum of Rs. 43,000/- as compensation for the death of T. R. Shankaran (the husband of claimant No. 1 and father of claimants 2 to 4), a Foreman in Koppers India Private Limited, Rourkela.

2. This appeal has been filed by the Life Insurance Corporation of India (hereinafter referred to as the 'Insurer'), opposite party No. 2 in the court below, with whom the Jeep No. ORO 529 belonging to the Hindustan Steel Limited, Rourkela (hereinafter referred to as the 'H. S. L.') was insured.

The facts on which the claim under Section 110-A of the Act was filed by the claimants in the court below are that at about 1.40 P. M. on 20-4-70 the deceased T. R. Shankaran was going on a bicycle on the left side of the road inside the H. S. L. premises, Rourkela. At that time the Jeep No. ORO 529 belonging to the H. S. L., driven by P. K. Madhaban, O. P. W. 1, came from behind at a high speed and without blowing any horn dashed against the deceased's bicycle as a result of which the deceased fell down at the spot sustaining serious injuries on his head. The jeep after dashing against the deceased

jumped over a Nala on the left side of the road and after crossing the Nala in that manner it dashed against the wall of the Central Stores of the H. S. L. at a little distance on the other side of the Nala and stopped at that place. The deceased being injured was immediately taken to the Ispat Hospital at Rourkela where he died after a few hours. In the claim petition it is stated that the deceased was about 38 years old by the time of his death; he was having a monthly income of about Rs. 725/-; and the wife and children of the deceased, who were completely dependant on the deceased, have been deprived of the financial aid which they were getting from the deceased. On that basis they have claimed a compensation of Rs. 1,23,000/- on account of loss of benefit for a period of 22 years, expecting that the deceased would have lived normally upto the age of 60 years. They also claimed Rs. 1,00,000/- for mental agony and pain suffered by them due to the death of the deceased.

3. The H. S. L. opposite party No. 1, and the insurer, opposite party No. 2, oppose the claim preferred by the claimants inter alia on the grounds that the age and income of the deceased, as stated by the claimants, are false; that the appellants are not legal representatives of the deceased; they have not sustained any loss due to the death of the deceased; and that in any case the claim preferred by them is exorbitant. They also state that the accident did not occur due to the rash and negligent driving of the driver of the jeep.

4. The Court below on an elaborate discussion and consideration of the evidence on record has arrived at the finding that the claimants were the legal representatives of the deceased; that the deceased was about 38 years old at the time of the accident (20-4-70); that the monthly income of the deceased was Rs. 616/- and out of the same his legal representatives, i. e. the claimants, were getting about Rs. 240/- per month towards their maintenance and benefits. Calculating the loss of benefit to the claimants due to the death of the deceased for 15 years at the aforesaid rate of Rs. 240/- per month the Tribunal has held that the opposite parties 1 and 2 are jointly and severally liable to pay to the claimants Rs. 43,000/- with costs as compensation and has ordered that the insurer should pay that amount to the claimant No. 1 for self and for the other claimants, within a period of three months from the date of the order, affiling which the claimants will realise the said amount through court from opposite parties 1 and 2.

The court below has in effect arrived at the finding that inside the factory premises near about the Electric Rolling Mill and the Central Stores the jeep in question came from behind the deceased at a high speed, dashed against the deceased who was passing on the left side of the road on a bicycle, as a result of which the deceased fell down at the spot, sustained severe injuries on his person and

died in the Ispat Hospital a few hours thereafter. The Court also finds that this accident took place due to the rash and negligent driving of the driver of the jeep.

5. In this case the owner of the jeep (respondent No. 5 in this appeal) has not preferred any appeal against the decision of the Court below. Mr. Basu, the learned counsel for the Insurer has very fairly conceded that as per Sec. 96 (2) of the Act the Insurer can neither question the finding of the court below that the accident took place due to the rash and negligent driving of the driver of the jeep, nor can he question the quantum of compensation and/or the basis on which the said quantum is fixed. Mr. Sinha for the claimants urged that the H. S. L., not having preferred any appeal or cross objection against the Tribunal's award, cannot question the correctness of the findings on the aforesaid points.

6. Mr. Misra for the H. S. L. contends that as by the award the insurer only is made liable to pay the entire amount of compensation it was not necessary for the H. S. L. to file any appeal against the said award, and the H. S. L., being a respondent in this appeal, can challenge the findings of the Tribunal under the provisions of Order 41, Rule 22, C. P. C. without preferring any appeal against the award. Mr. Misra's submission that the order of the Tribunal is entirely against the Insurer is factually incorrect. The order of the Tribunal runs thus:

"..... That the application is allowed in part on contest against the opposite parties. Opposite party No. 2, the insurer (L. I. C. of India) is directed to pay Rs. 43,000/- to the applicant's that is to applicant No. 1 for self and other minor applicants within a period of three months from the date of the order, failing, the applicants can realise this amount through court and in such realisation by them opposite parties 1 and 2 would be jointly and severally liable, though action should first proceed against opposite party No. 2 only." It is evident from the said order that both the owner and the Insurer of the jeep are jointly and severally liable to pay the compensation amount to the claimants, but at the first instance the Insurer (opp. Party No. 2) has been directed to pay the compensation amount within a particular period, and failing that the claimants can proceed against both the owner and the insurer to realise the amount through court. The order certainly does not absolve the H. S. L. of their above-mentioned liability to pay the assessed compensation amount. That being so, the award is not directed entirely against the insurer as urged by Mr. Misra.

7. The H. S. L. who has not preferred any appeal or cross objection, cannot challenge the findings of the Tribunal in any manner so as to assail the ultimate decision of the Tribunal holding the H. S. L. liable to pay the compensation as stated above. No doubt, a respondent, without preferring any

appeal or cross objection against the ultimate decision of a court, can question the correctness of a finding on a particular issue, but that can be done only in supporting the ultimate decision and not to assail the finding of the Tribunal regarding the rash and negligent driving of the jeep and also about the quantum of compensation fixed by it, for any effort in that direction, instead of supporting the ultimate decision would amount to an endeavour on the part of the H. S. L. to unsettle and set aside the said decision.

8. So in the ultimate analysis the said findings of the Tribunal cannot be questioned either by the Insurer or by the H. S. L. the two contesting opposite parties in this case.

9. However, I have gone through the evidence on record and its discussion in the impugned judgment and I am satisfied that the finding of fact of the Tribunal regarding the rash and negligent driving of the jeep is well founded and I do not see any reason to interfere with the said finding. The claimants have preferred a cross objection against the quantum of compensation fixed by the Tribunal, and I shall deal with that aspect of the matter later in this judgment.

10. Mr. Basu, the learned counsel for the Insurer appellant, contends that the accident in question and the act and omission which led to the accident all took place inside the factory premises of the H. S. L., which is a private place and not a public place, and as such the insurer is not liable to pay any compensation on account of the said accident.

As per Section 95 (1) (b) (i) of the Act, an Insurer is liable to pay compensation up to the extent specified in sub-section (2) of Section 95 for the death of or bodily injury to any person or damage to any property of a third party if the same is caused by or arise out of the use of the insured vehicle in a public place. "Public place" has been defined under Section 2 (24) of the Act as follows:

"Public place" means a road, street, way or other place, whether a thoroughfare or not, to which the public have a right of access and includes any place or stand at which passengers are picked up or set down by a stage carriage."

The dictionary meaning of the word 'access' in the said definition is 'admittance', 'admission'. Therefore a place to which the public have a right of access would mean the place where members of the public have admission as of right, that is, where they can go without any hindrance or without being required to take any permission from anybody. If members of the public do not, as of right, have access to a particular place that place cannot be said to be a public place as per the said definition. It has been held in Rajamal's case 1970 A. C. J. 44 (Mad).

"It is clear from the definition of the words 'public place' in Section 2 (24) of the Act that the criterion is whether the public

have a right of access to the place, and it will not be a public place merely if as a matter of fact the public have access."

It is well known, and judicial notice can be taken of the fact, that members of the public cannot go as of right inside the factory premises. At times some visitors are permitted to go inside the H. S. L. factory premises on obtaining special permits on prior applications for that purpose. It is also of common knowledge that members of the public, far from having a right to go inside the factory premises, cannot as of right claim to have a permit to enter into the Plant area on mere payment of an entry fee or on making an application to that effect. As is well known, permission to go inside the factory premises and the plant area is not granted liberally and the grant of such permission is always a matter at the discretion of the authorities of the H. S. L. and members of the public as such cannot claim to have the said permission as of right, nor can question the decision of the authority if permission applied for is refused. It is also well known that the plant and factory area of the H. S. L. is cordoned off from the township by a high boundary wall constructed all round the said area. The gates in that compound wall at different places are heavily guarded, and entry through those gates is strictly controlled by the men and officers of the H. S. L., and members of the public have no right of access through these gates. There are of course roads inside the factory premises, and some of these roads are broader than the main roads in the town, but those roads are meant only for the specific purposes of the factory and are certainly not public thoroughfares, and members of the public as such do not have any right to use these roads for any purpose whatsoever.

The claimants in Item No. 8 of the claim petition mentioned that the accident took place "inside the H. S. L. plant in between the Electric Plate Mill and the Central Stores". In Ext. 4, the report of the Motor Vehicles Inspector, it is stated that the accident took place inside the H. S. L. Plant in between the Electric Plate Mill and the Central Stores, P. W. 1 who was going with the deceased on another bicycle has testified to the fact that the aforesaid accident took place when he and the deceased were passing on the road inside the H. S. L. premises and were going towards their places of work. He has also stated that the accident took place near about the H. S. L. Central stores. P. W. 2 has also stated that near about the Central Stores the jeep dashed against the cycle driven by the deceased. The driver of the jeep, who has been examined as O. P. W. 1, has also stated that the accident took place at a place near about the Central Stores. O. P. W. 2, the security Inspector who was in the said vehicle at the time of the accident, has also stated that the accident took place near the Central Stores of the H. S. L. It is well known that the Electric Plate Mill or the Rolling Mill and the Central Stores of the H. S. L. are all with-

in the factory premises, cordoned off from the general public by the abovementioned compound wall. In paragraph 7 of the written statement filed by the Insurer it has been specifically averred that "The alleged accident having taken place inside private premises, the claim of the applicants is not covered by the policy of Insurance issued by this opposite party." From the abovementioned evidence and materials on record there is absolutely no doubt that the accident took place inside the factory premises of the H. S. L., which for reasons stated above, is a private place and not a public place as defined under the Act.

11. The H. S. L., the owner of the jeep in its written statement, while stating that at the place of occurrence the tie-rod of the jeep gave way and the jeep went out of control, has not controverted the fact that the said place was not a private place but was a public place. As the Insurer and the claimants alleged that the accident took place at private place and the evidence and materials on record showed a distinct tendency to establish that fact, it was for the H. S. L. to lend evidence and show that that place was a public place and not a private place. The H. S. L. has utterly failed in that direction.

12. On my above finding that the accident took place in a private place, the Insurer cannot be made liable to pay any compensation arising out of this accident.

13. Mr. S. Misra, the learned counsel for the H. S. L., contends that if the accident took place in a private place, then the claimants were not entitled to file any claim before the Claims Tribunal and the Claims Tribunal had no jurisdiction to order payment of compensation in respect of this accident. To support his above contention Mr. Misra has drawn my attention to Section 94 (1) of the Act and submits that the Act provides for the insurance of a vehicle for use in public places, and so the reliefs and remedies under the Act would be available only when any accident takes place due to the use of such a vehicle in a public place and not in a private place. There is nothing in S. 94 to support the above contention, and in making that contention Mr. Misra loses sight of Section 110, the most relevant provision in the Act on this point. Section 94 (1) merely makes it imperative to insure all vehicles which are to be used in public places. The object of Section 94 (1) is to ensure insurance of all vehicles which are to be used in public places so that if a third party suffers any damage due to the use of the said vehicle in a public place, he would be able to get damages for the same straightway from the Insurance company, and the recoverability of such damage would not depend upon the financial condition of the driver or the owner of the vehicle.

Section 110 of the Act provides for the constitution of a Claims Tribunal for a parti-

cular area, and that Claims Tribunal, as specifically mentioned in clause (1) of that section, is constituted "for the purpose of adjudicating upon" claims for compensation in respect of accidents involving the death of or bodily injury to persons arising out of the use of motor vehicles or damages to any property of a third party so arising or both. There is nothing therein to limit the power and jurisdiction of the Tribunal to only claims arising out of accidents in public places; the provisions of that section are wide enough to include claims for compensation arising out of accidents taking place both in the public and private places.

Moreover, Section 110-F provides that once a Claims Tribunal is constituted for a particular area, no Civil Court shall have jurisdiction to entertain any question relating to any claim for compensation which may be adjudicated upon by the Claims Tribunal for that area. Of course if a claim for compensation also includes a claim in respect of damage to property exceeding Rs. 2,000/-, an option is given to the claimants by the proviso to sub-section (1) of Section 110 of the Act to refer a claim to the Civil Court; and where a reference is so made the Claims Tribunal shall have no jurisdiction to entertain any question relating to such claim. This proviso obviously does not apply to the present case before me.

So the claimants in the present case could not have filed their claim for compensation in the Civil Court on account of the death of the deceased. So the Claims Tribunal of that area was the only competent authority to deal with the claim in question. The above contention of Mr. Misra therefore is without any substance.

14. The claimants (respondents 1 to 4) have preferred a cross objection claiming higher compensation than what has been awarded by the Tribunal. The Tribunal finds that the deceased who was a Foreman in Koppers India limited, a contractor's firm was earning about Rs. 650/- per month at the time of the accident. It has also been found that the deceased was about 38 years old at the time of his death by the aforesaid accident. The Tribunal on a consideration of the various materials available on record has arrived at the finding that the claimants were deriving a benefit of Rs. 240/- per month (Rs. 2,880/- per year) from out of the income of the deceased. Having arrived at the said finding it abruptly calculated the loss of benefit only for 15 years without giving any reason for fixing the said span of 15 years. Our High Court, and many other High Courts have assessed the general expectation of life in India till age of 65 and in some cases upto the age of 70. The claimants, however, in their petition fixed the expected longevity of the deceased at 60 years, and on that basis they have claimed compensation. The deceased was a healthy man as seen from the post-mor-

tem report Ext. 3, and reasonable expectations were that he would have lived and continued to earn the amount assessed by the Tribunal at least upto the age of 60 years. Thus the Tribunal was not justified in calculating the loss of benefit to the claimants only for a period of 15 years. On the above considerations, compensation should have been calculated at least for 22 years, i. e. upto the age of 60 years of the deceased.

15. The loss of benefit has been assessed by the court below at Rs. 240/- per month on a very convincing discussion and consideration of the evidence on record and I do not find any reason to interfere with the said finding. Calculating the loss of benefit at that rate for a period of 22 years, the amount of compensation comes to Rupees 63,360/-.

16. Both Mr. Basu and Mr. Misra submit that in many decisions of this court deduction of 1/6th from the lump sum compensation has been approved, and so order for similar deduction should be passed in this case. Mr. Basu and Mr. Misra are legally not entitled to raise the above contention for reasons stated above. There is no statutory obligation to order any such deduction. The legislature, while incorporating a new provision in the Act for payment of interest on compensation amount by the Amending Act 56 of 1969, did not make any provision for any such deduction on the aforesaid account. The contesting opposite parties and specially the H. S. L. did not agitate this question before the Tribunal, before whom the matter should have been raised in order that the Tribunal would have fixed the compensation amount keeping in view the submission on this count. The H. S. L., who is equally affected by the order of the Tribunal directing payment of compensation in a lump sum, has not preferred any appeal against the said award at least to agitate this question. The deceased, a healthy man, died due to the accident at the age of 38 years, by which time he was already working as a Foreman in a contractors firm. So with the passing of time and gaining of experience, he would possibly have earned more money enabling his dependants to get higher pecuniary benefits out of the same. This aspect of the matter has not been taken into account. As nothing so far has been paid to the claimants they must be eking out their existence for the last five years in extreme hardship, and if any compensation amount had been made available to them within a short time, they could have profitably invested the same for their benefit and existence. On the above considerations, I am not inclined to exercise my discretion in favour of directing deduction of 1/6th from the lump sum compensation amount to be paid in this case.

17. The claimants in their cross objection have claimed interest on the compensation amount as provided under Section 120 of the Act. As discretionary power for the

payment of interest has been vested in the courts and Tribunals adjudicating upon claims of this nature, a reasoned order either in the positive or in the negative has to be passed to that effect, or else it would amount to a failure on the part of the Court or the Tribunal to exercise a beneficial jurisdiction vested in them under the law. The observations in paragraph 4 of the decision in Janjali Devi's case (1974) 40 Cut LT 501 = (AIR 1974 Orissa 216) regarding court's discretionary power to grant interest on compensation under the Land Acquisition Act aptly apply to the point under consideration.

Considering the facts and circumstances of this case I deem it fit and proper to direct payment of simple interest to the claimants at the rate of 6 per cent per annum on the above mentioned compensation assessed in this appeal and that would be effective from the date of the passing of the award by the Tribunal (i. e. from 25-11-71) till the compensation amount is paid in full.

18. In the result, therefore, the H. S. L., the owner of the Jeep (opposite party No. 1 in the court below and respondent No. 5 in this appeal) is hereby directed to pay in lump sum Rs. 63,360/- as compensation with interest as directed above and the hearing fee of Rs. 50/- as awarded by the Tribunal to respondent No. 1, the mother of respondents 2 to 4, within a period of two months from to-day, failing which the claimants shall realise the aforesaid amounts through court in accordance with law. It is needless to mention that respondent No. 1 will receive the aforesaid compensation amount for herself and on behalf of all the other claimants, and each of them will be entitled to the same in equal shares.

19. The appeal preferred by the Insurer and the cross objection preferred by the claimants are allowed as stated above, but in the circumstances each party will bear his own costs of this appeal.

Appeal allowed.

AIR 1976 ORISSA 25

G. K. MISRA, C. J. AND P. K. MOHANTI J.,

Brajendra Maharana and others. Petitioners v. The Utkal University, Opposite Party.

O. J. C. Nos. 763, 764, 824 to 826 and 827 of 1975, D/- 18-8-1975.

(A) Constitution of India, Article 226
Natural justice — Malpractice at examination — Enquiry against delinquent-examinee — Principles stated in Paras 8 and 13.

(Paras 8, 13)

Cases Referred: Chronological Paras
AIR 1972 SC 1408 7
AIR 1972 Orissa 224 = 38 Cut LT 349 7
(FB)

IS/KS/D610/75/JHS

AIR 1970 SC 1269 = (1970) 3 SCR 963 7

AIR 1969 SC 198 = (1969) 1 SCR 317 7, 13

AIR 1966 SC 875 = (1966) 3 SCR 767 7, 15

AIR 1962 SC 1110 = (1962) Supp 3 SCR 36 7

(1960) 1 All ER 631 = (1960) 1 WLR 223 13

(1958) 2 All ER 579 = (1958) 1 WLR 762 7

A. Das, for Petitioners; S. C. Mohapatra and Sankarsan Rath, for Opposite Party.

MOHANTI, J.— These writ petitions under Articles 226 and 227 of the Constitution of India have been filed by six students of the Christ College, Cuttack for quashing the Notification No. EC-II (pub)/627/75 dated 20th February, 1975 (Annexure 4) issued by the Utkal University cancelling the results of the petitioners in the Second Bachelor of Arts Examination of 1974 on the ground that they had resorted to unfair means.

2. As common questions of law and fact are involved in these writ petitions they have been heard together and will be disposed of by this common judgment.

3. The broad facts which are almost identical and are also not in dispute are these:

The petitioners appeared at the Second B. A. Examination for the year 1974 from the Christ College Centre. Dr. S. N. Choudhury, M. A., Ph. D. (Utkal) who is the Reader in History of Kendrapara College was the Examiner in History Paper II. He reported that the answers given by the petitioners to some of the questions in their answer books were indetical. The Board of Conducting Examiners agreed to the report of Dr. Choudhury. Then charges of malpractice were framed against the petitioners and the matter was referred to the Discipline Committee constituted by the University. The petitioners filed show-cause to the charges and the Discipline Committee on a consideration of the same recorded the finding: "Identity established in the light of the report of the C. B. and further scrutiny of the scripts by the Committee" and recommended for cancellation of the results of the examination. The recommendation was accepted by the Administrator exercising the powers of the Syndicate. Accordingly, the impugned notification was issued.

4. The petitioners repudiated the allegations levelled against them and asserted that they have never indulged in unfair means. They contended that they were not given reasonable opportunity to defend themselves and that there was no observance of the principles of natural justice. The enquiry was tainted with mala fides and the decision for cancellation of the result is based on no evidence.

5. The University while denying the allegations made in the writ petitions maintained that adequate reasonable opportunity

had been given to the petitioners to meet the case and there has been no violation of the principles of natural justice. The Examiner reported the malpractice which on independent examination by the Board of Conducting Examiners was also found to be correct. On the basis of the report of the Board, the petitioners were called upon to show cause why disciplinary action should not be taken against them. The extracts of the reports of the Examiner and the Board were supplied to the petitioners along with the show cause notice. In the notice dated 11-2-1975 the petitioners were intimated that the Discipline Committee would hold the enquiry on 19-2-1975 and that the petitioners might offer any defence as they thought fit. The petitioners, though present at the enquiry, remained content with a mere denial of the charge. They did not examine any witness or produce any document in support of their explanations. They did not also ask for time to adduce any evidence. The enquiry was conducted bona fide and the members of the Discipline Committee had no axe to grind against the petitioners. Two of the members of the Discipline Committee, viz. Dr. G. Misra and Dr. L. K. Mohapatra are eminent educationists and have long experience as University examiners. The Administrator is a highly qualified man and he was a Revenue Divisional Commissioner before he joined the University. On a careful consideration of the answer papers the Discipline Committee came to the finding that the answers to some of the questions given by the petitioners were identical and the Administrator who is vested with the powers of the Syndicate accepted their recommendations and decided to cancel the results of the examination. The Discipline Committee is only a quasi-judicial tribunal and it has fairly assessed the materials on the record. The Syndicate is the controller of the examinations and the Administrator exercising the powers of the Syndicate has taken the decision to cancel the result of the examinations. His decision cannot be interfered with.

It is contended that the Christ College Centre from which the petitioners appeared is the most troublesome and indisciplined Centre and that there were several instances of indiscipline created by the candidates appearing from that centre in the past. It was alleged that on 15-4-1974 the candidates along with other students created a lot of disturbances because of strict invigilation and there were instances of stone-throwing, shouting and threat to beat the invigilators. A meeting of the candidates and other students was held on 4th May, 1974 and it was decided that the candidates would flout the discipline of the examination and adopt unfair means to answer the questions in the manner they liked. On 7-5-1974 a large number of students demanded from the Centre Superintendent that the seating arrangement in the upstairs should be cancell-

ed and the same should be made in the ground floor. They also demanded that they should be allowed to adopt unfair means. As the Centre Superintendent did not accede to the demand, the candidates abandoned the examination in the M. I. L. paper. On 8-5-1974 the candidates protested against arrangements for strict invigilation by tearing out the blank answer books supplied to them. They became violent and attempted to destroy the confidential papers kept in an iron safe in the Principal's room. The gold iron safe containing the question papers was removed outside and was broken open and the question papers were thrown out. It is on account of such conduct on the part of the candidates in the first B. A. examination of 1974 that the Centre Superintendent and the Invigilators became terror-stricken and did not venture to report about the malpractice adopted by the candidates in the second B. A. examination of 1974 in which the petitioners appeared.

6. The learned counsel for the petitioners advanced the following contentions:

(1) The finding of the Discipline Committee was not based on any evidence as no adverse conclusion about the use of unfair means could be reached on the solitary circumstance that their answers to some of the questions were similar.

(2) The procedure adopted by the Discipline Committee violated the principles of natural justice inasmuch as:

(a) neither the Centre Superintendent and the Invigilator were examined nor their reports were produced,

(b) the answer books were not made available to the petitioners,

(c) the chart showing the seating arrangement at the examination hall was not produced.

(d) the petitioners were not given an opportunity to cross-examine the Examiner who had reported about similarity of the answers.

7. At the outset it will be profitable to notice some authoritative decisions which have bearing on the points raised before us. In AIR 1962 SC 1110 (Board of High School and Intermediate Education, U. P. Allahabad v. Ghanshyam Das Gupta) their Lordships held that the Examination Committee, while dealing with the cases of examinees using unfair means in examination hall, acts quasi-judicially and the principles of natural justice apply to the proceedings before it. In that case no notice was at all given to the delinquent-examinee and therefore the order cancelling the examination was quashed.

In AIR 1966 SC 875 (Board of High School and Intermediate Education, U. P. Allahabad v. Bagleshwar Prasad) it was held that the Enquiry Committee set up by the

Education Board to enquire into unfair means adopted by the examinees at a particular examination has to decide all relevant questions in the light of evidence adduced before them. It was pointed out that direct evidence in such cases might not be available and the question will have to be considered in the light of the probabilities and circumstantial evidence. Their Lordships also pointed out that the problem which the educational institutions have to face from time to time is a serious problem and the court should be slow to interfere with the decision of the domestic tribunals.

In AIR 1969 SC 198 (Suresh Koshy George v. University of Kerala) it was held as follows:

"..... The rules of natural justice are not embodied rules. The question whether the requirements of natural justice have been met by the procedure adopted in a given case must depend to a great extent on the facts and circumstances of the case in point, the constitution of the Tribunal and the rules under which it functions."

Their Lordships also referred to the observations of Lord Harman, J. in the case of *Byrne v. Kinematograph Renters Society Ltd.* (1958) 2 All ER 579 which are as follows:

"What, then, are the requirements of natural justice in a case of this kind? First, I think that the person accused should know the nature of the accusation made; secondly that he should be given an opportunity to state his case; and thirdly, of course, that the tribunal should act in good faith. I do not think that there really is anything more".

In AIR 1970 SC 1269 (*The Bihar School Examination Board v. Subhas Chandra Sinha*) facts were of course different but the proposition of law laid down by their Lordships is clearly applicable to the facts of the present case. There was mass copying by the candidates of a particular centre. It was not considered necessary to give specific charges to each of the delinquent-examinee and the examination as a whole was cancelled. Their Lordships observed that the University is responsible for its standards and the conduct of examinations. It cannot hold a detailed quasi-judicial inquiry with a right to its alumni to plead and lead evidence etc. before the results are withheld or the examinations cancelled. If there is sufficient material on which it can be demonstrated that the University was right in its conclusion that the examinations ought to be cancelled then academic standards require that the University's appreciation of the problem must be respected. It would not do for the court to say that you should have examined all the candidates or even their representatives with a view to ascertaining whether they had re-

ceived assistance or not. To do this would encourage indiscipline if not also perjury.

In AIR 1972 SC 1408 (Prem Prakash v. Punjab University) their Lordships observed:

"The examinee can ask for more information or details with regard to the material or evidence which may be sought to be used against him and normally if he makes a request in that behalf, the University authorities, in order to inform him adequately of the case he has to meet, would supply him the necessary particulars or details of the evidence. In the very nature of things no hard and fast rule can be laid down and so long as the Court is satisfied that the opportunity which was afforded to the examinee was adequate and sufficient it will not interfere with any orders prejudicial to him which may have been made by the University authorities.

It was also observed:

"A good deal of emphasis had been laid on the answers which were given by the two candidates and our attention had been invited to the discrepancies between the details of the answers contained in the two answer books. . . . These, however, are matters on which the Court cannot entertain a petition under Article 226. It was for the Standing Committee to arrive at its own conclusion on the evidence before it and the same cannot be re-examined except on very limited grounds which have not been established. . . ."

In (1972) 38 Cut LT 349 = (AIR 1972 Orissa 224) (FB) (Pramila Dei v. Secy. Board of Secondary Education, Orissa, Cuttack) a Full Bench of this Court on a review of several decisions on the subject laid down as follows:

"(i) The proceeding against an examinee on a charge of malpractice is a quasi-judicial proceeding. It affects his future and if any adverse view is taken by the disciplinary authority it might blast his career. Though the proceeding is administrative it is quasi-judicial in nature inasmuch as the career of the examinee is in issue.

(ii) Where there are statutory or codified rules the quasi-judicial proceeding will be enquired into in conformity with those rules.

(iii) Where there are no such rules the principles of natural justice will be followed in making the enquiry keeping in view the fact that it involves the determination of a vital question integrally connected with the rights of the examinee.

(iv) In making such enquiry the authority might have to ascertain both facts and law.

(v) In doing so it must act in good faith.

(vi) The authority must fairly listen to both sides.

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The next question for consideration is whether the enquiring authority has any further duty in the matter of enquiry after charges are supplied, explanation is obtained and it listens to the parties in good faith. In other words, is it bound to follow any other requirements besides the aforesaid three elements? Clearly the enquiry is not in the nature of a criminal trial. The authority has no power to administer oath unless there is a codified rule to that effect. It need not examine any witness. It can obtain information in any way it thinks best; but if the information is so obtained the examinee must be given fair opportunity of correcting or contradicting any relevant statement prejudicial to his views. It follows as a necessary corollary that if the examinee wants any material to be produced or to cross-examine any witness, then the authority must make those materials or witness available. The authority has, however, no duty to *suo motu* examine oral evidence or give opportunity for cross-examination. If the delinquent as a part of his defence demands that witnesses reporting against him are to be cross-examined by him refusal thereof would amount to denial of reasonable opportunity.

It is also to be further remembered that in exercise of the Writ jurisdiction under Articles 226 and 227 of the Constitution over the decision of the educational authority the High Court does not function as a Court of appeal. It cannot look into the question of sufficiency or propriety of the evidence. It cannot interfere with the finding of that authority unless the same is based on no evidence or is based on evidence on which a reasonable person cannot hold the delinquent guilty."

8. A consideration of the principles laid down in the above decisions leads us to the following conclusions:

(1) The enquiry before the domestic tribunals in the matter of adoption of unfair means by examinees is of a quasi-judicial character and has to be undertaken in accordance with the principles of natural justice.

(2) The essential principles of natural justice that are to be followed by an authority dealing with a case of the present nature are as follows:

(a) The person affected shall be apprised of the charges of unfair means.

(b) he must be given an opportunity to make a representation and to explain the circumstances appearing against him; and

(c) the authority conducting the proceedings must not be biased and should act in good faith.

(3) Rules of natural justice not being embodied rules, it is open to the authority

concerned to evolve its own procedure for acquainting the person concerned with the charges and the material on which they are founded, and also for affording him an opportunity of explaining those charges. The procedure will necessarily vary with the facts, circumstances and nature of the case, constitution of the authority dealing with it and the rules under which it functions.

(4) A delinquent-examinee can ask for more information and details with regard to the material or evidence which is sought to be used against him, if he does not ask for further information, he cannot make a grievance out of it, unless it is shown that any prejudice has been caused on account of the procedure adopted.

(5) Enquiries conducted by quasi-judicial tribunals cannot be equated to the trials in ordinary courts of law.

(6) Where direct evidence of adaption of unfair means is not available, the question will have to be considered in the light of probabilities and circumstantial evidence.

(7) In dealing with the validity of the orders passed by the University authorities the High Court does not sit in appeal over the decision of the authority concerned. Its jurisdiction is limited. If the order in question is not supported by any evidence at all the High Court may interfere; but the conclusion that the impugned order is not supported by evidence must be reached after considering the question as to whether probabilities and circumstantial evidence do not justify that conclusion.

(8) It is primarily for the University authorities to come to a decision after taking into consideration the explanations submitted by the delinquent examinees and other circumstances. High Court would not ordinarily interfere with the decision if it is based upon relevant considerations and is arrived at after affording adequate opportunity to the candidates concerned.

9. Keeping the aforesaid principles in view we would proceed to examine the contentions raised before us.

10. On a careful consideration of the materials on record we are of the opinion that there is no substance in the argument that the principles of natural justice have been violated. The petitioners were informed of the charge levelled against them before commencement of the enquiry. They were also given another opportunity of personal hearing. Particulars of the unfair means were specified in the charge (vide Annexure 1). Extracts from the reports of the Examiner and the Board of Conducting Examiners were supplied to the petitioners along with the charge. In the second notice (Annexure 2) the petitioners were informed that the enquiry would be held on 19-2-1975 at 10.20 A. M. in the University office and that if they so desired they might remain present during the enquiry and offer any further defence. The petitioners submitted explana-

tions to the show cause notice and attended the enquiry. From the records of proceedings which were made available to us during the hearing, it appears that the petitioners merely denied the charges and did not produce any evidence in support of their defence. They did not also ask for time to produce evidence. We have not the slightest doubt that the enquiry was conducted in absolute good faith. No animus is suggested against any member of the Board of Conducting Examiners or the Discipline Committee. The members of the Discipline Committee besides considering the report of the Board of Conducting Examiners scrutinised the answer books themselves and were satisfied about the similarity of the answers given by the petitioners in their answer books.

On the question of non-observance of the principles of natural justice the first complaint of the petitioners is that neither the reports of the Superintendent and the Invigilator were produced nor they were examined at the enquiry. It is to be noted in this connection that the Centre Superintendent and the Invigilators had not submitted any report about the malpractice. It was therefore not necessary for the Discipline Committee to examine them suo motu. If the petitioners wanted to establish their defence by the evidence of the Centre Superintendent and the Invigilator they should have moved the Discipline Committee to secure the attendance of the Centre Superintendent and the Invigilator for examination. The grievance made by the petitioners at this stage appears to be an afterthought. It is averred in the counter affidavit of the opposite party that on account of disturbance and indiscipline created by the candidates the Centre Superintendent and the Invigilators became terror-stricken and did not venture to report about the malpractice. A number of instances of indiscipline have been cited in the counter affidavit. It is clear in the present case that an extraordinary situation had arisen in the Christ College centre during the period in question. Any action taken by the Centre Superintendent or the Invigilators against the candidates at the examination hall might have tended further to endanger the interests of discipline. Since there were repeated disturbances in this particular centre, a fact about which there does not appear any controversy, the mere absence of reports by the Centre Superintendent and the Invigilators cannot exonerate the petitioners.

11. The second complaint is that the answer books were not made available to the petitioners during the enquiry. There is no rule under which the petitioners were entitled to see the answer books. The principles of natural justice do not require that the answer books should be shown to the delinquent examinee. They merely require the affording of an opportunity to explain or meet the charges. This requirement was fully satisfied in the present case. More-

over, in view of the nature of plea taken by the petitioners it cannot be said that they have been prejudiced by non-disclosure of the answer books. Similarity of the answers to the questions as mentioned in the charges is not disputed by the petitioners. The common plea of all the petitioners is that they prepared from the book "B. A. History in the form of question answer" written by Shri Nabakishore Karmee, the Professor of History of the Christ College and the class notes dictated by him. Their contention is that as they prepared from a common source, the answers became similar.

12. The third complaint is that the chart showing the seating arrangement in the examination hall was not produced at the enquiry. The opposite party's contention is that as the chart was not available with the University it could not be produced at the time of hearing. It appears that the petitioners did not move the Discipline Committee for production of the chart at the time of enquiry. So it hardly lies in their mouths to make a grievance for its non-production at this stage. Having regard to the nature of the plea taken by the petitioners we do not think that they were prejudiced in any way by non-production of the chart at the time of enquiry.

13. The fourth complaint of the petitioners is that they were not given an opportunity to cross-examine Dr. Choudhury who had reported about similarity of the answers. It appears that though some of the petitioners made a request in their explanations submitted to the Deputy Registrar of the University for an opportunity to cross-examine the Examiner, no such request was made to the Discipline Committee at the time of enquiry. From the record of proceedings of the Discipline Committee, it appears that the petitioners never asked for summoning of the Examiner. The counter affidavit filed on behalf of the University is clear on the point and no reason has been assigned to doubt the averments made therein. It seems to us settled in law that it is not open to a petitioner to complain of the omission to produce a witness if he has not applied for the production of that witness. The question was considered by the Privy Council in *University of Ceylon v. Fernando*; (1960) 1 All ER 631. The entire case against the petitioner there, turned upon the testimony of one Miss. Balasingham. She was not produced during the enquiry proceedings. A contention was raised that the proceedings contravened the principles of natural justice because of the omission to produce her. Repelling the contention the Judicial Committee observed: "This might have been more formidable objection if the plaintiff had asked to be allowed to question Miss. Balasingham and his request had been refused." This view has been affirmed by the Supreme Court in AIR 1969 SC 198. We are of opinion that this contention is without any substance.

14. From the records produced before us we cannot say that the decision for cancellation of the result of examination was based on no evidence. We have looked into the book written by Shri Karmee, the question of History Paper II and the answer books of the petitioners which were made available to us by the learned counsel for the opposite party during hearing of the writ petitions. We are satisfied on a comparison of answers to question No. 2 given by the petitioners in O. J. C. Nos. 764, 824, 826 and 763 of 1975 with the answer given in the book of Shri Karmee that they are almost identical. The question No. 2 runs as follows. "Trace the role of Nurjahan during the rule of Jahangir." The answer to this question occurs at pages 60 to 63 of the book of Shri Karmee. Normally it is not possible for a candidate to reproduce such a lengthy answer from memory. The language and the manner of writing clearly suggest that the answers were the result of copying. The seat chart (Annexure A) shows that the petitioners in O. J. C. Nos. 764/75 and 824/75 were in the first row, the petitioner in O. J. C. No. 826/75 was in the second row and the petitioner in O. J. C. No. 763/75 was in the third row. In view of the position of the petitioners as shown in the chart it is not unlikely that they received help from each other or took help from a common source.

We also compared the answer of petitioners in O. J. C. Nos. 825/75 and 824/75 (Roll Nos. 732 and 733 respectively) in respect of question No. 8 and found that they tallied word for word. The seat chart (Annexure A) shows that Roll No. 733 was sitting just behind Roll No. 732 in the first row. It is therefore quite probable that they took help from each other or from a common source in answering question No. 8.

We also compared the answer of petitioner in O. J. C. No. 827/75 bearing Roll No. 1929 with that of another candidate bearing Roll No. 1927 in respect of question No. 8 and found that they are similar. The seat chart (Annexure A) shows that the petitioner in O. J. C. No. 827/75 was sitting just behind the candidate bearing Roll No. 1927 in the fourth row. It is therefore quite probable that they took help from each other or from a common source in answering question No. 8.

15. Having regard to the circumstances and probabilities of the case, it cannot be said that the decision to cancel the results of the petitioners is based on no evidence. The circumstantial evidence and the probabilities may not be enough for a decision by a court of law. But all considerations which govern trials in a court of law cannot be imported into enquiries held by domestic tribunals. It may well be that if the matter came up before us in appeal we might have taken a different view, but as indicated earlier, this Court does not act as

a court of appeal against the decision of the University authorities. The question whether the candidates had resorted to unfair means is a pure question of fact and the Discipline Committee which consisted of eminent educationists and experienced Examiners has reached the conclusion after due consideration of all the relevant materials. No mala fides have been proved against the members of the Committee. The enquiry has been fair and the petitioners had adequate opportunity of making their defence. There has been no violation of the principles of natural justice. We cannot therefore re-assess the evidence for ourselves and substitute our own conclusion for that of the Discipline Committee now ever erroneous it may appear to be. It is to be noted in this connection that in AIR 1966 SC 875 the results of respondents 1 and 2 were cancelled by the Board on the basis of the finding of the Enquiry Committee on the solitary circumstance that the respondents had given wrong answers to question No. 4 in precisely the same form in which the said answer had been given by another candidate. Though this was the only circumstance on which the decision was based their Lordships observed that the enquiry had been fair and the respondent had an opportunity of making his defence. On such observations their Lordships reversed the decision of the High Court in allowing the writ petition and in quashing the order of cancellation of the result.

16. The result therefore is that all the writ petitions are dismissed, but in the circumstances without any order as to costs.

17. Before parting with the cases, we cannot but seriously deprecate the conduct of the concerned Invigilators in not submitting a report about adoption of unfair means by the petitioners. It is not sufficient to say that they became terror-stricken by the conduct and behaviour of the candidates in the past. Even if they apprehended danger in taking immediate action for checking malpractice at the examination hall, nothing prevented them from submitting a report to the Centre Superintendent about the malpractice. To say the least, they have failed to discharge the duties entrusted to them.

G. K. MISRA, C. J.:— I agree.

Petitions dismissed.

AIR 1976 ORISSA 31

G. K. MISRA, C. J. AND K. B. PANDA, J.

Dayalu Narayan Swamy Appellant v. Kanika Ramaswamy Dora and others, Respondents.

A. H. O. No. 2 of 1972, D/- 11-7-1975.

*(Against Judgment of S. K. Ray J. in E. A. No. 175 of 1963 D/- 6-12-1971.

GS/IS/C718/75/RSS

(A) Specific Relief Act (1963), Sec. 38 — Extinguishment of usufructuary mortgage — Proper remedy is to file a suit for recovery of possession not a suit for permanent injunction. S. A. No. 175 of 1963 D/- 6-12-1971 (Orissa), Reversed.

On extinguishment of usufructuary mortgage by operation of law under Section 17 of the Orissa Money Lenders Act, the possession of the mortgagee is permissive possession. The proper remedy for mortgagor is to file a suit for recovery of possession and not a suit for permanent injunction. AIR 1974 Orissa 173, Relied on; S. A. No. 175 of 1963 D/- 6-12-1971 (Orissa), Reversed.

A suit for permanent injunction filed by a purchaser from mortgagor was dismissed in second appeal as not tenable. In A. H. O. filed by the purchaser the amendments to plaint sought by him as follows, were allowed: (a) Valuation of suit at purchase price, (b) deletion of prayer for permanent injunction and (c) addition of relief of recovery of possession. (Para 3)

Cases Referred Chronological Paras
AIR 1974 Orissa 173 = 40 Cut LT 213. 2

B. K. Pal, for Appellant; S. N. Sinha and S. S. Mohanty, for Respondents.

G. K. MISRA, C. J.:— The disputed land belonged to one Ram Chandra Dora. His son Balam Dora executed a registered usufructuary mortgage bond (Ext. A) in favour of the father of defendants 1 to 3 and 5 and grandfather of defendant No. 4 on 4-1-1916. The widow of Balam Dora executed an unregistered agreement for sale (Ext. 2) on 21-1-1965 in favour of the plaintiff and thereafter she executed the registered deed of sale (Ext. 1) on 14-5-1965 for Rs. 500/-. On the basis of the title under the registered sale deed the plaintiff filed the suit for permanent injunction. The contesting defendants assailed the suit alleging that the vendor was not the wife of Balam Dora and that the defendants purchased the disputed property by an oral sale about 8 months after the mortgage. All the courts have concurrently rejected the defence story and have held that the vendor is the wife of Balam Dora and transmitted a valid title in favour of the plaintiff by the registered sale deed. They also discarded the story of oral sale. The trial and the lower appellate courts decreed the plaintiff's suit for permanent injunction. In second appeal our learned brother S. K. Ray, J held that as the defendants were in actual possession of the disputed property a suit for permanent injunction does not lie. He accordingly allowed the second appeal after reversing the judgments of the courts below. This A. H. O. has been filed by the plaintiff against the judgment of the learned single Judge.

2. The only contention urged by Mr. Pal is that after the usufructuary mortgage was extinguished by operation of law under Section 17 of the Orissa Money

Lenders Act, the defendants were in permissive possession and a suit for permanent injunction lies against the defendants who were not in possession in their own right, title and interest. The contention is wholly misconceived and is concluded by a Full Bench decision of this Court in AIR 1974 Ori 173 (Jayagopal v. Gulab Chand). In paragraph 16 their Lordships made the following observation:—

"The section (Section 17 of the Orissa Money Lenders Act) itself clearly says that the mortgagee shall put the mortgagor, in possession of the property on discharge of the mortgage. Until the mortgagee puts the mortgagor in possession he continues in possession of the property on behalf of the mortgagor and not in derogation of his right, title and interest. Though no express permission has been granted by the mortgagor to the mortgagee to continue the possession, on discharge of the mortgage, the nature of the possession is permissive and not hostile until by any express act the mortgagee exercises his hostile animus. On the discharge of the mortgage the mortgagor will only sue for possession and not file a suit for redemption as the mortgage has been discharged but the mortgagee continues in possession on behalf of the mortgagor as before."

Thus the defendants were in permissive possession on behalf of the mortgagors. It is well settled that the relief of injunction is available only to a person who is in possession. Even though the defendants were in permissive possession on behalf of the plaintiff still the actual physical possession was with the defendants. The plaintiff cannot oust them unless he gets recovery of possession. Permanent injunction is not an appropriate relief even in the case of a permissive possession. The learned single Judge arrived at the correct conclusion and rightly dismissed the plaintiff's suit on this sole ground despite his recording the other findings in favour of the plaintiff.

3. In this appeal the plaintiff has filed an application for amendment of the plaint. The following are the essential features of the amendment sought:—

(1) The suit is to be valued at Rupees 500/-, the amount for which the plaintiff purchased the disputed property.

(2) Recovery of possession of the disputed land is sought.

(3) The prayer for permanent injunction has been deleted.

We have heard Mr. Sinha, appearing for the contesting defendants on the question of amendment. On the findings recorded that the plaintiff is the rightful owner and the defendants are in permissive possession and have not acquired any title by adverse possession, the amendment is a necessary logical corollary of the averments made in the plaint. We accordingly allow the amendment of the plaint as prayed for.

The suit was originally valued at Rs. 100/- and court-fee had been paid on such valuation in respect of the relief of permanent injunction. As this relief has been deleted, the plaintiff would now pay ad valorem court-fee on Rs. 500/- on the plaint minus the court-fee already paid on Rupees 100/-. The defendants were to pay court-fee in the first appeal and in the second appeal. But as the plaintiff was responsible for the suit being badly framed he would pay the deficit court-fee due on the memorandum of appeal in the first appeal as well as in the second appeal. The plaintiff is to pay also ad valorem court-fee in the memorandum of appeal in the A. H. O. The court-fee already paid in all the four courts comes to Rs. 42.00. Court-fee payable in all the four courts would be Rs. 282.00. So the balance court-fee payable by the plaintiff would be Rs. 240.00.

4. On the aforesaid analysis the plaintiff's suit be decreed for declaration of title and recovery of possession subject to the condition that the plaintiff would pay the deficit court-fee of Rs. 240.00 for all the four courts. If the plaintiff fails to pay the deficit court-fee as directed above within six weeks from today the A. H. O. would stand dismissed without further reference to the Bench.

5. The judgment of the learned single Judge is set aside and the A. H. O. is allowed. In the circumstances parties would bear their own costs throughout. In case the plaintiff does not pay the court-fee as directed above, the A. H. O. would stand dismissed without further reference to the Bench.

PANDA, J.:— I agree.

Appeal allowed.

AIR 1976 ORISSA 32

G. K. MISRA C. J. AND P. K. MOHANTI, J.

Rama Kumari Meher, Appellant v. Meenaketan Meher, Respondent.

First Appeal No. 161 of 1973, D/- 8-7-1975.

(A) Court Fees Act (1870), Schedule II, Articles 11 and 17A — Court fee in respect of an appeal against order of dismissal of petition for divorce under Section 13 of the Hindu Marriage Act, 1955 is payable under Article 17A and not under Article 11.

(Para 14)

(B) Hindu Marriage Act, (1955), Section 13 — Hindu Marriage and Divorce Rules (1956) (Orissa H. C.) Rules 3 and 4 — Proceeding for divorce whether suit — Ulti-

GS/KS/C716/75/CSV.

mate decision whether order or decree. AIR 1962 Pat 489 Diss. from; AIR 1967 Orissa 41 and judgment of G. C. Das J. in E. A. No. 43 of 1961 D/- 14-12-1961 (Orissa), Overruled.

Though proceedings under Sections 9 to 13 of the Hindu Marriage Act are initiated by petition, by the Hindu Marriage and Divorce Rules, 1956, Rules 3 and 4 framed by the High Court of Orissa, these petitions would be registered as suits and the ultimate decision in the proceeding is a decree against which an appeal lies. AIR 1962 Pat 489 Diss From; AIR 1967 Ori 41 and judgment of G. C. Das J. in F. A. No. 43 of 1961 D/- 14-12-1961 (Orissa) Overruled. (Paras 18 and 9)

Cases Referred: Chronological Paras
1967 Jab LJ 712 = ILR (1967) Madh Pra 555 13
AIR 1967 Orissa 41 = 33 Cut LT 13 1, 13
AIR 1965 All 280 21
AIR 1964 Orissa 122 = ILR (1964) Cut 354 12
AIR 1962 Pat 489 13
AIR 1961 Guj 202 12
(1961) First Appeal No. 43 of 1961 D/- 14-12-1961 (Orissa) 1, 13
AIR 1959 Cal 455 12

S. C. Mohapatra, for Appellant; R. K. Mohapatra Govt. Advocate, for Respondent.

MISRA C. J.— Ram Kumari (appellant) is the married wife of Menaketan Meher (respondent). (Contd. on col. 2)

pondent). She filed O. S. No. 58 of 1970 in the Court of the Subordinate Judge, Aska, for a decree of divorce under Section 13 of the Hindu Marriage Act, 1955 (hereinafter to be referred to as the Act). The suit having been dismissed she has filed the appeal. On the memorandum of appeal Court-fee of Rs. 6/- has been affixed. The Stamp Reporter is of the opinion that Court-fee of Rs. 22/8/- is payable. He relied on an unreported decision of G. C. Das J., the then Taxing Judge, in First Appeal No. 43 of 1961, decided on 14-12-1961 (Orissa) (Sripada Samba Siva Rao v. Sripada Subhalaxmi). He referred the matter to the Taxing officer (Registrar). The Taxing officer noticed apparent conflict in the aforesaid decision and another decision of Barman J. in 33 Cut LT 13 = (AIR 1967 Orissa 41) (Mst. Puinbasi Majhiani v. Shiba Bhue). He referred the Matter to the Taxing Judge for an authoritative pronouncement. The Taxing Judge S. K. Ray J. has referred the matter to the Division Bench. This is how the case has come before us.

2. Mr. S. C. Mohapatra for the appellant contends that Article 11 of Schedule II of the Court-fees Act, 1870, as amended in Orissa, applies to this case while Mr. R. K. Mohapatra, the learned Government Advocate, contends that Article 17A applies. To appreciate the rival contentions Articles 11 and 17A, so far as relevant, may be extracted:

Number	Proper Fee
11. Memorandum of appeal when the appeal is from an order inclusive of an order determining any question under Sec. 47 or Section 144 of the Code of Civil Procedure, V of 1908 and is presented.	
(a) xx xx	
(b) to a High Court Four rupees xx xx	
By Orissa amendment fee has been enhanced to 1½ times. So it would be six rupees. Thus if Article 11 applies, six rupees court-fee affixed to the memorandum of appeal is correct.	

Number	Proper Fee
17A. Plaintiff or memorandum of appeal in every suit where it is not possible to estimate at a money-value the subject-matter in dispute and which is not otherwise provided for by this Act.	
	When the plaintiff is presented to, or the memorandum of appeal is against the decree of—
(a) xx xx	
(b) any other Revenue Court, or any Court of a District Judge, Subordinate Judge, or Munsif.	Fifteen rupees if the value for purposes of jurisdiction does not exceed four thousand rupees, one hundred rupees if such value exceeds four thousand rupees

By Orissa amendment the fee has been enhanced to 1½ times. The valuation in this case is less than four thousand rupees. If this Article applies then the Court-fee payable on the memorandum of appeal would be Rs. 22/8/-.

3. The only question for consideration is as to which of these Articles would apply to this case. Article 17A is a residuary Article and can be invoked only if Article 11 is not applicable. We would accordingly proceed to analyse if Article 11 applies.

4. Article 11 on its clear language would apply to appeals from order only and not to appeals from decrees. By an inclusive definition orders passed under Section 47 and Section 144 C. P. C. have been included in this Article though such orders constitute decrees.

5. Section 21 of the Act lays down that subject to the other provisions contained in this Act and to such rules as the High Court may make in this behalf, all proceedings under this Act shall be regulated, as far as may be, by Civil P. C. 1908. Neither this Act nor the Hindu Marriage and Divorce Rules, 1956 prescribed under the Act by the High Court define decrees. In construing what is a decree, reference must be made to its definition in S. 2 (2), of the Civil P. C. "Decree" under Section 2 (2), so far as relevant, means the formal expression of an adjudication which so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint and the determination of any question within Section 47 or Section 144. Thus, though orders under Section 47 and Section 144 C. P. C. are not decrees, by the inclusive definition in Section 2 (2) C. P. C. such orders are decrees.

If orders under Section 47 or Section 144 C. P. C. would not have been included in Article 11, then court-fee would have been payable on such orders as is payable in a memorandum of appeal against decrees.

6. The next question for consideration is whether the impugned judgment of the Subordinate Judge dismissing the suit for divorce constitutes an order or a decree, Sections 9 to 13 of the Act dealing with restitution of conjugal rights, judicial separation, void marriages, voidable marriages and divorce show that orders passed by the Court under those sections constitute decrees. So far as relevant, those sections may be extracted:

"9. Restitution of conjugal rights— (1) When either the husband or the wife has, without reasonable excuse, withdrawn from the society of the other, the aggrieved party may apply, by petition to the district Court, for restitution of conjugal rights and the court, on being satisfied of the truth of the

statements made in such petition and that there is no legal ground why the application should not be granted, may decree restitution of conjugal rights accordingly.

xx xx xx xx
10. Judicial separation— (1) Either party to a marriage, whether solemnized before or after the commencement of this Act, may present a petition to the district court praying for a decree for judicial separation. x x x x x x

(2) Where a decree for judicial separation has been passed, it shall no longer be obligatory for the petitioner to cohabit with the respondent, but the Court may, on the application by petition of either party and on being satisfied of the truth of the statements made in such petition, rescind the decree if it considers it just and reasonable to do so.

11. Void marriages— Any marriage solemnized after the commencement of this Act shall be null and void and may, on a petition presented by either party thereto, be so declared by a decree of nullity if it contravenes any one of the conditions specified in clauses (i), (iv) and (v) of Section 5.

12. Voidable marriages— (1) Any marriage solemnized, whether before or after the commencement of this Act, shall be voidable, and may be annulled by a decree of nullity on any of the following grounds, namely—

xx xx xx xx
13. Divorce— (1) Any marriage solemnized, whether before or after the commencement of this Act, may, on a petition presented by either the husband or the wife, be dissolved by a decree of divorce on the ground that the other party—

xx xx xx xx
The underlined word in these sections shows that the statute prescribes for the passing of a decree for reliefs claimed under those sections.

7. Section 23 enacts that the Court shall decree relief in every proceeding under the Act subject to the conditions prescribed therein being fulfilled. Section 23 is as follows:

"23. Decree in proceeding.— (1) In any proceeding under this Act, whether defended or not, if the court is satisfied that—

(a) any of the grounds for granting relief exists and the petitioner is not in any way taking advantage of his or her own wrong or disability for the purpose of such relief, and

(b) where the ground of the petition is the ground specified in clause (f) of sub-section (1) of Section 10, or in clause (i) of sub-section (1) of Section 13, the petitioner has not in any manner been accessory to or connived at or condoned the act or acts complained of, or where the ground of the petition is cruelty the petitioner has not in any manner condoned the cruelty, and

(c) the petition is not presented or prosecuted in collusion with the respondent, and

(d) there has not been any unnecessary or improper delay in instituting the proceeding, and

(e) there is no other legal ground why relief should not be granted, then, and in such a case, but not otherwise, the court shall decree such relief accordingly.

(2) Before proceeding to grant any relief under this Act, it shall be the duty of the court in the first instance, in every case where it is possible so to do consistently with the nature and circumstances of the case, to make every endeavour to bring about a reconciliation between the parties."

Thus passing of a decree is mandatory and clearly provided in Section 23.

8. Section 28 of the Act makes provision for enforcement of the decrees and orders and appeals therefrom. It says that all decrees and orders made by the court in any proceeding under this Act shall be enforced in like manner as the decrees and orders of the Court made in the exercise of its original Civil jurisdiction are enforced, and may be appealed from under any law for the time being in force: provided that there shall be no appeal on the subject of costs only.

Thus a distinction is maintained between decrees and orders under the Act.

9. Section 2 (14) C. P. C. defines an order. "Order" means the formal expression of any decision of a Civil Court which is not a decree.

10. It is not as if passing of orders is not contemplated under the Act. Reference may be made to Sections 24, 25 and 26 which are extracted hereunder:

"24. Maintenance pendente lite and expenses of proceedings.— Where in any proceeding under this Act it appears to the court that either the wife or the husband, as the case may be, has no independent income sufficient for her or his support and the necessary expenses of the proceedings, it may, on the application of the wife, or the husband, order the respondent to pay to the petitioner the expenses of the proceeding, and monthly during the proceeding such sum as, having regard to the petitioner's own income and the income of the respondent, it may seem to the court to be reasonable.

25. Permanent alimony and maintenance.— (1) Any Court exercising jurisdiction under this Act may, at the time of passing any decree or at any time subsequent thereto, on application made to it for the purpose by either the wife or the husband, as the case may be, order that the respondent shall, while the applicant remains unmarried, pay to the applicant for her or his maintenance and support such gross sum or such monthly or periodical sum for a term not exceeding the life of the applicant as, having regard to the respondent's

own income and other property, if any, the income and other property of the applicant and the conduct of the parties it may seem to the Court to be just, and any such payment may be secured, if necessary, by a charge on the immovable property of the respondent.

(2) If the court is satisfied that there is a change in the circumstances of either party at any time after it has made an order under sub-section (1), it may, at the instance of either party, vary, modify or rescind any such order in such manner as the court may deem just;

(3) If the court is satisfied that the party in whose favour an order has been made under this section has remarried or, if such party is the wife, that she has not remained chaste, or, if such party is the husband, that he has had sexual intercourse with any woman outside wedlock, it shall rescind the order.

26. Custody of children.— In any proceeding under this Act, the court may, from time to time, pass such interim orders and make such provisions in the decree as it may deem just and proper with respect to the custody, maintenance and education of minor children, consistently with their wishes, wherever possible, and may, after the decree, upon application by petition for the purpose, make from time to time, all such orders and provisions with respect to the custody, maintenance and education of such children as might have been made by such decree or interim orders in case the proceedings for obtaining such decree were still pending, and the court may also from time to time revoke, suspend or vary any such orders and provisions previously made."

11. Thus there is provision for passing of orders under the Act which are not decrees. Orders of the Court granting pendente lite maintenance and expenses of proceedings under Section 24, granting of permanent alimony and maintenance subsequent to the decree under Section 25 and giving direction of interim custody of children under Section 26 are orders and not decrees. If orders are passed under Sections 25 and 26 relating to permanent alimony and maintenance or custody of children in the decree itself, then such orders constitute component part of the decree and are assailable in the appeal against the decree itself.

12. It is contended that Section 28 does not prescribe filing of appeals independent of C. P. C. It says that decrees and orders of the Court may be appealed from under any law for the time being in force. The argument is continued by saying that appeals against decrees are prescribed in Sections 96 and 100 C. P. C. and appeals against orders are provided for under Sections 104, 105 and Order 43 C. P. C. There is no provision in Order 43 for filing an appeal against an order passed under Section 24 or interim orders passed under Sections 25 and 26. The

contention is not sound. In AIR 1964 Ori-ssa 122 (Smt. Snehata Dansena v. Jagadish Dansena) such a contention was negatived. Reliance was placed on AIR 1959 Cal 455 (Smt. Sobhana Sen v. Amar Kanta Sen) and AIR 1961 Guj 202 (Kadia Harilal Purshottam v. Kadia Lilavati Gokaldas). The intention of the Legislature is that all decrees and orders made by the Court in a proceeding under the Act shall be appealable. The words "under any law for the time being in force" were added to indicate the forum where the appeal would lie and such other matters as regards procedure for hearing of appeals would be decided by the law on the subject for the time being in force. Appeals against interim orders under Sections 24, 25, and 26 of the Act as pointed out already would accordingly lie and in those appeals court-fee is payable under Article 11. In paragraph 3 of AIR 1964 Ori 122 there is an observation made to the effect that against an order under Section 24 of the Act a miscellaneous appeal is competent. As would be subsequently said, applications filed under Sections 9 to 13 are registered as suits and appeals against decrees would be registered as first appeals and not as miscellaneous appeals.

13. In AIR 1962 Pat 489 (Antala Gope v. Sarbo Gopain), a Bench of that Court held that a decree for divorce contemplated under Section 13 cannot be treated as a decree as defined in Section 2 (2) C. P. C. but is an order. The decision is contrary to the plain language of the several sections saying that decrees would be passed in those applications. Whether a proceeding initiated on application is a suit or not will be discussed at a later stage. Even assuming that the application so initiated is not a plaint and the proceeding is not a suit, yet the ultimate orders under Sections 9 to 13 are decrees as has been statutorily prescribed. The learned Judges of the Patna High Court drew some analogy in respect of appeals under the Guardians and Wards Act and the Provincial Insolvency Act. As has been said by the Privy Council in several cases, analogy is often a dangerous argument. No inspiration could be drawn from analogy contrary to the plain language of the statutory provisions. With respect, we say that this decision does not lay down the correct law.

The aforesaid Patna case was followed by Barman J. in AIR 1967 Ori 41 (Mst. Punbasi Majhiyani v. Shiba Bhue) in a case arising under the Indian Succession Act, 1925. We do not express any view as to the applicability of Articles 11 and 17A of the Court-fees Act to the provisions of the Indian Succession Act. It would be sufficient to say that the observation of the learned Judge in so far as he placed reliance on AIR 1962 Pat 489 is contrary to law.

In First Appeal No. 43 of 1961 (Orissa) the then Taxing Judge G. C. Das, J. made the following observations:

"The Hindu Marriage Act does not provide anywhere specifically that an appeal can be filed against an order under Section 24 or 25. Therefore, if an appeal is to be preferred against such an order, one has to fall back on the provisions of the Civil Procedure Code. These, however, do not specifically include appeals against order under Section 24 or 25 or the Hindu Marriage Act. Thus, it would be wrong to hold that no appeal lies against an order granting alimony itself which is purely a discretionary relief granted by the trial Judge. An application may be made for the grant of alimony either at the time of passing the decree or even subsequent to the decree under Section 25. Even if no such application was made to the trial Judge, it can be made to the appellate Judge if an appeal is pending against the decree. Thus, the relief granting alimony appears to be ancillary to the main relief for judicial separation or divorce as the case may be. Rightly, the Taxing Officer has held that when an appeal is preferred against a decree for judicial separation challenging with it an order passed by the trial Judge granting alimony, then no ad valorem court-fee is payable on the said relief as the amount was granted by way of alimony. Accordingly, I would answer question No. 1 in the affirmative, that is, the Court-fee payable would be a fixed court-fee under Article 17A of Sch. II of the Orissa Court-fees Act."

The aforesaid observations do not lay down the law clearly and correctly. As has already been said, against an order under Section 24 and certain orders under Sections 25 and 26 an appeal lies under Section 28 of the Act and Court-fee under Article 11 is payable on the memorandum of appeal against such orders and not under Article 17A. The observations of both Barman J. and G. C. Das J. are contrary to law and are hereby overruled.

It is not necessary to refer to a large number of cases. We agree with the conclusion in 1967 Jab LJ 712 (Nandkishore v. Parwatibai).

14. Thus the ultimate decisions of the Court under Ss. 9 to 13 of the Act are decrees and are appealable as such. Such appeals would be registered as first appeals. Article 11 has no application for payment of Court-fee on the memorandum of appeal against the decree so passed.

15. We would now proceed to examine if court-fee is payable under Article 17A on the memorandum of appeal against the decree passed under Sections 9 to 13 of the Act.

16. The constituents of Article 17A may be enumerated:

i) The memorandum of appeal must arise out of the final decision in a suit.

ii) It is not possible to estimate at a money value the subject-matter in dispute.

iii) Payment of court-fee on such memorandum of appeal is not otherwise provided for by the Court-fees Act.

There is no dispute that the last two conditions are fulfilled in this case. The subject-matter of the dispute is grant of divorce as prayed for by the appellant. It is not possible to estimate the money value of the subject-matter. If Article 11 is out of the way, there is no provision in the Court-fees Act which would govern such a memorandum of appeal.

17. The only question for consideration, therefore, is whether the memorandum of appeal arises out of a suit. The words "memorandum of appeal in every suit" have been somewhat inartistically drafted. The expression means memorandum of appeal against the judgment and decree given in a suit. The question ultimately boils down to the fact whether the proceeding for divorce before the learned Subordinate Judge constitutes a suit.

18. "Suit" has not been defined in the Civil P. C. or in the Act. Section 21 of the Act prescribes that subject to the other provisions contained in the Act and to such rules as the High Court may make in this behalf, all proceedings under the Act shall be regulated, as far as may be, by Civil P. C. There is no provision in the Act that application filed under Sections 9 to 13 of the Act would be treated and registered as suits. The High Court of Orissa has framed the Hindu Marriage and Divorce Rules, 1956 (hereinafter to be referred to as the rules) under the Act. Rules 3 and 4 may be extracted:

"3. Proceedings under the Act and petitions— (a) Every proceeding under the Act shall be registered as a suit;

(b) Every petition for divorce on any of the grounds mentioned in clause VIII or IX of sub-section (1) of Section 13 of the Act shall be accompanied by a certified copy of the decree for judicial separation or for restitution of conjugal rights, as the case may be.

4. Contents of petitions— (i) In addition to the particulars required to be given under Order 7, rule 1 of the Code of Civil Procedure and Section 20 of the Act, every petition for judicial separation, nullity of marriage and divorce shall contain the following particulars :—

(a) the place and date of marriage;

(b) the name, status and domicile of the wife and husband, before and after the marriage;

(c) the principal permanent address where the parties cohabited including the address where they last resided together;

(d) whether there is living any issue of the marriage and, if so, the names and dates of birth or ages of such issues;

(i) In every petition presented by a husband for divorce on the ground that his wife is living in adultery with any person or

persons or for judicial separation on the ground that his wife has committed adultery with any person or persons the petitioner shall state, the name, occupation and place of residence of such person or persons so far as they can be ascertained;

(ii) In every petition presented by a wife for divorce on the ground that her husband is living in adultery with any woman or women or for judicial separation, on the ground that her husband has committed adultery with any woman or women the petitioner shall state the name, occupation and place of residence of such woman or women so far as they can be ascertained.

(e) Whether there have been in any Court in India and if so, what previous proceedings with reference to the marriage by or on behalf of either of the parties, and the result of such proceedings;

(f) The matrimonial offence or offences charged, set out in separate paragraphs with the time and place of its or their alleged commission;

(g) Property mentioned in Section 27 of the Act, if any;

(h) The relief or reliefs prayed for."

Proceedings under Sections 9 to 13 of the Act are to be registered as suits even though they are initiated by an application on which court-fee is payable as on any ordinary application. The particulars which such an application would contain besides what is prescribed in Order 7, Rule 1 C. P. C. have been enumerated in Rules 3 (b) and 4 of the Rules.

Order 4 C. P. C. deals with institution of suits. Rules 1 and 2 thereof are as follows :

"1. Suit to be commenced by plaint.—

(1) Every suit shall be instituted by presenting a plaint to the Court or such officer as it appoints in this behalf.

(2) Every plaint shall comply with the rule contained in Orders VI and VII, so far as they are applicable.

2. Register of suits.— The Court shall cause the particulars of every suit to be entered in a book to be kept for the purpose and called the register of civil suits. Such entries shall be numbered in every year according to the order in which the plaints are admitted."

Ordinarily a suit is instituted by presenting a plaint. It is on account of this, it is contended by Mr. S. C. Mohapatra, that proceedings under Sections 9 to 13 of the Act are not suits inasmuch as they are initiated by petitions and not by presentation of a plaint. Though proceedings under Sections 9 to 13 are initiated by petitions the formalities and material particulars required to be mentioned in those petitions are as in a plaint. The petitions are to be verified. All material particulars are to be pleaded. The essential rights claimed in the petition must be properly focussed in the averments

so as to enable the Court to decide the issues in a regular trial. There is, therefore, no particular sanctity in the user of the word petition or plaint. According to the facts and circumstances of the case as required under law a petition may essentially amount to a plaint. The difference between the two appears to be more of nomenclature than of substance.

19. Section 26 C. P. C. makes the position clear. Every suit shall be instituted by the presentation of plaint or in such other manner as may be prescribed. Though proceedings under Sections 9 to 13 are initiated by petition, by rules the High Court has prescribed that those petitions would be registered as suits.

20. Section 20 of the Act deals with contents and verifications of petitions. It says that every petition presented under the Act shall state as distinctly as the nature of the case permits the facts on which the claim to relief is founded and shall also state that there is no collusion between the petitioner and the other party to the marriage.

21. On the aforesaid analysis, we are satisfied that petitions filed under Sections 9 to 13 of the Act are essentially in the nature of a plaint. At any rate, by the rules prescribed by the High Court on the filing of such petitions a suit would be registered as is done in the case of filing of a plaint. On this analysis the first condition of Article 17A that the memorandum of appeal must be against a decree arising out of a suit is fulfilled. We agree with the conclusion on this aspect of the case in AIR 1965 All 280 (Kusum Lata v. Kampta Prasad). Thus all the conditions of Article 17A are fulfilled. The memorandum of appeal is to be stamped with court-fee under Article 17A. The value of the subject-matter does not exceed Rs. 4,000/- and accordingly court fee of Rs. 22/8/- is payable.

22. We would sum up our conclusions thus:

i) Article 11 of the Court-fees Act is applicable to memorandum of appeal against orders and not decrees;

ii) Proceedings under Sections 9 to 13 of the Act are suits.

iii) Memorandum of appeal against decrees passed in a proceeding under Sections 9 to 13 of the Act is governed by Article 17A of the Court-fees Act.

iv) Against decrees arising out of petitions under Sections 9 to 13 of the Act, first appeals are to be filed.

v) Against orders arising out of such proceedings, miscellaneous appeals lie.

23. The reference is answered, as indicated above. The appellant is to pay court-fee of Rs. 22/8/- and not Rs. 6/-.

This appeal is unnecessarily hanging on for a long time to determine the payment

of court-fees. Hearing of the appeal be expedited.

MOHANTI, J.:— I agree.

Answered accordingly.

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K. B. PANDA, J.

G. C. Harichandan Jagadeb, Appellant
v. Jagannath Swamy and others, Respondents.

Misc. Appeal No. 52 of 1972, D/- 20-6-1975*.

(A) Orissa Hindu Religious Endowments Act (2 of 1952), Section 41 — Hereditary trustee — Proof of uninterrupted devolution of hereditary right from time of the founder of the institution is necessary.

Unless devolution by hereditary right is shown to have continued uninterruptedly from the time of the founder of the institution the trustee cannot be considered to be a hereditary trustee. If there is no continuity in the right claimed, obviously it suffers from an infirmity. In the instant case, not that there was any proof of any continuity of the management of the deity by the founder or his successors, rather contrary was the evidence in as much as at least from 1955 onwards the Endowment Commissioner had appointed non-hereditary trustees for the institution. In the settlement records, there was no reference to the appellant or his ancestors. Whatever right he had claimed according to his own showing was being exercised through opposite party No. 3 who himself was at one time a member of the Board of non-hereditary trustees. In this setting, the claim of the appellant that the institution was a private temple and that he was the hereditary trustee thereof had been rightly rejected. (Para 8)

Cases Referred: Chronological Paras
(1973) 1 Cut WR 438 8
AIR 1970 Orissa 141 = 36 Cut LT 897 8
ILR (1961) Cut 109 = (1961) 3 Orissa J. D. 35 8
(1961) 27 Cut LT 437 8

B. Harichandan, for Appellant; S. Misra, No. 2 and J. K. Mohanty and K. N. Sinha, for Respondents.

JUDGMENT:— The appellant Shri G. C. Harichandan Jagadeb who was originally opposite party No. 13 in O. P. No. 128 of 1968 under Section 41 of the Orissa Hindu Religious Endowments Act, 1951 (hereinafter referred to as the Act) having lost both in the Court of the Assistant Commissioner of Endowments as well as in appeal in the Court of the Commissioner of Endowments has preferred this appeal alleging that the findings of the learned Courts below that he

* (From an order of K. D. Lahiri, Commr. of Endowments in F. A. No. 17 of 1971 D/- 4-5-1972).

GS/JS/C699/75/RSK

is not the hereditary trustee of the deity Shri Jagannath Swamy situated in village Arkhapur under Purusottampur police station within the district of Ganjam are not sustainable. The short facts giving rise to this appeal are as follows: Lord Shri Jagannath Swamy is situated in village Arkhapur within a respectable temple having a height of about 90 feet. There are certain parwa Debatas. It has a compound wall and lion's gate etc. As it appears, there is no controversy at this stage that at one time the ancestors of the Raja of Athgarh had constructed the temple and placed the deity. He had also endowed certain lands and other properties in the name of the deity. Under Ext. A, the Inam Register of 1865 it appears that the Raj family of Athgarh were the founders and Hari Panda was the priest.

Ananda Panda, Bhagirathi Panda, Kandhuni Panda and Aranta Panda filed a petition under Section 41 of the Act before the Assistant Commissioner of Endowments claiming themselves with opposite party No. 3 Kapileswar Samantra, managing trustee, as hereditary trustees of the deity. In the alternative, their prayer was for a declaration that they are the hereditary sebakas of the deity and the properties thereof are being enjoyed by them partly for "Sebapuja" and partly for "services". The petitioners subsequently amended their petition stating that opposite party No. 3 had no right of hereditary trusteeship. But he was only a mere supervisor on behalf of the founder for which he was enjoying certain privileges such as doing Alata Chamar Seba and receiving the first prasad of the deity.

Opposite party No. 3 filed a written statement admitting that the deity had been installed by the Raja of Athgarh who created the endowment. Initially his case was that himself and his forefathers along with the forefathers of the petitioners were in charge of the management of the institution as Marfatdars. His family members were performing Alata Chamar Seba before the deity as of right and they were getting the first Prasad of the deity. He claimed this right on behalf of the Raja of Athgarh ever since the installation of the deity and under his authority and thus he claimed hereditary right to manage the affairs of the deity.

2. The Raja, present appellant (as opposite party No. 13) in a separate written statement substantially resisted the claim of the petitioners alleging that the institution was a private one belonging to his family and it is not a place of public religious worship. His further case was that it has never been delegated to the benefit of the community and opposite party No. 3 is neither trustee nor Archaka of the deity, but he is merely an agent who is to report about the management of the affairs of the deity to the Raja. He admitted in his written statement that Opposite party No. 3 had the privilege of doing Alata Chamar Seba and

receiving the first Prasad of the deity as a representative of the Raja and that outsiders had no right or interest over the deity. Regarding the appointment of non-hereditary trustees which had been done by the Endowment Commissioner, he pleaded ignorance about the same. Hence his prayer substantially was for a declaration that the deity was a private one and that he was the hereditary trustee thereof.

Opposite party Nos. 6 to 9 were the villagers who first stated that the deity was installed by the predecessors of opposite party No. 13, the appellant, but later on changed their stand claiming to have installed the deity themselves.

3. The petitioners examined 3 witnesses of whom P. W. 1 is petitioner No. 2. From the side of the appellant (opp. party No. 13) he examined himself as O. P. W. 1 supported by the evidence of O. P. W. 2 Kashinath Maharana. O. P. Ws. 4 and 5 were cited on behalf of the villagers. Several documents particularly Ext. A the pre-settlement Inam, Exts. B and C the Pattas of Arakhapur granted by Khallikote Raja Saheb, Ext. D the Record of rights of the year 1953, Exts. E series which are notices issued from the Endowment Department and Exts. F, G, H, I and K which are official records of the endowment department were filed.

4. On an assessment of the oral and documentary evidence, the learned Assistant Endowment Commissioner held that the institution Jagannatha Swamy is a public temple without any right of hereditary trusteeship of any of the petitioners or of the opposite parties and thus he dismissed their claim. He however, declared the petitioners as hereditary Archakas of the deity. He further declared that opposite party No. 13 (the present appellant) has a right of Alata Chamar Seba of the deity. As against the said order, it is opposite party No. 13, the present appellant who preferred an appeal being First Appeal No. 17 of 1971 before the Commissioner of Endowments. The learned Endowment Commissioner upheld the findings of the learned Assistant Endowment Commissioner and dismissed the appeal as against which the present appeal has been preferred by the Raja of Athgarh.

5. The petitioners villagers, having not come up in appeal as against the findings of the learned Assistant Endowment Commissioner which have been confirmed by the Endowment Commissioner, that matter need not be gone into. The grievance of the present appellant is that the institution should be declared to be his private temple over which, none excepting him has got the sole right. In support of his claim, he has examined himself and one witness. That the fore-fathers of the appellant had constructed the temple and installed the deity and endowed the properties can hardly be disputed. The question that arises for con-

sideration is if the petitioner can be declared to be the hereditary trustee of the institution. In that regard his evidence is thus:

"For the benefit of our Raj family, my ancestor had installed the deity and had endowed the land. The ancestors of the petitioners were engaged by him to perform sehapuja.

As Raj family we have the seba of Alat chamar, and on our behalf, O. P. 3 and his ancestors were performing that seba.

Occasionally I used to look to the management of the temple. We are to get the first bhog of the deity, but on our behalf Santara family used to take the same.

I do not know if any Trust Board was ever formed by the Endowment Department. It is not a fact that the deity is a public deity and that my ancestors had not installed the deity and had not endowed the lands. There is a gift deed to that effect."

Cross-examination on behalf of opposite party No. 3 was declined. When cross-examined on behalf of the petitioners, he stated thus:

"The Pujharis used to possess the lands of the deities and pay rent. I used to look after the accounts of the institution direct from O. P. No. 3. O. P. No. 3 is our agent to look after day to day management without our direction. O. P. No. 3 cannot perform any thing in the temple. The petitioners are performing the sehapuja since generation hereditarily. We cannot oust the petitioners from seba pooja right, but in case of negligence of duty only we can take action and oust them and appoint another from their family but not from outsiders."

In cross-examination on behalf of other opposite parties, he stated that—

"After attaining majority, I came to know that my ancestors had installed the deity. At the age of 21 or 22 I could know the genealogy. I have not mentioned the name of the founder in my W. S. nor I mentioned how many generations back it was installed.

It was installed somewhere in 1700. I have not filed any such document except the copy of Inam statement. Except this Inam copy Ext. A have no other document. I have no gift deed.

I have not seen the original Inam Register. Santara family is managing as our Agent since 7 generations.

The appointment of agent is not by written document, but by giving Sarhi.

About 5 to 6 months back father of O. P. 3 died. Mochi Santara is the elder brother of O. P. 3.

The eldest member of Santra family gets the hereditary right as agent. As agent I am in good term with O. P. 3. He is faithful to me till to day. I can dismiss O. P. 3, but I am bound to give the agentship to the

other member of his family, say his brother.

The Archaks have not informed me regarding filing of this case. O. P. 3 has also not informed me regarding filing of this case. O. P. 3 has filed the written statement without informing me. I do not know if the I. E. (Inspector of Endowments) had enquired into the matter. I do not know till to-day what is the claim of O. P. 3. Till now I do not know what claim the petitioners have made. I have not taken any action against the petitioners. I have also not taken any action against O. P. 3.

I do not know if since more than 20 years Trustees have been appointed by Endowment Department and to-day just now only I could know this.

O. P. 3 sends accounts once a year and in every 3 years it is being destroyed. I have accounts of the institution for the last 3 years.

It is not a fact that entire Athgarh estate has been sold to khallikote, but 59 zirayati villages have been sold.

Arkhapur is a Zirayati village. I know Jagan Mohan Patnaik, Dewan of Khallikot. I do not know his handwriting. Khaladi is one of the Muthas sold to Khallikot in auction. Arkhapur is within Khaladi Mutha.

There is Jagannath temple of Athgarh of which I am the Hereditary trustee. That is excepted temple.

I have never attended Ratha Jatra of Arkhapur. Alat Chamar takes place where the deity comes out. I have never seen Alat Chamar of this deity.

The income of the temple has fallen down. so the condition of the temple is not good for the last 5 to 6 years. The deity has only about 9 acres of lands, which are in Arkhapur.

I do not know if villagers pay darshan to the deity.

Ext. A is a pre-settlement inam of 4 acres of lands. It is in one place. One of the pujaries possesses the same. It is not a fact that we have no connection with this temple. In 1954 Khalikot Raja is in management of the estates sold to him. Lady members of our family do not use to go to this temple.

I have got papers to show that I have private right. It is not a fact that petitioners, O. P. 3 and myself have conspired. To Court he stated thus:—

"I claim private right over the institution. The institution is a minor Inam. In my accounts there is record to show that other 5 acres were given by Chandan mala dei.

That was Darmila Inam, I cannot say why that was not enquired into.

xx xx xx xx
Brundaban Harichandan Jagadeb has granted Darmila Inam to Athgarh Jagannath after inam enquiry. Hari Panda has been recorded as owner of the lands. None of our family member had objected to it, rather our family had agreed to it.

xx xx xx xx
Without my Agent's permission, nobody can pay Darshan. Some Krushna Padhy wanted permission to read Bishnusahasranama and I had permitted.

I do not know if O. P. 3 was a member of the Trust Board. I do not know if at any time Madras Board had taken contribution. I do not know if contribution is being paid. I have not paid rent to Khallikot or Athagarh.

The lands are quit rent paid to Tahsildar Kodala since long, and now full rent is assessed."

The evidence of the supporting witness Kashinath Moharana does not further the case of the appellant any way. He has stated in chief that opposite party No. 3 had been appointed by the Raja Saheb to look after the management. On his own admission, he constructs the chariot for the Rathajatra. In cross-examination he admits that the petitioners perform the seba, pooja, Bhograg and Seba and before them their ancestors were performing the same. Out of the usufructs of the lands of the deity they perform nities, festivals etc, and also appropriate the same towards their remuneration. He admits that he has got no lands and that Santara family opposite party No. 3 were Sahus originally, but after getting Sarhi, they became Samantaras. At one stage he states thus:

"Khallikot Raja has given Sarhi to Sahu family. Again says Athagarh Raja has given Sarhi to their family. I cannot say if this village is under Khallikot Raja Saheb.

xx xx xx xx
I cannot say on what terms and conditions O. P. 3 uses to manage on behalf of Raja Saheb.

xx xx xx xx
I do not know if trustees are being appointed in this institution since 18 to 20 years."

6. Apart from this evidence, no document has been filed on the side of the appellant to establish his claim as trusteeship much less as hereditary trusteeship. As I have already said that the ancestors of the appellant were the founders of the institution goes without doubt. But the assertion of the appellant that he was looking after the management of the deity all through and that opposite party No. 3 and his ancestors who were reporting about the management to him is not supported by any evidence nor circumstances. He has admitted that the three years' accounts are with him, but those have not been produced. O. P. 3 has not

chosen to examine himself nor the appellant got him examined on his side. The learned Commissioner of Endowments has dealt with this aspect of the case which need not be reiterated here. Evidently the seat of the deity is four miles away from the residential house of the appellant and he admits that his family members do not go to the temple. In the absence of any evidence that the appellant is in management of this temple or that without his permission nobody can as of right have Darshan and further in view of the fact that he has never participated in the ceremonies of the deity it follows that he was not at all interested in the affairs of the deity at any time. Even in the settlement records (Record of Rights of 1953) his name does not appear. Panda family had been described as Sebayats there. The utter inactiveness of the appellant in the affairs of the deity is a significant factor weighing against his claim that the deity is a private deity. Further at least from 1955 as the Debottar Department record shows as far back as on 15/19-3-1955 Shri B. K. Patra, J. (as he then was Commissioner of Endowments) had passed the following order in respect of this temple thus:

"4. Save, in so far herein provided the trustees shall have all the rights and powers and shall be subject to all the liabilities of trustees provided under the Act and the Rules duly made or deemed to be made thereunder.

5. The ex-trustee, persons in charge shall make over possession of the temple and its properties to the trustees appointed.

Sd. B. K. Patra
Commissioner of Endowment,
15-3-55.

To

1. Sri Mochiram Samantra.
2. Sri Ghanashyama Patnaik
3. Sri Ananda Panda

To

The Inspector of Endowments, Berhampur

pur

The Tahsildar, Kodala for favour of Publication and report.

The Ganjam Accounts Section".

This order (Ext. H) indicates that three persons were appointed as trustees and notices were duly given to the Inspector of Endowments and the Tahsildar, Kodala for favour of publication. Official acts are deemed to be correct and regularly done unless the contrary is shown. From this it follows that the appointment of the three trustees under Ext. H has been duly published. Although this order indicates that prior to this there was also a Board of trustees, yet no proof of the same has been adduced in this case. Ext. E dated 4-4-1962 is to the following effect:

"This matter coming on for final disposal before the Assistant Commissioner of Endowments, this day, it is hereby ordered as follows:

1) That Sri Kapileswar Samantra, 2) Sri Arjuna Padhan, 3) Sri Jogindra Sahu, 4) Sri Juri Padhan, 5) Sri Khalli Gantayat are hereby appointed as non-hereditary trustees of the above temple under Section 27 of the O. H. R. E. Act, 1951 for a period ending 31-3-1965 from the date of this order.

Sri Kapileswar Samantra shall be the managing trustee. (O. P. 3)".

Be it stated here that under Ex. H. Mochiram Samantra the brother of Opp. party No. 3 had been appointed as one of the non-hereditary trustees. The present petition by the panda family has been filed in the year 1968. When the appellant says that opposite party No. 3 was and is in his confidence till now, it is really surprising that though he was appointed as a non-hereditary trustee and so too his brother in 1955, he has kept this matter a secret to the appellant. Remaining in the confidence of the appellant and working to his prejudice are things which are not compatible. Even the restricted right which the family of the founders kept for themselves, according to the appellant, namely, Alata Chamar Seba and getting the first Bhog that he admits to have transferred to his agent opposite party No. 3. There is no evidence that with the gift of the Sarhi to the leading member of the Samantara family, he becomes the agent. It is in evidence that younger members of the Samantara family without any such Sarhi had previously become the members of the Board of non-hereditary trustees. As it appears, it is in view of these admitted telling circumstances that neither opposite party No. 3 nor anybody from his family did venture to come to the dock to depose in favour of the appellant. The appellant himself also felt shy to cite any of these people as witness.

7. In this context, a significant feature not noticed by the Courts below nor urged before me may be mentioned. The appellant admits that the village Arakhapur is a Zeriyati village. Khaladi is one of the Mutha sold to Khallikote in auction and village Arkhapur is within that Khaladi Mutha. From this it is clear that the entire village Arakhapur with the seat of the deity in it has been sold to Khallikote Raja. The supporting witness for the appellant Sri Maharana also in an unguarded moment had blurted out how Khallikote Raja had given Sarhi which he subsequently corrected. However, that supporting witness of the appellant to a direct suggestion gave the following reply:

"I cannot say if this village is under Khallikot Raja Saheb."

From this evidence on record it appears that the appellant has lost his title and ownership over the village Arakhapur and consequently over the deity. This is only compatible with his disinterestedness in the affairs of the deity. Be that as it may, since that point has not been looked into, I would leave it there.

8. Next coming to the vital question whether the appellant was aware of the ap-

pointment of non-hereditary trustees by the Endowment Commissioner, it may be said that his plea of ignorance of the same can hardly be accepted. Though on evidence it is shown that at least from 1955 there has been appointment of non-hereditary trustees, the indications are that prior to that even there were such appointments. The plea of the appellant that at the time of deposing in this proceeding he knew about the appointment of non-hereditary trustees by the Endowment Commissioner does not inspire confidence at all, particularly more so when a man of his confidence as opposite party No. 3 was in the Board and the institution was only four miles from his place of residence. If really he was looking after the management of the institution, this could not have escaped his notice and the very fact of his assertion that he did not know about it only establishes the fact that he was taking no interest at all in the affairs of the deity. Mr. Harichandan's learned Advocate for the appellant, only contention was that since the appellant had not been divested of his being non-hereditary trustee that right continues and that by the appointment of non-hereditary trustees, without his knowledge, he cannot be divested of his rights. In support of his contention, he cited ILR (1961) Cut 109 (Raja K. C. M. Harichandan v. Commr. of Endowments Orissa); and (1970) 36 Cut LT 897 = (AIR 1970 Orissa 141) (Bhramarbar Santra v. The State of Orissa). The facts of the former case are entirely different from the present case. There, admittedly the Raj family of Parikud had established a deity and by a Seba Samarpanapatra had transferred the Seba Puja to certain persons who failing to do so surrendered the Seba Samarpana Patra to the Raj family. The question arose whether during the time when the Raj family was not managing the deity they had lost their right of Sebayatship. It was held that even if the Raja was completely out of management for the period when the executants of the Seba Samarpana Patra or their ancestors were acting as Sebayat, yet the right of the founder to trusteeship was always there and it again devolved upon him to carry on the Sebayatship. Hence the Raja was the hereditary trustee of the deity. So the facts of that case are not applicable to the facts of the instant case. The latter case (1970) 36 Cut LT 897 = (AIR 1970 Orissa 141) also has no application to the present case. There when the character of the institution had not been determined under Section 41 of the Act, steps were taken for appointment of non-hereditary trustees. So it was held that without first recording a finding that a prima facie case was established that the institution was public and that the petitioners were not the hereditary trustees, the order for appointment of non-hereditary trustees under Section 27 of the Act and the direction for delivery of possession under Section 68 are without jurisdiction. It is

now well settled that a marfatdari right itself is a property right. Besides the petitioners are admittedly in possession of the temple and its properties. They cannot be divested of the same without a finding that the institution is public and they are not hereditary trustees thereof. So the dispute there was that when a petition under Section 41 was pending, there was no justification for taking action under Section 27 of the Act. Such is not the case here and as such it does not help the appellant in any way. As the facts of this case unmistakably show even if it be assumed that Arkhapur has not been transferred to the Raja of Kallikote and the opposite party No. 13's ancestors who had installed the deity, yet the impact of administration of the temple by the Endowment Department has to be judged. In the case of Adikanda Panda v. Gohinda Chandra Pradhan (1973) 1 Cut WR 438, it has been held that—

"Since the Endowment department took over management of the institution since the year 1939, thereby divesting the appellants of their right of trusteeship, if any, and kept them out of their such right, without any protest from them, for over 27 years, till the application under Section 41 was filed, the burden is heavy on them to establish their claim to the hereditary trusteeship. They must prove that Mukunda Panda is the founder of the religious institution and installed the deity, that he was in exclusive management of the institution and that the succession to the office of trusteeship has devolved by hereditary right without a break, since his time till the date of dispute which gave the cause of action for a petition under Section 41 of the Orissa Hindu Religious Endowments Act. It has likewise been held in a decision of this Court in the case of Commissioner of Hindu Religious Endowments, Orissa v. Dadhibaban Deb (1961) 27 Cut LT 437 and the relevant passage of that decision is quoted herein below:—

"In the new Act the position has been made absolutely clear that unless devolution by hereditary right is shown to have continued uninterruptedly from the time of the founder of the institution, the trustee cannot be considered to be a hereditary trustee."

The principle laid down here has been universally accepted. If there is no continuity in the right claimed, obviously it suffers from an infirmity. In the instant case, not that there is any proof of any continuity of the management of the deity by the founder or his successors, rather contrary is the evidence in as much as at least from 1955 onwards the Endowment Commissioner has appointed non-hereditary trustees for the institution. In the settlement records, there is no reference to the appellant or his ancestors. Whatever right he has claimed according to his own showing is being exercised through opposite party No. 3 who himself was at one time

a member of the Board of non-hereditary trustees. In this setting, the claim of the appellant that the institution is a private temple and that he is the hereditary trustee thereof has been rightly rejected.

According to the appellant, the headman of the Santra family was looking after the institution on his behalf and doing the Alat Chamara Seba and getting the first Bhog of the deity which he is entitled to. Thus appointment of any of the Santra family members by the Endowment Department as non-hereditary trustee cannot be without the knowledge of the appellant. At any rate, knowledge has to be presumed in the circumstances. To bring an action for possession of a hereditary office, the limitation is twelve years when the defendant takes possession of the office adversely to the plaintiff. At least the evidence being clear that from the year 1955 the Endowment Department had taken over the management the cause of action arose then, and any right to claim such hereditary office becomes barred by 1967. Admittedly the present proceeding started in 1956. In that view of the matter the claim has also been barred.

The learned Endowment Commissioner regarding the right of Alat Chamar Seba to the appellant has observed that since no such right was claimed nor there was any contest, he has simply by-passed it. I also agree with him that no finding on this is warranted.

9. In the result, therefore, the appeal fails and is dismissed with costs.

Appeal dismissed.

AIR 1976 ORISSA 43

S. K. RAY J.

Gouranga Sahu and others, Appellants
v. Bhaga Sahu and another, Respondents.

First Appeal No. 174 of 1968, D/- 16-6-1975*.

(A) Hindu Law — Adoption — Burden of proof — Mode of appreciation of evidence — Adoption 36 years old — Variety of transactions of open life and conduct on footing that adoption was valid taking place — Burden rests on him who challenges validity of adoption — (Evidence Act (1872), Section 101).

Though the normal rule is that one who seeks to deflect the natural line of succession to property by alleging adoption must discharge that burden, in cases of ancient adoption every allowance for the absence of evidence to prove such fact must be favourably entertained and where there is long lapse of 36 years between the adoption and the time of its being questioned and during that period

* (From order of V. V. R. Sharma, Sub. J., Bargarh in T. S. No. 21 of 1967, D/- 9-8-1968).

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of interregnum a variety of transactions of open life and conduct on the footing that the adoption was a valid act have taken place, the initial burden necessarily shifts to the person who challenges its validity. AIR 1969 SC 1359 and AIR 1945 P. C. 111, Rel. on. (Para 6).

(B) Limitation Act (1963), Article 58 — Suit for declaration that adoption took place — Right to sue accrues when adopted son's right is actually interfered with — Mere denial or oral protest or raising controversy in mutation proceeding as to adopted son's right is not sufficient.

For a suit to obtain a declaration that the plaintiff's adoption in fact took place the right to sue accrues within Article 58 when there is actual interference with the plaintiff's right or there is unequivocal threat of infringement of such right and a mere denial or oral protest which have no apparent connection with the actual exercise of the right of enjoyment of property would not be sufficient and the mere mutation proceedings in which the status of adoption is challenged would not amount to infringement of the plaintiff's right to property because those proceedings are not judicial proceedings, as the revenue authorities have no jurisdiction to decide the proprietary rights of the disputants to the immovable properties in question. AIR 1961 SC 808 and AIR 1926 PC 100. Rel. on. (Para 7)

(C) Limitation Act (1963), Article 58 — Applicability — Partition suit by plaintiff — Declaration that plaintiff's adoption in fact took place also claimed as one of reliefs — Article 58 does not apply.

Article 58 will apply only to a suit for declaration simpliciter that the plaintiff's adoption took place. (Contd. on col. 2)

option in fact took place and will have no application to a suit for partition in which declaration that plaintiff's adoption in fact took place is incidentally claimed as one of the reliefs. AIR 1939 Lah 135 and AIR 1924 PC 137 and 1959 MPLJ (N) 86 Rel. on. (Para 7)

(D) Limitation Act (1963), Article 110 — Joint family property — Partial exclusion from — Cause of action does not accrue for partition suit.

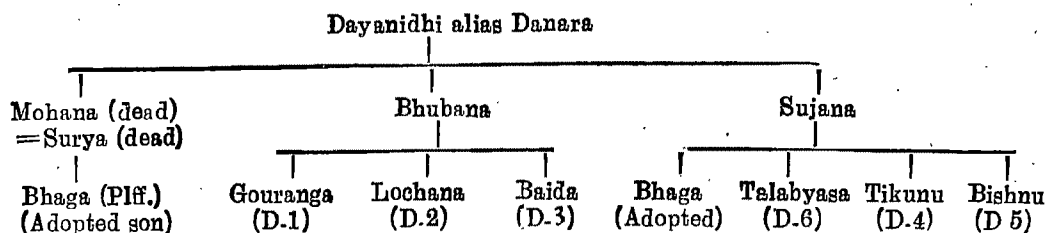
For limitation to begin to run for a suit for partition there must be complete exclusion of the plaintiff from the enjoyment of the joint family property and where the exclusion is partial and the plaintiff is in possession of part of joint family property cause of action does not accrue for a partition suit. AIR 1929 PC 231, Rel. on. (Para 7)

Cases Referred:	Chronological	Paras
AIR 1969 SC 1359 = (1969) 2 SCJ 743		6
AIR 1961 SC 808 = (1962) 1 SCR 67		7
1959 MPLJ (N) 86		7
AIR 1945 PC 111 = 49 Cal WN 517		6
AIR 1939 Lah 135 = 188 Ind Cas 853		7
AIR 1929 PC 231 = 56 Ind App 316		7
AIR 1926 PC 100 = 53 Ind App 220		7
AIR 1924 PC 137 = 51 Ind App 220		7

K. N. Jena, for Appellants; B. K. Pal, for Respondents.

JUDGMENT:— The unsuccessful defendants 1 to 5 are the appellants. This appeal arises out of a suit for partition in which the plaintiff has also sought for a declaration that he is the adopted son of late Mohan, which has been decreed.

2. The plaintiff and defendants are members of one family. The family genealogy is set out hereinbelow:—



The plaintiff claims to be the adopted son of Mohana and, therefore, wants to partition his one-third share in the entire joint family properties described in schedules A, B and C of the plaint. He further claims that his adoptive father Mohan got his Jyesthansa which he has separately mentioned in schedule G and that he is in possession of the properties set out in schedules D, E and F which may be allotted towards his share in the partition by metes and bounds.

3. Defendant No. 6 did not contest and has been set ex parte. The other defendants jointly filed a written statement. Their case is that even though all the parties are joint in mess and property and are in possession of different parcels of land for

the sake of convenience, there has been no partition of the family properties by metes and bounds. Mohana never adopted the plaintiff and, as such, the plaintiff is not Mohana's adopted son and Surya, widow of late Mohana, never executed any document in favour of the plaintiff, and even if there is any such document, the same is fraudulent and not genuine. They deny that Mohan was given any Jyesthansa at any time. So they plead that the suit properties should be partitioned, but the plaintiff should be given 1/8th share as the natural son of late Sujana. They contend that the movables of the joint family were never partitioned previously and as in this suit the plaintiff has not included the

movables of the family, the suit is defective and the plaintiff is not entitled to any relief. They admit that the plaintiff is in possession only of the properties stated in schedule A of their written statement and not the properties stated in schedules D, E and F of the plaint. They pray that the suit properties should be partitioned into two equal shares along with movables as shown in schedule B of the written statement and one share should be allotted to defendants 1 to 3 and the plaintiff should be allotted 1/8th share. Though not specifically raised in the written statement, an issue was framed as to if the suit was barred by limitation.

4. In decreeing the suit, the Subordinate Judge rendered the following findings:—

(a) The plaintiff is the adopted son of Mohana.

(b) The suit is not barred by limitation.

(c) The plaintiff is not entitled to get *Jyesthansa* which has become obsolete in Hindu Law and there is no proof of any custom. In partitioning the suit properties in schedules A, B and C, the properties in schedules D, E and F, of which the plaintiff is in possession, should be adjusted towards his share.

(d) The movable properties having been previously partitioned, the suit is maintainable in the absence of inclusion of movable properties in the hotchpot. There is no partition by metes and bounds of the immovable properties in suit. Claim for *Jyesthansa* cannot be entertained as the theory of *Jyesthansa* as understood in ancient Hindu Law has become obsolete.

5. Mr. K. N. Jena, learned counsel for the appellants, raised only three contentions, viz:—

(a) The finding of adoption rendered by the trial Court is erroneous;

(b) The suit is barred by limitation and

(c) In the absence of bringing the joint family movable properties into hotchpot for partition, the suit for partial partition must fail.

6. I will now take up the question of adoption. As the evidence stands, the adoption appears to have taken place in the year 1932. The evidence of adoption was being led during the second part of the year 1968. So even though the normal rule is that one who seeks to deflect the natural line of succession to property by alleging adoption must discharge that heavy burden, in cases of ancient adoption every allowance for the absence of evidence to prove such fact must be favourably entertained. Where there is a long lapse of years between the adoption and the time when it is being questioned and during that period of interregnum a variety of transactions of open life and conduct upon the footing that the adoption was a valid act have taken place, the initial burden necessarily shifts to the person who

challenges its validity. The law on this point is stated in Mulla's Hindu Law, 13th Edn, Article 512 at page 519 as follows:—

"But when there is a lapse of 55 years between the adoption and its being questioned, every allowance for the absence of evidence to prove such fact must be favourably entertained. It stands to reason that after a very long term of years, and a variety of transactions of open life and conduct upon the footing that the adoption was a valid act the burden must rest heavily upon him who challenges its validity."

This dictum has been approved by the Supreme Court in the case of Voleti Venkata Ramarao v. Kesaparagada Bhaskararao, AIR 1969 SC 1359. The method of appreciation of evidence regarding old adoption has been noticed by the Privy Council in the case of Tammanna Shivappa Kori v. Parappa Girmallappa Kori, AIR 1945 PC 111. In that case the trial Court disbelieved the evidence of adoption on the ground that it was discrepant in many materials. High Court reversed that judgment and the Privy Council affirmed the High Court's decision observing as follows:—

".....They (discrepancies) were mainly discrepancies as to the respective positions occupied by the parties and witnesses during the ceremony in the house where it took place; but all the witnesses agreed as to the vital facts necessary to establish an adoption.

".....Their Lordships agree with the learned Judges of the High Court in thinking that in the circumstances there was no sufficient ground for rejecting the evidence in support of the adoption ceremony; and that the discrepancies in such evidence can be explained by the length of time which had elapsed between the ceremony and the date when the witnesses were called upon to give evidence....."

The plaintiff has examined six witnesses, including himself to prove adoption. (After considering the evidence his Lordship proceeded.)

It is significant to note that the genuineness of Exts. 1 and 2 has not been challenged. No evidence has been given regarding circumstances improbabilising the story of adoption. Considering the entire evidence on record, both documentary and oral, and the variety of transactions of open life and conduct upon the footing of adoption coupled with the weakness of the defence evidence, and absence of any casteman or relative coming forward in support of the defence case, it is impossible to say that the finding of the trial Court that the plaintiff is the adopted son of Mohana is erroneous. That finding, therefore, is confirmed.

7. Next question is the question of limitation. Relying upon Article 58 of the Limitation Act, 1963, it is argued that the suit is barred by limitation as it has not been instituted within three years from the date

of the order in Ext. B. Ext. B is dated 16-5-1959 and, as the suit has been instituted on 18-3-1967, more than three years thereafter, it is barred under Article 58. Article 58 provides a period of three years for a suit to obtain any other declaration from the time when right to sue first accrues. There is no other Article like Article 57 providing any limitation for a suit for declaration of an adoption having taken place in fact. The question, therefore, is whether on passing of the order (Ext. B) any right to sue first accrued to the plaintiff and secondly, the suit being principally a suit for partition in which the question of adoption incidentally and collaterally arises, whether Article 58 can be attracted.

Under the old Limitation Act Article 118 was identical with Article 57 of the new Limitation Act except that the period of limitation of six years under the old Act has been abridged to three years under Article 57. Article 119 of the old Act provided a limitation of six years for suits to obtain a declaration that an adoption is valid and the period of limitation was to run from the time rights of the adopted son as such are interfered with. This Article has been omitted in the new Limitation Act and appears to have been merged in Article 58 which provides for suits to obtain any other declaration which would obviously include to obtain a declaration that an adoption is valid or that an adoption, in fact, took place. The starting point of limitation under the old Article was when the rights were interfered with. In its place the commencement of limitation is when the right to sue first accrues. For suits to obtain a declaration that an adoption took place, the starting point of limitation would be when the rights to such adoption are interfered with and that is when the right to sue must be deemed to have first accrued. Merely on account of shouts from the house-tops that the adoption never took place without actually interfering with the adopted son's right to property or with his actual enjoyment or possession of the property, right to sue to the adopted son cannot be said to have accrued, inasmuch as his rights as adopted son have not been actually interfered with. Mere verbal declarations do not amount to interference with the rights. Under Article 120 the expression "right to sue accrues" has been interpreted by the Supreme Court in the case of *C. Mohammad Yunus v. Syed Unissa*, AIR 1961 SC 808. Their Lordships said that under Article 120 (old) there can be no right to sue until there is an accrual of the right asserted in the suit and its infringement or at least a clear and unequivocal threat to infringe that right. It, therefore, appears that mere denials of the right of the plaintiff will not set the period of limitation running against him. There is no evidence of actual infringement or even unequivocal threat to infringe the right of the plaintiff. The defendants allege that they

have disputed the plaintiff's status as adopted son in mutation proceedings, and that would set the period of limitation run against him. Mutation proceedings are not judicial proceedings in which the title to and proprietary rights in immovable properties are determined. Therefore, merely raising a controversy as to adoption in a mutation proceeding does not amount to infringement of the right to property of the adopted son or an unequivocal threat to such right and, as such, the right to sue cannot be said to have accrued to the plaintiff. This appears to be the view of the Privy Council in a number of cases. In the case of *Nirman Singh v. Thakur Lal Rudra Pratap Narain Singh*, AIR 1926 PC 100, the plaintiff sued for partition. The Judicial Commissioner of Oudh reversed the decision of the Subordinate Judge on the point of limitation on the ground that the plaintiffs should have come within 12 years when their right in the mutation proceeding was denied. Disagreeing with this view, the Judicial Committee of the Privy Council said:—

".....its (Judicial Commissioner's) judgment is to a great degree based on the mischievous but persistent error that the proceedings for the mutation of names is a judicial proceeding, in which the title to and the proprietary rights in immovable property are determined....."

According to their Lordships, mutation proceedings are much more in the nature of fiscal inquiries instituted in the interest of the State for the purpose of ascertaining which of the several claimants for the occupation of certain denominations of immovable property may be put into occupation of it with greater confidence that the revenue for it will be paid. Such proceedings are not evidence that the successful applicant was in possession as sole legal owner in a proprietary sense, to the exclusion of all claims of the other members of the family as co-owners or for maintenance or otherwise, as revenue authorities have no jurisdiction to pronounce upon the validity of such a claim. Therefore, nothing in Ext. B could be construed as infringement or unequivocal threat of infringement of the plaintiff's right as adopted son of Mohana. In the case of *Radhoba Baloba Vaga v. Aburso Bhagwant-rao Shirole*, AIR 1929 PC 231 their Lordships of the Judicial Committee were considering the question of limitation in a partition suit and held that mere denial of the right of the plaintiff did not prove exclusion from the joint family property. In other words, the implication of this decision is that mere denial does not amount to infringement of right so as to give rise to accrual of the cause of action to sue. For limitation to begin to run for a suit for partition, there must be complete exclusion of the plaintiff from enjoyment of the joint family properties. Where exclusion is partial, cause of action does not accrue for a partition suit. In the

present case it is admitted by the defendants that the plaintiff was in possession of about 20 acres of joint family property and, therefore, there was no complete exclusion so as to start time running against him for the purpose of instituting a suit for partition.

Considering the aforesaid decision, I am of opinion that for a suit to obtain a declaration that an adoption in fact took place, limitation will be set in motion only when the adopted son's right has been infringed or there is an unequivocal threat of infringement of such right. Mere mutation proceedings in which the status of adoption is challenged would not amount to infringement of right, because the revenue authorities have no jurisdiction to decide the proprietary rights of the disputants to the immovable properties in question. Even applying Article 58, it cannot be said that the right to sue ever accrued to the plaintiff more than three years before the institution of the present suit. The point of limitation has been rightly negatived.

There is another aspect of the matter. This is not a pure suit for a declaration that the plaintiff's adoption in fact took place. It is in essence a suit for partition, though incidentally a declaration has been claimed as one of the reliefs. The plaintiff may not have claimed that relief and yet that question must, of necessity, have arisen for determination, before the relief of partition could be granted. Article 58 will apply only to a suit which is a suit for declaration simpliciter and not to a suit for partition in which a declaration of the kind envisaged in Article 58 is also appended as one of the reliefs. It is not the contention of the defendants that the suit as a partition suit is barred by limitation. If considering the true nature of the suit as a partition suit, it is in time, then the suit cannot be dismissed on the ground of limitation. Even if the suit is considered to be for ancillary reliefs also, it would be a composite suit to which Article 58 would not be applicable.

It has been held in the case of *Asa Ram v. Mt. Fatima Begum*, AIR 1939 Lah 185, that old Article 118 which is equivalent to new Article 57 applies only to a suit for a declaratory decree. On parity of reasoning, Article 58 of the new Limitation Act would be attracted in case of a suit for a declaratory decree only and not to a suit for partition. Their Lordships of the Lahore High Court for this view of theirs relied upon the case of *Kalyandappa v. Chantasa-ppa*, AIR 1924 PC 137. Similar view has been expressed in 1959 MPLJ (N) 86 where old Article 119 was being considered in relation to a suit for declaration of possession on the ground that the plaintiff is the validly adopted son. It was held that old Article 119 did not apply to suit for possession even though the plaintiff had to establish his adoption in order to succeed.

To sum up, old Article 119 has been omitted from the new Limitation Act and it appears to have merged in the general Article 58. Since the limitation begins to run under the old Article 119 from the time when the adopted son's right is interfered with, the same meaning is to be attributed to the expression "when the right to sue accrues" under Article 58 of the new Limitation Act. So no right to sue would accrue for the purpose of Article 58 unless there was actual interference with the plaintiff's right, not by a mere denial nor by mere oral protests which have no apparent connection with the actual exercise of the right of enjoyment of the property.

For the aforesaid reasons, I am of opinion that this point that the suit is barred by limitation must be negatived.

8. The last contention was that the movable properties of the joint family not having been brought into hotchpot, the suit is a suit for partial partition and consequently, the plaintiff must be non-suited. Relying upon the testimony of D. W. 1 the trial court has come to a finding that all movable properties of the family were previously partitioned and, as such, there was no joint movable property available to be brought into hotchpot for partition. The suit, therefore, cannot be said to be a suit for partial partition and on that account cannot be held to be not maintainable. This contention has, therefore, been rightly negatived.

9. All the three contentions raised having been negatived as aforesaid, there is no merit in this appeal which is, accordingly dismissed with costs.

The appeal is dismissed with costs,
Appeal dismissed.

AIR 1976 ORISSA 47

S. K. RAY, J.

Paramananda Mohanty and others, Appellants v. Bira Behera, Respondent.

First Appeal No. 63 of 1968, D/- 5-5-1975.

(A) Tort — Malicious prosecution — Institution of proceedings under Section 145, Criminal P. C. by defendant — Tank in which plaintiff has lease rights of fishery attached by S. D. O. — Plaintiff suffering loss thereby — If suit for such loss is maintainable against defendant. (Criminal P. C. (1898), Section 146).

Plaintiff had taken in auction the lease rights of fishery in a tank. On information by the defendant to the Magistrate that a breach of the peace is apprehended over the tank the Magistrate called for a report from the Police and having been satisfied about the apprehension of breach of the peace, at-

*(From decision of Sub J., Baripada in Money Suit No. 59 of 1965, D/- 2-4-1968).

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tached the tank under Section 145 Criminal P. C. The plaintiff sued the defendant for damages for the loss suffered by him by deprivation of his fishery rights by reason of the attachment. Held: that the defendant was not liable to the plaintiff for the loss.

Deprivation of the plaintiff of his possession of the tank under the lease was due to the order of attachment passed by the Magistrate. The basis for initiating proceeding under Section 145 Criminal P. C. is the satisfaction of the Magistrate regarding existence of apprehension of breach of peace. He did not take action on the petition itself, but waited till the police submitted report after enquiry on the basis of the application. He gets jurisdiction to attach under that section only in case of emergency. Existence of emergency is a fact which the Magistrate must determine initially on the basis of materials produced before it. Order of attachment cannot be made referable to any act of the defendants, who merely set the law in motion. The defendants, therefore, cannot be held liable for the consequent loss to the plaintiff on account of order of attachment passed by the Magistrate. AIR 1956 All 119; (1910) 14 Cal WN 96; (1883) ILR 6 Mad 426 Rel. on; AIR 1939 Mad 783 Dist.

(Para 8)

Cases Referred:	Chronological	Paras
AIR 1956 All 119 =	1956 All LJ 42	8
AIR 1939 Mad 783 =	(1939) 2 Mad LJ	9
296		
(1910) 14 Cal WN 96 =	10 Cal LJ 226	8
(1883) ILR 6 Mad 426		8

R. C. Patnaik, for Appellants; S. Mohanty and K. N. Sinha, for Respondent.

JUDGMENT:— The defendants who are residents of village Chhelia under Madhupur Grama Panchayat were sued in their representative capacity for recovery of damages amounting to Rupees 7,000/-. The suit was decreed in part for recovery of Rs. 4,500/-, with proportionate costs. The defendants in their representative capacity, except the plaintiff, were made jointly and severally liable for the said amount. The present appeal is from that decision by the aforesaid defendants.

2. There is a tank on plot No. 96 of village Chhelia under the management and control of Madhupur Grama Panchayat. The fishery right in the said tank is leased out for a period of three years at a time by auction held by the Grama Panchayat. Defendant No. 1 was a lessee till 31-3-1962 and on expiry of his lease, a fresh lease was granted to the plaintiff for three years in an auction held on 5-4-1962 in which he was the highest bidder. The plaintiff's lease was to expire on 31-3-1965. The plaintiff deposited the first year's premium and was granted a patta. But on an application of the outgoing lessee, defendant No. 1, the Sarpanch of the Grama Panchayat allowed him time till 20-4-1962 to catch and carry away fish reared by him during the period of his lease.

The plaintiff's case is that he executed his kabuliyat on 14-4-1962 and released fish fries in the tank for the first time on 21-4-1962 and thereby acquired possession of it. Subsequent thereto the S. D. O., Sadar directed the Sarpanch of Madhupur Grama Panchayat to hold a fresh auction in respect of this fishery as the bid amount was low, but on objection from the plaintiff, the S. D. O. withdrew his order on 24-8-1962. On 8-6-1963, the defendants with a malicious intention of putting the plaintiff to loss filed an application before the S. D. O. alleging that the fishery right in the tank had been granted to the villagers of Chhelia in the name of the plaintiff who was in the position of a benamidar and the plaintiff was about to catch fish forcibly and appropriate the same to himself. This application was sent to the police officer of Barsahi for enquiry and report and, ultimately on 29-11-1963, a preliminary order under Section 145 Criminal Procedure Code was passed and the tank was attached. The final order in the proceeding under Section 145 Criminal P. C. was passed on 30-3-1965 declaring the possession of the plaintiff as lessee on the date of the preliminary order. It will be seen that on the day following this final order the plaintiff's lease expired by efflux of time. The villagers, including defendants 1 to 11 thereafter on 9-5-1965 forcibly caught and removed the fish from the disputed tank which would be 60 maunds in weight valued at Rs. 6,000/-. The plaintiff further alleges that there was still 10 maunds of fish left in the tank of which he has been illegally deprived. He has, therefore, filed the present suit for recovery of damages to the tune of Rs. 7,000/- the loss to which he has been put on account of the illegal action of the villagers in getting the tank attached and thereby depriving him of the fruits of his leasehold interest in the tank. This, in substance, is the plaintiff's case.

3. The case of the defendants is that, in the past, the villagers of Chhelia used to take lease of this tank in the name of one of the villagers and the income from this tank was being utilised for the benefit of the village school. The lease immediately previous to the plaintiff's lease in question had, according to the said practice, been taken in the name of defendant No. 1 and during the period of that lease the villagers had, in fact, reared fish in the tank. When the lease was granted to the plaintiff, the villagers had still some fish left in the tank which they had not caught. The lease which plaintiff obtained in his own name was for the benefit of the entire body of villagers. In fact, the school managing committee had approved his name to be the ostensible lessee. The bid amount in fact was deposited by defendant No. 1 from the village fund, though plaintiff was recorded as the highest bidder. On the instigation of Dullav Chandra Patra, the then Sarpanch

3 and 4 in another. Mr. K. P. Verma, learned Government Advocate, has appeared on behalf of respondents 1 and 2. He has raised some preliminary points regarding the maintainability of the application of the petitioners. He submitted that the petitioners had an alternative remedy. The relief which the petitioners have sought in the writ application, amounts to seeking a declaratory decree and a money claim for the enhanced scale of salary from 1st January, 1971. According to him, they ought to have filed a suit in the court below. In order to find support to his contention, he relied on the case of *State of Madhya Pradesh v. Bhailal Bhai*, AIR 1964 SC 1006. In our opinion, there is no bar for entertaining an application under Articles 226 and 227 of the Constitution of India, when there is an alternative remedy. In that case on which reliance has been placed by the learned Government Advocate, their Lordships have clearly said that the High Court has power to order, but it has discretionary power and their Lordships have enumerated some of the circumstances under which discretion should not be exercised in entertaining the application. Their Lordships were considering in that case refund of money paid by the assessee, as sale tax, by mistake. The assessee had filed an application under Article 226 of the Constitution. In that background, their Lordships were making the observations. Their Lordships observed that the power to give relief under Article 226 was a discretionary power. That was specially true in the case of power to issue writs in the nature of mandamus. Among the several matters, which the High Court rightly took into consideration in the exercise of that discretion, were the delay made by the aggrieved party in seeking that special remedy and what excuse there was for it. Another was the nature of controversy of facts and law that might have to be decided as regards the availability of consequential relief. Thus, where a person came to the Court for relief under article 226 on the allegation that he had been assessed to tax under a void legislation, and having paid it under a mistake, was entitled to get it back, the Court, if it found that the assessment was void, being made under a void provision of law, and the payment was made by mistake, was still not bound to exercise its discretion directing repayment. Whether repayment should be ordered in the exercise of this discretion would depend in each case on its own facts and circumstances. It was not easy nor was it desirable to lay down any rule of universal application. The latter part of the observations of their Lordships makes it abundantly clear that their Lordships were not laying a general proposition of law, but it would

depend on the facts and circumstances of each case. In the instant case, in our opinion, considering the various rules of the Code, which we will presently refer, (they) go to show that the petitioners have acquired fundamental right to get their salary at the enhanced scale fixed by respondent No. 3.

7. Reference may also be made to another judgment of the Supreme Court in the case of *M/s. Baburam Prakash Chandra Maheshwari v. Antarim Zila Parishad now Zila Parishad, Muzaffarpur*, AIR 1969 SC 556 where it was held that existence of alternative remedy was no bar to the writ petition. Besides, in the instant case, respondents were heard at the time of the admission of the case. In the case of *Hirday Narain v. Income-tax Officer, Bareilly*, (AIR 1971 SC 33) their Lordships observed that if a writ petition was entertained and at the time of admission, the rule was issued against the respondents after hearing the respondents, the respondents could not be heard again on that point at the time of hearing and therefore on that score the application of the petitioners could not be rejected, even if they had alternative remedy. The learned Government Advocate then submitted that it was purely an administrative matter and this Court should not interfere. In our opinion, this submission also made by the learned Government Advocate is not tenable. Reference may be made to the case of *Union of India v. K. P. Joseph*, AIR 1973 SC 303 where it was observed that an administrative order could never confer any right would be too wide a proposition. There are administrative orders which confer rights and impose duties.

8. The learned Government Advocate further emphasised that in the instant case, writ would not lie also because the relief which the petitioners have sought amounts to seeking a declaratory relief and in order to substantiate this point he has relied on a judgment of the Allahabad High Court in the case of *Dalel Singh v. Honorary Secretary, Co-operative Union Ltd., U. P., Lucknow*, AIR 1956 All 43 where Bhargava, J., observed that the writ proceedings were not meant for declaratory decrees or for giving money decrees. In case a person was entitled to any subsistence allowance from his employer he could file a separate suit. No doubt, we find that the above observation of the Allahabad High Court has also been reiterated in a recent judgment in the case of *Sudarshan Kumar Kalra v. Union of India*, AIR 1974 Delhi 119 at p. 128, para. 28 where Shanker, J., who delivered the judgment for the Court, observed that in the context of the facts stated in the preceding paragraph of the said judgment, the relief prayed for in

the writ if granted would be nothing more than mere declarations to be availed of by the petitioners in the civil suit. Therefore, it was observed that the writ jurisdiction under Article 226 was not meant to serve those ends. His Lordship has also relied on the case of General Manager, Eastern Railway v. Kshirode Chandra Khansmobs, AIR 1966 Cal 601. On the facts and in the circumstances of the instant case, the observations made by their Lordships in the two cases referred to above are not applicable. On reading the application in its entirety along with the supplementary application, which the petitioners have filed, it appears that the petitioners have made out their cases that they have acquired fundamental right relying on the resolutions passed by respondent No. 3 contained under Annexures 1 and 2 of the application and on the provisions contained under various rules of the Code, to get their salary, at the higher scale fixed by respondent No. 3 from 1st January, 1971 and, therefore, they have prayed for a direction to be issued on the respondents to follow the resolutions passed by respondent No. 3, which entitled the petitioners to get their salary at the higher scale. Therefore, in our opinion their prayer cannot be said to be a mere declaration.

9. The learned Government Advocate as also Mr. Parmeshwar Prasad Sinha appearing on behalf of respondents Nos. 3 and 4 drew our attention to paragraph 7 of the resolution contained under Annexure 1 which reads as:

"The revised scales of pay shall apply to all Board's servants including those of the Electricity Department, Government of Bihar working in the Board."

Learned counsel for the two sets of respondents emphasised that the aforesaid paragraph made it abundantly clear that the revised scale applied only to the employees of the Board, who were actually working with the Board (respondent No. 3). The admitted case of the petitioners was that they were working with respondent No. 1. Therefore, according to them, paragraph 7 of the resolution does not entitle them to get their salary at the enhanced scale. In our opinion, this submission of the learned Government Advocate and Mr. Sinha cannot be accepted in view of the language used in paragraph 7 referred to above. It has been clearly stated therein that the revised scale of pay shall apply to all the Board's servants. Hence, we have to determine as to whether the petitioners ceased to be the Board's servants on their deputation. If they did not cease to be the Board's servants then certainly the petitioners are entitled to get their salary at the enhanced scale.

10. Learned counsel for the petitioners, as pointed out earlier submitted

that petitioner No. 2 was confirmed on 1-8-1967 as a permanent employee by respondent No. 3 before he was deputed to the department of respondent No. 1 on 18-1-68 whereas petitioner No. 1 was confirmed as a permanent employee with effect from 1-8-1967 and was deputed in the department of respondent No. 1 on 23-7-1966 by the order of respondent No. 3 dated 29-9-1973—vide Annexure 3/3. It seems that both petitioners Nos. 1 and 2 were made permanent retrospectively from 1-8-1967. Therefore, learned counsel for the petitioners submitted that petitioners Nos. 1 and 2 acquired lien on the posts in the department of respondent No. 3. Lien has been defined under Rule 28 of the Code which reads thus:—

"Lien means the title of a Government servant to hold substantively either immediately or on the termination of a period or periods of absence a permanent post, including a tenure post to which he has been appointed substantively."

According to the above rule, an officer has the right to return to his post, whether substantive or tenure. He may have a lien on appointment without having actually joined it. A lien can, therefore, be granted against a post substantive or tenure. Reliance was also placed on Rule 69 (b) of the Code which reads as:—

"Unless his lien is suspended under Rule 70, or transferred under Rule 72, a Government servant holding substantively a permanent post retains a lien on that post—

(a)

(b) while on foreign service, or holding a temporary post or officiating in another post."

11. Admittedly petitioners 3 and 4 are still holding temporary posts. In order to fortify their cases, learned counsel relied on Note 2 to Rule 268 of the Code. The said Note 2 reads thus:—

"Note 2. Under this rule, the transfer of a temporary Government servant to foreign service is permissible."

Therefore the transfer of a temporary Government servant to foreign service is permissible. This rule has to be read along with sub-rule (1) of Rule 270 of the Code which provides:—

"270 (1) A Government servant transferred to foreign service shall remain in the cadre or cadres in which he was included in a substantive or officiating capacity immediately before his transfer, and may be given such substantive or officiating promotion in those cadres as the authority competent to order promotion may decide."

Therefore, according to learned counsel for the petitioners, the same principle applies even in the case of petitioners Nos. 3 and 4, as sub-rule (1) to Rule 270 of the Code.

does not make any distinction between temporary and permanent posts. In our opinion, in the light of the discussions and the reference made above, the contention of learned counsel for the petitioners is well founded. All the four petitioners did not cease to be the servants of respondent No. 3 on their deputation. In that view of the matter, paragraph 7 of the Resolution referred to above entitles them to get their salary at the enhanced scale fixed by respondent No. 3.

12. Mr. Sirha appearing on behalf of respondents Nos. 3 and 4 has further contended that the rules contained under the Code are not applicable in the case of the servants employed by respondent No. 3. In our opinion, this submission of learned counsel is not tenable in view of serial No. 4 contained under Annexure 8 which we have quoted earlier. We hold that the rules contained under the Code are applicable to the cases of the petitioners and it also governs the servants employed by respondent No. 3.

13. In our opinion, there are some further reasons to hold why petitioners Nos. 3 and 4 should also get their salary at the higher scale. The statement made by the petitioners in paragraph 12 of the writ petition indicates that even those who are juniors to the petitioners Nos. 3 and 4 are getting their salary at the enhanced rate in the department of respondent No. 3. Persons who are junior to petitioners Nos. 3 and 4 have got to be assumed that they are also holding temporary posts. That fact has not been controverted in the two counter-affidavits filed by the two sets of respondents. Therefore, if petitioners Nos. 3 and 4 did not cease to be the servants of respondent No. 3, it would be a discrimination and violative of Articles 14 and 16 of the Constitution of India, if petitioners Nos. 3 and 4 are not allowed to draw their salary at the enhanced rate which the persons junior to petitioners Nos. 3 and 4 in the department of respondent No. 3 are drawing.

14. The learned Government Advocate, however, contended that the other employees of the department of respondent No. 1 holding the similar posts, would grumble and it would be discrimination against them, if those servants of the department of respondent No. 1 are not being allowed to draw at the scale of salary what the petitioners would be allowed to draw. In our opinion, this submission of the learned Government Advocate is not tenable. By reference to the various provisions of the rules of the Code, it is clear that the persons holding foreign service get higher emolument than the other persons in the department concerned—Vide clauses (c) and (e) to

Rule 283 of the Code. Besides, the petitioners being in foreign service, working as overseers in the department of respondent No. 1, remain in the cadre prescribed in the department of respondent No. 3, as it appears from sub-rule (1) to Rule 270 of the Code already quoted in paragraph 11 of this judgment. Therefore, it is open to respondent No. 1 to revert the petitioners back to the department of respondent No. 3. This view also finds support from the provision contained under Rule 275 of the Code which provides as follows:—

"A Government servant reverts from foreign service to Government service on the date on which he takes charge of his post in Government service provided that, if he takes leave on the conclusion of foreign service before rejoining his post, his reversion shall take effect from such date as the State Government may decide."

15. Learned Government Advocate then drew our attention to paragraph 3 of the counter-affidavit filed by respondents Nos. 1 and 2 wherein it is stated that the Bihar State Electricity Board revised the pay-scale of their staff including the overseers, without consulting the Government, and brought it into effect from 1st January, 1971. Therefore, according to him, the resolution passed under Annexures 1 and 2 by respondent No. 3 are not valid and they are not in accordance with law. In this connection, he referred to the provisions under Section 78-A of the Act which is to this effect:

"Directions by the State Government—(1) in discharge of its functions, the Board shall be guided by such directions on questions of policy as may be given to it by the State Government.

(2) If any dispute arises between the Board and the State Government as to whether a question is or is not a question of policy, it shall be referred to the Authority whose decision thereon shall be final."

In our opinion, this contention of the learned Government Advocate is also not acceptable in view of the provision of clause (c) and proviso to Section 79 of the Act. It would be useful to quote the section in extenso:—

"Power to make regulations.—The Board may make regulations not inconsistent with this act and the rules made thereunder to provide for all or any of the following matters, namely,

(a) the administration of the funds and other property of the Board, and the maintenance of its accounts;

(b) summoning and holding of meetings of the Board, the times and places at which such meetings shall be held, the

conduct of business thereat and the number of members necessary to constitute a quorum;

(c) the duties of officers and servants of the Board, and their salaries, allowances and other conditions of service;

(d) all matters necessary or expedient for regulating the operations of the Board under Section 20;

(e) the making of advances to licensees by the Board under Section 23 and the manner of repayment of such advances;

(f) the making of contributions by the Board under Section 24;

(g) the procedure to be followed by the Board in inviting, considering and accepting tenders;

(h) principles governing the fixing of Grid Tariffs;

(i) principles governing the making of arrangements with licensees under Section 47;

(j) principles governing the supply of electricity by the Board to persons other than licensees under Section 49;

(k) any other matter arising out of the Board's functions under this Act for which it is necessary or expedient to make regulations:

Provided that regulations under clauses (a) and (d) shall be made only with the previous approval of the State Government and regulations under clauses (h) and (i) shall be made with the concurrence of the Authority."

The above proviso makes it abundantly clear that regulations under clauses (a) and (d) only would be made with the previous approval of the State Government. In the instant case, the resolutions contained under Annexures 1 and 2 have been passed by respondent No. 3 obviously under clause (c) of Section 79 of the Act. Therefore even on that score the resolutions contained under Annexures 1 and 2 of the petition cannot be challenged.

16. The learned Government Advocate also contended that respondents 1 and 2 are not liable for paying the petitioners at the enhanced scale. If such a payment is ordered to be made by this Court, respondents Nos. 3 and 4 should be directed to pay at higher scale. On the other hand, Mr. Sinha appearing on behalf of respondents Nos. 3 and 4 contended that the enhanced rate has to be paid, if at all, by respondents Nos. 1 and 2. In our opinion also, the enhanced scale of salary to all the petitioners has to be paid by respondents Nos. 1 and 2 in view of the provisions contained under Rule 282 read with Rule 284 of the Code. First of all, we shall refer to Rule 282 of the Code which reads as:

"282. A Government servant transferred to foreign service shall draw pay from

the foreign employer from the date on which he relinquishes charge of his post in Government service. Subject to the provisions of Rule 283 and to any restrictions which the State Government may by general order impose the amount of his pay, the amount of joining time admissible to him, and his pay during such joining time shall be fixed by the authority sanctioning the transfer in consultation with the foreign employer."

Whereas Rule 284 of the Code provides:

"284. When a Government servant reverts from foreign service to Government service his pay shall cease to be paid by the foreign employer and his contribution shall be discontinued, with effect from the date of reversion as determined by Rule 275."

Keeping in mind the above two rules, it is clear that so long as the petitioners are in the service of respondents Nos. 1 and 2, the petitioners are entitled to get their pay at the higher scale as fixed under Annexure 2 from 1st January, 1971 from respondents Nos. 1 and 2 till they are reverted to the department of respondent No. 3 as contemplated under Rule 284 of the Code.

17. In the result, therefore, after full deliberation and consideration, we allow the application of the petitioners and direct respondents Nos. 1 and 2 to pay salary to the petitioners at the enhanced scale as shown in the resolution contained under Annexure 2 to the petition as we have already held that the petitioners have acquired right to receive their salary at the enhanced rate. In the circumstance, however, there will be no order as to costs.

Application allowed.

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S. SARWAR ALI AND NAGENDRA PRASAD SINGH, JJ.

Ram Nagina Singh and others, Petitioners v. S. V. Sohni and others, Respondents.

Civil Writ Jur. Cases Nos. 1317, 1366 and 1390 of 1974, D/- 28-11-1974.

(A) Bihar Lokayukta Act (6 of 1974), S. 3 — Power of Governor to appoint Lokayukta — Aid and advice of the Council of Ministers is a necessary pre-requisite — (Constitution of India, Art. 163).

The appointment of Lokayukta, as envisaged in Section 3, has to be made by the Governor with the aid and advice of the Council of Ministers. (Para 20)

Ordinarily when a power is vested, even by a Statute, in the Governor, he is to act on the aid and advice of the Council

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cil of Ministers. It does not cease to be an executive power merely because it is conferred by a Statute. It would be defeating the constitutional scheme if it was to be held that the mere use of the word "Governor" in any statute would be imputing an intention to the legislature of conferring a power 'eo nomine'. (Para 20)

Even if it be possible for the legislature to invest the Governor with powers eo nomine, in order to come to conclusion that the Governor has been invested with powers by the legislature eo nomine very strong indications will have to be there in the relevant Statute; since in one sense it goes against the concept of parliamentary form of Government, which is one of the basic postulates of the Constitution. In the present Statute there is no such indication. On the other hand, indications are to the contrary. Section 3 of the Ordinance states that the Governor shall by a warrant under his hand and seal appoint the Lokayukta in consultation with the Chief Justice of the High Court and the leader of Opposition. If Governor is to act eo nomine it would mean that although leader of opposition will have an effective role to play, the State Government would have no hand in the appointment. This appears to be inconceivable, unless there was something in the Statute which could irresistibly lead to the conclusion that the legislature had not contemplated aid and advice of Council of Ministers in the making of the appointment. (Para 20)

(B) Bihar Lokayukta Act (6 of 1974), S. 3 (1) Proviso — Appointment of Lokayukta — Whether any advice was tendered by the Ministers to the Governor — Court's power to enquire into — (Constitution of India, Art. 163 (3)).

Article 163 (3) of the Constitution prevents the Court from enquiry whether any advice was given by the Council of Ministers to the Governor in the exercise of his functions. (Para 23)

Clause (3) of Article 163 prohibits enquiry in respect of two matters. They are, (a) Whether any advice was given to the Governor by the Council of Ministers and (b) If an advice was given what was that advice. It cannot be said that it is only when an advice has been given that this clause applies and that it does not apply to a situation where no advice has been given. There is no reasonable basis for making the differentiation in the two situations. (Para 23)

Further, Article 163 (3) must be confined to the cases of actual advice. It has no application to a "deemed advice". Clause (3) of Article 163 postulates those class of cases where the Governor is to make an order as distinct from those class of cases where orders have been passed

by a Minister or Council of Ministers in accordance with the Rules of Executive Business without any actual reference to the Governor. In the appointment of Lokayukta the Governor has to factually receive the advice. It is not one of those cases where an appointment could be made by issue of notification from the Secretariat in the name of Governor without the actual knowledge of the Governor. As has been seen in Section 3 of the Act, the warrant of appointment has to be under the signature of the Governor himself. (Para 24)

(C) Constitution of India, Art. 163 (3) — Expression "inquiry" — Meaning of.

It is incorrect to say that if a fact in issue is admitted the Court has not to inquire into it. Even where facts are admitted, no conclusion is possible without inquiring into a matter or issue which is pre-requisite to the exercise of the jurisdiction or power of the Court in the matter of giving relief to a party in a judicial proceeding. (Para 26)

(D) Constitution of India, Art. 163 (3) — Clause (3) does not create any privilege in favour of the State.

The Article does not create any privilege but contemplates that certain matters shall not be inquired into by Courts. (Para 27)

(E) Bihar Lokayukta Act (6 of 1974), S. 3 (1) Proviso — Appointment of Lokayukta after consultation with the Chief Justice and the leader of Opposition — Consultation need not be by the Council of Ministers itself.

The contention that unless the Council of Ministers itself holds consultation with the Chief Justice and the Leader of Opposition it would not be a consultation as envisaged in Section 3 does not appear to be correct. What is required is consultation. It is not important as to what was the agency through whom the consultation has taken place. It is difficult to conceive that in actual practice there would be a consultation between a body of men like the Council of Ministers, and the Chief Justice and the Leader of Opposition. It had to be done through some agency. As long as the views of these two dignitaries have been ascertained it would be substantial and sufficient compliance with the requirement of law. It is to be noticed in this connection that consultation does not mean concurrence. AIR 1970 SC 370, Followed. (Para 30)

Held, that there was sufficient compliance with the requirements of Proviso to S. 3 where the views of the Chief Justice and the leader of the Opposition were ascertained after consultation by the Governor before appointing the Lokayukta. (Para 30)

(F) Bihar Lokayukta Act (6 of 1974), S. 23 — Appointment of Lokayukta made under the Bihar Lokayukta (Second) Ordinance (54 of 1973) does not lapse with the expiry of that Ordinance.

There is contrary intention in the Ordinance itself. Section 5 of the Ordinance contemplates appointment for five years, enduring even after the expiry of the Ordinance. The right so created cannot be taken away because the law which created it has expired. Moreover, this aspect is not of much importance in view of Section 23 of the Third Ordinance and the Act. No infirmity in the appointment of the Lokayukta having been established, it is clear that the effect of Section 23 is to antedate the Third Ordinance to the date of appointment. It has also the effect of converting appointment made under the Second Ordinance to an appointment under the Third Ordinance. Consequently, when the Act came into force the appointment of the Lokayukta would be an appointment under the Act, by virtue of the deeming provision in Section 23 of the Act. The Act would also be deemed to be in force on the date of the said appointment. Such is the effect of the deeming provision, which must be given its full effect. Case law referred. (Para 32)

(G) Constitution of India, Art. 226 — Writ of quo warranto — Principles regarding issue of stated.

Before a citizen can claim a Writ of quo warranto, he must satisfy the court, inter alia, that the office in question is a public office and is held by usurper without legal authority, and that necessarily leads to the enquiry as to whether the appointment of the said alleged usurper has been made in accordance with law or not." AIR 1965 SC 491. (Para 34)

Held that in view of the notifications and the warrant of appointment, and in the absence of any infirmity having been shown in the appointment the respondent was validly claiming to have been appointed Lokayukta in exercise of powers under S. 3 of the Ordinance 54 of 1973. His continuance in office was not illegal. The writ of quo warranto in the circumstances could not issue. (Para 34)

(H) Interpretation of Statutes — Articles of the Constitution — Interpretation.

In construing the various articles of the Constitution it would not be a correct approach to construe them in isolation. All relevant provisions of the Constitution, in the context of the question under consideration, have also to be considered. It is in the light of the constitutional scheme that the various articles of the Constitution have to be interpreted. This alone will lead to harmonious construction. (Para 15)

Cases Referred: Chronological Paras
AIR 1974 SC 1533 = 1974 Tax LR 2245 32

AIR 1974 SC 2192 = Civil Appeal No. 2289 of 1970, D/- 23-8-1974 = 1974 Lab IC 1380 16, 17

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AIR 1962 SC 945 = (1962) Supp 2 SCR 380 32

AIR 1961 SC 221 = (1961) 1 SCR 728 16

AIR 1955 SC 549 = (1955) 2 SCR 225 16

AIR 1953 SC 244 = 1953 SCR 773 32

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Jagdish Swaroop, Kailash Roy, Brajeshwar Mallik, Lalan Kumar Verma and Chandeshwar Jha (In C.W.J.C. No. 1317/74); Jagdish Swaroop, Chandeshwar Jha, Kameshwar Narain Singh, Fanish Singh, Sardanand Jha, Man Mohan and Lalan Kumar Verma (In C.W.J.C. No. 1366/74) and B. Das, Jagdish Swaroop, Brajeshwar Mallik, Awadh Kumar Lal and B. Mandal (In C.W.J.C. No. 1390/74), for Petitioners; F. A. Nariman, Addl. Solicitor General, Radha Mohan Pd. (for Respondent No. 1 in C.W.J.C. No. 1317/74); Narain Sinha, Solicitor General, K. P. Verma (G. P.), Ganesh Pd. Jaiswal and Lakshman Saran Sinha (In C.W.J.C. Nos. 1317, 1366 and 1390 of 1974) and Basudeva Pd., Sr. Advocate, Radha Mohan and Mrs. Renuka Sharma (for Respondent No. 1 in C.W.J.C. Nos. 1366 and 1390/74), for Respondents.

SARWAR ALI, J.:— These three writ applications have been heard together and will be governed by a common judgment. In these writ applications prayers have been made for issue of a writ in the nature of quo warranto as also prohibition. During the course of argument, however, it was rightly conceded that the writ of prohibition will not be attracted. That is so because no judicial or quasi-judicial order or proceeding is challenged in these writ applications. The substantial prayer, therefore, is with respect to issue of a writ in the nature of quo warranto as against respondent No. 1. Substantially therefore, the appointment of respondent No. 1 as Lokayukta is under challenge.

2. The law making provision for the appointment, and laying down function, of the Lokayukta was for the first time made by promulgation of Bihar Lokayukta Ordinance, 1973 being Ordinance No. 3 of 1973. The Ordinance was signed on 12-1-1973 by the then Governor and

published in the Bihar Gazette on 18-1-1973. No action was taken in pursuance of the Ordinance. On 14-3-1973 a bill in terms of Ordinance was introduced in the Bihar Legislative Council. On 8-4-1973 the first Ordinance lapsed. Hence necessity of the Second Ordinance being Bihar Lokayukta (Second) Ordinance, 1973 (the 'Second Ordinance'). The Governor signed this Ordinance on 6-5-1973 and the same was published in the Bihar Gazette on 11-5-1973. Section 3 of the Ordinance relates to the appointment of Lokayukta. In the exercise of purported power under the provisions of this Ordinance respondent No. 1 was appointed as the Lokayukta. The aforesaid appointment is under challenge for various reasons which shall be indicated hereinafter. The Ordinance envisages the appointment by a warrant under the hand and seal of the Governor. During the course of argument the warrant was produced, which is dated 26-5-1973.

3. The Second Ordinance lapsed on the mid-night of 26th August, 1973. The lapse was followed by promulgation of a Third Ordinance, called Bihar Lokayukta (Third) Ordinance (the 'Third Ordinance'). The Ordinance was signed by the Governor on 5-10-1973 and published in the Bihar Gazette on 8-10-1973. This was followed by the Bihar Lokayukta Act, 1973, Bihar Act 6 of 1974 (the 'Act').

4. In order to appreciate the contentions raised it would be necessary to refer to some of the provisions of the Ordinances and the Act. It may be stated at the outset that the parties to these writ applications accepted that there is no substantial differences between the various Ordinances and the Act except in relation to section 1 (sic) of the Third Ordinance and Section 23, which was not in the First and Second Ordinances, but was incorporated in the Third Ordinance. This section (Section 23), in the same language, finds place as Section 23 in the Act (except that in the Act there is reference to the third Ordinance).

5. Lokayukta as defined in Clause (2) (e) of the Ordinance means a person appointed as the Lokayukta of Bihar under Section 3. Section 3, which has an important bearing on the case may be quoted in extenso:

"Appointment of Lokayukta.— (1) For the purpose of conducting investigations in accordance with the provisions of this Ordinance the Governor shall by warrant under his hand and seal appoint a person to be known as the Lokayukta of Bihar:

Provided that the Lokayukta shall be appointed after consultation with the Chief Justice of the Patna High Court and the leader of the Opposition in the State

Legislative Assembly or if there be no such leader a person elected in this behalf by the Members of the Opposition in the State Legislative Assembly in such manner as the Speaker may direct.

(2) The person appointed as the Lokayukta shall, before entering upon his office, make and subscribe, before the Governor, or some person appointed in that behalf by the Governor, an oath or affirmation in the form set out for the purpose in the First Schedule."

Section 4 states that the Lokayukta is not to hold any other office. Section 5 deals with the term of office and other conditions of service of Lokayukta. This too is an important section which will come up for consideration. Sub-sections (1) and (2) may be quoted:

"(1) A person appointed as the Lokayukta shall hold office for a term of five years from the date on which he enters upon his office:

Provided that—

(a) the Lokayukta may by writing under his hand addressed to the Governor resign his office;

(b) the Lokayukta may be removed from office in the manner specified in Section 6.

(2) On ceasing to hold office, the Lokayukta shall be ineligible for further employment (whether as the Lokayukta or in any other capacity) under the State Government, or for any employment under or in, any such local authority, Corporation, Government Company or Society as is referred to in sub-clause (iii) of clause (i) of Section 2."

Section 6 deals with removal of Lokayukta. This too may also be reproduced.

"Removal of Lokayukta.— (1) Subject to the provision of Article 311 of the Constitution, the Lokayukta may be removed from his office by the Governor on the ground of misbehaviour or incapacity and on no other ground; provided that inquiry required to be held under clause (2) of the said Article before such removal shall be held by a person appointed by the Governor, being a person who is or has been the Chief Justice of a High Court or a Judge of the Supreme Court of India.

(2) A person appointed under the proviso to sub-section (1) shall submit the report of his inquiry to the Governor who shall, as soon as may be, cause it to be laid before each House of the State Legislature.

(3) Notwithstanding anything contained in sub-section (1) the Governor shall not remove the Lokayukta unless an address by each House of the State Legislature supported by a majority of the total membership of that House and majority of not less than two-thirds of the

members of that House present and voting has been presented to the Governor in the same session for such removal."

The other provisions which relate to the powers, jurisdiction, and the manner in which the Lokayukta has to exercise his jurisdiction and other incidental matters, need not be quoted here. But it would be necessary to reproduce Section 23. This is as follows:—

"23. Repeal and saving: (1) The Bihar Lokayukta (Second) Ordinance, 1973 (Bihar Ordinance No. 54 of 1973) is hereby repealed:

(2) Notwithstanding such repeal anything done or any action taken in exercise of the powers conferred by or under the said Ordinance, shall be deemed to have been done or taken in the exercise of powers conferred by or under this Act as if this Act were in force on the day on which such action was done or taken." (Extracted from the Third Ordinance).

6. The main ground of challenge, as will be later clarified and fully enunciated, is that the Lokayukta has been appointed by the Governor without the aid and advice of the Council of Ministers, which is not legally and constitutionally permissible. The learned counsel for the petitioners during the course of argument made it clear that they relied on the statements made in the affidavit of the State for the purpose of showing that their contention that the Governor had not taken the aid and advice of the Council of Ministers has been substantiated. It may be stated at this stage that a show cause and an affidavit was filed on behalf of the State on 24-9-1974. Both were sworn by the Under-Secretary to the Government of Bihar in the Cabinet Secretariat and Co-ordination Department, Sri P. P. Sen. The show cause states that facts as disclosed from the available records were being laid bare, leaving it to the counsel appearing for the State to render such assistance as was required in the light of submissions made on behalf of the petitioners and respondent No. 1. The State also did not claim any privilege. This was a reasonable attitude to take. On 7-11-1974 an application was filed on behalf of the State of Bihar stating that since after the filing of the aforesaid show cause, on fuller consideration of all aspects of the matters, the State of Bihar had been advised as mentioned in paragraph 4 of this application. A prayer was made in this application that submissions made in subparagraphs 1 and 2 of paragraph No. 4 of the petition which relate to the maintainability of the writ petitions should be disposed of as preliminary issue. When the case was taken up for hearing, the counsel for the parties agreed that instead of the point raised being decided as preliminary

issue, the whole case may be heard and the various objections that were sought to be raised may not be heard as preliminary issue. This is the course that we have adopted in this case.

7. It may further be stated at this stage that so far as respondent No. 1 is concerned, he filed a separate show cause. In that show cause various legal contentions have been raised and it has been averred that, in fact, and in law the appointment of respondent No. 1 as Lokayukta of Bihar by the Governor of Bihar was on the advice of Council of Ministers. I am not mentioning here the detailed contentions which have been mentioned in the show cause itself in support of this stand and other alternative contentions.

8. I have indicated that the petitioners rely mainly on what has been stated in the counter-affidavit filed on behalf of the State, in order to substantiate their contentions on the factual aspect of the case. It would, therefore, be pertinent to briefly indicate here as to what has been stated in the affidavit dated 24-9-1974 on behalf of respondent No. 5 (State of Bihar). In paragraph 1 of the counter-affidavit it has been stated that the deponent was deposing to the facts stated in the affidavit with reference to the records available in the Department of Personnel and Cabinet Secretariat and Co-ordination Department. In Paragraph 4, it is stated that after the promulgation of the Third Ordinance there were three sittings of the Council of Ministers in the month of May, 1973. There is no record in the Government Secretariat in the Department of Personnel or in the Cabinet or Co-ordination Department of any proceeding of any proposal for the appointment of Lokayukta or for selection of any person to be appointed to the office or of any approval of the Council of Ministers for creation to the post of Lokayukta. From the noting in the file in the Department of Personnel on 7-8-1973, it appears that Sri J. Pramanik, Under-Secretary of the Department of Personnel wrote:

"A question has been raised as to whether in view of such (Section 3 of the bill) a provision, Governor may act on his own in fixing his choice on a person after consultation with the prescribed authorities or he should act in this matter on the advice of Chief Minister and Council of Ministers."

It was suggested that the advice of the Advocate General may be obtained. It appears from the same file that on 13-8-1973 during the course of discussion it was observed (it is not clear who made the observation) that the appointment of S. V. Sohni (respondent No. 1) against the office of Lokayukta had not been made

with the approval of the Council of Ministers. A memorandum containing the proposal regarding the repromulgation of the Ordinance and formal approval of the appointment of respondent No. 1 was placed before the Council of Ministers. The Council of Ministers, however, adjourned the relevant item in the agenda of that meeting after some consideration. On 20-8-1974 a supplementary memorandum was prepared for consideration of the Cabinet meeting to be held on 23-8-1974. The memorandum was accompanied by the opinion of the legal advisors, namely, the Advocate General and the Law Department. The advice of the Law Department was that the post of Lokayukta with all its functions and power will cease to be operative after the Ordinance expired. On 23-8-1973 after some consideration the Council of Ministers again postponed their decision in respect of the aforesaid item in the agenda. On 30-8-1973 the Chief Secretary submitted a note mentioning that the Chief Minister had required him to send certain papers which the Chief Minister may require for his discussion with the Prime Minister or the President. This note is Annexure C to the State affidavit. Before sending the note of the Chief Secretary to the Chief Minister, who was in Delhi at that time, Sri B. K. Dubey, Secretary to the Chief Minister, sent his note dated 30-8-1973 to the Chief Secretary pointing out to him the notes under submission to the Chief Minister required modification. A copy of the note of Sri B. K. Dubey is Annexure D, to the affidavit. Neither the note of the Chief Secretary nor the note of Sri Dubey appear to have been sent to the Chief Minister at Delhi. On 4-9-1973 the Council of Ministers decided that the memorandum regarding repromulgation of the Ordinance and the appointment of the Lokayukta may be withdrawn and in effect the Ordinance was allowed to lapse. On 11-9-1973 the Council of Ministers approved the proposals for repromulgation of the Ordinance and approved the contents of the draft Ordinance. The Third Ordinance was accordingly promulgated in accordance with the decision of the Council of Ministers. In paragraph No. 7 it has been stated as follows:

"That there is no record on the files of the Department of Personnel or of the Cabinet Secretariat and Co-ordination Department indicating that at any time any proposal for the appointment of any person as Lokayukta was at all made or any decision taken in accordance with the requirement of Rule 27 (b) of the Third Schedule of the Rules of Executive Business."

9. It may be stated here that Annexure 1 to the petition filed by the State dated 7-11-1974 is a note dated 21-5-1973.

This incorporates the note of the Chief Secretary and the note of the then Chief Minister, Sri Kedar Pandey. In this note the Chief Secretary stated that the procedure for the appointment of Lokayukta is mentioned in Section 3 of the Lokayukta Ordinance. The Governor has to consult the Chief Justice and the leader of the opposition and thereafter the Governor has to appoint the Lokayukta. But the Governor, it was pointed out, could do so only after obtaining the opinion of the State Government. The note of the then Chief Minister to the Governor when translated is as follows:—

"In this connection I have already deliberated with you. In my opinion, it is not necessary to obtain the opinion of the Council of Ministers in this connection."

10. On the basis of these materials it was contended on behalf of the petitioners that the appointment of respondent No. 1 has been made without taking the aid and advice of the Council of Ministers and that the documents on the record lead to an irresistible conclusion that the necessity of taking the aid and advice of Council of Ministers was not thought to be a necessary requirement on the interpretation put by the Chief Minister. Learned counsel appearing on behalf of the State pointed out that it would not be necessary to deal with the factual aspect of the matter as according to his contention the jurisdiction of the Court was barred, so far as consideration of the factual aspect, whether or not any advice was given by the Council of Ministers, was concerned. Learned counsel for respondent No. 1, the learned Additional Solicitor General, who was appearing in one writ application, and Sri Basudeba Prasad, who was appearing in two of the writ applications, contended that the materials on the record do not lead to the conclusion suggested on behalf of the petitioners. According to the learned Additional Solicitor General it was at best a case where no firm conclusion could be arrived at on the materials on the record. Both of them, however, tried to interpret the various notes, other materials on the record, and the relevant circumstances and contended that either the Governor would be deemed in law to have acted on the aid and advice of the Council of Ministers, or that he, in his discretion, exercisable by virtue of provisions of Article 163 (2) of the Constitution, did not think that it was a matter where aid and advice was required as contemplated under Article 163 (1) of the Constitution.

11. Let me at this stage indicate the various points, briefly, which have been urged on behalf of petitioners in support of their contention that they are entitled to the writ as prayed for. The contentions raised are as follows:

(1) That, in fact, no aid and advice was obtained from the council of ministers by the Governor in making appointment of respondent No. 1. The aid and advice of the Council of Ministers was a necessary pre-requisite. The said aid and advice not having been obtained, the appointment of respondent No. 1, made on 26-5-1973, was not valid in law.

(2) That proviso to Section 3 (1) of the Second Ordinance requires that the Lokayukta should be appointed after consultation with the Chief Justice of the Patna High Court and the leader of Opposition in the State Legislative Assembly. This requirement was not fulfilled before making the appointment.

(3) The rules of Executive Business have not been followed in this case. The violation of the aforesaid rules makes the appointment of respondent No. 1 illegal and of no effect in law.

(4) That the appointment of respondent No. 1 was a temporary appointment and it lapsed with the expiry of the Second Ordinance.

(5) The appointment of respondent No. 1 being illegal, neither Clause 23 (2) of the Third Ordinance nor Section 23 (2) of the Act could give life to an invalid appointment. The result was that respondent No. 1 could not be said to be validly holding the office of Lokayukta on the date the writ applications were filed.

12. The main contentions of the learned Solicitor General, who appeared on behalf of the State of Bihar, may also be summarised. They are:

(1) The challenge to the validity of the appointment of respondent No. 1 is on the ground that the Governor acted on his own without obtaining aid and advice of the Council of Ministers. Article 163 (3) of the Constitution prevents the Court from enquiring whether any advice was tendered by the Ministers or not. In this situation, the very basis or foundation of the case of the petitioners disappears.

(2) Alternatively, the question whether a matter falls to be decided by the Governor in his discretion, as envisaged in Article 163 of the Constitution, is a matter which has to be decided by the Governor himself. His decision in the matter is final. The validity of the decision of the Governor cannot be challenged on the ground that he ought not to have acted in his discretion. If in the instant case the Governor did decide that in making appointment of Lokayukta he could and should act in his discretion, the matter was not justiciable.

(3) Section 23 of the Third Ordinance and Section 23 of the Act were validating provisions. The effect of these provisions was that irrespective of any infirmity or

doubt in the appointment of respondent No. 1 as Lokayukta made on 26-5-1973, the action taken was validated as a result of the aforesaid section and respondent No. 1 would be deemed to have been validly appointed as from 26-5-1973.

(4) The expiry of Ordinance 54 of 1973 did not bring the appointment of respondent No. 1 which was for a period of five years, to an end. Moreover, the validity of the appointment has to be examined with reference to the provision of the Third Ordinance and Act 6 of 1974.

(5) That the power to issue a writ of quo warranto is a discretionary power. The petitioners have moved this Court after a delay of about sixteen months. Respondent No. 1 does not suffer from any disqualification which would make his re-appointment impossible. Since respondent No. 1 could be re-appointed, as a matter of law the discretion of the Court should not be exercised to set at nought the appointment of a person who could be re-appointed. In any event taking the totality of the circumstances into consideration, it is not fit in which a writ of quo warranto should issue.

13. Learned Additional Solicitor General, apart from substantially supporting the approach of the learned Solicitor General in a helpful argument, raised various alternative contentions. If necessary they would be dealt with separately and later.

14. Mr. Basudeva Pd. also raised various alternative contentions. In one respect, however, his approach was different from that of the learned Solicitor General. His contention was that when the Governor is to exercise powers under a statute he is not exercising executive powers as envisaged under the Constitution. He is, therefore, not required in those circumstances, to act on the aid and advice of the Council of Ministers.

15. Before dealing with the main arguments in the case, it may be pointed out that in construing the various articles of the Constitution it would not be a correct approach to construe them in isolation. All relevant provisions of the Constitution, in the context of the question under consideration, have also to be considered. In my view, it is in the light of the constitutional scheme that the various articles of the Constitution have to be interpreted. This alone will lead to harmonious construction.

16. Article 154 of the Constitution states that the executive power of the State, shall be vested in the Governor. The expression executive power has been construed in several decisions of the Supreme Court. It was pointed out in *Rai Sahib Ramjaway Kapur v. The State of Punjab*, AIR 1955 SC 549 at p. 555:

"It may not be possible to frame an exhaustive definition of what executive function means and implies. Ordinarily the executive power connotes the residue of governmental functions that remain after legislative and judicial functions are taken away."

The same matter has been explained in the case of *Samsher Singh v. State of Punjab* (Civil Appeal No. 2289 of 1970) decided by the Supreme Court on 23-8-1974 (reported in AIR 1974 SC 2192), where the learned Chief Justice has observed as follows:—

"The executive power is generally described as the residue which does not fall within the legislative or judicial power. But executive power may also partake of legislative or judicial actions." It has also been explained by the Supreme Court that it includes all acts necessary for carrying on supervision or the general administration of the State including both a decision as to action and carrying out of the decision. [See *Ram Jaway Kapur's case* (AIR 1955 SC 549) and *State of Bihar v. Srimati Sonabati* (AIR 1961 SC 221 at p. 230)]. Article 162 of the Constitution states that subject to the provisions of the Constitution the executive power of the State shall extend to matters with respect to which the legislature of the State has power to make laws. This is subject to the proviso as mentioned therein. Article 163 deals with the manner in which the executive power has to be exercised. It clearly says that there will be a Council of Ministers with the Chief Minister at the head to aid and advice the Governor in the exercise of his functions, except in respect of defined area where the Governor is to act in his discretion. Sub-clause (3) of this Article which will be crucial in this case is as follows:—

"The question whether any, and if so what, advice was tendered by Ministers to the Governor shall not be inquired into in any Court."

Article 166 deals with the conduct of Government business. It states that all executive actions of the Government of State shall be expressed to be taken in the name of the Governor. Clause (2) bars judicial inquiry, in specified circumstances, in respect to the question whether an order was made or executed by the Governor. Sub-clause (3) states that for the more convenient transaction of the business of the Government there may be allocation among the Ministers of the said business. It is to be noticed that Article 166 (3) may dispense with the necessity of tendering a formal advice to the Governor. If the rules do envisage such a situation, the decision of the Council of Ministers or a Minister has finality

about it. Fulfilment of the Rules of Executive Business, in such a situation, would be a deemed advice to the Governor in the eye of law. This position has been explained by the learned Chief Justice in *Samsher Singh's case* (supra) in these words:

"The decision of Minister or Officer under the rules of executive business is the decision of the Governor."

It may, however, be clarified that so far as third persons are concerned, the decision has to be communicated before it can be said to be a decision in the eye of law, (See *Bacchittar Singh v. State of Punjab*, AIR 1963 SC 395).

17. Having briefly dealt with the relevant provisions of the Constitution, it may now be emphasised that our Constitution envisages a parliamentary or cabinet form of Government. This matter has been fully set at rest by various decisions of the Supreme Court including the recent decision in *Samsher Singh's case*. It may here suffice to quote some passages from the decision in *Samsher Singh's case*, (AIR 1974 SC 2192). The learned Chief Justice while dealing with this aspect of the case observed as follows:

"..... we hold that the President or the Governor acts on the aid and advice of the Council of Ministers with the Prime Minister at the head in the case of the Union and the Chief Minister at the head in the case of State in all matters which vests in the executive whether those functions are executive or legislative in character. Neither the President nor the Governor is to exercise the executive functions personally..... Appointment or dismissal or removal of persons belonging to the judicial service of the State is not a personal function but is an executive function of the Governor exercised in accordance with the rules in that behalf under the Constitution."

At page 45 of the judgment, the learned Chief Justice observed as follows:—

"Appointment and removals of persons are made by the President and the Governor as the constitutional head of the executive on the aid and advice of the Council of Ministers."

The learned Chief Justice emphasised (at p. 10) that our Constitution embodies generally the Parliamentary or Cabinet system of Government of the British model both for the Union and the States. These quotations are from the leading judgment of the learned Chief Justice with whom four other Hon'ble Judges of the Supreme Court agreed. The same aspect has been emphasised in the judgment of Krishna Iyer, J. with whom Bhagwati, J. was in agreement. I will extract one or two quotations from the judgment of the Hon'ble Judges. Krishna Iyer, J. observed as follows:—

"Of course, there is some qualitative difference between the position of the President and the Governor. The former, under Article 74 has no discretionary powers, the latter too has none, save in the tiny strips....."

It was further observed with reference to discretionary power of the Governor:

"These discretionary powers exist only where expressly spelt out and even these are not left to the sweet will of the Governor but are remotely controlled by the Union Ministry which is answerable to Parliament for those actions."

In relation to the form of Government envisaged in the Constitution, the learned Judges observed:

"As we have already indicated, the overwhelming catena of authorities of this Court have established over the decades that the Cabinet form of Government and the parliamentary system have been adopted in India and the contrary concept must be rejected as incredibly allergic to our political genius, constitutional creed and culture."

It may also be pointed out that even in relation to the allocation of the business of the Government, the decision of the Governor is to be on the aid and advice of the Council of Ministers, (per Hon'ble C. J. in *Samsher Singh's case* at page 25). It is thus clear that the Parliamentary or Cabinet form of Government is envisaged in the Constitution. The idea of Parliamentary or Cabinet form of Government is basic to our Constitution. I may, however, hasten to add that I am not using the expression 'basic' in the same sense in which it has been used in *Kesavananda Bharati Sripadagalvaru v. State of Kerala* (AIR 1973 SC 1461). It may also be stated that the Supreme Court has clarified that the view that was being taken in *Samsher Singh's case* was in conformity with the earlier decisions of the Supreme Court which have been at length discussed in the judgment aforesaid.

18. Having briefly dealt with the relevant provisions of the Constitution, it would, at this stage, be appropriate, first, to consider the submission of Mr. Basudeva Pd., who has contended that in the instant case it was not necessary for the Governor to act on the aid and advice of the council of ministers. The contention of Mr. Prasad is that Article 162 of the Constitution states that subject to the provisions of the Constitution the executive power of the State shall extend to matters with respect to which the legislature of the State has power to make law. It was contended, therefore, that, however wide executive powers may be they are subject to the provisions of the Constitution. Article 245 is one such provision. If, therefore, a law is made where the power

of appointment is given to the Governor, it will be different and distinguishable from the general executive powers which is exercisable by the Governor on aid and advice of the Council of Ministers by virtue of the various provisions of the Constitution.

19. The learned Solicitor General on the other hand contended that the Constitution does not contemplate the delegation of power *eo nomine* to the Governor, except in areas where he in his discretion may exercise power by virtue of Article 163 (2) of the Constitution. Article 163 (1) is all embracing and whenever executive powers are to be exercised by the Governor they have to be on the aid and advice of the Council of Ministers. It is not for the legislature to undo the constitutional scheme so far as the exercise of executive powers are concerned. In other words, the Governor can either exercise executive powers on the aid and advice of the Council of Ministers, or the only circumstance where he need not take their aid and advice is where, by and under the Constitution, the Governor is required to exercise his functions in his discretion. It was further contended that the power of appointment of Lokayukta under Section 3 of the Ordinance being an executive power, the same will have to be exercised with the aid and advice of the Council of Ministers. Without fully adopting the argument of the Solicitor General, the petitioners also take the stand that so far as the impugned appointment is concerned, the Governor had to act on the aid and advice of the Council of Ministers.

20. Without deciding the extreme contention that has been put forth by the learned Solicitor General, it appears to me that ordinarily when a power is vested, even by a Statute, in the Governor, he is to act on the aid and advice of the Council of Ministers. It does not cease to be an executive power merely because it is conferred by a Statute. It would be defeating the constitutional scheme if it was to be held that the mere use of the word "Governor" in any Statute would be imputing an intention to the legislature of conferring a power *'eo nomine'*. Indeed the presumption should be otherwise. When the Governor is under the constitutional scheme to act on the aid and advice of the Council of Ministers, the use of expression Governor in any Statute would, in any event, and unless a strong contrary intention can be inferred, mean Governor acting on the aid and advice of the Council of Ministers. Any other interpretation would upset the constitutional scheme. Even if it be possible for the legislature to invest the Governor with powers *eo nomine*, in so far as the present Statute is concerned, this, in my

view, has not been done. In order to come to a conclusion that the Governor has been invested with powers by the legislature *eo nomine* very strong indications will have to be there in the relevant Statute; since, as already explained, in one sense it goes against the concept of Parliamentary form of Government, which is one of the basic postulates of the Constitution. In the present Statute I find no such indication. On the other hand, indications are to the contrary. Section 3 of the Ordinance states that the Governor shall by a warrant under his hand and seal appoint the Lokayukta in consultation with the Chief Justice of the High Court and the leader of Opposition. If Governor is to act *eo nomine* it would mean that although leader of Opposition will have an effective role to play, the State Government would have no hand in the appointment. This appears to be inconceivable, unless there was something in the Statute which could irresistibly lead to the conclusion that the legislature had not contemplated aid and advice of Council of Ministers in the making of the appointment. I am further of the opinion that the use of the word Governor in Section 3 of the Ordinance was appropriate for the reason that the section contemplates the issue of warrant under the hand and seal of the Governor. Taking all these into consideration, I am of the view that the appointment of Lokayukta, as envisaged in Section 3, has to be made by the Governor with the aid and advice of the Council of Ministers.

21. Learned counsel for respondent No. 1, Mr. Basudeva Pd. has placed reliance on two cases in support of his contention. They are: *Om Prakash Mehta v. Emperor* (AIR 1948 Nag 199) and *In Re, Venkataraman* (AIR 1949 Mad 578). He relied on the following observation in *Om Prakash's* case:

"Section 59 (1), Constitution Act, deals with the normal executive activities of Government which are not covered by Statute. It does not purport to limit the scope and extent of any special enactment passed by a competent Legislature and within its province."

It is necessary to examine in what context these observations were made. Section 59 (1) of the Government of India Act requires that all orders of the Government of the Provinces have to be expressed in the name of the Governor. In *Om Prakash's* case certain powers had been conferred on the Provincial Government. In those circumstances, it was held that the impugned order not having been expressed in the name of the Governor did not bring infirmity in the order. These observations cannot be read to mean that if the expression Governor has been used in a Statute it means that the

expression is used '*eo nomine*'. In the case of *In Re Venkataraman* (AIR 1949 Mad 578 at p. 579) the observations relied upon are as follows:—

"Secondly Section 59 (1), Constitution Act deals with the normal executive activities of Government which are not covered by Statute. It does not purport to limit the scope and extent of any special enactment passed by a competent legislature and within its province."

Here also the question under consideration in the instant case was not being considered. These two cases are, therefore, in my view, distinguishable.

22. Having dealt with the contention of Mr. Basudeva Pd. I must now deal with the main argument which has to be first considered in this case and that is whether Article 163 (3) is a bar to the consideration of the question whether any advice was given by the Council of Ministers to the Governor in the instant case.

23. Reading Article 163 (3) in its full width, and giving full effect to the language used in the Article, ascribing to the words plain ordinary meaning according to the usage of English language, it would appear that it prohibits inquiry in respect of two matters. They are, (a) Whether any advice was given to the Governor by the Council of Ministers and (b) If an advice was given what was that advice. It was suggested on behalf of the petitioners that it is only when an advice has been given that this clause applies. It does not apply to a situation where no advice has been given. I do not think it is possible to accept this contention. Clause (3) really combines two sentences into one. If the compound sentence could be broken up into two simple sentences they would read: (a) The question whether any advice was tendered to the Governor by the Ministers shall not be inquired into in any court, and (b) The question as to what advice was tendered by the Ministers to the Governor shall not be inquired into in any court. The two ideas as indicated above have been blended together to form this clause. It would be pertinent here to inquire whether there could be any reasonable basis for the Constitution makers to differentiate between the two situations as mentioned above. It would mean that the Constitution makers thought that if an advice was given and ignored, it does not matter; hence no necessity of any inquiry. But if no advice was given and action taken, it does matter. The door of inquiry should not be shut. I can discern no reasonable basis for making the differentiation in the two situations. We should not impute to the constitutional makers an intention—contrary as it is to the language of the

Article 163 (3)—which would result in unreasonable differentiation.

24. It was contended on behalf of the petitioners that the interpretation put on Clause (3) of Article 163 by the Solicitor General and Additional Solicitor General should not be accepted in view of certain decisions of the Supreme Court. They are: *Bachhittar Singh v. State of Punjab* (AIR 1963 SC 395); *M/s. Bijoy Lakshmi Cotton Mills Ltd. v. State of West Bengal* (AIR 1967 SC 1145); *A Sanjeevi Naidu v. State of Madras* (AIR 1970 SC 1102) and *Haridwar Singh v. Begun Sumbui* (AIR 1972 SC 1242). It was pointed out that in those cases infraction of rules of executive business has been looked into. Learned counsel suggested that the effect of these decisions is that there would be no bar to the consideration of the question whether or not any advice was given to the Governor, because the Rules of Executive Business envisage that a decision taken in conformity with the Rules of Executive Business amounts to an advice to the Governor. Learned Solicitor General and Additional Solicitor General pointed out that Article 163 (3) must be confined to the cases of actual advice. I find merit in the contention. Article 163 is attracted when there are factually two parties, one receiving the advice and the other giving it. This clause postulates those class of cases where the Governor is to make an order as distinct from those class of cases where orders have been passed by a Minister or Council of Ministers in accordance with the Rules of Executive Business without any actual reference to the Governor. It has no application, to borrow the expression in *Bachhittar Singh's* case, to a "deemed advice". In such a situation the decision of a Minister is the decision of the Governor. The Rules of Executive Business combine the two roles in one. The requirement of aid and advice as envisaged in Article 163 (1) is satisfied in such cases, because the order actually passed by the Minister, and deemed to be that of the Governor, in itself, necessarily, involves also the advice given by a Minister or Council of Ministers. In the instant case the Governor has to factually receive the advice. It is not one of those cases where an appointment could be made by issue of notification from the Secretariat in the name of Governor without the actual knowledge of the Governor. Here, as we have seen in Section 3 of the Act, the warrant of appointment has to be under the signature of the Governor himself.

25. It may be pointed out that the cases to which reference has already been made are cases of either deemed advice, or cases where the question for consideration was whether an order could be

passed by a Minister incharge of one Department or the other, or the Cabinet. None of those cases are cases where there was, or could be, an occasion of giving actual advice by a Minister or Council of Ministers to the Governor. These cases, in my view, do not stand in the way of the interpretation that I have put on Article 163 (3) of the Constitution.

26. The other objections raised on behalf of the petitioners is that the expression inquiry in Article 163 (3) of the Constitution does not apply to cases where either facts are admitted or where all the relevant and material facts are placed before the Court and they lead to only one conclusion. Where a decision has to be arrived at by looking into materials on the record, it is plain that it is only after an inquiry that any conclusion can be arrived at. The Court does in such a situation, inquire into a matter. Further, in my view, where the foundation of a decision is existence or non-existence of a fact, it cannot be said that the Court does not inquire into it even though it is on the basis of such existence or non-existence that a conclusion is arrived at. It is, therefore, clear that even where facts are admitted, no conclusion is possible without inquiring into a matter or issue which is pre-requisite to the exercise of the jurisdiction or power of the Court in the matter of giving relief to a party in a judicial proceeding. It would thus be not correct to say that if a fact in issue is admitted the court has not to inquire into it. The bar here is on inquiry and not what a party chooses to call as evidence to prove and disprove the facts. The issue is inherent in the controversy itself.

27. Learned counsel for the petitioners further contended that Article 163 (3) creates a privilege in favour of the State and it is capable of being waived. In this case, it is said, it has actually been waived. But as I read the Article, I do not think that any question of privilege is involved. The Article is a bar to the jurisdiction of the Court to inquire into specified matters. There is a clear difference between a privilege and a bar to the jurisdiction of the Court. The Article does not create any privilege but contemplates that certain matters shall not be inquired into by Courts. In this view of the matter the last contention in relation to Article 163 (3) of the Constitution also cannot be accepted.

28. In the view that I have taken of the legal position, so far as the interpretation of Article 163 (3) of the Constitution is concerned, it is not necessary to inquire into, and adjudicate the question whether any advice was, in fact, tendered to the Governor by the Council of Ministers. It is also not necessary to de-

cide whether the materials on the record are sufficient to come to a firm conclusion. It must be re-stated that arguments were advanced by the learned counsel for respondent No. 1 that if the question was justiciable, there was, in fact, and in law no such infirmity as to call for an issue of a writ in the nature of quo warranto.

29. The next branch of contention of the petitioners is that there was no consultation as envisaged in proviso to Section 3 of the Ordinance. It was suggested that in this case the consultation was by the Governor and not by the Council of Ministers. The requirement of proviso to Section 3 is that there should be a consultation by the Council of Ministers with the Chief Justice and the leader of Opposition. It was alternatively contended that the leader of opposition, Sri Sunil Mukherji, had not agreed to the appointment of respondent No. 1. The Governor was under a wrong impression that he had actually concurred in the appointment. The incorrect assumption by the Governor would bring infirmity in the appointment and would not amount to fulfilment of the requirement of proviso to Section 3.

30. That there was a consultation with the Chief Justice of the Patna High Court and the leader of Opposition, Sri Sunil Mukherji, who has been impleaded as respondent No. 2 in this case, is fully borne out by Annexure E to the affidavit filed on behalf of State. This Annexure is a letter of Sri Jiwan Singh, the Secretary to the Governor, along with the minutes of the meeting held at Raj Bhawan on the 24th and 25th May, 1973. There is no reason to doubt the correctness of the minutes. It is clear from a perusal thereof that the views of the Chief Justice and the leader of Opposition were fully ascertained. Shri Mukherji has filed an affidavit in this Court in which he has stated that he was consulted by the Governor of Bihar and in the course of the said consultation several names including that of Sri S. V. Sohni came up for discussion. Taking all these into consideration the conclusion is irresistible that the views of the Chief Justice and Sri Sunil Mukherji, the leader of Opposition, were ascertained. The contention that unless the Council of Ministers itself holds consultation with the Chief Justice and the Leader of Opposition it would not be a consultation as envisaged in Section 3 does not appear to be correct. What is required is consultation. It is not important as to what was the agency through whom the consultation has taken place. It is difficult to conceive that in actual practice there would be a consultation between a body of men like the Council of Ministers, and the Chief Justice and the Leader

of Opposition. It had to be done through some agency. As long as the views of these two dignitaries have been ascertained it would be substantial and sufficient compliance with the requirement of law. It is to be noticed in this connection that consultation does not mean concurrence. This has been so held by the Supreme Court in case of Chandermaulshwar Prasad v. The Patna High Court (AIR 1970 SC 370). Now, dealing with other branch of the contention of the petitioners, it may be stated that so far as effective consultation is concerned, Sri Mukherji himself affirms to it. It appears from Annexure E to the affidavit of the State (page 100 of the brief) that on 25-5-1973 when the Chief Justice specifically agreed to the appointment of respondent No. 1 as Lokayukta, Sri Mukherji remained silent. This was interpreted as acceptance on his part of the suggestion that respondent No. 1 be appointed as Lokayukta. It was only after appointment of respondent No. 1 on 26-5-1973 that Shri Mukherji communicated at 10 P.M. in the night that his silence should not be interpreted as acquiescence in the suggestion of appointment of respondent No. 1. From the materials on the record it is, first, difficult to see as to how the Governor could come to the conclusion that Sri Mukherji was objecting to the appointment of respondent No. 1 when he did not express any opinion to the effect at the meeting held on 25th May, 1973 in express terms. In any event, the fact of effective consultation having been established in this case, even if there was some misconception about the opinion of Sri Mukherji, I do not think it would bring any infirmity in the appointment of respondent No. 1 or would amount to non-compliance with the requirements of proviso to Section 3.

31. It was contended on behalf of petitioners that there was infraction of the Rules of Executive Business. These rules are Rules 8, 12, 13 and 28 (a) (ii) read with 3rd Schedule of Item 27 (b). Rule 8 of the Rules, so far as relevant, is as follows:—

"Subject to the orders of the Chief Minister under Rule 12, all cases referred to in the Third Schedule to these rules shall be brought before the Council in accordance with the provisions of the rules contained in Part II."

Rule 12 deals with the cases referred to in Third Schedule in which after consideration by the Minister-in-charge, the matter can either be circulated or brought up for consideration at the meeting of the Council under the orders of the Chief Minister. Rule 13 envisages that the Chief Minister may direct ascertainment of opinion by circulation in certain cases without the matters being placed before

the Council of Ministers. Rule 28 (a) (ii) may be quoted :

"(a) The following cases shall be submitted to the Chief Minister through the Chief Secretary by the Principal Secretary/Secretary of the department concerned after consideration by the Minister-in-charge but before the issue of orders :

(ii) Cases raising questions of policy and cases of administrative importance not covered by the Third Schedule." Item 27 (b) of the Third Schedule is as follows :

"Proposal for direct appointment to the posts whose maximum pay-scale exceeds Rs. 840."

The effect of this argument is that the Rules of Executive Business require that the appointment of respondent No. 1 had to be brought before the Council of Ministers and it was after the aid and advice of the Council of Ministers that the appointment could be made. This really takes us back to the first question, namely, whether the absence of advice can be inquired into. Even if the interpretation put forth by the petitioners is accepted, it would only mean that no individual Minister could deal with the matter of appointment of Lokayukta. It had to be dealt with by the Council of Ministers. In my view, even if the Rules of Executive Business do not apply the position would have been the same. If the appointment in question is not covered by any specific rule in the Rules of Executive Business still the appointment in question would have to be made by the Governor on the aid and advice of the Council of Ministers. This is not one of the cases where the appointment could be made departmentally without any aid and advice being actually tendered to the Governor. In those circumstances the alleged infraction of Rules of Executive Business really brings us back to the question which has already been considered namely, whether it is open to this Court to inquire whether any aid or advice was given by the Council of Ministers. This, as already held, is barred by Article 163 (3) of the Constitution. Business rules cannot override the bar of the aforesaid article. I may also briefly notice the argument advanced by the learned Additional Solicitor General that Item 27 (b) of the Schedule does not apply to the instant case. Item 27 (b) has already been quoted. It envisages appointment where pay-scale exceeds Rs. 840. A perusal of the Ordinance makes it clear that there is no question of pay-scale so far as the appointment of Lokayukta is concerned. Reference in this connection may be made to Section 5 (4) read with the Second Schedule. Item 27 (b) of the Business Rules, in my view, is not, there-

fore, applicable and the argument of the learned Additional Solicitor General appears to be correct. It was also pointed out that appointment of Advocate General and Members of Public Service Commission have been dealt with in items 1 and 9 of the Third Schedule Business Rules. It was only to be expected that if an appointment of a high dignitary like the Lokayukta was to be covered by any item in the Third Schedule, there would have been a separate and specific provision. This too appears to be correct. In fact, when the Rules of Executive Business were made, the office of Lokayukta was not there at all. We have not been told that there was any amendment in the rules after the Ordinance in question was promulgated. It is, therefore, not surprising that there is no item in the Third Schedule relating to the appointment of Lokayukta. As already indicated, the power of appointment will, therefore, have to be exercised in conformity with the provision of Section 3 by the Governor with the aid and advice of the Council of Ministers, irrespective of any provision in the Rules of Executive Business. It is, therefore, not possible to accept the contention of the learned counsel for the petitioners as noticed above.

32. The contention that the appointment of respondent No. 1 would lapse on the expiry of the Ordinance, being a temporary legislation, was adequately met by demonstrating that there is contrary intention in the Ordinance itself. Section 5 of the Ordinance contemplates appointment for five years, enduring even after the expiry of the Ordinance. The right so created cannot be taken away because the law which created it has expired. (See AIR 1962 SC 945, *State of Orissa v. Bhupendra Kumar*). Moreover, this aspect is not of much importance in view of Section 23 of the Third Ordinance and the Act. No infirmity in the appointment of respondent No. 1 having been established, it is clear that the effect of Section 23 is to antedate the Third Ordinance to the date of appointment of respondent No. 1. It has also the effect of converting appointment made under the Second Ordinance to an appointment under the Third Ordinance. Consequently, when the Act came into force the appointment of respondent No. 1 would be an appointment under the Act, by virtue of the deeming provision in Section 23 of the Act. The Act would also be deemed to be in force on the date of the said appointment. Such is the effect of the deeming provision, which must be given its full effect. (See *State of Bombay v. Pandurang Vinayak*, AIR 1953 SC 244). Reliance, in my view, was also rightly placed on *Abdul Majid v. P. R. Nayak* (AIR 1951 Bom 440 at p. 447). M/s. Guja-

rat Pottery Works Private Ltd. v. E. P. Sood (AIR 1967 SC 964 at p. 968) and S. K. G. Sugar Ltd. v. State of Bihar (AIR 1974 SC 1533). It was observed by Chagla, C. J. in Abdul Majid v. P. R. Nayak (AIR 1951 Bom 440 at p. 447), while considering similar provision in Section 58 of Act 31 of 1950, as follows:—

"..... The language used in Section 58 is both striking and significant. It does not merely provide that the orders passed under the Ordinance shall be deemed to be orders passed under the Act, but it provides that the orders passed under the Ordinance shall be deemed to be orders under this Act as if this Act were in force on the day on which certain things were done or action was taken. Therefore the object of this section is, as it were, to antedate this Act so as to bring it into force on the day on which a particular order was passed which is being challenged. In other words, the validity of an order is to be judged not with reference to the Ordinance under which it was passed, but with reference to the Act subsequently passed by Parliament."

This has been quoted with approval in Gujarat Pottery Work's case (at page 369). The principles aforesaid are fully applicable in the instant case. There can thus be no doubt that the effect of the deeming provisions is (if my earlier conclusions are correct) that respondent No. 1 is validly occupying the office of Lokayukta. It is not necessary to consider the alternative submission of the contesting respondents that even if there was infirmity in the initial appointment it has been validated by Sec. 23 aforesaid, nor is it necessary to consider the contrary submissions made on behalf of the petitioners.

33. Since I have dealt with the various contentions that have been raised in order to challenge the appointment of respondent No. 1 to the office of Lokayukta, and I have found none of them to have been substantiated, it is not necessary to deal with the other contentions raised on behalf of the State and respondent No. 1. It may be stated here that apart from the main contentions which I have formulated in paragraph 11 of this judgment other contentions were also raised on behalf of respondent No. 1. It is not necessary to merely state them or deal with them in this judgment in the view that I have taken.

34. The scope of writ of a quo warranto is well settled. In the case of the University of Mysore v. C. D. Gorinda Rao (AIR 1965 SC 491) Gajendragadkar, J. speaking for the Court observed as follows:—

"As Halsbury has observed:

'An information in the nature of a quo warranto took the place of the abso-

lete writ of quo warranto which lay against a person who claimed or usurped an office, franchise, or liberty, to enquire by what authority he supported his claim, in order that the right to the office or franchise might be determined'. Broadly stated, the quo warranto proceeding affords a judicial enquiry in which any person holding an independent substantive public office, or franchise, or liberty, is called upon to show by what right he holds the said office, franchise or liberty; if the inquiry leads to the finding that the holder of the office has no valid title to it, the issue of the writ of quo warranto ousts him from that office. In other words, the procedure of quo warranto confers jurisdiction and authority on the judiciary to control executive action in the matter of making appointments to public offices against the relevant statutory provisions; it also protects a citizen from being deprived of public office to which he may have a right. It would thus be seen that if these proceedings are adopted subject to the conditions recognised in that behalf they tend to protect the public from usurpers of public office; in some cases, persons not entitled to public office may be allowed to occupy them and to continue to hold them as a result of the connivance of the executive or with its active help, and in such cases, if the jurisdiction of the courts to issue writ of quo warranto is properly invoked, the usurper can be ousted and the person entitled to the post allowed to occupy it. It is thus clear that before a citizen can claim a writ of quo warranto, he must satisfy the court, inter alia, that the office in question is a public office and is held by usurper without legal authority, and that necessarily leads to the enquiry as to whether the appointment of the said alleged usurper has been made in accordance with law or not."

In this case the learned counsel for respondent No. 1, in the course of argument, produced the warrant of appointment under the hand and seal of the Governor. Annexure A is a notification issued by the Secretariat of the Governor stating that respondent No. 1 has been appointed as Lokayukta on 26th May, 1973. Annexure B is the notification of the State Government dated 1st June, 1973 stating that the Governor of Bihar in exercise of powers under Section 3 of the Ordinance 54 of 1973 (Second Ordinance) has appointed respondent No. 1 as Lokayukta. In view of these notifications and the warrant of appointment, and in the absence of any infirmity having been shown in the aforesaid appointment, it must be held that respondent No. 1 is validly claiming to have been appointed Lokayukta of Bihar. His continuance in office is not illegal. The writ of quo warranto, in the circumstances, cannot be issued on the principles

enunciated in the Supreme Court judgment.

35. In the result, these writ applications are dismissed but in the circumstances, there will be no order as to costs.

NAGENDRA PRASAD SINGH, J.:— I agree.

Petitions dismissed.

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S. N. P. SINGH, C. J. AND S. K. JHA, J.

Hari Narain Singh, Petitioner v. Patna Improvement Trust and others, Respondents.

Civil Writ Jur. Case No. 57 of 1973, D/- 16-8-1975.

(A) Patna Improvement Trust (Disposal of Land) Rules (1957), R. 9 (3) (b) — Whether mandatory or directory.

Judging in the light of the cumulative effect of the rules especially Rule 9 (3) read with Rule 16 and Rule 11 it must be held that the provisions of these rules are merely directory laying down certain guidelines to be ordinarily and generally followed either by the Land Disposal Committee or by the Trust itself. There is no scope for judging the provisions of Rules 16 and 9 (3) as mandatory. Rule 11 clearly says in so many words that no applicant merely by making an application shall have a claim or right in having any particular plot of land settled in his favour. It would be doing violence to the language of Rule 11 if it were to be held that provisions of Rules 9 and 16 were mandatory in nature. But although directory in nature, the provision was meant ordinarily and generally to be followed.

(Para 5)

(B) Bihar Town Planning and Improvement Trust Act (35 of 1951), S. 85 (3) — Applicability.

Sub-section (3) of Section 85 is attracted in the case of two or more persons claiming to exercise a right of offer under clause (b) of sub-section (2) to take on lease or purchase any land. Where there has been no competition between applicants claiming to exercise any right offered under sub-section (2) (b) of Section 85, Section 85 (3) is not attracted.

(Para 4)

Prabha Shankar Mishra, S. C. Misra, and Kumar Hari Narain Singh, for Petitioner; Ray Paras Nath, Yadunath Saran Singh, Indu Shekhar Pd. Sinha and Bhupendra Narain Sinha, for Respondents.

S. K. JHA, J.:— In this application under Articles 226 and 227 of the Constitution of India the petitioner prays for a

writ of mandamus to issue against respondent No. 1, the Patna Improvement Trust (hereinafter to be referred to as the Trust) commanding it to consider the petitioner's application for settlement of one of the plots in favour of the petitioner, after quashing the settlement of a plot of land made by respondent No. 1 in favour of Ramesh Prasad, respondent No. 2.

2. When this application was taken up for hearing, learned counsel for the petitioner prayed for an adjournment of the case on the ground that an application for substitution of the Trust, which was originally respondent No. 1 to the writ application, by the Patna Development Authority (hereinafter to be referred to as the Authority), which is its successor-in-interest, would be made. It may be mentioned here that during the pendency of this writ application the Trust was superseded and the said Authority was constituted in its place. Mr. Yadunath Saran Singh, who initially appeared on behalf of the Trust, conveyed to us that he was also representing the Authority and he would be filing appearance on its behalf later—by Tuesday next. In that view of the matter, it was not thought necessary to issue any notice to the Authority for its addition as a party respondent. The Authority being represented before us, we treated it as respondent No. 3 to this writ application and proceeded to hear the arguments on merits.

3. The facts giving rise to this application are short and simple. The petitioner and respondent No. 2 are both members of the legal profession in Patna. None of them has any residential house of his own or any land in Patna. Respondent No. 1 had been constituted as a local authority by the State of Bihar under the Bihar Town Planning and Improvement Trust Act, 1951 (Bihar Act 35 of 1951) — hereinafter to be referred to as the Act — for the improvement and development of, and for providing residential facilities in, Patna for the benefit of residents. The Trust was also responsible for settlement of plots of land and houses for the people of various income groups. One such colony is situate at Shrikrishnapuri where respondent No. 1 developed some plots for settling them to the applicants of lower income group. Applications were invited for settlement of these plots in the month of September, 1971 at the rate of Rs. 3,100 per katha. The petitioner submitted his application for settlement of plot No. 122-E in his favour complying with all the formalities required under the law. Respondent No. 1 received near about 1,000 applications and in respect of plot No. 122-E herein before mentioned there were more than two applications including those of petitioner and respondent No. 2. The aforesaid plot was ultimately

settled by the Trust in favour of respondent No. 2. When the petitioner came to know that that plot had been settled in favour of respondent No. 2 and that no auction had been held between the different competitors for the same plot, this application was filed challenging the settlement made by respondent No. 1 in favour of respondent No. 2. The main ground of attack against the settlement made and the obvious rejection of the petitioner's application for settlement is that no competitive auction was held as is required by law.

4. Mr. Prabha Shankar Mishra, learned counsel for the petitioner, urged that the settlement made in favour of respondent No. 2 should be quashed and a writ of mandamus should issue to respondent No. 1 or its successor-in-interest respondent No. 3, commanding it to consider the application of the petitioner afresh and to conform to the requirement of law regarding auction in respect of the plot amongst the applicants for the settlement of the same plot. It was contended that the impugned settlement was made in utter violation of the provisions of Section 85 (3) of the Act and Rule 9 (3) (b) of the Patna Improvement Trust (Disposal of Land) Rules, 1957 (hereinafter to be referred to as the Rules). It was urged that the provisions aforesaid being mandatory in nature, respondents 1 and 3 are bound to act according to the statutory requirements. For the purpose of appreciating the arguments advanced, it is necessary to refer to the provisions of Sec. 85 (3) of the Act and Rule 9 (3) (b) of the Rules.

Section 85 of the Act reads thus:—

"(1) The Trust may retain, or may lease, sell, exchange, let on hire, or otherwise dispose of, any land vested in or acquired by it under this Act.

(2) Whenever the Trust decides to lease or sell any land acquired by it under this Act from any person, it—

(a) shall give notice by advertisement in the local newspapers, and

(b) shall offer to the said person, or his heirs, executors or administrators, a prior right to take on lease or to purchase such land, at a rate to be fixed by the Trust, if the Trust considers that such an offer can be made without detriment to the carrying out of the purposes of this Act.

(3) If in any case two or more persons claim to exercise a right offered under clause (b) of sub-section (2) to take on lease or to purchase any land the rights shall be exercisable by the person who agrees to pay the highest sum for the land, not being less than the rate fixed by the Trust under that clause to the exclusion of the others."

[It will be seen from the provisions aforesaid that sub-section (3) of Section 85 is

attracted in the case of two or more persons claiming to exercise a right of offer under clause (b) of sub-section (2) to take on lease or purchase any land. In the present case there has been no competition between applicants claiming to exercise any right offered under sub-section (2) (b) of Section 85. Section 85 (3) is, therefore, not attracted at all in the instant case.

Under the rule-making power conferred under Section 134 of the Act, the Trust had framed the Rules aforesaid. It may at once be noticed that Section 85 of the Act does not contemplate the settlement or sale of plots of land by the Trust in any particular manner nor does it envisage the following of any rules by the Trust which may be prescribed for that purpose. It is also pertinent to point out that Section 134, which confers powers on the Trust to make rules, does not confer any specific power of rule-making with regard to disposal of lands by it. Obviously, none of clauses (a) to (g) of Sec. 134 gives any specific power in this regard. It is manifest, therefore, that the rules with which we are concerned in the instant case have been framed under the general provision contained in clause (h) of Section 134, which says that the Trust may make rules consistent with the Act generally for carrying out the purposes of the Act. I have given this background because mandatory or directory character of the rule will have to be judged in the above context.

Turning now to Rule 9 (3), it reads—

"9. Lease or sale of plots to persons of specified income-groups or members of Co-operative Housing Societies.— (1)

(2)

(3) All applications for lease or sale of plots reserved for persons of specified income-groups, shall be submitted by them to the Land Disposal Committee, along with the evidence of their belonging to any of these groups the plots shall be leased or sold to—

(a) the applicant, if there be only one application in respect of that plot, on payment of standard costs;

(b) the highest bidder among the applicants, if there be more than one application in respect of that plot, on payment of costs at the highest rate bid and accepted:

Provided that the rate so bid and accepted shall not be lower than the standard cost:

Provided further that the Chairman shall cause a notice indicating the number of applications received in respect of any plot till the previous day to be hung upon the notice board of his office."

It is actually Rule 9 (3) (b) on which learned counsel for the petitioner ultimately rested his case. For, when it was

pointed out to him that Section 85 (3) is not applicable to the case at hand, he at once appreciated the infirmity of his argument based on Section 85 (3) and finally focussed all his attention to the provisions of Rule 9 (3) (b).

5. Rule 3 of the Rules lays down that when execution of a scheme framed under the Act has so far progressed that vacant lands within the limits of the scheme have been divided into convenient plots and lands for the use of the public, such as roads, parks and playgrounds or lands required by the Trust for its own use or for such other use as the Trust may desire, have been indicated either on the site or a map prepared by the Trust, it has been given the power to decide which plots are to be leased out, sold, exchanged with other lands, let on hire or otherwise disposed of. Under Rule 4 of the Rules the Trust is empowered to appoint a Committee constituting of the Chairman and four other Trustees or associate members under Section 16 of the Act and such a Committee has been termed the Land Disposal Committee which, subject to the decisions of the Trust under Rule 3, is to execute the work of disposal of lands in any scheme. Rule 7 deals with lease or sale of land to the previous owners or their heirs, etc. Rule 8 deals with lease or sale of land to displaced persons. Rule 9 relates to lease or sale of plots of land to persons of specified income group or members of Co-operative Housing Societies. Rule 10 deals with lease or sale of lands not reserved by Trust and Rule 12 with temporary letting or lease of lands by it. Rule 13 enables the Trust to lease out lands for the development of public institutions and community centres, whereas Rule 14, which is in the shape of a non obstante clause, lays down that the Trust may, with the previous sanction of the State Government, provide such facilities as it may consider to be necessary for encouraging the organisation and development of small or medium industries. Rule 16 lays down priorities or preferences to be kept in view while making settlement or sale of residential plots under Rule 10.

It is pertinent to reproduce Rule 16 aforesaid here—

"In case of plots to be sold or leased for residential purposes, except those which are to be sold or leased under Rule 10 or to a Co-operative Housing Society, under Rule 9, preference will be given to one—

(a) who is ordinarily a resident of Patna or is engaged in Patna in some profession, e.g., medical, teaching, journalism, legal, engineering etc., trade, commerce, business or service;

(b) who does not own or have a share in, a residential house of his own at Patna; and

(c) who does not own or have a share in, any land at Patna suitable for construction of a residential house."

This is more or less a complete picture of the rules for disposal of land by the Trust. In order to judge whether the rules are mandatory in character or directory laying down certain guidelines in the matter of disposal of land, one further provision in the Rules deserves special attention and that is Rule 11. Rule 11 (1) lays down that mere issue of notice under Section 7 or 8 or issue of notice or advertisement under Rule 10 or receipt of applications under Rules 9 and 10, shall not by itself create any claim or right in favour of any person for settlement of sale of any land vested in the Trust. Rule 11 (2) lays down that the Land Disposal Committee may reject, without assigning any reason, any application or any bid or any offer for lease or sale of any land vested in the Trust.

Judging in the light of the cumulative effect of the rules aforesaid—especially Rule 9 (3) read with Rule 16 and Rule 11, I am of the view that the provisions of these rules are merely directory laying down certain guidelines to be ordinarily and generally followed either by the Land Disposal Committee or by the Trust itself. There is no scope for judging the provisions of Rules 16 and 9 (3) as mandatory. Mr. Mishra urged that the provision of Rule 16 in the matter of laying down priorities is as mandatory as that of Rule 9 (3). I am not inclined to accept this argument, especially in view of the clear provisions of Rule 11 which say in so many words that no applicant merely by making an application shall have a claim or right in having any particular plot of land settled in his favour. When a person cannot claim as of right settlement of a particular plot in his favour, it would be doing violence to the language of Rule 11 if it were to be held that the provisions of Rules 9 and 16 were mandatory in nature. I must, however, make it clear that, although directory in nature, the provision was meant ordinarily and generally to be followed and it does little credit to the authorities of the Trust to assert that in the matter of allocation of residential plots for settlement ever since 1963 it was not the practice to lease them by auction amongst the competing applicants.

It is a fact, which is borne out by the counter-affidavit of the Trust as well as respondent No. 2, that an Enquiry Commission was constituted, commonly known as the Mahapatra Enquiry Commission, to go into the question of some alleged irre-

gularities committed by the Trust or its authorities in the matter of settlement of plots of land. There also the stand taken by the Trust and its officers was that

"till 1963, residential and commercial plots used to be put in auction when there were more than one applicant insistent upon such plot. When that was found to be only advantageous to comparatively wealthy people and when the Trust became aware of public resentment against such practice, they decided to abandon that as far as possible and make allotments by encouraging adjustment between competing applicants."

And, it was held by the Commission that no legitimate grievance could be made against the said allotments being made. I want to make it perfectly clear that I am in no way being influenced by the report of Enquiry Commission aforesaid but I have made a reference to the averments made in the counter-affidavit in this regard merely for the purpose of showing that the Trust's or its authorities' bona fides may not be challenged in all cases. Be that as it may, once the rules have been framed—albeit merely as guidelines to be followed in the matter of disposal of land either by the Trust or by the Land Disposal Committee, and sufficient representation was made to the intending applicants that the procedure laid down in these rules would, as far as possible be adhered to, the contention of learned counsel for the Trust or the Development Authority, respondent No. 3, that the rules were never followed in the matter of allotment of plots for residential purposes after 1963 cannot give the Trust or its officers immunity to the acts being dubbed by persons aggrieved as arbitrary in nature.

6. Be that as it may, since the petitioner has not been able to make out any legal right in him nor a corresponding statutory obligation on the part of the Trust, a writ of mandamus cannot issue. It is hoped that the Development Authority will consider the case of the petitioner for allotment of any plot in any of its colonies at Patna suitable for being leased out to him. But that again is a different matter. As the position stands, this application has to be dismissed but with the observations above made. There shall be no order as to cost.

S. N. P. SINGH, C. J. :— I agree

Petition dismissed.

AIR 1976 PATNA 53

MADAN MOHAN PRASAD, J.

Mahendra Narain Chaudhary and another, Petitioners v. The Sub-Divisional Education Officer cum Municipal Education Officer, Chakradharpur and another, Respondents.

Civil Writ Jur. Case No. 208 of 1975, D/- 23-7-1975.

(A) Bihar and Orissa Municipal Act (7 of 1922), Ss. 339-Ka, 339-Kha — Powers of Municipal Education Officer.

Section 339-Ka provides that notwithstanding anything contained in Sec. 137, the appointment, posting and the promotion of the teachers and other staff of the establishment of the school shall be made and disciplinary action including removal and dismissal shall be taken against them by the Municipality in consultation with the Municipal Education Officer appointed under Section 339-Kha. Section 339-Kha, however, does not refer to the appointment of Municipal Education Officer. It is obvious that under Section 339-Ka, the power has been given to the Municipality in respect of appointment, posting and promotion of teachers and other staff and Section 339-Kha does not define the powers of the Municipal Education Officer. This provision is intended to meet the case where there is difference between the Municipal Education Officer on the one hand and the Municipal Commissioners on the other. Thus it cannot be said that in the matter of transfer, both the Municipal Education Officer and the Municipal Commissioners have the concurrent powers by virtue of Section 339-Kha. Sections 339-Ka and 339-Kha would be conflicting to each other if it were to be held that the Municipal Education Officer also independently had the power to transfer by virtue of S. 339-Kha.

(Paras 8, 10, 11)

(B) Constitution of India, Art 226 — Principle of natural justice — Violation of — Persons holding posts of Head Masters in Municipal Schools transferred to other schools to posts which had fallen vacant and which were posts of Assistant teachers — Held as they were reduced in rank as a result of the transfer without any notice to place their case the order violated the principle of natural justice.

(Para 13)

Prabha Shankar Mishra, Ganesh Prasad Singh, Rajendra Prasad Singh and Ramesh Chandra, for Petitioners; S. S. Hassan and Fanish Singh, for Respondents.

ORDER :— This is an application under Articles 226 and 227 of the Constitution of India for issuance of writs in

LS/LS/E385/75/DHZ

the nature of certiorari and mandamus quashing the orders contained in Annexures 1 and 6 passed by the Municipal Education Officer of Chakradharpur transferring the petitioners from one school to the other on posts alleged to be inferior to those held by them.

2. The first petitioner was, on the date of the order aforesaid, Head Master in Shoundik Dharamsala Middle School at Chakradharpur, and the second, the Head Master in Dandasai Urdu Middle School, Chakradharpur. Both these Schools are said to be under the management and control of Chakradharpur Municipality. The first petitioner says that he passed the Matriculation examination in the year 1953, Madhyama examination of Hindi Vishwa Vidyalaya, Prayag, in the year 1954, and the Teachers' Training Examination in the year 1968. He also underwent training in the Teachers' Training School at Chiri in the District of Ranchi. The second petitioner claims to have passed the Final School Examination (equivalent to Matriculation) from the Board of Secondary Education, West Bengal, in the year 1952. He also attended the Teachers' training course for six months in the year 1968 and claims to have passed the I. A. examination in the year 1973 from the Ranchi University. The first petitioner was appointed an Assistant Teacher in the Town Middle School, Chakradharpur, which was taken over by the Municipality in 1962 and renamed as Adarsh Madhyamik Vidyalaya. He was subsequently promoted to the post of Head Master of that school with effect from the 1st August, 1959. Thereafter, he joined the present school as the Head Master on his being transferred thereto by the Municipality. The second petitioner was appointed an Assistant Teacher in a Maktab at Potka within Chakradharpur Block. Later, he was appointed by the Municipality of Chakradharpur as an Assistant Teacher in the Urdu Town L. P. School. Thereafter, he was transferred as Head Master to the present school. This school was upgraded as Upper Primary School and thereafter as a Middle School with effect from the 24th February, 1972 provisionally and then permanently since the 2nd November, 1973. While these two petitioners were working in the two schools aforesaid and occupied the posts of Head Master, they received an order (Annexure 1) by which they were transferred to other schools mentioned against their names. It appears that petitioner No. 1 was transferred from Shoundik to Adarsha Madhyamik Vidyalaya, Chakradharpur, where he had once before worked, to the post which had fallen vacant on account of the promotion of one Chintamani Mahto. The second petitioner was transferred from

Dandasai Urdu Middle School to Urdu Town School at Chakradharpur to the post which had fallen vacant on account of the promotion of one Maulvi Rashid.

3. The petitioners are aggrieved by this order because they were holding the post of Head Master in the two schools and they have been transferred to other schools to posts which had fallen vacant which, it is said, are posts of assistant teachers. Their grievance, thus, is that they have been reduced in rank as a result of this transfer. Their further case is that no notice was given to them in respect of this order of reduction in rank.

4. A counter-affidavit has been filed on behalf of respondent No. 1 in which it has been stated that the two petitioners were teachers appointed under Extension Improvement Programme of the Education Department and as a result of take over, by Government of the Primary Education since the 1st January, 1971, they became Government servants. It is denied that the schools are under the management of the Chakradharpur Municipality. It is, however, stated that the Municipality had appointed the petitioners in an irresponsible manner to the posts of Head Masters in the Middle Schools and, hence, the Sub-Divisional Education Officer cum Municipal Education Officer, has reverted them to the posts of assistant teachers. It is also said that as they did not hold the requisite qualifications for holding the posts of Head Masters, the transfer order in that view of the matter is just and proper.

5. A reply to this counter-affidavit was filed by the petitioners alleging that the inclusion of the name of any teacher in the List under the Extension Improvement Programme of the Education Department does not effect any change in the employment condition of such teachers. It is said that in spite of the fact that the Government met the entire budget of the Middle Schools, the teachers working in the Municipal schools are in direct control of the Municipality and the statements contrary to it are incorrect. No further counter-affidavit in respect of this petition was filed by the aforesaid respondent.

6. Learned counsel for the petitioners has raised two points before me; firstly, that the order passed by the Municipal Education Officer is without jurisdiction inasmuch as he had no authority to transfer or revert the petitioners to the posts of assistant teachers; and, secondly, that admittedly it is a case of reduction in rank without notice and, therefore, bad in law.

7. It is undisputed that in the present case the petitioners have been reduced in rank and reverted to a post they

occupied before becoming Head Master, namely, the post of assistant teacher. It is undisputed that they have not been given any notice thereof. The reason which has been given is that they are not qualified to hold the post of Head Master of a Middle School. In this connection, it is stated that the minimum qualification for a person to be appointed a Head Master of a Middle School is I. A. trained. Petitioner No. 1 has passed 'Madhyama' examination without English which is said to be equivalent to I. A. The other petitioner also claims to have passed I. A. and to have received six months' teachers training course. It is thus obvious that they should have been given an opportunity to show to the satisfaction of the authorities concerned that they were qualified enough to continue to be the Head Masters of the schools. Actually, the question does not appear to have been agitated at all before the order by which it is admitted they have been reverted was passed. This is, therefore, in violation of the principles of natural justice. Again if at all, they were Government servants as alleged by the first respondent, they would be entitled to notice under Article 311 (2) of the Constitution. The order must, therefore, in any view of the matter be struck down on this ground alone.

8. On the second point, a dispute has been raised whether the petitioners are Government servants or Municipal servants. It is admitted by the respondent that the appointing authority was the Municipality. Nothing has been produced to show that the State has taken over the administration and control of the school with regard to the appointment, dismissal, etc. of the teachers. If they were the servants of the Municipality, there is no provision of law pointed out to me which would entitle the Municipal Education Officer to pass the order reverting the petitioners to an inferior post and to transfer them from one place to another. Learned counsel for the petitioners has drawn my attention to the Bihar Municipal (Third Amendment) Ordinance, 1974. It has been pointed out on behalf of the petitioner that this Ordinance amends Section 3 of the Bihar and Orissa Municipal Act (hereinafter referred to as 'the Act') and adds to it the definition of Municipal Education Officer which means 'the Sub-Divisional Education Officer of the Sub-Division within the jurisdiction of which the school is situated'. Turning next to the amendment of Section 339 of the Act aforesaid, it appears that the old section has been substituted by a new one which provides for the establishment of a planning committee for education and its powers. Sub-section (3) of the new Section 339 provides that the Education Planning Committee shall discharge its

duties and functions in accordance with the rules framed by the State Government. Sub-section (5) provides that the duty of the Committee shall be to prepare a plan for the development of education at primary and middle stages and prepare a list of candidates suitable for appointment to the post of teachers and other servants in the schools mentioned in Section 339-Ka. Section 339-Ka however, provides that notwithstanding anything contained in Section 37, the appointment, posting and the promotion of the teachers and other staff of the establishment of the school shall be made and disciplinary action including removal and dismissal shall be taken against them by the Municipality in consultation with the Municipal Education Officer appointed under Section 339-Kha. The latter section, however, does not refer to the appointment of Municipal Education Officer. I have already referred to the definition of 'Municipal Education Officer' in Section 3 of the Act in this respect. Section 339-Kha aforesaid provides that if there is any difference of opinion between the Commissioners of the Municipality and the Municipal Education Officer on the question of appointment, posting, transfer, removal or dismissal of any member of the establishment including teachers of any school, the matter shall be referred to such authority as may be prescribed in this behalf by a general or special order by the State Government and the decision of such authority shall be final.

9. On the basis of the aforesaid provision of law, it has been urged on behalf of the petitioner that the Municipality, in other words, the Municipal Commissioners, alone had the jurisdiction to appoint, post or promote teachers of schools under their jurisdiction in consultation with the Municipal Education Officer; but the Municipal Education Officer as such had no jurisdiction to pass the order. In the present case, it is said that there was not even a consultation with the Municipality or Municipal Commissioners made by the Municipal Education Officer before passing the order.

10. On the other hand, Mr. Shamsul Hassan, appearing for the State, has placed reliance on Section 339-Kha. He contends that because the word 'transfer' is to be found in Section 339-Kha and is not to be found in Section 339-Ka, by implication it would mean that the order of transfer could be passed both by the Municipality and the Municipal Education Officer; in other words, that they had concurrent powers in this respect. The reasoning given by him is that there would not be a difference of language between the two sections, if the two authorities had not concurrent power to do

the act, namely, transfer; and, it is urged that 'transfer' not having been included in Section 339-Ka under which the Municipal Commissioners alone could appoint, post or promote, it means that this power of transfer is not to be exercised by Municipality alone but also by the Municipal Education Officer. I am unable to accept the interpretation sought to be put upon the provision by Mr. Shamsul Hassan. It is obvious that under Section 339-Ka, the power has been given to the Municipality in respect of appointment, posting and promotion of teachers and other staff. Section 339-Kha is not the provision which defines the powers of the Municipal Education Officer. This provision is intended to meet the case where there is a difference between the Municipal Education Officer on the one hand and the Municipal Commissioners on the other. It is thus difficult to come to the conclusion that in the matter of transfer both the Municipal Education Officer and the Municipal Commissioners have the concurrent powers by virtue of Section 339-Kha.

11. I may point out that the Ordinance does not appear to have been carefully or well drafted. I have mentioned earlier that the Municipal Education Officer is described as a person appointed under Section 339-Kha, but the latter section does not deal with this appointment at all. There were earlier Ordinances amending the Bihar and Orissa Municipal Act in 1967 and 1968. For the first time, in the year 1967, Section 339 was amended and a new Section 339 was substituted therefor. It was in that amendment that there was Section 339-B which gave the State Government power to appoint Municipal or Notified Area Education Officer. Section 339-A, amended by that Ordinance, therefore, contained the words "the Municipal Education Officer appointed under Section 339-B". In spite of the amendment of the definition, referred to earlier, in the present Ordinance also, the words similar to what obtained in Section 339-A have been retained in Section 339-Ka. Obviously, this is a mistake. Section 339-D, as amended by the Ordinance of 1967, contained the provisions similar to what is to be found in Section 339-Kha as amended by the present Ordinance of 1974. It appears that the word 'transfer' was there in that section and, so, that word has been retained even in present Section 339-Kha. Curiously enough, the word 'transfer' is not to be found, as stated earlier, in Section 339-Ka as amended by the present Ordinance or in Section 339-A as amended by the Ordinance of 1967. If a harmonious interpretation is to be given, it is obvious that Sections 339-Ka and 339-Kha would be conflicting to each other if it were to be held that the Municipal Edu-

cation Officer also independently had the power to transfer by virtue of Section 339-Kha. If all the powers for appointment, posting, promotion, taking disciplinary action, etc., have been given to the Municipal Commissioners under Section 339-Ka, the power of transferring teachers or other member of other staff of the school from one place to another must be deemed to have been vested in the Municipality itself by virtue of S. 339-Ka.

12. In the circumstances, if it be taken that the school was managed and was under the control of the Municipality, the Municipal Education Officer had no jurisdiction to pass the order of transfer independently. No provision of law other than Section 339-Kha has been pointed out to me to show that the Municipal Education Officer had any such jurisdiction.

13. In any view of the matter, therefore, the impugned order has to be struck down. The order is bad as it violates the principle of natural justice and is admittedly an order reducing the petitioners in rank without giving them any notice to place their case; and, secondly, the order is bad even if it be taken that the Municipality had alone the right to pass the order in consultation with the Municipal Education Officer. I would, accordingly, quash the order contained in Annexures 1 and 6 passed by the Municipal Education Officer. This will not, however, affect the right of the appropriate authority to consider the question as to whether the petitioners are qualified to retain the post of Head Masters.

14. In the result, the application is allowed. In the circumstances of this case, there will be no order for costs.

Petition allowed.

AIR 1976 PATNA 56

H. L. AGARWAL, J.

Nawal Kishore Singh and others, Petitioners v. Rajendra Prasad Singh and others, Opposite Party.

Civil Revn. No. 1312 of 1972. D/- 9-5-1975.*

(A) Civil P. C. (1908), O. 39, R. 2 (3) — Disobedience of order of injunction — Detention in Civil prison or attachment of property, when to be resorted.

In cases of disobedience of an order of injunction it is not always mandatory for the Court to make an order for the detention of the guilty person, in civil prison.

*(Against order of Rup Kishore Prasad, 2nd Addl. Dist. J. Patna, D/- 30-8-1972.)

HS/IS/C982/75/KNA

The two modes of disciplinary actions provided in the Code, namely, the attachment of property or detention, are only alternatives which can be awarded to the contemner according to the discretion of the Court. AIR 1954 Pat 513, Rel. on; AIR 1972 All 556, Dist. (Paras 3 & 4)

The property that may be ordered to be attached for disobedience of injunction must be the property of the defencant and not the suit property. (Para 3)

Cases Referred: Chronological Paras
 AIR 1972 All 556 = 1972 All LJ 692 3
 AIR 1954 Pat 513 = 1954 Cri LJ 1593 4
 AIR 1917 Mad 448 = 30 Mad LJ 523 3

Bindeshwari Pd. Sinha, for Petitioners; Rama Kant Varma, Ambika Eant Sinha and Krishna Kumar Sinha, for Opposite Party.

ORDER:— This application in revision by the plaintiffs arises out of a proceeding under Order 39, Rule 2 (3) of the Code of Civil Procedure (hereinafter referred to as the Code) which was taken against the defendants opposite party in the following circumstances:—

The plaintiffs instituted a title suit in the court of the Subordinate Judge, Biharsarif, for declaration of title and possession with respect to certain properties described in the plaint. On the 6th February, 1968, they filed a petition for issue of a temporary injunction restraining the defendants from changing the status quo with respect to Schedule II properties in any way and simultaneously applied for appointment of a pleader commissioner for local inspection of the physical features of the properties in question as they then existed. The learned Subordinate Judge granted both the prayers of the plaintiffs. An order of ad interim injunction was granted against the defendants restraining them from making any change in the existing condition of the disputed properties. The pleader commissioner made local inspection and submitted his report regarding the existing conditions of Schedule II properties. On 19-12-1968, the plaintiffs filed a petition in the trial court alleging that the defendants first party had deliberately disobeyed the order of ad interim injunction and were making a new construction on the land in question. Another pleader commissioner was appointed to find out the correctness of the allegations and the pleader commissioner who was appointed, confirmed the allegations of the plaintiffs. It is not necessary to state all the other questions which were raised in the court below for answering the main question that has been raised before me for my decision. The trial court found on the materials in the inquiry that he held in the matter, that the defendants first party, five in number, had violated the order of ad

interim injunction and were guilty of disobedience of the said order. It accordingly ordered them to be detained in civil prison for 15 days. The said defendants filed an appeal against the order of the trial court challenging the order on merits. Their plea was that the order of ad interim injunction was not served upon them. The learned Additional District Judge, however, confirmed the finding of the trial court against the defendants on merits and also came to the conclusion that some new constructions were made by these defendants first party on plot No. 719 after the order of ad interim injunction was served on them on 11-2-1968, and thereby, they disobeyed the court's order. He, however, set aside the order of the trial court in regard to the civil detention of the defendants concerned and instead, passed an order of attachment of the property in question, which, according to him, was sufficient to meet the ends of justice in the circumstances of the case. Simultaneously, he also directed the defendants to remove the new constructions within two months of the order failing which steps under Order 39, Rule 2 (4) of the Code was to be taken. It is against this part of the judgment of the learned Additional District Judge that the plaintiffs have moved this court in revision.

2. Learned counsel appearing on behalf of the petitioners raised two questions (i) that it was mandatory for the court to punish the defendants by detention in civil prison in view of the finding of disobedience of the order of ad interim injunction and (ii) that the attachment of the property could not be of the property in the suit itself.

3. I shall take up first the contention raised first. Sub-rule (3) of Rule 2 of Order 39 of the Code which provides for taking of action against the person disobeying the order of injunction provides that "the court granting injunction may order the property of the person guilty of such disobedience or breach to be attached, and may also order such person to be detained in the civil prison....." Reading the relevant provision of sub-rule (3), in my opinion, it is difficult to accept this contention raised on behalf of the petitioners that in case of a disobedience, it is always mandatory for the court to order for detention of the guilty person in civil prison. As a matter of course, the first punishment or the direction that has been indicated in sub-rule (3) for the disobedience in question is the attachment of the property of the guilty person. The order of detention in the civil prison is intended to be passed in addition to the attachment of the property of the guilty person. Learned counsel, however, placed

reliance on a decision of a learned Single Judge of the Allahabad High Court in *Niranjan Shukla v. Shanker Shukla* (AIR 1972 All 556). This decision is not an authority for the proposition that has been raised. It has been held that the nature of punishment will depend upon the nature of the breach. The violation of an order of injunction is a civil wrong and it is discretionary with the court not to award any punishment when the breach is of a minor nature. Reading the scheme of sub-rules (3) and (4) of Order 39, Rule 2 of the Code, it appears to me that the emphasis is on getting the order of injunction acted upon and if there has been a contravention of the same by any person, any advantage derived by him on breach of the order of injunction to the prejudice of the other party has got to be brought back to a position where it originally stood, directing him to desist from continuing the breach or restore the status quo ante. The punishment for disobedience to be imposed upon the guilty person by an attachment of his property is to remain in force for a period not more than one year at the end of which time, the property may be sold only in the case if the disobedience and breach continues. In that event, the aggrieved party may be awarded appropriate compensation out of the sale proceeds of the properties which may be sold in case the disobedience or the breach continues. It is true that attachment of property of the guilty person is effected to ensure award of compensation whereas detention in civil prison intends to check the infringement and disobedience as such and punishes the person committing the disobedience or breach of the order of injunction. The court is, however, left with the discretion in this regard. In *Thazath Suppi v. Alabi Kunhi Koya* (AIR 1917 Mad 448), it has been very clearly observed that a court can, in its discretion, order either arrest or attachment of property and is not bound, in the first instance, to attach the property and then only order imprisonment. There is, however, sufficient judicial authority in support of this proposition that while ordering punishment for disobedience or breach, the punishment of attachment of the property need not precede the other punishment, namely, detention in civil prison. The court is not obliged to order an attachment of the property in the first instance before passing the order of detention.

4. The disciplinary actions provided in Order 39, Rule 2 (3) of the Code, namely, the attachment of property or detention, the two modes of punishments are only alternative which can be awarded to the contemner according to the discretion of the court. This view is fully supported by a Bench decision of this

Court in *State of Bihar v. Sonabati Kumari* (AIR 1954 Pat 513).

5. In this case, the court of appeal below has not thought it proper in its discretion to punish the defendants by detaining them in civil prison. Sitting in revision, I do not think it desirable to interfere with the discretion of the learned Additional District Judge on this account and examine the propriety of the exercise of that discretion by him. He has, however, directed the defendants concerned to remove the new constructions within two months of his order. In the event of the failure of the defendants to have removed the offending construction, it would be open to the court below to exercise the powers conferred upon it under sub-rule (4) of Order 39, Rule 2 of the Code i.e. selling the property and awarding appropriate compensation to the plaintiffs therefrom.

6. Mr. Bindeshwari Prasad Sinha, learned counsel, has further raised a contention and that seems to me to have some force is that the property that should be attached must be of the person guilty of disobeying the order of injunction. The property, therefore, should have been of the defendants first party. The learned Additional District Judge has, however, ordered the attachment of 'the property in question', perhaps, thereby meaning the suit property. It is not clear to me from the facts stated in the judgment as to whether 'the property in question' can be sold in case the contingency contemplated in sub-rule (4) of Order 39, Rule 2 arises as the property of the defendants concerned and out of the sale proceed any compensation could be given to the plaintiffs. The trial court will examine this aspect of the matter and if the property in question cannot answer the properties as belonging to defendants 1 to 5, it will take steps for attachment of such property.

7. Save and except this modification in the order of the court of appeal below, I do not find any merit in this application and would accordingly dismiss the same, but without costs.

Application dismissed.

AIR 1976 PATNA 58

B. D. SINGH AND B. P. SINHA, JJ.

Jadunandan Puri, Petitioner v. The President, Board of Secondary Education, Bihar, Patna and others, Respondents.

C. W. J. C. No. 360 of 1974. D/- 25-4-1975.

(A) Constitution of India, Arts. 226, 227 — Estoppel — Petitioner participating

HS/KS/C973/75/RSK

in election of managing committee of the school — Managing Committee after its constitution selecting non-petitioner as Head Master of the school — Petitioner is estopped from challenging appointment on ground that the committee was not properly constituted — (Evidence Act (1872), S. 115). Misc. Judl. Case No. 404 of 1961. D/- 19-7-1961 (Pat.), Followed.

(Para 6)

Cases Referred: Chronological Paras

1974 BBCJ 1001 7

AIR 1963 Pat 118 = 1962 BLJR 681 6

AIR 1962 SC 1210 = 1962 Supp (2) SCR 144 6

(1961) Misc. Judl. Case No. 404 of 1961, D/- 19-7-1961 (Pat.) 6

Radha Raman, Dinesh Chandra Sinha, for Petitioner; T. K. Jha, Standing Counsel No. 1 and Sachchidanand Jha, Jr. Counsel to Standing Counsel No. 1 and Prabha Shankar Mishra and I. T. Gou for Nos. 4 to 7, for Respondents.

ORDER:— This application by Jadunandan Puri under Articles 226 and 227 of the Constitution of India is directed against the order dated the 23rd February, 1974, as contained in Annexure 5, passed by the District Education Officer (respondent No. 2) approving the appointment of Surendra Deo Singh (respondent No. 7) as the Head Master of Ashok Ucha Vidyalaya at Daudnagar in the district of Aurangabad, as recommended by the ad hoc managing committee of the said school (respondents Nos. 4 to 6) by its resolution dated the 29th January, 1974 as contained in Annexure F to the counter-affidavit filed by respondents Nos. 4 to 7. In the application the petitioner has prayed for quashing of the appointment of respondent No. 7, for direction to the authorities to take steps for appointment of a permanent Head Master afresh, in accordance with law, and for a further direction to respondent No. 3 (the Sub-divisional Education Officer) to take steps for expeditious reconstitution of the Managing Committee of the said school.

2. In order to appreciate the point involved in this application, it will be necessary to state briefly the facts, as stated by the petitioner in his writ application:—

His application relates to a non-Government recognised High School known as "Ashok Ucha Vidyalaya" at Daudnagar in the district of Aurangabad. The managing committee of the aforesaid school was constituted on the 11th of May, 1973. An appeal was filed against the constitution of the above committee under Rule 40 of the Bihar High Schools (Constitution, Powers and Functions of Managing Committee) Rules 1964 (hereinafter referred to as the Rules), before the President of the Board of Secondary Education (respondent No. 1) who set aside the constitution

of the above managing committee, and directed reconstitution thereof within the maximum period of two months by his order dated the 7th November, 1973, as contained in Annexure 1 to the writ petition. By the said order the President of the Board had also directed that during the above period the Head Master of the School, the departmental representative as well as life members would continue to function as members of the Managing Committee. The petitioner further stated in his application that there was no life member in the said school. Respondent No. 3 unauthorisedly nominated respondents Nos. 5 and 6, in place of life members, who were merely donor members. Although, the President had directed the election of the new Managing Committee to be completed within two months, no election was held till the filing of the writ application by the petitioner in this Court. The ad hoc managing committee took steps for appointment of a permanent Head Master for the said school by issuing advertisement for the same, which was published in the Searchlight dated the 15th January, 1974. A copy of the said publication is Annexure 2. According to the petitioner, the advertisement ought to have been published at least in two daily newspapers of Bihar, as per regulations and the rules framed under Sec. 8 (1) of the Bihar High Schools (Control and Regulation of Administration) Act, 1960. The petitioner has further stated in his application that he along with others made applications for appointment to the post of the Head Master. He also stated that he had been officiating as Head Master of the School continuously from the year 1971. He had also functioned in the said capacity in the year 1968 till October, 1969. He was in service in the said school from 1945 and had been Assistant Head Master since 1955. The petitioner is an M.A. trained and he has till now put in over 28 years of service as teacher in various capacities in the said school. He has further asserted in paragraph 9 of the application that respondents Nos. 5 and 6 held a farcical interview on the 29th January, 1974 and recommended the names of the following three persons in order of preference for appointment to the post of the Head Master of the said school to respondent No. 2 the District Education Officer:—

(i) Sri Sunder Deo Singh (respondent No. 7),

(ii) Sri Rakiv Saheb and

(iii) Sri Agam Prakash Verma.

In other part of his application the petitioner stated that respondent No. 7 had been in service of the said school from the year 1958 and he was censured by the Managing Committee under resolution

No. 4 dated the 29th April, 1973, for his lapses in evaluation of school examination answer books. His conduct in accounts matter was also under examination by the Managing Committee in 1973. He was also debarred from examinationship of the Board for five years from the year 1973. Respondent No. 7, he stated, is the father-in-law of the younger brother of respondent No. 5 and happened to be the Samdi of respondent No. 6. Respondent No. 5 is the Secretary of the said school whereas respondent No. 6 is the President of the ad hoc managing committee. Respondent No. 5 is nephew of respondent No. 6. When the petitioner learnt about the fact of the recommendation of respondent No. 7 to the post of the Head Master of the said school, he sent a written protest to respondent No. 2, as disclosed in Annexure 3. He further stated in paragraph 14 of the petition that respondent No. 2 assured the petitioner that justice would be done in the matter and in his letter dated the 21st February, 1974 (Annexure 4) he directed respondent No. 4 to hold an interview afresh for which an expert was to be deputed to help the selection. However, respondent No. 2 only after two days passed the impugned order approving the appointment of respondent No. 7.

3. No counter-affidavit has been filed on behalf of respondents Nos. 1 to 3. However, a counter-affidavit has been filed on behalf of respondents Nos. 4 to 7 on the 26th November, 1974, inter alia, submitting therein that the petitioner had no locus standi to challenge the order as contained in Annexure 5; the petitioner having acquiesced and participated in the interview, was estopped from challenging the same. On the point of estoppel in paragraph 8 it was further mentioned that in pursuance of the direction of the President (respondent No. 1) a meeting was held in the school on the 9th December, 1973, by respondent No. 3 for the purpose of electing the President and the Secretary of the School. It was attended by the petitioner in the capacity of the Head Master in charge along with respondents 5 and 6. Respondent No. 5 proposed the name of respondent No. 6 for the post of the President, which was seconded by the petitioner and accordingly, respondent No. 6 was unanimously declared elected as the President of the School. Respondent No. 6 proposed the name of respondent No. 5 for the post of the Secretary which was seconded by the petitioner and, accordingly, respondent No. 5 was elected as the Secretary of the School.

4. A reply to the counter-affidavit was filed by the petitioner on the 1st of April, 1975, controverting certain facts alleged in the counter-affidavit by the petitioner. Thereafter a supplementary counter-affidavit was filed on behalf of

respondents Nos. 4 to 7 as a rejoinder to the reply to their counter-affidavit, on the 10th of April, 1975.

5. By order dated the 9th March, 1974, Anwar Ahmad J. had referred this case to a Division Bench. This is how it has come before us.

6. Mr. Radha Raman learned counsel appearing on behalf of the petitioner has placed before us the relevant facts as well as other materials on the record. In our opinion, the foremost point to be decided in this application is as to whether, in the circumstances mentioned in the application as well as in the counter-affidavit filed on behalf of respondents Nos. 4 to 7, the petitioner had a locus standi to file an application under Articles 226 and 227 of the Constitution, particularly when he along with others had appeared before the ad hoc managing committee as a candidate for the post of the Head Master of the said School and when he had seconded the election of respondents Nos. 5 and 6 as Secretary and President respectively. Now according to us, it is not open to him to say that the said managing committee was not duly constituted. It is clear that he is estopped from making such assertion. It will be relevant to reproduce the provisions contained under Section 115 of the Evidence Act:

"When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing."

The principle of estoppel follows from the said provision. Reference may be made to Halsbury's Laws of England, Third Edition, (Volume 15) at pages 235-236 which deal with the Law regarding Estoppel by conduct, wherein the relevant passage reads:—

"..... Thus a man who, acting as director of a company takes part in confirming the allotment of shares to himself, cannot, in an action for calls, be heard to say that his appointment as director, or the allotment of shares, was irregular and ultra vires."

An appropriate case is to be found in an unreported judgment dated 19-7-1961, in Dr. Rai Shivendra Bahadur v. The Governing Body of Nalanda College (Misc. Judicial Case No. 404 of 1961 (Pat.)). Untawalia, J., (now the Judge of the Supreme Court) while delivering the judgment for the Court, has mentioned at page 11 of the judgment that the points which were raised on behalf of the petitioner were combated by learned counsel for the res-

pondents (of the case). On behalf of the respondents it was strenuously argued there that the appointment of the petitioner was not valid in law because (i) the previous governing body at its meeting held on the 23rd February, 1958 hurriedly passed the resolution appointing the petitioner as Principal without considering the cases of other teachers, specially of Mr. A. Hasan of the college for promotion and (ii) the appointment of the petitioner was never approved by the Syndicate of the University as required by Article 5 of Statute XVI. According to the respondents, the petitioner was not only a party to the various resolutions of the new governing body, but also acted upon them having applied for the post of the Principal and having also appeared at the interview before the Governing Body on the 18th December, 1960. The petitioner was, therefore, not entitled to any writ or order in his favour in that case. Untwallia, J. at page 18 of the judgment observed:—

"He having acquiesced in that and having applied and taken his chance for being appointed as Principal of the College must be deemed to have accepted the action of the Governing Body as valid and legal. It is not open to him now after having failed to secure the appointment by the new Governing Body to come to this Court for a writ in the nature of mandamus or any order or direction of the like nature."

Therefore, in our opinion, the petitioner's application is not maintainable mainly on the ground that the petitioner is estopped from challenging the validity of the Constitution of the ad hoc committee. Mr. Radha Raman, however, urged that the petitioner is not estopped from challenging its constitutionality. He has relied on a decision of this Court in the case of *Bengal Coal Co. Ltd. v. Chairman, Central Govt. Industrial Tribunal* (AIR 1963 Pat 118). He drew our attention to paragraph 8 of the judgment at pages 120-21. In our opinion, the observations made by their Lordships in that case are not applicable to the facts of the instant case. It is true that in that case their Lordships have observed that the petitioner was not estopped from raising objection in writ petition. It may be noticed that in that case the question was regarding the constitutionality of the Central Government Industrial Tribunal. The petitioner in that case had submitted to its jurisdiction and had not challenged its constitutionality at all in his writ application. Therefore, their Lordships have held in that case that mere acquiescence of the petitioner would not confer jurisdiction on the Tribunal, if it was not validly constituted. In the instant case, as mentioned earlier;

the petitioner himself had seconded the election of respondents Nos. 5 and 6, and thereafter when it was so constituted, he himself appeared for interview along with others. Therefore, according to us, the present case is governed by the observation made by Untwallia, J. in the unreported decision referred to above which was affirmed by the Supreme Court (vide AIR 1962 SC 1210).

7. Mr. Radha Raman, then contended that in the instant case, the counter-affidavit which has been filed on behalf of respondents Nos. 4 to 7 has been sworn by respondent No. 7 himself who was appointed by the said members of the ad hoc managing committee. Besides, according to him, respondent No. 7 had no authority to swear affidavit on behalf of the ad hoc managing committee. In order to find support to his contention, he relied upon a decision of this Court in the case of *Nirmalendu Bhattacharya v. President Board of Secondary Education* (1974 BCC 1001), where Anwar Ahmad, J., observed that the right to sue or defend a legal proceeding vested in the Managing Committee. In fact, Rule 31, sub-rules (1) and (2) of the Bihar High Schools Rules deal with all the powers the managing committee was made to possess. There was no mention anywhere that any right of the managing committee would vest in the President. Clause (2) of Rule 33 provided for delegation of powers of the managing committee to the President with regard to the conduct of business alone. His Lordship further observed that in the application it was not mentioned anywhere that the managing committee by its resolution had delegated its powers to the President as contemplated in the aforesaid Clause (2) of Rule 33. The President, therefore, had no locus standi to file an application under Articles 226 and 227 of the Constitution for enforcement of any right whatsoever. The right if any, rested in the Managing Committee and not in the President. In our opinion, the above observation of his Lordship is also not applicable to the facts of the instant case; nor does it support the contention of Mr. Radha Raman. It may be seen that in that case the President alone was the petitioner. Therefore, whether he had any locus standi or not, his Lordship was considering, but in the instant case the counter-affidavit has not been filed solely by respondent No. 7. It has also been filed on behalf of respondents Nos. 4 to 6. It is true that respondent No. 7 has sworn the counter-affidavit. In first two paragraphs of the counter-affidavit he has stated as follows:—

"1. That I am respondent No. 7 and as such fully aware of the facts and circumstances leading to this case."

"2. That I have gone through the contents of the writ petition under reply (hereinafter to be called 'the petition') which I have understood."

Lastly in paragraph 27 of the counter-affidavit it is stated as follows:

"That the contents of paragraphs Nos. 1, 2, 7, 8, 10 to 16, 18 to 21 and 26 are true to my knowledge and information derived from the records of the case and the rests are my submissions to this Hon'ble Court."

Therefore, we do not find any flaw in the affidavit sworn by respondent No. 7. Besides in the instant case, as mentioned earlier, the petitioner has himself in paragraph 7 of his application stated that he along with others made application for appointment to the post of the Head Master. Obviously, therefore, he had also appeared before the ad hoc managing committee for being appointed as the Head Master of the School. After due consideration, therefore, from different aspects of the matter, we are of the view that the application of the petitioner is not maintainable.

8. In the result, the application is dismissed and the order as contained in Annexure 5 to the writ application is confirmed. In the circumstances of the case, however, there will be no order as to costs.

Petition dismissed.

AIR 1976 PATNA 62

SHAMBHU PRASAD SINGH AND
S. K. CHOUDHURI, JJ.

M/s. Bihar Small Arms, Petitioner v.
The Union of India and others, Respondents.

Civil Writ Jurisdiction Case No. 1806
of 1974, D/- 15-4-1975.

(A) Arms Act (1959), S. 17 and Sch. II
Item 9 (a) — Change in place of manufacturing — Central Government alone is competent to grant — Licence granted in Form No. IX for manufacturing unit of gun factory — Arms Rules (1962), Rr. 4 and 53.

For the purpose of S. 17 the licensing authority for making a variation in the conditions of the licence will be as prescribed in the Rules. According to R. 53 the area of validity of the licence specified in the licence may be extended by the authority which has got power to grant a licence. So far as item 9 (a) of Sch. II is concerned the Central Government is the licensing authority which can grant the licence and the State Government is the licensing authority which can renew it. In view of provisions of R. 53 therefore the

State Government is not competent to extend the area of validity of the licence granted in Form No. IX for locating a manufacturing unit of Gun factory at a particular place. (Para 5)

B. C. Ghose, Sankat Haran Singh and V. P. Singh, for Petitioners; Balbhadra Prasad Singh (Advocate General), Sita Sharan Singh (Jr. Counsel to the Advocate General), R. N. Sahai Sinha (Standing Counsel, Central Govt. and Lala Sahindra Kumar) for Respondents.

ORDER :— The petitioners are partners of a firm, M/s. Bihar Small Arms. The firm was granted a manufacturing licence No. 3/61 in Form No. IX for locating a manufacturing unit of gun factory at Monghyr. The licence was renewed from time to time as required by law. The manufacturing unit of the petitioners is located in a very small space at gun factory within Jail compound at Monghyr, and they could not get extra space there in spite of all efforts by them. Accordingly, the petitioners approached the authorities for location of their unit (within the same manufacturing limit as shown in the licence) outside the jail campus (at Monghyr). On the 16th September, 1970, they applied for an additional manufacturing unit at Bakhtiarpur. By a letter dated the 20th February, 1970 (Annexure 18), the Under-Secretary to the Government of India had intimated to the Secretary to the State Government that the Government of India (respondent No. 1) had no objection to any change in respect of such place of business, factory or shop being allowed by the State Government to any licensed unit within their State. The State Government (respondent No. 2) approved the addition of Bakhtiarpur as a place of business/factory of the petitioners, and, accordingly, on the 15th December, 1972, Bakhtiarpur was added in column No. 3 of the licence in Form IX meant for the place of business, factory or shop. By letter No. 4573 dated the 19th October, 1974 (Annexure 5) the District Magistrate, Patna (respondent No. 3) informed the petitioners that by the order of the Government all the permissions and facilities granted to the petitioners for the manufacturing unit at Bakhtiarpur were cancelled with effect from the 11th October, 1974. By the said letter, the petitioners were also directed to produce their licence in Form IX for necessary amendment. By this writ application under Article 226 of the Constitution of India the petitioners want quashing of the order and directions contained in Annexure 5. Their case is that after their licence was amended and they were allowed to have a manufacturing unit at Bakhtiarpur, they spent a huge amount to the tune of lacs over erection of Sheds, con-

struction of factory, purchasing modern machines, tools and equipments, etc. and advance payment to the labourers, etc. They further claim that they were not heard before the letter (Annexure 5) was issued. It has been urged on their behalf in the circumstances, the order contained in Annexure 5 is bad for two reasons: firstly, that there has been a violation of the rule of natural justice in passing the order without hearing the petitioners, and, secondly, that respondent No. 1 having intimated by Annexure 18 that the State Government could permit a change in respect of the place of business and the State Government (respondent No. 2) having allowed such a change, they cannot be allowed to resile from the approval accorded to the petitioners earlier. Reliance is placed on the doctrine of promissory estoppel.

2. A lengthy rejoinder has been filed on behalf of respondent No. 2. The sum and substance of the rejoinder is that there has been no illegality in issuing the order and direction contained in Annexure 5. A letter dated the 22nd April, 1972 from the Deputy Secretary to the Government of India in the Ministry of Home Affairs to the Secretary to the Government of Bihar, Political (Police) Department has been made Annexure A to the rejoinder. It is stated in the said letter with reference to the earlier letter dated the 20th February, 1970 (Annexure 18) that the Government of India have no objection to the shifting of the factory of the petitioners' unit to the proposed industrial estate which the Bihar Government was intending to establish subject to the condition that this Firm shifts along with all other firms together, to the proposed industrial estate, where proper security arrangement could be made. The case of respondent No. 2 is that the licence of the petitioners was amended by mistake in ignorance of this direction of respondent No. 1. Another letter of the said Deputy Secretary to the Government of India written to the said Secretary of the State Government which is dated the 16th May, 1973, has been made Annexure B to the rejoinder. From this letter, it appears that respondent No. 2 was not prepared to shift all the manufacturing units located at Monghyr to the proposed industrial estate at Bakhtiarpur, and, in the circumstances, respondent No. 1 was not agreeable to the shifting of the manufacturing unit of the petitioners only to Bakhtiarpur either in whole or in part. It has been urged on behalf of the respondents that under the law the respondent No. 2 had no power to amend the licence and, therefore, the amendment allowed was without jurisdiction. It has further been contended that as the matter is governed by statutes and statutory rules, no

question of promissory estoppel would arise in the case and that remanding the matter to the authorities for giving a hearing to the petitioners on the question of cancellation will be a futile exercise inasmuch as respondents 2 and 3 cannot amend the licence as to the place of manufacture.

3. The real question, therefore, which arises for decision in the case is whether it was within the power of the State Government (respondent No. 2) to amend the licence of the petitioners and thereby permit them to have a manufacturing unit at Bakhtiarpur.

4. Section 2 (1) (f) of the Arms Act (hereinafter referred to as 'the Act') defines 'licensing authority' to mean "an officer or authority empowered to grant or renew licences under rules made under this Act, and includes the Government". The main part of Section 5 lays down that "no person shall—

(a) manufacture, sell, transfer, convert, repair, test or prove, or

(b) expose or offer for sale or transfer or have in his possession for sale, transfer, conversion, repair, test or proof, any fire-arm or any other of such class or description as may be prescribed or any ammunition, unless he holds in this behalf a licence issued in accordance with the provisions of this Act and the Rules made thereunder."

Section 15 of the Act confers power on the licensing authority to renew a licence. Section 17 of the Act authorises the licensing authority to vary the conditions thereof. Section 44 authorises the Central Government to make rules for carrying out the purposes of the Act by notification in the Official Gazette. Rules were framed by the Central Government in the year 1962 and are known as the Arms Rules, 1962 (hereinafter referred to as 'the Rules'). Rule 4 of the Rules says that "licences under Chapter II of the Act may be granted or renewed for such purposes, by such authorities, in such Forms and to be valid for such period and in such areas as are specified in Schedule II, subject to such conditions as are specified in that Schedule and in the licence". Item No. 9 (a) of Schedule II is relevant for the purpose of this case and is quoted hereunder:

(See Table on next page)

Rule 53 (1) of the Rules lays down that "on application from a licence-holder, a licensing authority may extend the area of validity specified in his licence, if he is satisfied about the need of such extension, subject to the condition that the licensing authority has the power to grant a licence in relation to the area to which extension is sought". As it appears from Item No. 9 (a) of Schedule II, quoted above, the licence for manufacture, etc. is to be grant-

Item No.	Purpose	Categories of arms, ammunition as defined in Schedule.	Place/ class of persons.	Licensing authority.	Areas for which the licence can be granted.	Renewing authority.	Form No.	Conditions.
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1	2	3	4	5	6	7	8	9
9(a)	Manufacture, conversion, shortening, repair, test other than proof-test, sales transfer, keeping for sale, transfer conversion or test of arms and ammunition.	All	Through-out India.	Central Government.	Within the premises to be specified in the licence.	State Government.	IX	

ed in Form IX. The Form mentions a number of conditions. Condition No. 5 thereof reads as follows:

"He shall not manufacture fire-arms of any category or description other than those allowed to be manufactured under column 4; nor expand his business, except with the prior permission of the Central Government and subject to such conditions as may be prescribed by the Central Government."

5. Relying upon the provisions of the Act and the Rules, referred to in the preceding paragraphs, the learned Advocate General, appearing for respondent No. 2 and learned Addl. Standing Counsel for the Union of India have contended that the change as to the place of manufacture in the licence could be allowed by the Central Government only. Mr. B. C. Ghose, appearing for the petitioners, has contended that the variation in the terms and conditions of the licence can be allowed under Section 17 of the Act by the licensing authority, and, according to the definition of the expression 'licensing authority' as given in Section 2 (1) (f), it also includes the Government which term, according to Section 3 (23) of the Central Government Act includes any State Government. No doubt, the State Government is also the licensing authority, but it could not vary the conditions of the licence and allow the petitioners to have any manufacturing unit at Bakhtiarpur. In my opinion, the expression "and includes the Government" in Section 2 (1) (f) does not indicate that the State Governments are the licensing authority for all purposes. The first part of the definition shows that an officer or authority empowered to grant or renew licence under the Rules made under the Act, is licensing authority. The expression 'and includes the Government' was added to the definition to remove the doubt and make it clear that even the Government, that is, the Central Government or any State Government could be the licensing authority if they are so empowered under the Rules made under the Act. If

the construction sought to be put by Mr. Ghose is accepted, then a State Government will be the licensing authority under the Act concerning any part of India even not lying within that State for the purpose of manufacture, etc. Such a construction will make the working of the Act impossible. Therefore, for the purpose of Section 17 also, on which Mr. Ghose has put strong reliance, the licensing authority for making a variation in the conditions of the licence will be as prescribed in the Rules. We have already referred to Rule 53; according to which, the area of validity specified in the licence may be extended by the authority which has got power to grant a licence. In Schedule II to the Rules, the heading of column No. 5 is 'licensing authority' and the heading of column No. 7 is 'renewing authority'. Undoubtedly, according to the definition of the term 'licensing authority' in S. 2 (1) (f) of the Act, it includes both, namely, the authority which can grant a licence and the authority which can renew it; but in relation to the heading of column No. 5 in Schedule II 'licensing authority' means the authority which can grant the licence, and in relation to the heading of column No. 5 the licensing authority means the authority which can renew the licence. So far as item No. 9 (a) of that Schedule is concerned, the Central Government is the licensing authority which can grant the licence and the State Government is the licensing authority which can renew it. In view of the provisions of Rule 53, therefore, the State Government, that is, respondent No. 2, is not competent to extend the area of validity of the licence of the petitioners.

6. It has been contended by Mr. B. C. Ghose that really it is not a case of extending the area of validity as contemplated by Rule 53, and, therefore, that rule has no application to the present case. According to him, the area of validity means such area which is covered by the licence, for instance, if the licence is granted originally for one or two districts only, and subsequently, it is extended to other districts of the State; or,

5. The next question to be determined is whether the orders of termination of the services of the petitioners have been passed in accordance with or in violation of the Regulations. These orders have been passed under Regulation 13 (i) of the Regulations which reads as under:—

“Notwithstanding anything contained in Regulations 9, 10 and 12,

(i) Where a penalty is imposed on an employee on the ground of conduct which has led to his conviction on a criminal charge, or

(ii)

(iii)

the punishing authority may consider the circumstances of the case and pass such orders thereon as it deems fit.”

The penalties that can be imposed under the Regulations are stated in regulation as under:—

(i) Censure;

(ii) withholding of increments or promotion;

(iii) recovery from pay of the whole or part of any pecuniary loss caused to the Board by negligence or breach of orders;

(iv) reduction to a lower service, grade or post, or to a lower time-scale or to a lower stage in a time-scale;

(v) compulsory retirement;

(vi) removal from service which shall not be a disqualification for future employment;

(vii) dismissal from service which shall ordinarily be a disqualification for future employment.”

Regulation 9 prescribes procedure for imposing major penalties while regulation 10 prescribes the procedure for imposing minor penalties. Regulation 12 pertains to joint inquiry. Regulation 13 expressly excludes the operation of regulations 9, 10 and 12, which means that in cases covered by regulation 13, no enquiry is to be held, no show-cause notice is to be issued and no explanation is to be called from the delinquent employee. Thus in the case of an employee convicted on a criminal charge, his conduct which led to the conviction and the circumstance of the case have alone to be considered for imposing one of the penalties stated in regulation No. 7. It has been submitted by the learned counsel for the petitioners that the orders for termination of services of the petitioners have been passed merely on the ground that they were convicted of an offence under Section 188, Indian Penal Code, and their conduct, which led to the conviction, or the circumstances of the case have not been considered and, therefore, those orders cannot be sustained. Reliance for this proposition is placed on a Full Bench judgment of this Court in *Om Parkash v. The Director, Postal Services*, ILR (1972) 2 Punj

and Har 72 = (AIR 1973 Punj 1) (FB). In that case, the petitioner was convicted for the commission of offences under Ss. 420/511, 467, 468 and 471/109, Indian Penal Code, in connection with the submission of false medical reimbursement claims on the finding that he had knowingly used forged cash memos for claiming medical reimbursement and had tried to cheat the Government in that manner. After his conviction he was dismissed from service by the order of the appointing authority reading as under:—

“Whereas Shri Om Parkash son of Shri Charanjit Rai, Postman. No. 37, Amritsar H. O. (under suspension) was convicted on criminal charges under Sections 120-B, 420/511, 467, 468 and 471/109, Indian Penal Code, in the Court case No. 153/67 SPE Ambala F. I. R. No. 44/66, by the Court of Shri S. K. Jain, Special Judicial Magistrate 1st Class, Punjab, Patiala, on March 20, 1969, in connection with submission of false medical reimbursement claims by him.

I, the undersigned, now, therefore, dismiss Shri Om Parkash son of Shri Charanjit Rai, Postman, Amritsar H. O. from Government service with effect from September 16, 1969, forenoon.”

The Full Bench held that the order of dismissal was passed merely on the basis of his conviction and without considering the conduct which led to his conviction, as is the requirement of Rule 19 (1) of the Central Civil Services (Classification and Appeal) Rules, 1965. In the cases before us, the orders terminating the services of the petitioners were not passed merely on their conviction, but their conduct which led to their conviction and the circumstances of each case were considered as is clear from the text of the order which has been set out in full in an earlier part of this judgment. The text of each order clearly shows that the punishing authority in the first instance, described the facts of each case and towards the end, imposed the penalty on the ground of his conduct of deliberately violating lawful order and showing flagrant disregard to the law, which led to his conviction on the criminal charge earlier mentioned and came to the conclusion that he was not a fit person to be retained in service. The reason stated is, no doubt, a brief one, but it is the basis of the order terminating the services of each petitioner. It cannot, therefore, be said that the order does not consider the circumstances of each case and conduct of each petitioner leading to his conviction and the effect thereof on his suitability to be retained in service. The cases before us are, thus, distinguishable from the case before the Full Bench on which reliance has been placed.

6. It is then argued that the punishing authority did not exercise his own judicial discretion while passing the order of termination of services against each petitioner, but signed the order on dotted lines as directed by the Chairman of the Board. Since the

punishing authority acted as a quasi-judicial authority while passing such orders, his discretion could not be fettered by the Chairman and, therefore, the orders, not being the result of application of independent mind of each punishing authority, are liable to be set aside as having been passed at the instance of an extraneous authority. Reliance for this proposition has been placed on various judgments of the Supreme Court, but I do not feel the necessity of burdening this judgment with quotations from those decisions because I find myself in complete agreement with this proposition. It has been denied by the punishing authority in each case that he passed the order on the direction of the Chairman or any other higher authority. It is asserted that he applied his independent mind while passing the order and the fact that the order in each case is in the same language is explained by saying that each punishing authority approached the Law Department of the Board for a legal draft of an order terminating the services of the erring employees so that proper and legal orders could be passed. Under Regulation 13, no draft of the order is provided in the regulations themselves. It is denied that the Chairman of the Board issued any directive to terminate the services of all the employees who had gone on strike and were convicted of the offence under Section 188, Indian Penal Code. In view of this denial there arises a dispute on facts. We do not consider it a fit case to examine the evidence in order to resolve that dispute. In a petition under Article 226 of the Constitution, when a fact asserted in the petition is denied by the respondent, it is not safe to accept the assertion made by the petitioner. It cannot, therefore, be held that the punishing authorities of all the petitioners passed the impugned orders at the dictation of the Chairman of the Board and, therefore, there is no substance in the plea put forth on behalf of the petitioners. Even if the assertion of the petitioners is accepted, in my opinion, the orders passed by the punishing authorities cannot be quashed on that ground. Extraordinary situations require extraordinary solutions. A policy decision by the management in extraordinary circumstances, like strikes and lock-outs, can be justified in order to avoid the allegations of discrimination and victimisation or the like. If an individual case in due course arises, the punishing authority has to exercise his own judicial mind and discretion in the matter of inflicting punishment, but if a sizeable number of employees adopt the same course as a result of the decision taken by their Union and are guilty of the same acts of conduct leading to their conviction, a general policy can be laid down by the employer as to the punishment to be imposed upon the erring employees en masse. In such a case, the plea of interference with the judicial discretion of each punishing authority will not be available. It is a matter of common experience

that whenever a large number of employees of the Government or any other establishment in the private or public sector go on strike and the strike is put an end to, it is usually as a result of an agreement arrived at between the representatives of the employees and the officers of the employer that the action to be taken against the erring employees is decided upon. If a strike is called off unconditionally without arriving at an agreement with the management, it will be open to the management to prescribe the penalty to be imposed on all the employees, who went on strike or were guilty of certain acts of misconduct, leviable under the Service rules.

7. The ratio of the decision of the Supreme Court in *Punjab National Bank Ltd. v. Its Workmen*, (1960) 1 SCR 806 = (AIR 1960 SC 160), relied on by the learned counsel for the petitioners, seems to go against his contention and supports the view I have taken above. In that case a large number of employees of the Punjab National Bank went on strike, which was termed as illegal by the Bank and 150 of them were dismissed. The dismissed employees raised an industrial dispute which was referred for adjudication to the Industrial Tribunal. The Tribunal decided that the strike was illegal and participation in illegal strike justified the dismissal of the employees. Even so the Tribunal made an order directing the Bank to pay certain amount to the employees on compassionate grounds. The Bank challenged that direction for the payment of the amount to the employees before the Labour Appellate Tribunal which held that, though the strike was illegal, the Bank, by its conduct, had precluded itself from exercising the alleged right to dismiss its employees for their participation in such an illegal strike. It was pleaded by the Union of the employees that it was known to the Bank that the strike was the result of the unanimous decision and that all the acts committed by the Union and its officers before and during the strike were the acts not of any individual but of the Union as a whole. There was no rule for making any distinction between one workman and another and if the Bank took back a large number of strikers, it should have taken back the 150 remaining workmen as well, but it refused to do so because of its policy of victimisation, as it wanted to teach a lesson to all the office-bearers and active workers of the Union.

8. In my opinion in order to avoid such like allegations it becomes necessary for the management to formulate its policy for dealing with the employees who go on strike and are convicted of a criminal offence which is committed as a result of the decision taken by the Union. Since strike is a collective action of the employees, they have to be dealt with collectively, if any punishment is to be meted out to them.

9. In *India General Navigation and Rly. Co. Ltd. v. Their Workmen*, (1960) 2

SCR 1 at p. 27 = (AIR 1960 SC 219) the following observations appear which show that a decision for imposing the same punishment on every workman guilty of the same misconduct can be made:—

"To determine the question of punishment, a clear distinction has to be made between those workmen, who not only joined in such a strike, but also took part in obstructing the loyal workman from carrying on their work, or took part in violent demonstrations, or acted in defiance of law and order, on the one hand, and those workmen who were more or less silent participants in such a strike, on the other hand. It is not in the interest of the Industry that there should be a wholesale dismissal of all the workmen who merely participated in such a strike. It is certainly not in the interest of the workmen themselves."

Again, on page 30 of the report, the following observations are pertinent as to the punishment to be imposed on employees who defy the lawful orders promulgated under Section 144 of the Code of Criminal Procedure:—

"The position, therefore, is that the strikes were illegal, that there was no question of those strikes being justified, and that, assuming that the strikers were liable to be punished, the degree and kind of punishment had to be modulated according to the gravity of their guilt. Hence, it is necessary to distinguish between the two categories of strikers. The Tribunal attempted to make such a distinction by directing that the 52 workmen, who had been convicted under Section 143, read with Section 188 of the Indian Penal Code, were not entitled to reinstatement, and the remaining 208 workmen were so entitled. Dealing with the case of the thirty-seven workmen, who had been convicted only under Section 188 of the Indian Penal Code, for transgression of the prohibitory orders under Section 144 of the Code of Criminal Procedure, the Tribunal put those workmen on the same footing as the rest of the workmen. But, in our opinion, those 37 workmen do not stand on the same footing as the others. Those 37 workmen, who were convicted under S. 188 of the Indian Penal Code, had been found to have violated the prohibitory orders passed by the public authorities to keep the public peace. Those convictions were based upon evidence adduced before the Magistrate, showing that the workmen had proceeded to the steamer flat through the jetty, in defiance of the orders promulgated under Sec. 144. We have examined the record and we find that there is sufficient indication that those 37 workmen were among the violent strikers, and could not be placed in the category of peaceful strikers. Hence, it is clear that those workmen not only joined the illegal strike by abstaining from their assigned duty, but also violated regularly promulgated orders for maintaining peace and order. Such persons, apparently, cannot be said to be peaceful

strikers, and cannot, therefore, be dealt with as lightly as the Tribunal has done. The Tribunal, in our opinion, is wrong in taking the view that the appellants had nothing to do with the violation of the order under Section 144 of the Code of Criminal Procedure, promulgated by the District Magistrate, with a view to maintaining peace and order at the site of work. These 37 workmen, therefore, should not have been ordered to be reinstated."

These observations clearly lead to the conclusion that the same punishment is to be imposed on all the employees guilty of the same or similar acts of misconduct and this can be done by the management laying down a policy.

10. It has also to be borne in mind that the Board, under regulation 30, has the power to revise the proceedings of any punishing or appellate authority, suo motu or at the instance of an employee. This regulation reads as under:—

"The Board may call for and examine the records of any case in which a subordinate authority passed any order under regulation 24 or has inflicted any of the penalties specified in regulation 7, or in which no order of penalty inflicted has been passed and after making further investigation, if any, may confirm, remit, reduce or, subject to the provisions of regulation 24, increase the penalty or subject to the provisions of regulations 9, 10 and 11, inflict any of the penalties specified in regulation 7."

11. The penalty of termination of service is provided in regulation No. 7 and, therefore, even if a punishing authority were to pass any order other than termination of service, it was open to the Board, under regulation 30, to inflict the punishment of termination of service. Instead of exercising this power, if the Board or its Chairman adopted a uniform pattern of punishment in the case of all employees convicted of an offence under Sec. 188, Indian Penal Code, for defying the prohibitory order at Delhi or Chandigarh, there was nothing wrong or contrary to the Service regulations. I am, therefore, of the opinion that even if the impugned orders, terminating the services of the petitioners under regulation 13, were passed by each punishing authority, as a result of consultation with the Chairman, or as a result of the policy formulated by the Board, the orders cannot be struck down on that ground and cannot be termed as vitiated. It has also to be borne in mind that an order of punishment can be passed, even in the first instance, by the appellate or revising authority. Even under Article 311 of the Constitution, which prescribes that an order of dismissal or removal from service cannot be passed by an authority subordinate to that by which he was appointed, an order of dismissal or removal from service can be passed by an authority higher than the authority, who appointed the civil servant. This

matter was considered by a Full Bench of this Court in Karnail Singh v. State of Punjab, (Civil Writ No. 3612 of 1973), decided on 1-11-1974 = (reported in 1975 Lab. IC 646 Punj) (FB), where the question debated was whether an order of retirement on attaining the age of 55 years under Rule 5.32 (c) of the Punjab Civil Services Rules, Vol. II, could be passed by the State Government instead of the Excise and Taxation Commissioner, who had appointed that employee. It was held that:—

- (i) in the absence of anything to the contrary stated in any relevant statute or statutory rule, the State Government or the Governor is the appointing authority of a State Government servant;
- (ii) inasmuch as the Governor's power to appoint has also been delegated by him to the Excise and Taxation Commissioner, the Governor as well as the Excise and Taxation Commissioner could validly and effectively issue to the petitioner, the notice of retirement under R. 5.32 (c);
- (iii) the Excise and Taxation Commissioner, while issuing the notice of retirement, is exercising the State Government's power which is delegated to him by the relevant rules;
- (iv) any authority other than the Excise and Taxation Commissioner or the Governor (the State Government) could not issue such a notice, as such authority would not be appointing authority of an Excise Inspector; and
- (v) likewise, a notice served by an Excise Inspector on the State Government (or the Governor) in exercise of his corresponding right under Rule 5.32 (c) to retire any time after attaining the age of 55 years would be as valid and effective as a notice served by him on the Excise and Taxation Commissioner, who had actually appointed him."

On the parity of reasoning it can be held that the Board is the appointing authority of every employee and other authorities are the delegates of that power. So the Board can pass any order of punishment under the Regulations and if it guided the individual punishing authorities to pass a uniform order in the case of the petitioners and others like them, it committed no error of law and the order cannot be struck down on that ground.

12. Lastly, it has been argued that regulation 13 is violative of Article 14 of the Constitution inasmuch as no guidelines have been provided to the punishing authority for taking action under that regulation. An arbitrary power has been conferred on the punishing authority the result of which is that for the same misconduct, one punishing authority may pass an order of dismissal or

removal from service while another may pass an order stopping a number of increments and a third may administer only a warning and the fourth may pass an order of censure and so on. The power under regulation 13 is quasi-judicial and it is a fundamental principle of jurisprudence that there is no equality before a judicial or a quasi-judicial decision. Merely because different punishments can be awarded by different punishing authorities is no ground to declare regulation 13 as discriminatory and violative of Article 14 of the Constitution. The quantum of punishment has to be left to the discretion of the punishing authority. It may here be emphasised that Article 14 guarantees equality before the law and not before a judicial or a quasi-judicial decision. A similar argument was advanced before the Supreme Court in Jagmohan Singh v. State of U. P., AIR 1973 SC 947, to the effect that uncontrolled and unguided discretion in the Judges to impose capital punishment or imprisonment for life was hit by Article 14 of the Constitution, but was not accepted. It was observed that if the law has given to the Judge a wide discretion in the matter of sentence to be exercised by him after balancing all the aggravating and mitigating circumstances of the crime, it will be impossible to say that there would be at all any discrimination, since facts and circumstances of one case can hardly be the same as the facts and circumstances of another. In an earlier case, Bhudhan Choudhry v. State of Bihar, (1955) 1 SCR 1045 = (AIR 1955 SC 191) it was held that Art. 14 can hardly be invoked in matters of judicial discretion. After referring to the observation of Frankfurter, J., in Snowden v. Hughes, (1943) 321 US 1, that "the Constitution does not assure uniformity of decisions or immunity from merely erroneous action, whether by the Court or the executive agencies of a State", it was observed that

"the judicial decision must of necessity depend on the facts and circumstances of each particular case and what may superficially appear to be an unequal application of the law may not necessarily amount to a denial of equal protection unless there is shown to be present in it an element of intentional and purposeful discrimination."

There is, therefore, no merit in this submission which is repelled.

13. It is then submitted by the learned counsel for the petitioners that Regulation 13 should be struck down as conferring an arbitrary power on the punishing authority because no appeal has been provided against such order and in case it be held that an appeal has been provided, the appellate authority has not been prescribed by the Board, and, therefore, the right of appeal has remained dormant and has, in fact, been denied to the petitioners. There is equally no merit in this submission because it is not necessary that in every case an appeal or appeals should be provided against the

orders of the punishing authority or any authority exercising judicial or quasi-judicial powers. No statutory provision or regulation can be struck down on this ground. In the case of the petitioners the right of appeal has been provided under regulation 18. By virtue of regulation 31, Appendix 'B' to Punjab Public Works Electricity Branch Provincial Service Class III (Subordinate Posts) Rules, 1952, is still in force and that prescribes the appointing authority, the nature of penalty, authority empowered to impose penalty, appellate authority and second appellate or revisional authority. These rules have been kept in force by orders dated February 19, 1959 and October 1, 1960, of the Punjab State Electricity Board and the order of the Haryana State Electricity Board dated May 10, 1967. The petitioners, however, did not avail of the remedy of appeal and only made representations to the punishing authorities for review of their orders which were declined.

14. The validity of regulation 13 is also attacked on the ground that it does not provide for any opportunity of hearing being afforded to the delinquent employee against whom action is contemplated. It is said that the violation of the rule of natural justice — *audi alteram partem* — makes the orders of termination of services null and void. In this connection it may be stated that the rules of natural justice do not form part of the law of the land, they only supplement the law and do not supplant it. If a statute specifically provides that a hearing need not be given to an employee before inflicting certain punishment, it has to be seen whether the provision is reasonable or not. The same rule will apply to a regulation prescribing the conditions of service between an autonomous body and its employees. Article 311 (2) of the Constitution provides that no person, who is a member of a civil service of the Union or an All India Service or a civil service of a State, or holds a civil post under the Union or a State, shall be dismissed or removed or reduced in rank except after an enquiry in which he has been informed of the charges against him and given a reasonable opportunity of being heard in respect of those charges and where it is proposed, after such enquiry, to impose on him such penalty, until he has been given a reasonable opportunity of making representation on the penalty proposed, but only on the basis of the evidence adduced during such enquiry. To this clause a proviso has been added that it shall not apply where a member of a service is dismissed or removed or reduced in rank on the ground of conduct which has led to his conviction on a criminal charge, which clearly means that after conviction if the punishment is to be imposed on the basis of the conduct which led to his conviction, no enquiry need be held nor any opportunity of hearing or showing cause against the proposed penalty has to be afforded to the public servant concerned. Regulation 13 is also

analogous to clause (2) of Article 311 with its proviso. Similar also is Rule 19 of the Central Civil Services (Classification, Control and Appeal) Rules, 1965. The regulation cannot be struck down on the ground that it does not provide for an opportunity of hearing being afforded to the delinquent employee before passing the order of punishment for the reason that the employee has the chance of showing his innocence when he faces the criminal trial and if he is not able to exculpate himself there, a second enquiry into the same facts need not be held by the disciplinary authority. In this view of the matter, regulation 13 is valid and action under it could be taken by the punishing authority against the petitioners.

15. For the reasons given above, I find no merit in these petitions which are dismissed, but without any order as to costs. The dismissal of the petitions will, however, not bar the parties from negotiating a settlement, if desired.

SANDHAWALIA, J.:— 16. I have the privilege of perusing the very lucid judgment prepared by my learned brother Tuli, J. I agree with him that the writ petitions must be dismissed.

17. It is, however, only on an ancillary point that I feel compelled to refrain from giving whole-hearted concurrence to the above-said judgment. It was urged before us that the punishing authority in these cases did not exercise its own judicial discretion while passing the order of termination against each petitioner but had signed the order on the dotted line, as directed by the Chairman of the Board. As has been fully noticed by my learned brother Tuli J., the allegations of fact for this contention were stoutly denied on behalf of the respondents. It was categorically stated in the return that the order of termination was not passed on the direction or behest of the Chairman of the Board or of any other higher authority. Equally it was asserted that the punishing authority had acted in a quasi-judicial manner and independently applied its mind whilst passing the orders in each individual case. The close similarity of the language of the orders was plausibly explained on the respondents' behalf by averring that the Law Department of the Board had prepared a legal draft for passing a proper order in case termination of the services of the erring employee was to be resorted to.

18. It is well settled that the burden of establishing the necessary facts to show the invalidity of an impugned order obviously rests on the writ petitioner. In this case, the petitioners had on the pleadings before us signally failed to discharge that burden and we are unanimous in our opinion that it was not a fit case for examining evidence to resolve the dispute, if any. I agree entirely with Tuli, J., that on these facts it was wholly unsafe to accept the assertions made by

the petitioners and the contention must, therefore, be rejected. I would wish to rest my judgment in the context of this contention upon the above-said firm footing.

19. On the above-said finding, no further issue arises and it is, therefore, that I do not feel at all the necessity of pronouncing upon a hypothetical proposition. My learned brother Tuli, J., however, has proceeded to hold that even if the assertion of the petitioners that their services have been terminated at the command and direction of the Chairman of the Board was correct, still the orders passed by the punishing authority in its quasi-judicial capacity would not be tainted with any infirmity. This issue in these hypothetical terms was not debated before us at length on behalf of the respondents and that is one reason for my reluctance to arrive at any considered finding thereon. However, it appears to me that it is well established, both on principle and by a long line of precedent, that a quasi-judicial power must be exercised independently and completely uninfluenced by any extraneous consideration. That principle perhaps admits of little or no exception. Therefore, to carve out a proviso or an exception to this rule, even in the context of slightly unusual circumstances may well not be called for and indeed may be fraught with consequences which may ultimately tend to erode the basic principle underlying the exercise of judicial or quasi-judicial power. I am, therefore, unable to persuade myself that the mere fact that the employee-petitioners had acted collectively would, in any way, justify the abandonment of the accepted mode and manner of exercising quasi-judicial authority.

20. I am more than fully conscious that troublesome practical difficulties in peculiar situations may well arise. That, however, is a matter for the legislature or the rule-making authority, as the case may be. To create a remedy for such a situation by way of interpretation which may tend to erode the salutary principle of quasi-judicial power appears to me to be fraught with danger. Once it is held that a person or body of persons is to act quasi-judicially, then the mere fact that the action they intend to counter, is en masse or collective would not justify the abandonment of the hallowed principle that quasi-judicial power must be exercised independently and untrammelled by any extraneous influence.

21. With the aforesaid words, I would reiterate my concurrence with Tuli, J., on all the other points.

Petitions dismissed.

AIR 1976 PUNJAB & HARYANA 38 FULL BENCH*

S. S. SANDHAWALIA,
MAN MOHAN SINGH GUJRAL AND
MUNI LAL VERMA, JJ.

Sadhu Singh and others, Defendants-Appellants v. Pritam Singh s/o Narain Singh and another, Plaintiffs-Respondents.

Second Appeal No. 39 of 1972, D/-8-5-1975.**

(A) Civil P. C. (1908), O. 2, R. 2 and R. 4 — Suit for possession of immovable property filed — Subsequent suit for accrued mesne profits not barred.

Per Sandhawalia and Muni Lal Verma, JJ. (Majority view):— O. 2, R. 2 of the Civil P. C. does not bar a suit for mesne profits filed subsequently to a suit for possession of the property because the claim for those accrued mesne profits had not been earlier included therein. Conflict in case law discussed.

(Paras 36 and 38)

Reading R. 2 and R. 4 together the conclusion is inevitable that O. 2 treats the cause of action for recovery of immovable property as distinct from a cause of action for the mesne profits thereof.

(Para 11)

Per Man Mohan Singh Gujral, J. (Contra):— A second suit for recovery of mesne profits would be barred if in the earlier suit for recovery of possession of immovable property that relief is not claimed and that the cause of action for the recovery of immovable property and for the recovery of mesne profits arising therefrom is the same.

(Para 72)

O. 2, R. 4 is not intended to provide exception to O. 2, R. 2 but is to be taken as an explanation only. (Paras 71 and 48)

Cases Referred: Chronological Paras

AIR 1966 Andh Pra 325 = (1965) 2 Andh
WR 226 26, 33, 32

AIR 1964 Bom 42 = 65 Bom LR 588
18, 64, 70

AIR 1960 SC 1118 = (1960) 3 SCR 975 35

AIR 1958 SC 918 = 1959 SCR 1099 35

AIR 1954 Orissa 202 = ILR (1954) Cut 232
64, 71

*(Note:— In this case, the Judges of the Full Bench differ in their views. The majority view is taken by S. S. Sandhawalia and Muni Lal Verma, JJ. and the minority view, by Man Mohan Singh Gujral, J. The judgments in the case are printed in the order in which they are given in the certified copy—Ed.)

** (Decided by Full Bench on order of reference made by Man Mohan Singh Gujral, J. on 16-11-1973).

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AIR 1954 Punj 173 = 56 Pun LR 109 35
AIR 1953 Madh Bha 161 64, 71
AIR 1949 PC 78 = 75 Ind App 121

7, 8, 43
AIR 1942 Bom 338 = 44 Bom LR 735
17, 64, 69

AIR 1942 Cal 40 = 45 Cal WN 996
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AIR 1940 All 524 = 1940 All LJ 727
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AIR 1933 All 84 = 140 Ind Cas 181

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AIR 1931 PC 229 = 35 Cal WN 977
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55, 62, 63, 69, 72
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AIR 1931 Pat 233 = 12 Pat LT 540 27, 61
AIR 1926 Rang 137 = 95 Ind Cas 380

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AIR 1924 PC 34 = 51 Ind App 24 25, 50
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80 Ind Cas 259 17, 24, 69
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19, 52
1910 Pun LR 31 = 8 Ind Cas 224 19
1907 Pun Re 28 = 1908 Pun LR 93 19, 52

(1904) ILR 31 Cal 262 = 31 Ind App 10
(PC) 71

(1904) ILR 27 Mad 116 64
(1895) ILR 17 All 533 = 1895 All WN 121

15, 64, 66, 68
(1892) ILR 19 Cal 615 23, 55, 60
(1890) ILR 17 Cal 968 58, 59

1889 Pun Re 129 (FB) 19, 21, 35, 52
(1888) ILR 11 Mad 151 20, 53, 54, 55, 66

(1888) ILR 11 Mad 210 22, 55, 54
(1888) 22 QBD 128 = 58 LJ QB 120 43

(1885) ILR 12 Cal 482 (PC) 53, 64, 68
(1885) 14 QBD 141 = 53 LJ QB 476 9

(1883) ILR 9 Cal 283 = 12 Cal LR 434 57
(1882) ILR 8 Cal 593 = 10 Cal LR 359

(FB) 23, 55, 58
(1881) ILR 3 All 543 64, 65

(1881) ILR 3 All 660 (FB) 14, 58, 55, 64,
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(1873) 8 CP 107 = 42 LJ CP 98 7
(1869) 12 Suth WR 5 23

K. K. Aggarwal with G. C. Garg for
Appellants; H. L. Sarin with M/s. M. L.

Sarin, M. S. Libarhan and S. K. Gawari,
for Respondents.

S. S. SANDHAWALIA, J.:— The
issue of law arising from virtually un-

disputed facts in this reference may well
be formulated in the following terms:—

"Whether Order 2, Rule 2 of the Code
of Civil Procedure, 1908 bars a suit for

mesne profits filed subsequently to a suit

(Sandhawalia J.) [Prs. 1-4] P. & H. 39

for possession of the property because the
claim for those accrued mesne profits had
not been earlier included therein?"

It suffices to advert to the relevant facts
briefly. The subject-matter of the dis-
pute is the urban property situated at
Circular Road, Ambala City. In Janu-
ary, 1966, Pritam Singh respondent alone
brought a suit for possession of the above-
said property alleging inter alia that the
defendants were in wrongful and un-
authorised occupation thereof from the
14th of June, 1965. In this suit he did
not include any claim for mesne profits
which had accrued till the date of the
filing of the same. That suit is still pend-
ing decision. Later in 1968 Pritam Singh
respondent along with his sister Smt. Sur-
jit Kaur respondent together brought the
present suit (from which this regular sec-
ond appeal arises) for the recovery of
Rs. 3,200/- as mesne profits or in the
alternative as damages for illegal use and
occupation of the property above-men-
tioned from the original date of its un-
authorised occupation.

2. Apart from the other grounds
the defendants resisted the second suit on
two preliminary objections regarding
which the trial Court struck the follow-
ing two issues:—

1. Whether the trial of the suit cannot
be proceeded with in view of the provi-
sions of Section 10, Civil Procedure Code?

2. Whether the suit is barred under
Order 2, Rule 2 of the Code of Civil Pro-
cedure as alleged in para. 2 of the preli-
minary objections in the written state-
ment?

Both the above-said issues were decided
against the plaintiffs resulting in the dis-
missal of the suit. On appeal the learned
Additional District Judge, Ambala, up-
held the finding of the trial Court on
issue No. 1, but on issue No. 2 he reversed
the finding of the trial Court by holding
that the suit was maintainable and not
barred by the provisions of Order 2, Rule 2
of the Code of Civil Procedure. The
defendant-appellants in the present sec-
ond appeal challenge the decision of the
learned Judge on issue No. 2 quoted above.

3. As is manifest the point at issue
is one of pure law, and to be candid it is
indeed not free from difficulty. My
learned brother Gujral, J. in his lucid
order of reference to the larger Bench has
noticed the head-on clash of some of the
authorities and in the course of argument
many more were cited before us at the
bar. I, therefore, deem it apt to examine
the matter in its historical background
and then on principle before adverting to
the plethora of precedents on this point.

4. As to the sources of the law and
their history it is indeed possible to go

back for more than a century in this context. There is no manner of doubt that the earliest Indian Civil Procedure Code were modelled on the language and patterned to follow the principles and procedures of the then existing English law. At common law claims for ejectment and for mesne profits were always treated as separate causes of action so much so that an action for mesne profits did not even lie until judgment had been recovered in ejectment. It was only after the enactment of the Common Law Procedure Act, 1852 that the two actions were even enabled to be joined. Adopting the above-said rule the Indian Code of Civil Procedure, 1859 expressly provided that a claim for recovery of land and a claim for mesne profits arising out of such land should be deemed to be distinct causes of action. Indeed the relevant Section 10 thereof may usefully be quoted verbatim—

"10. A claim for the recovery of land and a claim for the mesne profits of such land shall be deemed to be distinct causes of action within the meaning of the two last preceding sections."

Subsequently in England the Judicature Act and the Rules of practice framed thereunder came into force. Therefore when the Indian Code of Civil Procedure was remodelled and enacted in 1877, the language of the Judicature Act and the rules thereunder which were then the existing law was in many instances incorporated and substituted for the earlier language of the Indian Code of Civil Procedure of 1859. As a result, therefore, Section 10 of the earlier Code quoted above was substituted by Sec. 44 of the Code of Civil Procedure, 1877 (which is in *pari materia* with Order 2, Rule 4 of the present Code of Civil Procedure, 1908). A reference to the corresponding provision would show that the language of Section 44 was taken from Order 17, Rule 2 of the English Rules framed under the Judicature Act. Therefore, despite the change of terminology it is more than patent that no change in the law was at all intended either in England or in India from the settled rule (earlier at English Common Law and later in terms adopted by the statutes) that claims for mesne profits and claims for the possession of the property were distinct and separate causes of action. To reiterate, it is apparent that the rule explicitly laid in Section 10 of the 1859 Code was intended to be continued and the mere change of language owing to the reasons above-noticed was not calculated to depart from the earlier settled law on this point. It then deserves mention that Rules 1, 2 and 4 of Order 2 of the present Code of Civil Procedure, 1908 are in *pari materia* with Sections 42, 43 and 44 of the Code

of Civil Procedure, 1877, and therefore patently intended to continue the existing law. As a matter of chronology, therefore, it is evident that for more than a century the English Common Law and the subsequent statutes and the Indian Procedural Code patterned thereon had considered the claim of mesne profits and the claim of possession of the property as two distinct and separate causes of action.

5. Examining the matter on principle, apart from its history, the core of the issue here is whether a claim for the possession of the property and a claim for the mesne profits arising therefrom are two distinct and separate causes of action or whether they constitute a single and indivisible cause. Necessarily, therefore, the question arises as to what is the exact import of the term 'cause of action'.

6. Though the above-said term of art arises invariably in civil litigation it is significant to notice that the present Code of Civil Procedure has not chosen to define the same in Section 2 thereof. Equally it has to be borne in mind that in precedents extending over centuries no attempt even has been made to lay down an exhaustive and precise definition of the term 'cause of action'. That being so it would indeed be pedantic to do what is perhaps neither possible nor desirable. It suffices to recall what the *Corpus Juris Secundum* has to say on the point:—

"Cause of action is a term of varying and doubtful meaning; and because of its many different and delicate shades of meaning according to the circumstances in which it is used, the Courts have found it difficult to give any general definition of the term, and perhaps no definition could be framed which would be entirely free from criticism, although it has been said that there is no legal expression the meaning of which is more clearly apparent."

7. Even though no precise definition may be possible it nevertheless becomes essential to have a broad inkling of what the term 'cause of action' implies and it is perhaps best to adopt the meaning attributed thereto by Lord Esher, Master of Rolls, in *Read v. Brown*, (1888) 22 QBD 128—

"* * * What is the real meaning of the phrase 'a cause of action arising in the City'? It has been defined in *Cooks v. Gill* Law Rep. 8 CP 107 to be this: every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved."

The above-said observations have the merit of approval in Mohammad Khalil Khan v. Mahbub Ali Mian, AIR 1949 PC 78 wherein their Lordships also have laid down the tests that may be applied in cases falling under O. 2, R. 2 in order to determine whether the claim in a new suit is in fact founded upon a cause of action distinct from that which was the foundation of the former suit.

8. One of the salient tests laid down by Sir Madhwan Nair in Mohd. Khalil Khan's case AIR 1949 PC 78 above is that if the evidence to support the two claims is different then the causes of action are also different. Applying this test, can it be said that the evidence to support a claim for the possession of property is identical with the evidence required for establishing a claim for mesne profits? The answer, to my mind, appears to be patently in the negative. Section 2 (12) of the Code of Civil Procedure defines the term as follows:—

"2 (12). 'mesne profits' of property means those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom, together with interest on such profits, but shall not include profits due to improvements made by the person in wrongful possession."

As is plain from the above-said provision the claim for mesne profits may well require evidence of the duration of wrongful possession of profits which the person in wrongful possession may have actually received or in the alternative constructively which he might with ordinary diligence have received; and the quantum of interest on such profits. Can it possibly be said that evidence of the above-said nature is equally required to support the claim of possession? In my view it is hardly so. In a suit for possession it might well suffice the plaintiff to prove his title to the property and the factum of possession within 12 years of the filing of the suit in order to succeed. At the highest it can be said that some facts in the two suits may be either common or similar. But as has often been said mere similarity is not identity. Merely because in the two cases the facts may substantially run to an extent parallel to each other or simply because certain matters are common in the two suits cannot warrant a conclusion that the evidence in a suit for possession and in a suit for mesne profits may necessarily be identical. I find, therefore that by the application of the above-said test also it would be manifest that the two causes of action are distinct and separate.

9. The above-mentioned view that I am inclined to take is amply fortified by

the decision of the Court of Appeal in *Brunsdon v. Humphrey*, (1885) 14 QBD 141. Therein the plaintiff whilst driving his cab came into collision with the van of the defendant through the negligence of the latter's servant. In the accident the cab was damaged and the plaintiff also sustained bodily injury. He first sued the defendant for damage to his cab and recovered some amount therefor. Afterwards he brought an action in the High Court claiming damages for personal injuries sustained. Brett, M. R. upholding his claim observed as follows:—

"* * * Different tests have been applied for the purpose of ascertaining whether the judgment recovered in one action is a bar to a subsequent action. I do not decide this case on the ground of any test which may be considered applicable to it, but I may mention one of them; it is whether the same sort of evidence would prove the plaintiff's case in the two actions. Apply that test to the present case. In the action brought in the county Court, in order to support the plaintiff's case, it would be necessary to give evidence of the damage done to the plaintiff's vehicle. In the present action it would be necessary to give evidence of the bodily injury occasioned to the plaintiff, and of the sufferings which he has undergone, and for this purpose to call medical witnesses. This one test shows that the causes of action as to the damage done to the plaintiff's cab, and as to the injury occasioned to the plaintiff's person, are distinct. Therefore we are not now called upon to apply a legal maxim, the application of which ought not to be stretched. The plaintiff is entitled to recover the sum of £ 350, awarded by the jury. Two actions may be brought in respect of the same facts, where those facts give rise to two distinct causes of action."

10. Inevitably, one must now turn to the relevant provisions of the statute and the scheme in which these are laid in Order II of the Civil Procedure Code. For facility of reference, these may first be set down:

"Order II

Frame of Suit

R. 1. Every suit shall as far as practicable be framed so as to afford ground for final decision upon the subjects in dispute and to prevent further litigation concerning them.

2 (1) Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court.

(2) Where a plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished.

(3) A person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs; but if he omits, except with the leave of the Court, to sue for all such reliefs, he shall not afterwards sue for any relief so omitted.

Explanation: x x x x

Illustration: x x x x

3. Joinder of causes of action: x x

4. No cause of action shall, unless with the leave of the Court, be joined with a suit for the recovery of immovable property, except—

(a) claims for mesne profits or arrears of rent in respect of the property claimed or any part thereof;

(b) claims for damages for breach of any contract under which the property or any part thereof is held; and

(c) claims in which the relief sought is based on the same cause of action:

Provided: x x x x x.

It is indeed unnecessary to dilate at length about the objects and the purposes underlying Rule 2 above-quoted. It has been authoritatively held that the provision is plainly directed against the twin evils of the splitting up of claims and splitting up of remedies. It is obviously intended to avoid a multiplicity of actions. However, even a plain reading of the rule makes it evident that it is intended clearly to apply only to a claim based on one cause of action. It does not bar the bringing of a second suit if it is based on a distinct and separate cause of action. It is elementary that, except where a statutory provision provides otherwise, two suits may be brought upon facts which give rise to two distinct causes of action. In order to attract the application of Rule 2, the previous suit as well as the subsequent suit must arise out of a single and indivisible cause of action and secondly the suit must be substantially between the same parties.

11. Now it is an elementary canon of construction that the provisions of a statute are to be read harmoniously and an interpretation is to be avoided which may render any part thereof otiose. Applying this salutary principle, the provisions of Rule 2 and Rule 4 above quoted must be construed as complementary to each other. Now the very opening words of Rule 4 are a clear pointer to the fact that this provision treats a claim for the recovery of immovable property and a claim for mesne profits thereof as two distinct and separate causes of action. This

is so because that could be the only reason why Rule 4 above-said has to especially provide for joining a claim for mesne profits with a claim for the recovery of immovable property. Indeed, if the two claims were a single indivisible cause of action, then no necessity for a provision like sub-clause (a) of Rule 4 would arise and such a construction would render this provision wholly redundant and otiose. On the other hand, but for the provision of Rule 4 (a) which provides an express exception, the general prohibition of joining any other cause of action with a suit for recovery of immovable property would come into operation even in cases where the two claims were to be made. It is merely an enabling provision which allows the joinder of these two causes of action. The conclusion, therefore, which inevitably seems to flow from reading Rule 2 and Rule 4 together is that Order 2 treats a cause of action for recovery of immovable property as distinct from a cause of action for the mesne profits thereof.

12. A reference to analogous statutes again reinforces the view that the two causes of action are treated as distinct and separate. The Limitation Act of 1908 which was promulgated in the very year in which the present Civil Procedure Code came into force provided by Article 109 thereof (corresponding to Article 51 of the Limitation Act of 1963) that the limitation for suing for mesne profits was 3 years from the date when the profits were received. In sharp contrast thereto, Arts. 136 to 138, 140 to 142 and 144 of the said Act (corresponding to Arts. 64 and 65 of the Limitation Act of 1963) provided a limitation of 12 years for a suit for the recovery of possession of immovable property. It is manifest, therefore, that the periods of limitation as also the terminus a quo for a suit for mesne profits and a suit for the recovery of possession of immovable property are both substantially different. If both these causes of action were one and indivisible, this could possibly not be so. It is so only because the statute treats the two causes of action as patently separate from each other. As is well known, mesne profits accrue from day to day and the cause of action in such a case, therefore, would be a continuing one and arising out of the continued misappropriation of the profits, actual or constructive, to which the plaintiff is entitled at law. On the other hand, in a suit for recovery of immovable property the terminus is always a fixed one from either the alleged date of dispossession or when the possession of the defendant becomes adverse to the plaintiff. The procedural limitation statutes, therefore, again buttress the view that mesne

profits on the one hand and suit for the recovery of immovable property have been accepted to be distinct causes of action.

13. The above-quoted provisions of the Limitation Act also bring into sharp relief what is otherwise equally evident on principle. A wrongful dispossession of immovable property or a continuance in adverse possession thereof is by itself an independent wrongful act. This would per se give rise to a cause of action to the plaintiff. If thereafter the person in wrongful possession continues to deprive the rightful owner of the usufruct of the said property either actual or constructive he commits a second and independent wrongful act thus giving rise to another distinct cause of action. Hence a wrongful dispossession of immovable property can be and in fact is distinct and separate from the wrongful deprivation of the usufruct thereof to its owner. As has been authoritatively said there is no reason on principle why a plaintiff, if so inclined, may not acquiesce in the wrong of dispossession for some time till he chooses to recover the same (subject to a limitation of 12 years) and yet claim from time to time (within the three years period of limitation) the profits of the land whilst it remains in the wrongful occupation of the defendant.

14. The stage is now set for the examination of the authorities and the existing conflict therein. The basic reliance of Mr. K. K. Aggarwal on behalf of the appellants is on the Full Bench judgment reported as *Laljimal v. Hulas*, 1881 ILR 3 All 660 (661). There is no gainsaying the fact that the conclusion arrived at in the said case would lend support to the proposition advanced by the counsel for the appellants. With the greatest deference, however, it has to be noticed that the issue was probably not exhaustively agitated before the Bench. The matter appears to have been treated as one of first impression. Brief judgments each running hardly into a single short paragraph were separately recorded by Straight, J. and Spankie, J. Ever here it appears to me that the Bench did not arrive at any conclusive finding that the causes of action for mesne profits and that for the recovery of immovable property are identical or indivisible. On the contrary it was in terms opined that the two causes of action again could be distinct and separate and this is manifest from the following observations of Justice Straight—

"It may well be that in some cases a claim of mesne profits would, as contemplated by Section 44 of Act X of 1877 (corresponding to Order 2, Rule 4 of the present Code) amount to a cause of action distinct from that on which a suit for the

recovery of immovable property or for declaration of right to immovable property might be founded."

After making the above-said observations, however, the learned Judges found that on the peculiar facts of the case the possession and mesne profits were so mixed up and involved with one and the same common cause, namely, the non-delivery of possession in a suit for specific performance of the contract of mortgage, that they must be taken as constituting the whole claim the plaintiffs were entitled to make in respect of the same. It is possible, therefore, to construe this judgment as peculiar to the facts upon which it was founded.

15. Once the above-quoted judgment was rendered it was naturally followed within the Allahabad High Court and Mr. Aggarwal's reliance on *Mewa Kaur v. Banarsi Prasad*, (1895) ILR 17 All 533, which is a Division Bench case, does not in any way add to the argument on his behalf. However, it is instructive to notice that even here, Chief Justice Edge and Banerji, J. had this to say:—

"* * * It is possible that there may be a case in which a party would be entitled to claim recovery of immovable property and to claim mesne profits in respect of that property in which the cause of action might not be the same, and it may have been to provide for such a case as that, that cl. (a) of S. 44 was inserted in that section. Such a case does not present itself to our minds. We cannot say that such a case has not arisen."

16. Whatever aid the above-said two cases may give to the argument on behalf of the appellant, the same appears to be substantially eroded by the weighty observations of Acting Chief Justice Sulaiman speaking for the Special Bench in *B. Ram Karan Singh v. Nakhahad Ahir*, AIR 1931 All 429. In this case the claim for mesne profits related to the period between the institution of the first suit for possession and the actual date on which the possession was obtained. It was resisted on the identical ground of the bar of Order 2, Rule 2, Civil Procedure Code. In allowing the claim Sulaiman Ag. C. J. observed:—

"It seems to us that the cause of action for recovery of possession is not necessarily identical with the cause of action for recovery of mesne profits. The provisions of Order 2, Rule 4 indicate that the legislature thought it necessary to provide especially for joining a claim for mesne profits with one for recovery of possession of immovable property and that but for such an express provision such a combination might well have been disallowed. A suit for possession can be brought within twelve years of the date

when the original dispossession took place and the cause of action for recovery of possession accrued. The claim for mesne profits can only be brought in respect of profits within three years of the institution of the suit and the date of the cause of action for mesne profits would in many cases be not identical with the original date of the cause of action for the recovery of possession."

It is thus manifest that within the Allahabad High Court also there is a clash of opinion and in the latest Special Bench decision brought to our notice the weighty observations of Acting Chief Justice Sulaiman indeed tend to favour the view canvassed on behalf of the respondents.

17. Within the Bombay High Court reliance is sought to be placed on a Division Bench judgment of Beaumont, C. J. and Sen, J. reported as Channappa Girimalappa Jolad v. Bagalkot Bank, AIR 1942 Bom 338. The facts there were slightly peculiar in so far as the claim for possession was based on the alleged wrongful alienation of immovable property by the adoptive mother of the plaintiff. Though the learned Chief Justice held that a second suit for mesne profits was barred because it has not been included in a previous suit for possession of the property he expressly noticed the conflict within the Court because in Ramchandra v. Lodha, AIR 1924 Bom 368 it has been in terms held that a claim for possession of the immovable property was not founded on the same cause of action as a claim for mesne profits in respect of that property. Chief Justice Beaumont found some conflict in the earlier view of the Court and the subsequent decision in Naba Kumar v. Radhashyam, AIR 1931 PC 229 (to which judgment detailed reference would be made hereafter) but ultimately seems to have rested his decision on the peculiar facts of the case with the following observations:—

"* * * It is, I think, difficult to reconcile Ramchandra v. Lodha, AIR 1924 Bom 368, with that opinion of the Privy Council. But in this case there was something more in the former suit than the claim for possession, because an issue was raised as to whether Irawa had a life interest in the property. Directly the Court held that she had not got a life interest in the property, it manifestly became possible for the plaintiff, on exactly the same facts and law as he had relied on for challenging the life interest, to claim the rents and profits received by the defendant in respect of that life interest. In my opinion, it is clear that in this case a claim for rents and profits could have been made on the same cause of action as that on which the 1933 suit was founded."

It appears from the above that the matter was tilted to one side not so much on an issue of principle as upon the peculiarity of the facts in that case.

18. Mr. Aggarwal had also placed some semblance of reliance on the Single Bench judgment in Dwarkadas Nathamall v. Vimal, AIR 1964 Bom 42. I am, however, of the view that it is completely wide of the mark. Therein there was no issue of any earlier suit for the recovery of possession and a subsequent one for a claim to mesne profits. The problem was posed merely by the fact that the plaintiff had brought a suit in 1954 for recovery of mesne profits for the year 1951 which was decreed in his favour in 1955. The plaintiff then brought a second suit in March 1955 for recovery of mesne profits for the years 1952-53 against the same defendants which was rightly held to be barred. This decision seems hardly relevant to the present issue.

19. As regards the predecessor Courts of this High Court the Judgment cited in Ganga Ram v. Abdul Rahman, 28 Pun Re 1907, seems equally wide of the mark because it relates to the competency of a mortgagee to institute a separate suit for principal and interest when both had fallen due. The above-said judgment was naturally followed in Chaudhri Kundan Mal v. Sardar Allah Dad Khan, 19 Pun Re 1910, which again was a case of a mortgagee suing only for interest due and not for principal thereof after the date of the expiry of the mortgage term. Obviously this also is hardly relevant. Same can well be said of Malik Karim Baksh v. Jattu Ram, 31 Pun LR 1910. Here it deserves pointed notice that the point at issue is directly covered by the Full Bench judgment in Raja Bikrama Singh of Faridkot v. Prab Dial, 129 Pun Re 1889 in favour of the respondents and the observations in Division Benches or single Benches contrary to that view are entitled to little weight and therefore do not merit either distinguishing or refutation individually.

20. The solitary judgment of the Madras High Court referred to on behalf of the appellants is Venkoba v. Subbanna, (1888) ILR 11 Mad 151. There is hardly any discussion in the short order which was merely an acceptance of a reference from the Court below. These observations are directly contrary to the subsequent authoritative Full Bench judgment of the Madras High Court, to which reference is made hereafter.

21. As against the above-said decision there is a string of consistent judicial opinion which decisively favours the contrary view canvassed on behalf of the respondents. Inevitably reference must first be made to the Full Bench decision in

Raja Bikrama Singh's case, 129 Pun Re 1889 which has held undisputed sway within this jurisdiction for well-nigh a century. No decision directly contrary to its ratio within this Court has been cited. In Raja Bikrama Singh's case, the point at issue was formulated for consideration on a reference to the larger Bench by Powden, J. The unanimous opinion rendered by the Full Bench was that a second suit was not barred by the analogous provisions of Sections 42 and 43 of the Civil Procedure Code of 1877 which were then in force. Plowden, J. pathily observed—

"* * * On the view we adopt, ejecting a person from immovable property in his possession, and thereafter preventing the person entitled to the profits of immovable property from enjoying them are not the same cause of action, but distinct causes of action, being separate wrongful acts. On principle, we see no reason why a plaintiff should not, if so disposed, acquiesce in the wrong of dispossession and leave the land with the defendant till he chooses to recover it (subject to the law of limitation), and yet claim from time to time the profits of the land while in the occupation of the defendant."

22. In the Madras High Court the earlier case cited is that of Tirupari v. Narasimha, (1888) ILR 11 Mad 210. There the Division Bench concluded as follows:—

"* * * We are of the opinion that the suit to recover mesne profits and the suit to eject are not parts of a claim founded on the identical cause of action within the meaning of Section 43, and that if mesne profits are alone claimed in the first suit as damages due for adverse occupancy, a second suit can be maintained to recover possession of the land."

The authoritative pronouncement, however, is the Full Bench decision in Ponnammal v. Ramamirda Aiyar, ILR 38 Mad 829 = (AIR 1915 Mad 912) which has been consistently followed thereafter in the Madras High Court and has been accepted as authoritative in other jurisdictions as well. It was categorically held therein that where a plaintiff sued for possession of lands only when he might have joined in the same action claims for mesne profits and damages, it was still open to him to bring a subsequent suit against the same defendants for the profits which became payable before the institution of the former suit and which might have been included in that suit. For the reiteration of the above-said ratio reference in passing may be made to Venugopal Pillai v. Thirugranavalli Ammal, AIR 1940 Mad 934 and Tadeipalli Ramiah v. Madala Thathiah, AIR 1937 Mad 849.

23. Within the Calcutta High Court an identical view has prevailed for more

than a century by now. In Protap Chunder Burooah v. Ranee Surno Moyee, (1869) 12 Suth WR 5, it was held relying even on an earlier Full Bench decision of the Court that a regular suit for mesne profits would lie even after a suit for possession, if in that suit no question of mesne profits was raised or decided. An authoritative decision, however, later is that of the Full Bench in Kishori Lal Roy v. Sharut Chunder Mozumdar, (1882) ILR 8 Cal 593 in which Garth, C. J. speaking for a Bench of five Judges observed that the accepted law within the Court was to allow a plaintiff to enforce a claim for possession of land and for mesne profits either in one suit or two as he may think proper. This judgment was expressly followed in Lalesor Babui v. Janki Bibi, (1892) ILR 19 Cal 615. A relatively recent judgment showing the consistent trend is that of Sris Chandra Nandy v. Joyramdanga Coal Concern Ltd., AIR 1942 Cal 40.

24. In the Bombay High Court a Division Bench in Ramchandra Adaram Agarwale v. Lodha Gouri Bhadbhunji, AIR 1924 Bom 368, expressly referred to and followed the view taken by the Madras Full Bench in Ponnammal's case AIR 1915 Mad 912 (supra).

25. In Ma Myaing v. Mg. B. Chit, AIR 1926 Rang 137, the conflict of decision with the Allahabad High Court was noticed by the Bench and it opined that the ratio of the Full Bench in Ponnammal's case AIR 1915 Mad 912 followed by the Bombay decision quoted above laid down a sounder rule of law, and followed the same.

26. In the Andhra Pradesh High Court a relatively recent Division Bench judgment reported as Abburi Rangamma v. Chitrapu Venupurnachandra Rao, AIR 1966 Andh Pra 325 has exhaustively considered the matter both on principle and authority and then held that the cause of action for recovery of immovable property is distinct from that of mesne profits and hence a second suit claiming the same would not be barred by Order 2, Rule 2 of the Civil Procedure Code.

27. The only judgment of the Patna High Court cited before us is the Division Bench case of Loknath Singh v. Dwarika Singh, AIR 1931 Pat 233, which is directly on the point and the learned Judges therein have expressly preferred to follow the Madras view laid by the Full Bench in Ponnammal's case AIR 1915 Mad 912.

28. It is manifest from the above re'sume' of authority that there is an overwhelming weight of precedent in favour of the view canvassed on behalf of the respondents in the Puniab, Calcutta, Madras, Patna, Andhra Pradesh and Rangoon High Courts. There appears to be apparent

conflict of authority within the Allahabad High Court itself but the subsequent Special Bench judgment in B. Ram Karan Singh's case AIR 1931 All 429 (SB) (supra) is consistent with the above-said string of authorities. From the cases cited before us it appears that some conflict ensues within the Bombay High Court which has not been finally resolved.

29. The high authority of the Privy Council has been invoked on behalf of the appellants and it remains to examine this contention. As a last resort Mr. Aggarwal had argued that the ratio of Naba Kumar Hazra v. Radhashyam Mahish, AIR 1931 PC 229 is applicable and that case has overruled the consistent string of authorities to which a reference has been made above. I am wholly unable to agree. The above-mentioned case was the aftermath of the earlier decision reported as Nagendrabala Dasi v. Dinanath Mahish, AIR 1924 PC 34. A reference to the two judgments would show that the facts therein were indeed tangled. A close reading exhibits that a pleader who was appearing for the judgment-debtors in a mortgage suit had the decree in the said suit purchased benami in the name of his wife. He later began to execute the same but the judgment-debtors having come to know of the said fact filed a suit to have it declared that it was really a benami and a fraudulent purchase for and on behalf of the pleader who was the real purchaser. The plaintiffs, therefore, claimed appropriate relief in that action. During the pendency of the suit the property was sold and the wife of the pleader was allowed to purchase a part of the same and in consequence thereof necessary amendments were permitted to be made in the plaint by which the plaintiffs further laid claim to a reconveyance of the decree, as also the said property. The plaintiffs' suit was decreed and it was ordered that reconveyance of the decree be made in favour of the plaintiffs conditional on their paying a sum of Rs. 13,750/- only. On appeal the High Court not only affirmed this part of the judgment but further ordered that the two defendants must also convey the properties purchased by the female defendant (i.e. the wife of male defendant) during the course of the execution proceedings of the decree. The Privy Council upheld this judgment of the High Court by their decision in Nagendrabala Dasi's case.

30. Subsequently some of the judgment-debtors instituted a fresh suit upon the allegation that after the execution sale of the properties in question the purchasers thereof were for sometime in receipt of rents and profits for which they had not accounted. The relevant claim in the plaint was for account and payment.

The trial Court held that the suit was barred by principles of res judicata. However, the High Court took a contrary view holding that the facts gave rise to no question of res judicata. On appeal their Lordships of Privy Council in Naba Kumar Hazra's case, AIR 1931 PC 229 held that without expressing any opinion on the point of res judicata they were of the view that the suits of the plaintiffs were plainly barred by Order 2, Rule 3 of the Civil Procedure Code.

31. It is plain from the above-quoted facts that in the latter case there was no question or issue of any claim for mesne profits. Particular relief sought was only for account and payment. Equally manifest it is that no issue of any previous or subsequent suit for possession of immovable property arose. Their Lordships of the Privy Council did not even remotely construe or treat the cause of action in the case as one for mesne profits. They made no reference to the long string of authoritative precedent on the point because it did not in terms arise. Similarly as the specific provisions of Order 2, Rule 4 of the Civil Procedure Code were not at all attracted, therefore no reference was made to them. An analytical reading of the judgment would show that there is nothing therein to indicate that the Privy Council intended to depart from the settled principle (recognised both in Indian and English law) that an action for mesne profits and an action for recovery of immovable property were founded on distinct causes of action and to overrule the large body of consistent case law on the point.

32. In the above context what is particularly worthy of notice is the fact that the distinguished jurist Sir Dinshah Mulla was himself a party to the judgment in Naba Kumar Hazra's case, AIR 1931 PC 229. In his authoritative commentary on the Civil Procedure Code Sir Dinshah Mulla later did not even remotely treat the said decision as laying down a contrary view from that taken by the large majority of the High Courts on this point to which reference has been made above. I am, therefore, of the view that the Privy Council case does not cover the point at issue either directly or by way of analogy and it is, therefore, of no aid to the appellant.

33. In this context it also deserves mention that similar arguments based on Naba Kumar Hazra's case AIR 1931 PC 229 were raised before the Division Benches in Tadepalli Ramiah v. Madala Thathiah, AIR 1937 Mad 849; Venugopal Pillai v. Thirugananavalli Ammal, AIR 1940 Mad 934; Abburi Rangamma v. Chitrapu Venupurnachandra Rao, AIR 1965 Andh Pra 325 and Sris Chandra Nandy v.

Joyramdanga Coal Concern Ltd., AIR 1942 Cal 40, and were repelled for detailed reasons recorded therein. No useful purpose would be served in traversing the same ground again and it suffices to mention that I am in entire agreement with the reasoning given in the above-said judgments for distinguishing the Privy Council case.

34. Two more matters remain to be adverted to ere I close this judgment. Firstly it appears that the construction advocated on behalf of the appellants, namely, that the two causes of action are in fact a single indivisible cause would lead to anomalies, to hardship and if I may say so with the greatest respect to illogicality. This is patent if the argument is carried to its extreme in order to test its validity and to my mind a case illustrative of this fact is one reported as Saghir Hassan v. Tayab Hasan, AIR 1940 All 524. Therein in conclusion it has been observed as follows:—

"In our judgment if a person is wrongfully kept out of possession of immovable property he is entitled to sue for possession and for mesne profits and under the provisions of Order 2, Rule 2 (3) he is bound to include both claims in one suit. If he sues only for mesne profits he cannot in a subsequent suit sue separately for possession. In other words he is no longer entitled to possession; and if he is not entitled to possession he is not entitled to mesne profits."

With the greatest deference to the learned Judges I would beg to differ from the above-said view and it appears to me that thereby mere technicalities of procedure have been elongated to an extent so as to erode even the substantive rights of possession to property. On the above-said opinion if an unfortunate litigant under some misapprehension or wrong advice or perhaps due to financial disability (for sustaining a suit for possession) sues for mesne profits in the first instance and omits or fails to sue for possession of the property at the same time then subsequently even his substantive right to recover his own immovable and valuable property against a mere trespasser would become barred. The end-result, therefore, would be that a valuable substantive right to property would be lost by a mere procedural error or disability. Such a situation has necessarily to be avoided unless, of course, it is the only and inevitable rule deducible from the unequivocal provisions of a statute. This is certainly not the case here. At the highest what can possibly be said for the appellant is that two views are perhaps possible on the relevant provisions of Order 2, Rules 2 and 4, Civil Procedure Code. As I have already pointed out above a very

large number of illustrious judges have taken a contrary view which is clearly in favour of that canvassed by the respondent. Now it is a settled rule of construction that where two interpretations of a statutory provision are possible then one which tends to mere technicality, causes unnecessary hardship, erodes substantive rights, and denies a trial on merits, is naturally to be avoided. On this larger and equitable consideration also it appears to me that the construction that a cause of action for mesne profit is separate and distinct from a cause of action for recovery of immovable property is to be distinctly preferred.

35. Lastly I am inclined to the view that within this particular jurisdiction the rule of stare decisis also prevents any construction other than that advocated on behalf of the respondents. This is so because for nearly a century since 1889 the rule laid down by the Full Bench in Raja Bikaram Singh of Faridkot's case 129 Pun Re 1889 has held unmistakable sway both in the Lahore High Court and thereafter in this successor Court. Chief Justice Bhandari in Municipal Committee, Delhi v. Janki Das Jagan Nath, AIR 1954 Punj 173, had occasion to observe that it must be remembered that this Court is a successor and a continuation of the Court at Lahore and the decisions of that Court ought to be followed in the application of the principle of stare decisis, unless those decisions are manifestly erroneous. The same result flows by way of analogy from the more authoritative pronouncement of their Lordships of the Supreme Court in Maktul v. Mst. Manbhari, AIR 1958 SC 918. It deserves pointed mention that even the learned counsel for the appellants had conceded that no view even remotely contrary to or dissenting from the ratio in Raja Bikrama Singh's case has ever been voiced either in the Lahore High Court or in this Court. Now, as a matter of abundant caution, even if any such dissent exists (though none has been brought to our notice) it would not even remotely detract from the weight of the ratio in Raja Bikrama Singh's case in view of the forthright opinion of their Lordships in Jai Kaur v. Sher Singh, AIR 1960 SC 1118, in the following terms:

"It is true that they did not say in so many words that these cases were wrongly decided; but when a Full Bench decides a question in a particular way every previous decision which had answered the same question in a different way cannot but be held to have been wrongly decided."

It is manifest, therefore, that a view of the law which is also in consonance with the massive weight of precedents in innumerable other High Courts and which

has been followed within this jurisdiction for nearly a hundred years is, therefore, not capable of being easily disturbed. Their Lordships of the Supreme Court have repeatedly reiterated that even Benches of co-equal jurisdiction are binding upon each other. Unless there is cause to differ — in the present case far from it being so I am indeed wholly in agreement — the ratio in Raja Bikrama Singh's case is a binding one and no cause has been shown to us to disturb the consistency and the continuity of a rule which has held the field for all this while.

36. I conclude, therefore, that in the light of the legislative history; on an examination of principle; considering the specific provisions of the relevant statute, taking in view the massive weight of precedent; no option exists but to answer the legal question (formulated in the opening part of the judgment) in the negative.

37. In view of my above-said opinion on the only issue of law raised, the same is hereby decided against the appellants. The appeal is hereby dismissed but in view of the intricate point of law involved I propose no order as to costs.

MUNI LAL VERMA, J. (agreeing):—

38. I agree with the view taken by my learned brother S. S. Sandhawalia, J.

MAN MOHAN SINGH GUJRAL, J. (dissenting):— 39. I have had the advantage of reading the judgment of my learned brother S. S. Sandhawalia, J., but with utmost respect for my learned brother I have been unable to persuade myself that the interpretation sought to be placed on Order 2, Rule 2, Code of Civil Procedure, is in accordance with the true intent and scope of this provision especially if O. 2 R. 2, is examined in the light of the other provisions contained in Order 2, Rule 1, and O. 2, R. 4.

40. The facts necessary for the decision of the only issue in this case are not in dispute and having been set out in the judgment of my learned brother bear no repetition. It would suffice to mention that in the earlier suit which was for possession of the property and was filed on the basis that the defendants were in wrongful and unauthorised occupation, a claim for mesne profits till the date of the institution of the suit had not been included and that subsequently a separate suit for the recovery of the mesne profits was filed.

41. This suit was contested on various grounds including the two which led to the following issues:—

1. Whether the trial of the suit cannot be proceeded with in view of the pro-

visions of Section 10, Civil Procedure Code?

2. Whether the suit is barred under Order 2, Rule 2 of the Code of Civil Procedure as alleged in para. 2 of the preliminary objections in the written statement?

Both the issues were decided against the plaintiffs by the trial Court but in appeal the learned Judge reversed the finding on issue No. 2. It is this decision which is the subject-matter of the present appeal.

42. Whether the second suit is barred in view of the provisions of O. 2, R. 2, Civil Procedure Code, is the problem with which we are faced. In order to appreciate the relevant contentions, it would be appropriate to examine the provisions of Order 2, Rules 1, 2 and 4 and for facility of reference they are set down below.

"1. Every suit shall as far as practicable be framed so as to afford ground for final decision upon the subjects in dispute and to prevent further litigation concerning them.

2. (1) Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court.

(2) Where a plaintiff omits to sue in respect of or intentionally relinquishes, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished."

(3) A person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs; but if he omits, except with the leave of the Court, to sue for all such reliefs, he shall not afterwards sue for any relief so omitted.

Explanation.—For the purposes of this rule an obligation and a collateral security for its performance and successive claims arising under the same obligation shall be deemed respectively to constitute but one cause of action.

No cause of action shall, unless with the leave of the Court, be joined with a suit for the recovery of immovable property, except—

(a) claims for mesne profits or arrears of rent in respect of the property claimed or any part thereof;

(b) claims for damages for breach of any contract under which the property or any part thereof is held; and

(c) claims in which the relief sought is based on the same cause of action:

Provided that nothing in this rule shall be deemed to prevent any party in a suit for foreclosure or redemption from

asking to be put into possession of the mortgaged property."

A bare perusal of the above provisions would show that clue to the problem is contained in the expression "cause of action" in the sense that if a claim for possession of the property and a claim for mesne profits arising therefrom are considered distinct and separate cause of action, then a subsequent suit is not barred, but if they are considered one cause of action the suit would be barred.

43. The expression "cause of action" has not been put into the strait-jacket of a precise or even a general definition either in the Code of Civil Procedure or any other statute. It is accepted that the term "cause of action" is of a varying and doubtful meaning and because of its finer shades, it is not easy to put the concept in a steel frame. Over the past decades efforts have, however, been made by eminent judges and jurists to lay down the guidelines for appreciating true meaning of this expression. Relying on the observations in *Read v. Brown*, (1888) 22 QBD 128, the Privy Council in *Mohammad Khalil Khan v. Mahbub Ali Mian*, AIR 1949 PC 78, broadly defined "cause of action" as every fact which would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment. The following principles were deduced from the case law:—

"(1) The correct test in cases falling under O. 2, R. 2, is "whether the claim in the new suit is in fact founded upon a cause of action distinct from that which was the foundation for the former suit.

(2) The cause of action means every fact which will be necessary for the plaintiff to prove if traversed in order to support his right to the judgment.

(3) If the evidence to support the two claims is different, then the causes of action are also different.

(4) The causes of action in the two suits may be considered to be the same if in substance they are identical.

(5) The cause of action has no relation whatever to the defence that may be set up by the defendant nor does it depend upon the character of the relief prayed for by the plaintiff. It refers... to the media upon which the plaintiff asks the Court to arrive at a conclusion in his favour."

It was further observed that where the facts which would entitle the plaintiffs in their new suit to recover property to establish their title are substantially the same as those alleged in their former suit to recover property X, the causes of action in the two suits are identical and the plaintiffs are barred by reason of O. 2, Rule 2, from maintaining the new suit.

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44. While proceeding to consider, in the light of the above observations, whether a claim for mesne profits and a claim for possession arise out of the same cause of action or not, it would be pertinent to examine the definition of mesne profits contained in Section 2(12) of the Civil Procedure Code. The definition is as follows:—

"2(12) "mesne profits" of property means those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom, together with interest on such profits, but shall not include profits due to improvements made by the person in wrongful possession."

In the Code of Civil Procedure, 1859, the relevant provisions were Sections 7 to 10. Section 7 provided that every suit shall include the whole of the claim arising out of the cause of action. It was further provided that if the plaintiff relinquishes or omits to sue for any portion of his claim, a suit for the portion so relinquished or omitted shall not be entertained afterwards. Section 10 provides as follows:—

"10. A claim for the recovery of land and a claim for the mesne profits of such land shall be deemed to be distinct causes of action within the meaning of the two last preceding sections."

In view of the above provision, a claim for recovery of land and a claim for mesne profits of such land were treated as distinct causes of action. The implication of this is that but for the deeming provision contained in Section 10 the two claims would be considered to have arisen out of one and the same cause of action and as it was intended that these claims should be treated as distinct causes of action a deeming provision had to be introduced. The argument that the framers of the Indian Code of Civil Procedure, 1859, accepted the concept that a claim for recovery of land and a claim for mesne profits were distinct causes of action is obviously fallacious, as in that case there was no occasion to introduce the deeming provision as contained in Section 10.

45. Leaving the historical aspect apart, even if the test whether the evidence to support the two claims is the same or different is applied, in my opinion the plausible conclusion would be that a claim for possession of property and a claim for mesne profits thereof form one cause of action. In a suit for possession of property in order to succeed, the plaintiff would have to prove his title to the property and the fact that he had been in possession within twelve years of the filing of the suit. In a suit for mesne profits, besides proving these facts the

plaintiff would have to prove the period during which the defendant had been illegally in possession and the profit which the person in wrongful possession of such property had received or might with ordinary diligence have received therefrom. It would, therefore, appear that the material part of the evidence is the same. In fact, unless the plaintiff can establish his claim for possession, a claim for mesne profits would not arise. If the view taken is that the evidence in the two cases must be wholly identical and not only substantially so, even a claim for mesne profits for subsequent years would not bar a claim for earlier period, as in the former suit the plaintiff would have to prove the profits which would or could have been earned during the particular period while in the latter suit the profits for a different period would have to be established. It is, however, not disputed that mesne profits for an earlier period cannot be claimed in a subsequent suit where earlier, mesne profits for a subsequent period had been claimed. The true test would, therefore, be that the evidence in the two suits should substantially be the same and applying this test I find that the plaintiff, in order to establish his claim for mesne profits, would lead substantially the same evidence which he would have to in order to succeed in a suit for possession against a person in wrongful possession. The only additional fact which he would have to prove could be in respect of the quantum of the mesne profits involved.

46. The stage is now set for examining the second argument advanced on behalf of the respondent which is based on Rule 4 of Order 2. The precise argument is that Rule 4 envisages that a claim for recovery of immovable property and a claim for mesne profits thereof are two distinct and separate causes of action. It is asserted that if a claim for mesne profits and a claim for recovery of immovable property are treated as a single cause of action, sub-rule (a) of Rule 4 would become redundant.

47. The above argument, no doubt on first impression, does appear attractive, but a close examination of Rule 4 would highlight the hollowness of this contention. It appears that the expression "cause of action" in Order 2, Rule 4, has been used not in the sense it is used in Order 2, Rule 2, but in a different context. A reference to clause (c) of Rule 4 would support such an argument. Ignoring clauses (a) and (b) of Rule 4 for the present, the relevant portion of Rule 4 would read as follows:—

"No cause of action shall be joined with a suit for the recovery of immovable property except — claims in

which the relief sought is based on the same cause of action."

According to this clause, claims arising out of a cause of action can be joined with a suit for the recovery of immovable property if the cause of action is the same, out of which the claims as well as the suit for the recovery of immovable property arise. The cause of action being one, no question of joining a cause of action with a suit for the recovery of immovable property would in this situation arise and, viewed in this context, so far as clause (c) of Rule 4 is concerned, the opening part of Rule 4 would be redundant. In case the claim to which reference is made in clause (c) of Rule 4 is based on the same cause of action in which a suit for the recovery of immovable property is based, the two claims would have to be joined in the same suit in view of the provisions of Rule 2 of Order 2 and no leave of the Court would be necessary. The only harmonious way in which Rule 4 (c) can be read is if the expression "cause of action" occurring in the opening line of R. 4 is taken to imply "claim" and the rule is read to mean that no claim shall be joined with a suit for the recovery of immovable property except claims in which the relief sought is based on the same cause of action.

48. Even if clause (a) of Rule 4 of Order 2 is closely examined, it would not support the contention that it envisages that a cause of action for the recovery of immovable property is distinct from the cause of action for mesne profits thereof. All that Rule 4 (a) provides is that a claim for the recovery of immovable property and a claim for mesne profits or arrears of rent in respect of that property or any part thereof can be joined in one suit without the leave of the Court. In case it was intended that a claim for mesne profits or arrears of rent be treated as a separate cause of action, clause (a) would have read as "cause of action giving rise to claim for mesne profits or arrears of rent in respect of the property claim or any part thereof." As a single cause of action can give rise to numerous claims, it cannot be plausibly urged that claims for mesne profits and arrears of rent in clause (a) of Rule 4 should be treated as if arising from a different cause of action from the one from which a suit for the recovery of immovable property arises. This rule provides that no cause of action shall be joined with a suit for the recovery of immovable property except claims for mesne profits or arrears of rent in respect of the property claimed or any part thereof unless the leave of the Court has been obtained but it does not necessarily carry an implication that a claim for mesne profits and a claim for posses-

sion of immovable property amount to separate and distinct causes of action. Having regard to the language of Cl. (c) of Rule 4 of Order 2, it can be plausibly urged that clauses (a) and (c) are not really exceptions but are merely explanations of the rule embodied in Rule 2 of Order 2.

49. It would be pertinent to examine another argument at this stage. It is contended that as the period of limitation for a suit for mesne profits was different from the period of limitation provided for a suit for the recovery of possession of immovable property, it could be inferred that the Limitation Act treats these causes of action as distinct and separate from each other. To me the argument appears to be devoid of the merit of plausibility. The starting point of limitation for both the claims would be the same, inasmuch as the moment the plaintiff is illegally dispossessed, he is entitled to recover possession as well as mesne profits for the period during which he remains dispossessed. The fact that a suit for the recovery of possession of immovable property can be brought within twelve years while a suit for mesne profits would have to be brought every three years is of no consequence for determining whether the two claims are based on distinct causes of action or on the same cause of action. A single cause of action may entitle a person to more than one relief and it could often happen that limitation for all these reliefs may not be the same, but that circumstances would not carry the implication that these reliefs have arisen out of different causes of action. To quote an example, a Government servant who is wrongfully dismissed may be entitled to a number of reliefs arising out of this cause of action including relief of reinstatement, back wages and promotion etc., but the period of limitation for all these reliefs would not be the same even though they arise out of the same cause of action. Having examined the various arguments advanced on either side, the stage is now set for considering the case law on the subject. It would be pertinent to observe at the outset that there is a sharp conflict of opinion as to whether a suit for possession of immovable property and a suit for mesne profits arise out of the same cause of action or are based on different causes of action. The High Courts of Madras, Calcutta and Bombay have taken the view that a suit for possession does not bar a suit for mesne profits accrued before the first suit, as the second suit is based on a cause of action different from that of the first suit. A contrary view has been taken by the High Courts of Allahabad, Oudh, Madhya Bharat, Peshawar and Sind, and in some of the decisions of the Calcutta, Bombay and Orissa High Courts.

In earlier cases, the Lahore High Court also accepted the view of the Calcutta and Madras High Courts as laying down the correct law. As the decision in these cases was not in accordance with the ratio of the decision of the Privy Council in *Naba Kumar Hazra v. Radhashyam Mahish*, AIR 1931 PC 229, the view of the Madras, Calcutta and Lahore High Courts was not followed by the other High Courts after the decision of the Privy Council in *Naba Kumar Hazra's* case.

50. Before proceeding to examine the other case-law, it would be appropriate to consider in detail the ratio of the decision in *Naba Kumar's* case AIR 1931 PC 229 and to examine the rival contentions whether it has or has not any bearing on the question that confronts us. The litigation giving rise to this appeal before the Privy Council had a long-drawn history and the case was a sequel of a case which had earlier come before the Privy Council in *Nagendrabala Dasi v. Dinanath Mahish*, AIR 1924 PC 34. It is not necessary to make a reference to the detailed facts and it would suffice to mention that as a result of the earlier case a pleader was held to be trustee for the mortgagors of the mortgaged property and also certain properties which he had purchased at a sale in execution of the decree in the name of his wife. He was ordered to transfer the decree and property to one set of mortgagors who were the plaintiffs in the suit on certain terms and conditions, with which we are not concerned. Subsequently two more suits were filed. One of these was instituted by the mortgagor plaintiff in the former suit. Initially the suit was filed for declaratory relief but subsequently the plaint was amended and assignment of the mortgage decree was prayed for. In the High Court in appeal, a prayer for the conveyance of the properties with necessary accounts was made. The High Court varied the decree and directed that the property should also be conveyed to the respondents but made no order for accounts. The claim for accounts was not pressed any further and the High Court's decree was affirmed by the Privy Council. The second suit was then filed on the allegation that after the execution purchase of the properties by the appellants they had received rents and profits for which they had not accounted and to which the plaintiffs were entitled. The trial Court held that the matter was *res judicata*, but in appeal the High Court came to the conclusion that the plaintiff was entitled to the profits and ordered accounts. Before the Privy Council the main question that arose was whether the second suit was barred by Order 2, Rule 2, or not. While considering the question, Sir George

Lowndes, who spoke for the Court, made the following observations:—

"The rule in question is intended to deal with the vice of splitting a cause of action. It provides that a suit must include the whole of any claim which the plaintiff is entitled to make in respect of the cause of action on which he sues, and that if he omits (except with the leave of the Court) to sue for any relief to which his cause of action would entitle him, he cannot claim it in a subsequent suit. The object of this salutary rule is doubtless to prevent multiplicity of suits.

The cause of action in the present suit is, their Lordships think, clearly the same as in the previous suit, the right to the rents and profits vested on the same foundation of facts and law as the right to have the purchases of the decree and of the properties declared to be purchase for the mortgagors.

The relief which the respondents claim in the present suit is an account of the rents and profits of these properties received by the appellants after their purchase and before the conveyance to the respondents. It is, their Lordships think equally clear that this relief could have been claimed in the previous suit. The conversion, by the execution purchase during the pendency of the suit, of the rights under the decree into the properties, entitled the respondents to ask in that suit for the conveyance of the properties. They evidently claimed this relief in the trial Court, but the Subordinate Judge thought that as there was no appropriate prayer in the plaint he could not grant it. The respondents went to the High Court on the contention that the Subordinate Judge was wrong, and that he ought to have ordered the conveyance of the properties. The High Court accepted this contention and granted the relief which the respondents so sought. If this was right, and their Lordships have no doubt that it was, it is obvious that the respondents could also have claimed an account of the rents and profits, and not having done so, or having abandoned the claim, they cannot seek this relief in a subsequent suit."

The ratio of the above decision clearly brings out that a claim for rents and profits of immovable property and a claim for possession of that property arise out of the same cause of action.

51. The above decision is sought to be distinguished on the ground that in the second suit there was no claim for mesne profits and that there was no earlier suit for possession of immovable property. In my opinion, the distinction sought to be drawn does not really arise. In *Naba Kumar Hazra's case* AIR 1931 PC 229 the

judgment-debtors had claimed in the earlier suit that the purchase by the pleader's wife was fraudulent and a prayer for reconveyance of the properties was made. The possession of the immovable properties by the pleader's wife can in the circumstances be considered unlawful. The rents and profits of these properties received by the person in unlawful possession were in fact mesne profits. The fact that in the suit the claim was for accounts of the rents and profits received and not for mesne profits is of no material consequence as the profits received would fall within the definition of the expression "mesne profits" as used in Section 2 (12) of the Civil Procedure Code. I have, therefore, no hesitation in holding that the observations in *Naba Kumar Hazra's case* fully support the contention that a claim for mesne profits and a claim for possession of immovable property in wrongful possession arise out of the same cause of action.

52. While proceeding to examine the case-law I would first consider the cases which have taken the view that wrongful possession of profits and wrongful ouster constitute distinct and separate causes of action. So far as the Lahore High Court is concerned, the matter was considered in *Raja Bikrama Singh of Faridkot v. Prab Dial*, 129 Pun Re 1839 (FB), and it was ruled as under:—

"The right to possess immovable property, and the right to enjoy the profits of such property are, we think, two distinct rights, and not necessarily connected. They are often found to be vested in the same person as owner of the property, but they may be, and often are, vested in different persons. An infringement of the former right does not necessarily involve an infringement of the latter right. An infringement of the right to possess immovable property may entitle the possessor to sue for two remedies, namely for damages for the trespass (not by way of mesne profits); and for recovery of possession; but does not of itself entitle him to claim mesne profits. An infringement of the right to enjoy property by taking its profits, entitles the person so permitted to sue for compensation for the loss sustained, that is, for the profits actually received by the defendant, or what might with due diligence have been received by him. The two wrongs appear to us to give rise to two distinct causes of action, the first arising when the act of trespass is committed; the second when the mesne profits should have been receivable by the plaintiff, but for the defendant's wrongful act."

The above observations were made in a case where it was not canvassed that the causes of action in a claim for possession.

of immovable property and for mesne profits were not distinct and the argument only proceeded on the basis of the change in language of S. 43 of the Code of 1882 as compared with S. 7 of Act VIII of 1859. Even otherwise, there is no basis for concluding that a right to possess immovable property and a right to enjoy the fruits thereof are not necessarily connected and that an infringement of either of the rights would not involve an infringement of the other right. A right to claim mesne profits would only arise if there is a right to possess immovable property which yields profits. In forming this view I find support from *Chaudhri Kudan Mal v. Sardar Allah Dad Khan*, 19 Pun Re 1910, though the facts in this case were somewhat different. In this case a mortgagee, after the date of the expiry of the mortgage term, sued only for interest due and not for principal though both the principal and the interest were then payable. On these facts it was held that the plaintiff was precluded from suing for the principal amount subsequently in view of the provisions of Section 43 of the Code of Civil Procedure, 1882. This decision was based on an earlier decision in *Ganga Ram v. Abdul Rahman*, 28 PR 1907.

53. *Tirupati v. Narasimha*, (1338) ILR 11 Mad 210, is the earliest Madras case taking the view that a claim for possession of the land was not barred under Section 43 of the Code of Civil Procedure, merely because the plaintiff had omitted to claim the land in the former suit for mesne profits. No reasoning has been given in this judgment and the decision proceeded on the assumption that a suit for mesne profits and a suit to eject were not parts of a claim founded on the identical cause of action within the meaning of Section 43 of the Civil Procedure Code. What is more surprising is that no reference was made to the earlier decision of the same Court in *Venkoba v. Subbanna*, (1888) ILR 11 Mad 151, even though one of the judges in *Tirupati's* case was also member of the Bench in *Venkoba's* case and this case had been decided only a few days earlier. In *Venkoba's* case, the plaintiffs claimed possession of certain land and got a decree in execution of which he obtained possession. Subsequently he brought a suit for mesne profits for three years prior to the taking of possession. It was held that Section 43 was a bar to suits for such mesne profits. It was concluded that the words "every suit shall include the whole of claim in respect of the cause of action" include not only the claim arising out of that cause of action but also any other claim founded on the same cause of action and enforceable at the date of the former suit. Support for this view was obtained from

Madan Mohan Lal v. Lala Sheo Sanker Sahai, (1885) ILR 12 Cal 482 (PC).

54. The question was then considered by a Full Bench of the Madras High Court in *Ponnammal v. Ramanirada Aiyar*, ILR 38 Mad 829 = (AIR 1915 Mad 912) (FB) wherein accepting the view in *Tirupati's* case (1888) ILR 11 Mad 210 in preference to *Venkoba's* case (1888) ILR 11 Mad 151 it was held that it was open to the plaintiff to bring a subsequent suit against the defendants for the profits which became payable before the institution of the former suit and which might have been included in that suit. This conclusion was reached on the basis of Section 10 of the Civil Procedure Code of 1859 and Section 44 of the Code of Civil Procedure, 1882 (now Order II, Rule 4). The argument that Section 10 of the Code of 1859 treated a claim for recovery of land and a claim for mesne profits arising out of such land as distinct causes of action is not plausible, as has been discussed in an earlier part of the judgment. As noticed earlier, in fact Section 10 supports the view that a claim for recovery of land and a claim for mesne profits arise out of the same cause of action and would have been treated as such but for the deeming provision in S. 10. The second limb of the argument, which is based on Section 44 (Order 2, Rule 4, Civil Procedure Code, 1908) has also been examined earlier and the conclusion reached was that this provision does not, on a true construction of this provision, support the view adopted in *Tirupati's* case and followed in *Ponnammal's* case.

55. The next case to which reference was made, is *Tadepalli Ramiah v. Madala Thathiah*, AIR 1937 Mad 849, but this is a case where the second suit related to a claim for mesne profits accruing subsequently to the suit for recovery of possession. Such a claim the plaintiff was not entitled to make at the time the suit for possession was filed. The proposition that even though a prior suit had been instituted for possession a second suit for mesne profits accrued since the institution of the suit would lie, has never been doubted and in *Tadepalli Ramiah's* case the decision of the Privy Council in *Naba Kumar Hazra's* case, (AIR 1931 PC 229) was considered in the light of this principle and it was concluded that the Privy Council did not intend to depart from the well-settled principle that a second suit for mesne profits accrued after the institution of the suit would lie. This authority is, therefore, of limited relevance. The view taken by the Madras High Court in *Ponnammal's* case (AIR 1915 Mad 912) (FB) was reiterated in *Venugopal Pillai v. Thirugnanavalli*, AIR 1940 Mad 934. The argument was not examin-

ed afresh in this case and it appears that the cases in which the contrary view had been taken were not brought to the notice of the learned Judges deciding this case.

56. In *Kishori Lal Roy v. Sharut Chunder Mozumdar*, (1882) ILR 8 Cal 593 (FB), a Full Bench of the Calcutta High Court, considered the question whether for the purpose of determining the stamp fee payable on an appeal to the High Court the claim for possession and mesne profits should be considered as distinct and separate claims within the meaning of Section 17 of Act VII of 1870. While considering this aspect it was observed that having regard to the practice of the Courts and the language of the Legislature the policy of the law has always been to induce a plaintiff to dispose of his whole claim for possession of land and mesne profits in one suit only. It was further observed as follows:—

"And there seems much good sense in this policy, because in the generality of such cases, the plaintiff's right to mesne profits follows his right to possession, in the same way that in a money claim, a right to interest follows the right to the principal sum. The Court which decides the question of possession has generally all the materials before it to decide at the same time the question of mesne profits and it would be only entailing both upon the Court and the parties unnecessary expense and trouble, to try the claim in two different suits."

It was further noticed in this case that in passing the Civil Procedure Code of 1859, the Legislature seems to have contemplated the joinder, under ordinary circumstances, of claims for possession and for mesne profits in one suit. The following observations were made in respect of Section 10 of the Code of 1859:—

"And then Section 10 enacts, that, for the purposes of Sections 8 and 9, a claim for possession and for mesne profits shall be deemed to be distinct causes of action. This, I think, implies that a claim for possession and mesne profits, when joined in one suit, would, but for this last section, be considered as one cause of action; but that, for purposes of jurisdiction, and of allowing the Court to order separate trials, if necessary, such a claim was to be considered as embracing distinct causes of action."

The ratio of the decision in *Kishori Lal Roy's* case, therefore, clearly supports the view that a claim for recovery of possession and a claim for mesne profits form one cause of action.

57. In *Monohur Lal v. Gouri Sunkur*, (1883) ILR 9 Cal. 283, to which our attention was drawn, it was held that a plaintiff suing for mesne profits of land

is not precluded from afterwards maintaining a suit for possession of such land. These observations were made on the basis of Section 10 of the Act of 1859 which clearly provided that a claim for recovery of land and a claim for mesne profits were to be deemed to be distinct causes of action. This authority has, therefore, no bearing on the question before us.

58. In *Lallessor Babui v. Janki Bibi*, (1892) ILR 19 Cal 615, the question was directly considered, as the second suit for mesne profits for the period antecedent to the date of the institution of the first suit for the recovery of possession was dismissed on the ground that it was barred by the operation of Section 43 of the Code of 1882. In coming to the conclusion that the second suit for mesne profits was not barred reliance was placed on the earlier decision of the Calcutta High Court in *Kishori Lal Roy's* case, (1882) ILR 8 Cal 593 (FB) and *Mor Mohan Sirkar v. The Secretary of State for India in Council*, (1890) ILR 17 Cal 968. It was further noticed that the case of *Lalji Mal v. Hulasi*, (1881) ILR 3 All 660 (FB) was not in point, and decision in *Venkoba v. Subbanna*, (1888) ILR 11 Mad 151, was not accepted as laying down the correct law. To me it appears that the ratio of the decision in *Kishori Lal Roy's* case was not correctly appreciated, as the basis on which the decision was arrived at and the observations to which a reference has already been made clearly favour the view that a right to mesne profits is to be treated as an accessory to the right to possession. The observations in *Kishori Lal Roy's* case further show that the evidence necessary to decide the question of mesne profits and the question of possession is generally the same and that if the two claims are tried separately it would lead to unnecessary expense and trouble. The only plausible way these observations can be interpreted is that the Full Bench in *Kishori Lal Roy's* case considered the claim for possession of immovable property and the claim for mesne profits arising therefrom as one cause of action.

59. So far as *Mon Mohan Sirkar's* case (1890) ILR 17 Cal 968 is concerned, it related to a suit for mesne profits which had accrued between the date of the institution of the suit for recovery of possession and the date of delivery of possession. As the second suit was in respect of the mesne profits which had accrued after the institution of the suit for recovery of possession, the decision of this case has no bearing on the point that is now under consideration in the present case. It may also be added that the view that *Lalji Mal's* case (1881) ILR 3 All 660 (FB) was not applicable is not tenable. In

this case the mortgagee was to obtain possession of the mortgaged property and was to take the mesne profits but was kept out of possession for three years. He then filed a suit to enforce the performance of the contract for delivery of possession and obtained a decree. His subsequent suit for mesne profits for the period he was not given possession was dismissed on the ground that it was barred by the provisions of Section 43 of Act X of 1877. The following observations made by Straight, J. who spoke for the majority view in this Full Bench clearly supports the contention that a claim for possession of immovable property and a claim for mesne profits arising therefrom arise out of the same cause of action:—

"As the mortgagee might in the former suit, in addition to seeking the specific performance of the mortgage-contract, have asked for such mesne profits by way of compensation for the breach of it, and as the claim for possession and mesne profits were in respect of the same cause of action, viz., the breach of the contract to give possession, the second suit was barred by the provisions of Sec. 43 of Act X of 1877."

60. In *Sris Chandra Nandy v. Joyramdanga Coal Concern Ltd.*, AIR 1942 Cal 40, while considering whether the suit fell within the purview of Section 17 of the Court-fees Act, it was observed that claims for possession and mesne profits were not based on the same cause of action. This view was based on *Lalassar Babui's case* (1892) ILR 19 Cal 615 and no fresh approach to the point in issue was made.

61. In support of the view that a claim for possession of immovable property and a claim for mesne profits arising therefrom are two distinct causes of action, reference was made to *Loknath Singh v. Dwarika Singh*, AIR 1931 Pat 233. In this case the plaintiff brought a suit for mesne profits for three years, but the suit was resisted on the ground that the claim for mesne profits was not maintainable in the absence of a claim for recovery of possession. The defence was rightly held to be untenable for the reason that the objection could only be raised to the subsequent suit for ejectment when brought and not to the suit for mesne profits which was brought earlier. No doubt in this case it was held that cause of action for ejectment is distinct from the cause of action for mesne profits, but these observations were in the nature of obiter, as the point did not really arise in this case.

62. In *Abturi Rangamma v. Chitrapu Venupurnachandra Rao*, AIR 1966 Andh Pra 325, the question arose whether the plaintiff who had earlier instituted a

suit for mesne profits of immovable property could subsequently sue for recovery of possession or whether Order 2, Rule 2, Civil Procedure Code, stood in the way. The conclusion reached was that the cause of action for recovery of immovable property and a cause of action for mesne profits of the property claimed were distinct and separate. For coming to this conclusion four reasons in the main have been adopted which may be formulated as follows—

(1) That Order 2, Rule 4, treated the two causes of action separately.

(2) That the dates of the accrual of cause of action in both these cases and the period of limitation prescribed were different.

(3) That the facts which would constitute the cause of action in case of mesne profits may not be identical in a suit for recovery of immovable property and that the evidence to prove the necessary facts in the two cases would be different.

(4) That Section 10 of the Code of 1859 contemplated that a claim for recovery of possession of immovable property and a claim for mesne profits were to be treated as distinct causes of action and that the policy underlying this provision was retained in Order 2, Rule 4.

All the above arguments have been examined earlier and, with utmost respect for the learned Judges who decided *Abturi Rangamma's case*, I am unable to accept these arguments as plausible and the reasons for this view have already been indicated earlier. It may be mentioned further that the ratio of the decision in *Naba Kumar Hazra's case* AIR 1931 PC 229 was not considered in this case nor was reference made to the body of case-law in which the contrary view has been taken.

63. The only other case supporting the above view, to which reference may be made, is *Myaing v. Mg B. Chit*, AIR 1926 Rang 137, as in this reference has been made to the cases in which the contrary view was adopted. Without, however, examining the reasoning it was concluded that a suit for mesne profits was not barred by a previous suit for partition and separate possession. The decision of the Privy Council in *Naba Kumar Hazra*, AIR 1931 PC 229 was not examined in this case.

64. In support of the contrary view, reference has been made to the decisions of the Allahabad High Court in (1881) ILR 3 All 543 and 660, (1895) ILR 17 All 533, AIR 1933 All 84, AIR 1940 All 524, and the decisions of the Bombay High Court in AIR 1942 Bom 338 and AIR 1964 Bom 42. Reference was also made to (1885) ILR 12 Cal 482 (PC), (1904) ILR

27 Mad 116, AIR 1954 Orissa 202, AIR 1942 Pesh 9, AIR 1915 Sind 35 and AIR 1953 Madh Bha 161.

65. In *Debi Dial Singh v. Ajaib Singh*, (1881) ILR 3 All 543, the cause of action for the recovery of mesne profits was the same as the cause of action for recovery of possession of immovable property. No reasons for this view have been indicated and, therefore, in order to appreciate the reasoning, we will have to examine the case of *Lalji Mal v. Hulasi*, (1881) ILR 3 All 660 (FB). On an examination of the various provisions of the Civil Procedure Code, it was held that the claims to possession and to mesne profits were in respect of one and the same cause of action, namely, the breach of the contract to give possession.

66. In *Mewa Kuar v. Banarsi Prasad*, (1895) ILR 17 All 533, a Division Bench of the Allahabad High Court, following the decision in *Lalji Mal's case* (1881) ILR 3 All 660 (FB) and *Venkoba's case* (1888) ILR 11 Mad 151 it was held that the claim for mesne profits for the period prior to the institution of the suit for possession was barred by Section 43 of the Civil Procedure Code. In this case the argument that Order 2, Rule 4, provided an indication that the two causes of action were separate was examined and it was observed that in Section 44 of the Code of Civil Procedure, 1882, which was substituted by Order 2, Rule 4, Civil Procedure Code, 1908, cause of action and claim were treated as synonymous. It was considered doubtful whether S. 44, which provided a rule of procedure, intended to enact that a claim for mesne profits and a claim to recover the land in respect of which the mesne profits were claimed could not arise out of the same cause of action. The argument was further examined in the following words:—

"It is possible that there may be a case in which a party would be entitled to claim recovery of immovable property and to claim mesne profits in respect of that property in which the cause of action might not be the same, and it may have been to provide for such a case as that that clause (a) or Section 44 was inserted in that section. Such a case does not present itself to our minds. We cannot say that such a case has not arisen. What the first paragraph of Section 43 enacts, so far as it is necessary to refer to it, is that —"Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action." In the former suit the cause of action in respect of which the claim for possession was made was, so far as the present defendant was concerned, the forfeiture entitling the plaintiff to possession and the wrongful keeping of the plaintiff

out of the possession and enjoyment of the property. Now what was the cause of action for the mesne profits claimed from the defendant-appellant? It was stated briefly that, the plaintiff being entitled by reason of the forfeiture to possession, this defendant wrongfully withheld possession from the plaintiff and deprived him of the profits of the land. It appears to us that there were here not two causes of action, but one and the same cause of action and, that the same cause of action which supported the plaintiff's claim for possession in the previous suit supports his claim for mesne profits in the present suit, so far as the period between the 31st of January, 1889 and the 23rd of December, 1889 is concerned."

67. In *Ganeshi Lal v. Bansi Dhar*, AIR 1933 All 84, it was ruled that O. 2, R. 2, enunciated a rule of public policy which disfavours multiplicity of suits. A suit for recovery of possession was held to be barred where a prior suit for rent of the same property had been instituted and in that suit possession had not been asked for. The same view is reiterated in *Saghir Hassan v. Tavab Hasan*, AIR 1940 All 524 and it was noticed that a right to claim possession and a right to claim mesne profits arise out of the wrongful dispossession of property and the cause of action is the same in respect of both the claims.

68. Before parting with the decision of the Allahabad High Court, mention may be made of the decision in *B. Ram Karan Singh v. Nakchhad Ahir*, AIR 1931 All 429, in which a Special Bench, which decided this case, held that a claim for mesne profits accruing subsequently to the institution of the previous suit is a claim based on a different cause of action and is not barred by the provisions of O. 2, R. 2. In this case no doubt it was observed that a cause of action for recovery of immovable property was not necessarily identical with a cause of action for recovery of mesne profits, but these observations were made in a case where the second suit related to mesne profits for the period subsequent to the institution of the previous suit for possession. In fact, the case-law was examined with a view only to consider whether a suit for subsequent mesne profits was barred or not and not whether a suit for mesne profits accruing earlier to the institution of the previous suit was barred. So far as the claim for mesne profits for the period prior to the first suit is concerned, it was in a way accepted that such a claim would be barred. While examining the case of *Mewa Kuar v. Banarsi Prasad*, (1895) ILR 17 All 533, it was noticed that in this case a claim for mesne profits prior to the institution of

the earlier suit was held to be barred and the correctness of this decision was not doubted. On the other hand, in support of the ratio of this decision, reference was made to *Madan Mohan Lal v. Sheo Shankar Sahai* (1885) ILR 12 Cal 482 (PC) in these words "that a subsequent claim for mesne profits prior to the suit would be barred is also apparent from the case decided by their Lordships of the Privy Council: *Madan Mohan Lal v. Sheo Shankar Sahai*, (1885) ILR 12 Cal 482 (PC)." A distinction was consequently drawn between these cases and the cases which related to claim for mesne profits accruing after the date of the institution of the suit. B. Karan Singh's case therefore, cannot be pressed into service for the view that a second suit for mesne profits is not barred where in the first suit possession was claimed in respect of the property from which the mesne profits accrue and in fact, on a true interpretation of its ratio, it indirectly lends support to the contrary view.

69. So far as the Bombay High Court is concerned, the first case to which reference is made is *Ramchandra v. Lodha*, AIR 1924 Bom 368. In this brief judgment, following the decision in *Ponnammal's case*, AIR 1915 Mad 912 (FB) it was held that omission to sue for mesne profits prior to the date of the plaintiff's suit for possession of immovable property does not bar the second suit against the same defendants for those mesne profits. The basis of this conclusion was not independently examined. Moreover, in a subsequent case, *Channappa Girimalappa Jolad v. Bagalkot Bank*, AIR 1942 Bom 338, this authority was explained and not relied upon and it was held as follows:—

"The right to the rents and profits of the properties wrongfully alienated by the adoptive mother rests on exactly the same facts and law as the claim to the corpus of those properties and hence where a claim for mesne profits is not included in a previous suit for possession of the property, a second suit for such mesne profits is barred by O. 2. R. 2."

In this case the argument that O. 2. R. 4, indicated that a claim for mesne profits or arrears of rent and a suit for recovery of immovable property were different causes of action was examined in detail and it was noticed as under:—

"Now it was held by this Court in 26 Bom LR 288 = (AIR 1924 Bom 368 = 80 Ind Cas 259), *Ramchandra v. Lodha* that a claim for possession to immovable property is not founded on the same cause of action as a claim for mesne profits in respect of that property. The plaintiff in that case having sued for possession of immovable property, and omitted to claim mesne

profits, was held entitled nevertheless to file a subsequent suit claiming mesne profits. The Court relied to a great extent on O. 2. R. 4, Civil P. C., which provides (inter alia) that no cause of action shall, unless with the leave of the Court, be joined with a suit for the recovery of immovable property, except claims for mesne profits or arrears of rent in respect of the property claimed or any part thereof. It is said that that rule recognizes the fact that a claim for possession and a claim for mesne profits derived from the property of which possession is claimed are founded on two different causes of action. Order 2, Rule 4 is founded on Order 14, Rule 6 of the Rules of the Supreme Court in England, and those rules do not contain any rule corresponding with O. 2. R. 2. It seems to me that it may well be that the expression "cause of action" in O. 2. R. 2, has a wider meaning than the expression in O. 2. R. 4. Moreover, the provision in the latter rule may have been inserted ex abundanti cautela without intending to lay down that the causes of action for possession and for mesne profits or arrears of rent accruing were distinct."

While coming to this conclusion, support was obtained from the judgment of the Privy Council in *Naba Kumar Hazra's case*, AIR 1931 PC 229.

70. In *Dwarkadas Nathmal v. Vimal*, AIR 1964 Bom 42, a plaintiff brought a suit for recovery of mesne profits for the year 1951 and obtained a decree. He then brought a second suit for recovery of the mesne profits for the two subsequent years against the same defendants and on these facts it was held that the second suit was barred by O. 2. R. 2, as two claims arose out of the same cause of action. The fact that in the two suits the plaintiff had to establish that the defendant was in possession of the property during two different periods was held not to justify the conclusion that the cause of action for the two suits would be different.

71. Following the ratio of the decision in *Naba Kumar Hazra's case*, it was held in *Mukunda Pradhan v. Krupasindhu Panda*, AIR 1954 Orissa 202, that the claim for mesne profits which accrues from the date of right to possess till the date of institution of the suit for possession arises from the same cause of action. In *Mohd. Yunus Fazal Mohamad v. Mt. Jahan Sultan*, AIR 1942 Pesh 9, the same view was taken and it was held that where a plaintiff sues for mesne profits where a claim for possession is also open to him, the subsequent suit for possession is barred. Suit for mesne profits and suit for possession of immovable property were treated as if they arose out of the

same cause of action. In *Hiromal v. Faridkhan*, AIR 1915 Sind 35, the plaintiffs first filed two suits for mesne profits which were decided in their favour and it was held that they had proved their title to the land. Subsequently the plaintiffs filed a suit for recovery of possession and the question arose whether this suit was barred under Order 2, Rule 2 of the Civil Procedure Code. The question whether a claim for possession of immovable property and the claim of mesne profits arising therefrom arose from one cause of action or different causes of action, was considered in the light of Order 2, Rule 2, and Order 18, Rule 2, Rules of the Supreme Court, and also Section 10 of the Civil Procedure Code of 1859, in the following words:—

"For the appellant it is urged that Order 2, Rule 4, makes it clear that a claim for mesne profits is a separate cause of action to a claim for recovery of possession of land. This rule follows closely the wording of the English rule — Order 18, Rule 2, Rules of the Supreme Court. There the use of the word claim as synonymous with cause of action is probably due to the fact that in the phraseology of the English Law a plaint is called a statement of claim. The word claim, therefore, denotes not only the demand for the relief, but the basis on which that demand is made. Rule 4, if literally interpreted, might lead to the inference that a claim for mesne profits involved a separate cause of action to a claim for the land, but Section 44 (a), Civil Procedure Code of 1882, to which the rule corresponds, was interpreted by the Privy Council in the case of *Gunesh Dutt Thakoor v. Jewach Thakorain*, (1904) ILR 31 Cal 262 (PC). In that case the cause of action was the refusal of the defendants to recognize the right of the plaintiff, a widow, to succeed to her deceased husband's share in the family property under a partition which had not been completed at her husband's death. It was contended that Section 44 (a) barred the claim to recover the moveable with the immovable property, the subject of the partition in the same suit. Their Lordships said:

"The rule, i.e. Section 44 (a), is not very happily expressed, but there can be nothing irregular in seeking to recover in one suit immovable and moveable property if the cause of action is the same in both."

"I understand their Lordships' adverse criticism of Section 44 (a) to mean that the provision as to mesne profits should not have been stated as an exception, but taken as a proviso or as an explanation. Being stated as an exception, it implied that no other claim for moveable property could be joined in a suit for re-

covery of land. But the intention that should have been expressed was that claims for mesne profits and rent being on the same cause of action were not within the rule. It is this judgment of the Privy Council which has undoubtedly led to the new clause (e) of the rule. This clause relates to claims on the same cause of action and is clearly no exception. So that the defect to which the Privy Council referred has been repeated instead of being corrected. In my opinion, clause (a) and clause (e) of the rule are of the same character. They are not exceptions but provisos added with a view to explain that the rule does not forbid the joinder of claims to moveable property when they arise out of the same cause of action. Section 10, Civil Procedure Code of 1859, enacted that a claim for the recovery of land and a claim for mesne profits of such land 'shall be deemed to be distinct causes of action' within the meaning of the section referring to joinder of causes of action. The use of the words 'shall be deemed to be' shows that the Legislature was conscious that the rule was an artificial one. This section has been omitted in the subsequent codes and it would be very surprising if the present rule was intended to preserve this artificial distinction, for the object of the amendments made in Order 2, Rule 2, was to check multiplicity of litigation and to remove restrictions on the comprehensiveness of the suit.

It is difficult to see any distinction between dispossession of land and its profits and the dispossession of immovable and moveable property, which was the subject of the judgment of the Privy Council in the cases already referred to." The above observations bring out that Order 2, Rule 4, was not intended to provide an exception to Order 2, Rule 2, but was to be taken as an explanation only. Notice was also taken of the fact that Section 10 of the Civil Procedure Code of 1859 was omitted in the subsequent Codes and from this an inference was drawn that the artificial distinction created by Section 10 was not intended to be preserved. This, in my opinion, places the correct interpretation on O. 2, R. 4. The same view was taken in *Gangabhai v. Kanhaiyalal*, AIR 1953 Madh Bha 161, and the reasoning adopted in *Hiromal's* case (supra) was accepted as the correct interpretation.

72. Having regard to the entire discussion made above, I find no escape from the conclusion that a second suit for recovery of mesne profits would be barred if in the earlier suit for recovery of possession of immovable property that relief is not claimed and that a cause of action for the recovery of immovable pro-

perty and for the recovery of mesne profits arising therefrom is the same. The Privy Council in Naba Kumar Hazra's case, AIR 1931 PC 229 (supra) has adopted this view, and the earlier authorities in which the contrary view was taken do not lay down the correct law.

73. Consequently, the finding on issue No. 2 is set aside and this issue is found against the plaintiffs. The appeal of the defendant-appellants must, therefore, succeed and is accepted. There will be, however, no order as to costs.

ORDER

74. In view of the majority opinion, this appeal is dismissed with no order as to costs.

Appeal dismissed.

AIR 1976 PUNJAB AND HARYANA 59

BHOPINDER SINGH DHILLON AND
RAJENDRA NATH MITTAL, JJ

Northern India Iron and Steel Co. Ltd., Petitioner v. The State of Haryana and another, Respondents.

Civil Writs Nos. 733 of 1975, 66C3 of 1974, 192, 229, 838, 867 and 892 etc. of 1975, D/- 9-7-1975.

(A) Punjab Electricity (Duty) Act (10 of 1958) (as applied to Haryana), S. 3 — Electricity Supply Act (1948), S. 49 — Electricity Act (1910), S. 22-B and Sch., Cl. 6 — Sale of Goods Act (1930), S. 37 — Power cut in Haryana on the orders of the State Government — Right of State Electricity Board (following two-part tariff system) to charge demand charges in accordance with Schedule of Tariff — Not affected — S. 37, Sale of Goods Act, not applicable — (Contract Act (1872), S. 31). (Para 9)

It cannot be held that the Board was not ready to serve the consumer as there is no lapse on its part on account of which the energy was not being supplied. Readiness to serve would mean that the Board has adequate arrangements to supply energy, and it can supply it, if not forbidden by any lawful order or prevented from any cause beyond its control. In the instant case, it had not been shown that the energy was not being supplied on account of any lapse on the part of the Board. On the other hand, it was apparent that it was not doing so on account of lawful orders of the State Government and acute shortage of electric energy because of power crisis. Electricity Act, 1910, gives full protection to the Board.

(Para 5)

In two-part tariff system, if the Board does not charge demand charges, it shall be selling the energy at loss. This

is not possible for the Board. All the consumers in the State (including the petitioner in the instant case), have signed agreement. The petitioner as well as other consumers did not raise any objection regarding tariff while signing such agreements. It is, therefore, bound by it. AIR 1966 Bom 160, Rel. on. (Para 6)

Section 37 of the Sale of Goods Act, which relates to delivery of wrong quantity, has no applicability. AIR 1970 SC 732. Ref. (Para 6)

Nor has Section 31 of the Contract Act any applicability as the agreement to pay minimum demand charges between the parties is not a contingent contract.

(Para 7)

The Board is also entitled to charge surcharge on the demand charges in addition to energy charges. AIR 1969 Raj 254, Rel. on. (Para 19)

(B) Electricity Supply Act (1948), Ss. 49, 59 — Haryana State Electricity Board has got power to change the tariff from time to time under S. 49 — S. 59 confirms that view — Agreement by Consumer to pay 'relevant tariff' meant tariff in force, indicating that Board was entitled to amend. ILR (1971) 1 Puni 255, Rel. on. (Para 11)

(C) Punjab Electricity (Duty) Act (10 of 1958) (as amended by Haryana Act 16 of 1974), Ss. 3 (1) (iii), 13 — Two part tariff system — Electricity duty on demand charges during power shortage period — Not illegal. AIR 1969 Raj 254, Rel. on. (Para 17)

(D) Punjab Electricity (Duty) Act (10 of 1958), (as applied in Haryana), S. 3 — Rule 3 of the Rules framed under S. 13 is not ultra vires S. 3 — (Ibid, S. 13 — Rules under R. 3).

The Haryana State Government in two part tariff could prescribe that the duty was payable on the demand charges. In those circumstances, Rule 3 cannot be held to be ultra vires Section 3 of the Duty Act. (Para 18)

(E) Constitution of India, Art. 14 — Punjab Electricity (Duty) Act (10 of 1958) (as applied to Haryana), S. 3 — Discrimination in duty on demand charges in Haryana during power cut period, between steel furnace owners and arc furnace consumers — Art. 14 not violated. — (Punjab Electricity (Duty) Act (10 of 1958) (as applied to Haryana), S. 3).

It is an admitted fact that consumption in electric furnaces is very high. In order to meet that demand the Haryana Electricity Board has to fix very heavy installations at great cost. The owners of the steel furnaces thus create a class in themselves. There is no differentiation in tariffs for the steel furnace owners inter se. The classification of furnace

owners is reasonable and is not hit by Article 14 of the Constitution. (Para 22)
Cases Referred: Chronological Paras
 (1971) ILR (1971) 1 Puni 255 11
 AIR 1970 SC 732 = (1969) 2 SCR 939 6
 AIR 1969 Raj 254 = 1969 Raj LW 147 16
 AIR 1966 Bom 160 = 67 Bom LR 919 6
 AIR 1952 All 866 = 1952 Cri LJ 1676 (FB) 8

Siri Chand Goyal, Sr. Advocate with C. P. Goyal, for Petitioner; J. N. Kaushal, Advocate General, Harvana with C. D. Dewan, Addl. Advocate General, P. S. Jain and V. M. Jain, for Respondents.

RAJENDRA NATH MITTAL, J.:—

This judgment of mine will dispose of a bunch of writ petitions, as detailed below, which involve common questions of law and facts. The petitioners can be mainly divided into two categories, namely:—

- (i) Large Supply Consumers.
- (ii) Medium Supply Consumers.

Civil Writs Nos. 6603 of 1974, 192, 229, 529, 591, 593, 594, 626, 645, 678, 679, 680, 682, 683, 722, 723, 725, 726, 727, 728, 729, 730, 731, 742, 747, 777, 778, 779, 780, 833, 843, 863, 868, 869, 881, 883, 884, 885, 886, 887, 907, 964, 965, 975, 979 and 980 of 1975; and 25, 595, 681, 733 and 838 of 1975 (Arc Furnaces' Category) belong to former category of petitioners; and 422, 584, 676, 720, 721, 724, 732, 743, 781, 841, 848, 867 and 892 of 1975 to latter category of petitioners.

(Some of the large supply consumers are running Furnaces. Such consumers constitute subdivision amongst the large supply consumers. A specific mention has been made about these consumers in the aforesaid list).

2. The facts have been given here from civil writ petition No. 733 of 1975. The petitioner owns a factory and is manufacturing alloy steel and steel castings. It is a large supply consumer of electricity which is supplied by the Harvana State Electricity Board, respondent No. 2 (hereinafter referred to as 'the Board'). The connected load of the petitioner is 8687.649 K. Ws. and its contract demand is also the same. It has been allotted 1,06,590 units on daily basis as its power quota by the Board. There was shortage of electric energy in the State of Harvana and the State Government issued orders and directions for maintaining the supply and securing the equitable distribution of the energy. The petitioner was subjected to power cut on account of the orders and directions of the State Government. The Board in spite of power cut, has been billing the petitioner on the basis of demand charges as was done earlier. According to the petitioner, the Board is not entitled to charge the demand charges and it has challenged its rights to do so. The State of Harvana, the peti-

tioner says, is entitled to charge duty on the energy consumed under the Punjab Electricity (Duty) Act, 1958 (hereinafter referred to as 'the Duty Act'). It is, however, charging duty not only on the consumption of energy but also on the demand charges. On April 15, 1974, the electricity duty was revised whereby it was increased from 20% to 50% on the category of industrial consumers in which the petitioner falls. The above notification was amended by notification, dated April 24, 1974, with retrospective effect from April 15, 1974, and certain changes were made in the slabs. The Board, according to the petitioner, instead of collecting the duty according to the above notifications from April 15, 1974, is doing so, from April 1, 1974. The Board has been charging surcharge of 20% on the amount of bills. It is alleged by the petitioner that it is entitled to the duty only on the bill relating to energy consumed by it and not on demand charges. The Board revised the tariff with effect from August 1, 1974. By virtue of the new tariff, the energy charges and demand charges have been increased. The petitioner has also challenged the tariff regarding the demand charges and the surcharge and the electric duty on the demand charges. All the writ petitions have been contested by the Board.

2-A. The first question that arises for determination is as to whether the Board is entitled to demand charges in spite of the fact that it imposed cut in the supply of electric energy. In order to decide this question, it is necessary to know as to how the tariffs are framed. Section 49 of the Electricity Supply Act, 1948 (hereinafter referred to as 'the Supply Act') authorizes the Board to frame uniform tariffs. The aforesaid section is as follows:—

"49 (1) Subject to the provisions of this Act and of regulation, if any, made in this behalf, the Board may supply electricity to any person not being a licensee upon such terms and conditions as the Board thinks fit and may for the purposes of such supply frame uniform tariffs.

(2) In fixing the uniform tariffs, the Board shall have regard to all or any of the following factors, namely:—

"(a) the nature of the supply and the purpose for which it is required;

(b) the co-ordinated development of the supply and distribution of electricity within the State in the most efficient and economical manner, with particular reference to such development in areas not for the time being served or adequately served by the licensee;

(c) the simplification and standardisation of methods and rates of charges for such supplies;

(d) the extension and cheapening of supplies of electricity to sparsely developed area.

(3) Nothing in the foregoing provisions of this section shall derogate from the power of the Board, if it considers it necessary or expedient to fix different tariffs for the supply of electricity to any person not being a licensee, having regard to the geographical position of any area, the nature of the supply and purpose for which supply is required and any other relevant factors.

(4) In fixing the tariff and terms and conditions for the supply of electricity, the Board shall not show undue preference to any person."

3. A reading of the section shows in fixing the tariffs, the Board shall take into consideration various factors, such as, the nature of the supply and the purposes for which the electricity is required, the simplification and standardisation of methods and rates of charges for such supplies and the co-ordinated development of the supply and distribution of electricity within the State in the most economical and efficient manner. The section also authorizes the Board to fix different tariffs for the supply of electricity to any person not being a licensee in different circumstances. In doing so, it has to take into consideration the nature of supply and the purposes for which the supply is required and any other relevant factors. The section clearly authorizes the Board to simplify and standardise the methods and rates of charges.

4. There are two well-known systems of framing tariffs— one is the flat rate system and the other is two-part tariff system. Under the former system, a flat rate per unit is fixed. The latter comprises of (a) demand charges to cover investment and also the standing charges to some extent; and (b) energy charges to provide for balance of the standing charges not covered in the demand charges and the running charges. The Board has framed its tariff on the latter system, that is, two-part tariff system. In order to see what is two-part tariff system, it is necessary to know what is demand charges. The Board has framed conditions for supply of electric energy to consumers other than distributing licensees under Section 49 of the Supply Act (hereinafter called as 'the Terms and Conditions'). Clause 1 therein defines various terms. 'Demand Charge' has been defined in sub-clause (h) of clause (1) as follows:—

" 'Demand Charge' shall mean the amount chargeable per month in respect of Board's readiness to serve the consumer irrespective of whether he consumes any energy or not, and is based upon the

connected load, the maximum demand or the contract demand, as the case may be and as prescribed in the relevant schedule of tariff."

4-A. It is clear from the definition that the demand charge is based on the connected load, the maximum demand and the contract demand. The definitions of 'Connected Load' and 'Contract Demand' are as follows:—

" 'Connected Load' means the sum of the rated capacities of all the energy consuming apparatus in the consumer's installation, which can be operated simultaneously.

'Contract Demand' means the maximum demand agreed to between the consumer and the Board."

'Maximum Demand' has been defined in the Supply Act which says that 'Maximum Demand' in relation to any period shall, unless otherwise provided in any general or special order of the State Government, mean twice the largest number of kilowatt-hours or kilo-volt-ampere-hours supplied and taken during any consecutive thirty minutes in that period. In Haryana, as already stated, for supplying electricity to the large consumers, and medium size consumers, two-part tariff is applicable. The Board changed the tariff with effect from the meter reading in September, 1974, that is, the reading on the basis of which bills were prepared in October, 1974. According to the old Schedule of tariff, the tariff was fixed as follows:—

"Tariff: Demand charges:

First 1000 KVA.....Rs. 6.50 per KVA per month

All above 1000 KVA.....Rs. 5.50 per KVA per month Plus

energy charges

5.00 paise per Kwh for the First 1,00,000 Kwh per month

4.5 paise per Kwh for the next, 2,00,000 Kwh per month

4.0 paise per Kwh for all in excess of 3,00,000 -do-

Subject to (1) A rebate of half paise per Kwh for all units in excess of 360 Kwh per KVA per month or in excess of 420 Kwh per KW per month if the demand charge is based on KW.

(2) A maximum overall rate of 10 paise per Kwh without prejudice to the monthly minimum charges under Item (7) below.

Note: The above tariff covers supply at 11 KW or 6.6 KV and 3.3 KV for supply at 400 volts surcharge of ten per cent is leviable.

(i) Add surcharge of 20% on 50 P/monthly minimum charges (industrial, factory lighting and colony supply).

(ii) Add further surcharge of 20% on above.

(4) Demand Assessment:

(a) The demand for any month shall be defined as the highest average load measured in kilovolt amperes during any 30 consecutive minutes period of the month.

(b) The monthly demand charges shall be based on the actual maximum demand during the month or (ii) 65% of the contract demand or (iii) 75% of the highest maximum demand during the preceding eleven months or (iv) 100 KVA whichever is the highest. For the first 11 months from the commencement of supply alternative (iii) shall not be applicable.

(c) The contract demand means the maximum KW/KVA for the supply of which the Board undertakes to provide facilities from time to time.

Note: In case the consumer exceeds his contract demand in any month by more than 7½% a surcharge of 25% will be levied on the 50 P/monthly minimum charges (industrial, factory lighting and colony supply).

(d) If in any case the maximum demand is being measured in KW the same shall be converted into KVA by the use of actual power factor and KVA tariff applied for working out the demand charges.

(e) In case the supply has been given on restricted hours basis then a reduction of 30% in demand charges will be given if supply is for 12 hours or less. Occasional break downs or shut downs if any, on the part of the supplier shall, however, not entitle a consumer to any reduction.

(f) Force Majeure: in the event of lock out, fire or any other circumstances considered by the supplier to be beyond the actual control of the consumer the consumer shall be entitled to a proportionate reduction in demand charges/minimum charges provided he serves at least 3 days notice on the supplier for shut down of not less than 15 days' duration.

(g) The power factor of the consumer shall not be less than 85% at any time within 100% and 75% of the highest maximum demand as recorded in the 3 months preceding the date of checking of power factor. In case the power factor falls below 85%, the consumer shall have to pay a surcharge of 1/2% of 5.0 P. charges for each 1% decrease in the power factor.

Note:— The Board shall give a week's notice to the consumer to facilitate measurement of power factor on the above basis. If the consumer fails to provide the load requirement as above in spite of the notice the power factor as measured under the load conditions actually provided by the consumer shall be taken into account for purposes of billing.

(5)	xx	xx	xx	xx
	xx	xx	xx	xx
(6)	xx	xx	xx	xx
	xx	xx	xx	xx

(7) Monthly minimum payment: The demand charges under Items (4) and (5) above shall be reckoned as the monthly minimum charges.

(8) Payment: The above rates are net. In the event of the monthly bill not being paid in full within the time specified in the bill a surcharge of two per cent. shall be levied on the unpaid amount of the bill for each 30 days' successive period or part thereof until the amount is paid in full.

(9) Single point Delivery: The above tariff is based on the supply being given through a single delivery and metering point and at a single voltage. Supply at other points or at other voltages shall be separately metered and billed."

5. In the new schedule of tariff, the system of charges remained the same. The rates were, however, varied. Another material change which was made in the new schedule of tariff was that the maximum overall rate of 10 paise per Kwh which had been provided in the old tariff was deleted. The schedule provides certain safeguards to the consumers. Clause 4 (e) says that in case of supply for restricted hours, certain concessions will be given in demand charges. In clause 4 (f), it is stated that in the event of lock-out, fire or any other circumstances, considered by the supplier to be beyond the control of the consumer, the consumer shall be entitled to certain reductions in demand charges. In some clauses, safeguards have also been provided for the Board. The payment of demand charges, according to the schedule, is based on (i) the actual maximum demand during the month; or (ii) 65% of the contract demand; or (iii) 75% of the highest maximum demand during the preceding 11 months; or (iv) 100 KVA, whichever is the highest. It shows that the demand charges are based not on the energy consumed but on the power factor. The criteria as given in the schedule for fixing the demand charges is in consonance with the definition of the demand charges. Therefore, no fault can be found with it according to the latter part of the definition. The argument which has been vehemently canvassed is that the Board had no electric energy to supply to the petitioner and, therefore, it cannot be said that it was ready to serve the consumer. It is submitted that in the circumstances, the Board is not entitled to charge demand charges. No doubt, the argument is ingenious, but when examined closely, it was found to be without merit. The.

aforesaid definition is to be read subject to the provisions of the Indian Electricity Act, 1910 (hereinafter referred to as 'the 1910 Act') applicable to the Board. Section 22-B provides that if the State Government is of opinion that it is necessary or expedient so to do, for maintaining the supply and securing the equitable distribution of energy, it may by order provide for regulating the supply, distribution, consumption or use thereof. Clause 6 of the schedule to the said Act says that if the licensee is not prevented from supplying energy by cyclones, floods, storms or other occurrences beyond its control, it shall continue to supply energy in accordance with the requisition. It is clear from the aforesaid provisions that the obligation of the Board to supply electric energy is not absolute but is subject to the restrictions placed by the aforesaid provisions. If the Board has been ordered by the Government to impose a cut in the supply of electric energy to the consumer or it is unable to supply the same on account of any happening as provided in clause 6 of the Schedule of 1910 Act, the Board cannot be blamed for not supplying the energy. In such a situation, it cannot be held that it was not ready to serve the consumer as there is no lapse on its part on account of which the energy was not being supplied. Readiness to serve would mean that the Board has adequate arrangements to supply energy, and it can supply it, if not forbidden by any lawful order or prevented from any cause beyond its control. In the present case, it has not been shown that the energy was not being supplied on account of any lapse on the part of the Board. On the other hand, it is apparent on the record, that it was not doing so on account of lawful order and acute shortage of electric energy because of power crisis. Thus the provisions of the 1910 Act give full protection to the Board. In this situation, in my view, the Board was always ready to supply electric energy to the petitioner.

6. A contention has been raised by the learned counsel for the petitioner that electricity is 'goods' within the definition of Section 2(7) of the Sale of Goods Act, 1930, and, in case, the goods are not supplied in accordance with the terms of the agreement the consumer is liable to pay only for delivery of such quantity as has been supplied to the consumer. No doubt, it is true that electricity falls within the definition of the expression 'goods' (see Commr. of Sales Tax, Madhya Pradesh, Indore v. Madhya Pradesh Electricity Board, Jabalpur, (1969) 2 SCR 939 = (AIR 1970 SC 732)) but the learned counsel in advancing this argument loses sight of the schedule of tariff. As already stated, there are two systems of charging

tariff, one known as two-part tariff system and the other single-part tariff system. In two-part tariff system, the consumer is liable to pay for the energy consumed and also the demand charges. Demand charges are to cover the investment and the standing charges to some extent. It is the power factor which is the basis for determining demand charges. In the single-part tariff, both the charges are consolidated and rate is fixed on that basis. In that case, the rate of energy is higher than that fixed under the other system. The Board in that system takes demand charges along with energy charges. In two-part tariff system if the Board does not charge demand charges, it shall be selling the energy at loss. This is not possible for the Board. Generally, two-part tariff system is applied throughout the country for large supply consumers and medium size consumers. No fault can be found with the said system. All the consumers including the petitioner, have signed agreement. The petitioner as well as other consumers did not raise any objection regarding tariff while signing such agreements. It is, therefore, bound by it. Similar view has been taken by a learned Division Bench of the Bombay High Court in Maharashtra State Electricity Board v. M/s. Madhusudandass and Brothers, Tumsar, AIR 1966 Bom 160. It has held that the minimum billing demand charge is a part of the tariff and by agreement between the parties, the consumer is bound to pay this charge as well as the charge for the actual energy consumed. In the present case, the schedule of tariff has, however, provided some relief in case the supply is made for 12 hours or less. It may also be mentioned that the Board on account of energy crisis has also given additional reliefs to the consumer of which full discussion will be made later. Section 37 of the Sale of Goods Act which relates to delivery of wrong quantity has no applicability. In view of the aforesaid reasons, I do not find any substance in this contention.

7. Another contention has been raised by the learned counsel for the petitioner that the contract between the petitioner and the Board was a contingent contract as defined in Section 31 of the Contract Act and that the petitioner was not liable to pay any demand charges in case the Board failed to supply the energy. I have given a thoughtful consideration to this argument but regret my inability to accept the same. Section 31 of the Contract Act defines the contingent contract as a contract to do or not to do something if some event collateral to such contract does or does not happen. In the case of agreement to pay 'Minimum Demand Charges', there is no col-

lateral event which is to happen. The consumer is liable to pay the minimum demand charges. These charges, in certain circumstances, as already mentioned, can be reduced. Section 31, in my view, has no applicability as the contract between the parties is not contingent.

8. The learned counsel for the petitioner then advanced the contention that the Legislature can give power to any subordinate authority to make reasonable rules/bye-laws. He argues that the demand charge on the face of it is unreasonable and no intention can be assigned to the Legislature to delegate such a power to the Board. He, therefore, submits that it is liable to be struck down on this ground. The learned counsel in support of his contention has referred to a Full Bench judgment of the Allahabad High Court in *Bhushan Lal v. State*, AIR 1952 All 866, wherein it has been observed that it is a fundamental principle of law that rules or regulations or orders made under a power conferred by the Legislature upon a subordinate authority must be reasonable. It is further observed that this furnishes a justiciable standard for the Courts to apply to all subordinate legislation and by this wholesome rule, no subordinate legislation may make rules and regulations which may be considered unreasonable. I have given a thoughtful consideration to the argument but do not find any force in it. The principle laid down by the learned Full Bench is unexceptionable. The question is whether the above principle is applicable to the instant case or not. In my view, it is not. It has already been discussed above as to how the tariff is framed and why the consumer is liable to pay demand charges. There is no unreasonableness in these charges. There are, therefore, no reasons to strike them down.

9. After taking into consideration all the aforesaid arguments, the irresistible conclusion is that the Board is entitled to recover the demand charges in accordance with the clauses of the schedule of tariff.

10. Another contention which was sought to be raised by the counsel for the petitioner is that the Board had no authority to change the tariff. A reference has been made by him to the following para. of agreement between the parties:—

"And I/we hereby declare that the said conditions of supply including Schedule of Tariff Service charge and General charges have been perused by/read to me/us and I/we agree to be bound by them."

11. I have also given a deep thought to this contention of the learned counsel for the petitioner but do not find

any substance in it. The Board has got the power to change the tariff from time to time under Section 49 of the Supply Act. Section 59 of the Supply Act relates to general principles for Board's finances and it says that the Board shall not, as far as practicable, carry on its operations under the Act at a loss, and shall adjust its charges accordingly from time to time. This section further confirms the above view. It is also provided in the agreement that the petitioner had perused the conditions of supply of electric energy and it was bound by these conditions. Clauses 23 and 31 of the Terms and Conditions specifically provide that the tariff can be amended by the Board from time to time. In addition to the aforesaid clauses, there is also a clause in the agreement to the effect that the petitioner shall pay in accordance with relevant tariff. The words 'relevant tariff' are very significant and mean the tariff in force. The aforesaid clauses clearly indicate that the Board was entitled to amend the tariff and the petitioner would be bound by the amended schedule. In this view, I get support from the decision of a Division Bench of this Court in Civil Writ No. 2988 of 1968, (*Kartar Singh v. Punjab State Electricity Board*) decided on 7-5-1969.*

12. It is then argued by the learned counsel for the petitioner that the Punjab Electricity Board has given some relief to its consumers in similar circumstances and that relief be given to the petitioner on the same pattern. In order to adjudicate on this contention, it is necessary to refer to certain facts. The State of Haryana vide its orders, dated January 4, 1974, and November 21, 1974, imposed cuts in the supply of electricity. The orders of the Haryana Government are Annexures R-2/3 and R-2/4. In the former, it is stated that a cut be imposed in the supply of electric power upto 60% of the normal supply, with effect from November 3, 1973, till further orders in respect of electric arc furnaces, large supply, medium supply and small industrial consumers. By the latter order, a cut has been imposed on the supply of electric power in respect of all industrial consumers, domestic, commercial and other consumers and agricultural consumers. The cut prescribed in the case of all industrial consumers during certain period is upto 100% on energy consumption. On supply of electric energy, 100% cut was imposed to 'all industrial consumers' from the midnight of November 21 and 22, 1974, upto the midnight of November 28 and 29, 1974. Consequently, the Board gave some relief to the consumers vide sale circular No. 5/75, dated April 23, 1975.

* reported in ILR (1971) 1 Puni 255.

in the family. It therefore became necessary for the plaintiff to separate one of his married sons and to keep him in the suit premises, along with his wife and children. It is argued before the learned District Judge that the urgency for the additional accommodation was reduced on the death of the plaintiff Munshiram. The learned District Judge repelled this argument on the ground that it was not necessary for the court to take note of the circumstances which had arisen after the appeal was filed. He accordingly reversed the finding on issue No. 1 and held that the landlord required the premises reasonably and bona fide. He further held that the notice to quit served on the defendants was valid. He accordingly allowed the appeal and decreed the suit. As regards issue No. 2 relating to default in the payment of rent, it appears that the defendants-tenants made payment and the issue became redundant. The defendants have now preferred this second appeal.

3. Shri S. K. Keshote, the learned advocate for the appellants contends that the right to sue on the basis of personal necessity did not survive to the heirs of the deceased landlord Munshiram. He emphasised that the bona fide requirement of the premises for the residence of the plaintiff himself and his family members was the personal requirement of the landlord Munshiram and such a personal cause of action perished with the death of the landlord. Reliance is placed on the decision of their Lordships of the Supreme Court in *Smt. Phoolrani v. Nambatri Ahluwalia*, AIR 1973 SC 2110. In my opinion, the contention is devoid of force. *Smt. Phoolrani's* case (*supra*) relied upon by the learned counsel for the appellants is distinguishable on facts and does not apply to the present case. In that case, their Lordships observed:

"The survival of the right to sue on the death of a plaintiff is a problem that has often to be solved on a permutation of several facts and circumstances."

Their Lordships then added:

"The solution to the problem whether the appellants can continue the proceedings in their capacity as the legal representatives of the plaintiff lies in the pleadings of the plaintiff for those alone can reveal the true nature of the right asserted by the plaintiff in the ejectment proceedings. In column 18 (a) of the ejectment application the ground for evicting the tenant is stated thus:

"The premises are required bona fide by the petitioner for occupation as a residence for himself and members of his family and that the petitioner has no other reasonable suitable residential accommodation."

In column 18, the other relevant information is stated to be that the plaintiff had a large family consisting of his wife, son, daughter-in-law and three minor grand-daughters, and that the family had only two rooms in its possession, which were wholly inadequate for its requirements.

Thus the requirement pleaded in the ejectment application and on which the plaintiff has founded his right to relief is his requirement, or to use an expression which will effectively bring out the real point, his personal requirement. If the ejectment application succeeds — we will forget for a moment that the plaintiff is dead — the premises in the possession of the tenant may come to be occupied by the plaintiff and the members of his family but that does not make the requirement pleaded in the application any the less a personal requirement of the plaintiff. That the members of his family must reside with him in his requirement, not theirs. Such a personal cause of action must perish with the plaintiff." (Paras 10 and 11).

4. In the present case, the relevant allegations for eviction are contained in para. 3 (ka) of the plaint which runs as under:—

"(क) यह कि मुर्दई के दो लडके रामअवतार वो लक्ष्मीनारायण है इनकी शादी हो गई है वो इनके बच्चे भी है मुर्दई अपने लडकों सहित जिस मकान में रह रहा है उसमें सारे परिवार की रिहायश के लिये स्थान परियाप्त नहीं है और मकान कम होने के कारण बहुत तंगी रहती है इसके अलावा राम अवतार व लक्ष्मी नारायण की औरतों में आपस में झगडे बाजी रहती है इससे दोनों भाईयों में भी भनवन रहती है और झगडे बाजी होने के कारण हमारे सबके दिमाग में परेशानी व अशान्ती रहती है इस कारण मुर्दई अपने एक लडके को उसको बहू बच्चों सहित उक्त किराये शुदा जायदाद में आबाद करना चाहता है इसलिए जायदाद मुतनाजा की वादी को नेक वो जायज जरूरत है।"

It follows from the aforesaid para that the plaintiff Munshiram claimed eviction of the defendant from the suit premises on two-fold requirements. The first requirement which he pleaded was almost similar in terms to that pleaded in *Smt. Phoolrani's* case (AIR 1973 SC 2110) (*supra*). But the second requirement pleaded by him, namely, the requirement for the residence of one of his two

married sons in the interest of the peace of his family, cannot be said to be the personal requirement of the plaintiff Munshiram. It is a requirement of the family so that peace in the family be restored and such a cause of action, in my opinion, did not perish with the death of the plaintiff Munshiram. In this view of the matter, the legal representatives of the landlord Munshiram had the right to continue the suit for eviction against the defendants. It is obvious that the requirement that the suit premises are needed for the use of the family members in the circumstances of the case is both reasonable and bona fide. The learned District Judge has found proved from the evidence on the record that there were frequent quarrels between the plaintiff's two sons and their wives and there was no peace in the family and as a result of these quarrels the plaintiff wanted to separate one of his married sons and to keep him in the suit premises. The right to sue survived even after the death of the plaintiff Munshiram so far as this part of the requirement pleaded in the plaint was concerned. The learned District Judge, in the circumstances, rightly decreed the suit.

5. Before parting with the case, I would like to mention that the view taken by the learned District Judge that subsequent events arising during the pendency of the appeal cannot be taken notice of in the case like the present one, is clearly erroneous in view of the authoritative pronouncement of their Lordships of the Supreme Court in *P. Venkateswarlu v. The Motor & General Traders*, 1975 UJ (SC) 327 = (AIR 1975 SC 1409). In that case, their Lordships held as under:—

"We affirm the proposition that for making the right or remedy claimed by the party just and meaningful as also legally and factually in accord with the current realities, the court can, and in many cases must, take cautious cognizance of events and developments subsequent to the institution of the proceedings provided the rules of fairness to both sides are scrupulously obeyed." (para 4).

6. The appeal fails and it is dismissed with no order as to costs.

7. The prayer for Leave to Appeal is refused.

Appeal dismissed.

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M. L. JOSHI, J.

Dr. Lalit K. Sharma, Petitioner v. Principal and Controller S. M. S. Medical College attached Hospitals Jaipur and others, Respondents.

Civil Writ Petn. No. 959 of 1975, D/- 8-10-1975.

(A) Medical Council Act (1956), S. 33 and Regulations — Postgraduate course after passing M.B.B.S. Exam. — Selection and registration — Criteria — Selection to Resident House Officer is a condition precedent — (Rajasthan University Ordinance No. 278-B).

The criteria laid down by the Medical Council under its Regulations framed under S. 33 of the Medical Council Act for selection and registration to the post-graduate course after passing the M.B.B.S. Examination when read along with provisions of Ordinance No. 278-B of the University of Rajasthan Hand Book, make it clear that the appointments to the stipendiary and non-stipendiary posts of the Resident House Officer etc. are a condition precedent to the registration of post-graduation studies. The selection to the Resident House Officers etc. is a condition precedent and gate-way to the registration in the post-graduate course. Putting it differently the selection to the stipendiary and non-stipendiary posts is an integral part of the training to the post-graduation course and is a necessary step for the registration in the post-graduation studies. Without selection to the above posts it is almost impossible to get the registration in the post-graduation course. (Para 10)

(B) Constitution of India, Sch. VII, List I, Entry 66 — Training to post-graduate studies in medicine — Subject is covered by Entry 66 and is within the legislative competence of Parliament. AIR 1963 SC 702 and AIR 1964 SC 1823, Rel. on. (Para 12)

(C) Medical Council Act (1956), S. 33 and Regulation — Criteria for registration for post-graduate course — Words "Undergraduate course" — Meaning — Words "under-graduate course" envisage merit in the Final M.B.B.S. examination and not the aggregate marks obtained in all the three University M.B.B.S. Examinations — Criterion laid down by State of Rajasthan for selection to Resident House Officers etc. as in 1974, held, was valid — (Rajasthan University Ordinance No. 274). (Para 13)

(D) Medical Council Act (1956), Ss. 19-A and 20 — Regulations framed by Medical Council for post-graduation medical education are advisory and not

mandatory — Criterion laid down by University which does not prescribe different standards for training of Resident House Officer, Registrar etc. cannot be struck down.

Although the expression "minimum standard of medical education" occurring in S. 19-A indicates the mandatory character of the section, provisions of Sec 20 indicate that the Medical Council is authorised to prescribe standards of post-graduate medical education for the guidance of University and their advice in the matter of securing uniform standards. On a combined reading of S. 19-A and S. 20 of the Medical Council Act, it is clear that the regulation regarding selection to post-graduate training is not of a mandatory character. It is true that the object behind the regulation of the Medical Council Act is to secure uniform standards for post-graduation education but the object is not undermined by laying down a criterion if the standard of training for Resident House Officer, Registrar etc. is not in any manner different.

(Para 14)

(E) Constitution of India, Art. 223 — Certiorari — Regulations framed by Statutory body — Interpretation — Regulation capable of two interpretations — High Court would not interfere on the ground that construction placed by the educational body is less reasonable than the alternative interpretation. AIR 1966 SC 707 and AIR 1964 SC 1823, Rel. on.

(Para 14)

Cases Referred: Chronological Paras
 (1970) 2 Andh WR 165 17
 AIR 1966 SC 707 = (1966) 1 SCR 974 15
 AIR 1964 SC 1823 = (1964) 6 SCR 363 12, 15
 AIR 1963 SC 702 = (1963) Supp 1 SCR 475 12

C. K. Garg, for Petitioner; M. D. Purohit, Addl. Govt. Advocate, for the State; V. S. Dave (for No. 3) and N. M. Kasliwal (for No. 5), for Respondents.

ORDER:— This petition under Article 226 of the Constitution of India seeks by appropriate writ, direction or order quashing of the notice Annexure 5 of the Principal and Controller of S. M. S. Medical College dated 15th of May, 1975, and as a consequence it is prayed that the respondents Nos. 1 and 2 be directed to hold selection of the students to the post-graduate medical training in accordance with the criteria laid down in the regulation framed under Section 33 of the Indian Medical Council Act hereinafter called the Act.

2. Certain facts giving the background of this petition deserve to be noticed to understand the nature of the relief and the circumstances in which it is being asked for.

3. The petitioner passed his final M.B.B.S. Examination from S. M. S. Medical College, Jaipur in May, 1974. Thereafter he completed one year of compulsory rotating internship training which was completed on 14th of May, 1975 and obtained full registration with the Medical Council. The Principal S. M. S. Medical College, non-petitioner No. 1, notified a scheme on 18th of April, 1975, containing guidelines on which the admissions were to be made for selection and appointment of Resident House Officers, Registrars, C.M.Os., Assistant Pathology, Junior Demonstrators and full time post-graduates. Under the aforesaid scheme, selection for the post of Resident House Officer was to be made strictly according to the merit on the basis of aggregate marks secured in all the three University M.B.B.S. Examinations. Some students raised objections to the scheme dated 18th of April, 1975, as it was a departure from the long established practice adopted by the medical colleges of the Rajasthan and the State Government consulted all the Principals of five Medical Colleges in Rajasthan and after obtaining information from various colleges outside the State in regard to the criteria for admission to the post-graduate training decided to switch back to the criteria which have hitherto been followed in the matter of selection to the post-graduate training—a fact which has not been controverted by the petitioner.

According to the criteria hitherto followed the selections to the post-graduate training were to be made on the merits judged on the basis of aggregate marks in the final M.B.B.S. Examination. Accordingly under the directions of the State Government, the non-petitioner No. 1 notified that the selections for the Resident House Officers (full paid graduates) Resident Senior House Officers etc. would be made for the year 1975 as per the practice followed in the year 1974. The applications were therefore invited calling upon the candidates to express their preferences clearly in the applications and submit the same latest by 19th of May, 1975 (vide Annexure 5).

4. The petitioner impugns the above mentioned scheme (Annexure 5) inter alia on the ground that it is in contravention of the regulation framed under Section 33 of the Act whereunder the selection of students for post-graduate training is to be made strictly on merit judged on the basis of academic record in the under-graduate course. According to the petitioner the under-graduate course comprises of the three M. B. B. S. examinations of the University. The petitioner's case is that the regulation has force of law and neither the State Government nor the non-petitioner No. 1

has any competency to act in contravention of the regulation and, therefore, the impugned scheme is bad in law. The further case of the petitioner is that as per the marks obtained in the final M.B.B.S. Examination he would rank 62nd in the class whereas according to the marks obtained in all the three examinations of the M.B.B.S. he ranks 48th in the class and, therefore, the impugned scheme works adversely against him in the matter of selection by adopting a criterion which is not in consonance with the regulation. The petitioner, therefore, prays for restraining the respondents from giving effect to the impugned Annexure 5 and further for issuance of a direction for adopting a criteria as per the regulation of the Medical Council.

5. During the pendency of the writ petition one Dr. Ajay Singh Rathore moved an application for impleading him as non-petitioner stating that he is likely to be affected by the result of the petitioner. He was, therefore, impleaded as non-petitioner No. 3. Subsequently on the objections of the non-petitioners Nos. 1 and 2 the Principals of the remaining four colleges in Rajasthan and the University of Rajasthan were also impleaded.

6. The writ petition has been opposed by the non-petitioners Nos. 1, 2 and 3. The non-petitioners Nos. 1 and 2 have submitted a joint reply to the writ petition whereas the non-petitioner No. 3 has rendered a separate reply. The main points which have been made out in the reply of the non-petitioners Nos. 1 and 2 are that (i) the applications were invited for appointment to the various stipendiary and non-stipendiary post of R.H.O., Registrar, C.M.Os, etc. and not for registration for the post-graduate courses and therefore the writ petition is pre-mature; (ii) the criteria for selection for post-graduate training course laid down by the Medical Council of India have been interpreted by all the medical colleges of Rajasthan and various other colleges of India on the basis of merit secured in the final M.B.B.S. examination only which have never been objected to by the Medical Council of India in spite of inspections made by its officials on various occasions; (iii) the criteria laid down in Annexure 5 furnish a reasonable basis in order to judge the merit of the student in the under-graduate course and are in no way in contravention of the regulation of the Medical Council; (iv) the impugned criteria for selections to the above posts are in conformity with the criteria laid down by the Medical Council; (v) the guidelines published in Annexure 1 were only of administrative character and had no force of law and could be reviewed by the non-petitioners Nos. 1 and 2.

7. On the similar lines is the reply rendered by the non-petitioner No. 3. The non-petitioner No. 3 has, however, raised some additional points mention of which is necessary. The additional points are that (i) that the Medical Council of India had only advisory jurisdiction in the matter of post-graduate studies under Sec. 20 of the Medical College Act and the criteria laid down by it are of advisory nature and are not at all of mandatory character; and (ii) the criteria laid down by the Medical Council of India by its regulation under Section 33 relate to the registration of the students for post-graduate study and not for the appointment of the stipendiary and non-stipendiary posts of the R.H.O., Registrar, C.M.Os, etc. and therefore the writ petition is misconceived at this stage.

8. In the rejoinder to the reply of the non-petitioners Nos. 1 and 2 the petitioner has emphatically refuted the contention that his petition is pre-mature, and has further traversed the contentions raised in the reply and reiterated the stand taken in his petition.

9. Mr. Garg in support of the writ petition has advanced the following contentions:—

(1) Neither the State Government nor its functionary including the non-petitioner No. 1, the Principal and Controller of S. M. S. Medical College had competence to lay down criteria contained in Annexure 5 as they relate to the higher education which subject is in the legislative sphere of the Parliament alone under entry 66 of List I of Schedule VIIIth of the Constitution.

(2) The criteria laid down in Annexure 5 by the non-petitioners Nos. 1 and 2 are in contravention of the regulation framed by the Medical Council of India under Section 33 of the Medical Council Act and are, therefore, invalid.

(3) The non-petitioner No. 2 having laid down the criteria by his order dated 18th of April, 1975 had no jurisdiction to review and replace them by impugned criteria.

10. A preliminary point has been raised on behalf of the non-petitioners Nos. 1, 2 and 3 that the writ petition is pre-mature and is, therefore, not maintainable at this stage. The contention proceeds on the basis that the applications were invited for various stipendiary and non-stipendiary posts sanctioned by the State of Rajasthan and not for the registration of the post-graduate course. It is said that the appointment as Resident House Officer, Registrar, Full Time Post-Graduate etc. only makes the students eligible for registration to the post-graduate course for which they have to apply in a separate form. It is further submitted that

there is no guarantee that all those who get stipendiary and non-stipendiary posts will be entitled to registration to the post-graduation course. On this basis it is said that the writ petition is premature at this stage.

Now the Ordinance No. 278-B of the University of Rajasthan Hand Book provides that no candidate shall be admitted to the examination for the degree of Doctor of Medicine or Master of Surgery unless he produces satisfactory evidence to the effect—that he after having obtained the M.B.B.S. degree of the University or of any other University recognised by the Medical Council of India for the purpose has been a House Physician, House Surgeon in a teaching hospital recognised by the University etc. or has obtained the M.B.B.S. degree and full registration with the Medical Council not less than three academic years previously and has registered as a post-graduate student in the University at least two academic years previously. Likewise the criteria for selection to the post-graduate training laid down in the Medical Council Regulation also provide that the students to become eligible for registration to post-graduate course should after passing the M.B.B.S. examination and putting in one year's compulsory rotating internship has done one year's Housemanship prior to the admission to the M.D./M.S. course. From the above provisions, it will appear that the appointments to the stipendiary and non-stipendiary posts of the Resident House Officer etc. are a condition precedent to the registration of post-graduation studies. The selection to the Resident House Officers etc. is a condition precedent and gate-way to the registration in the post-graduate course. Putting it differently the selection to the stipendiary and non-stipendiary posts is an integral part of the training to the post-graduation course and is a necessary step for the registration in the post-graduation studies. Without selection to the above posts it is almost impossible to get the registration in the post-graduation course. In this view of the matter, it is futile on the part of the contesting non-petitioners to contend that the writ petition is pre-mature. The preliminary objection is accordingly turned down.

11. Now I proceed to take up each of the contentions of the petitioner on merits. Contentions Nos. 1 and 2 are closely interlinked and they may be taken up together.

12. It has been argued that the training to post-graduate studies is a subject within the sphere of the Parliament vide Entry 66 of List I of Schedule VIIth of the Constitution. There is no doubt about this proposition and the matter is also concluded by the authority laid down

in *Janardhan Subbanaya v. Mysore State*, AIR 1963 SC 702 and *Chitralekha v. State of Mysore*, AIR 1964 SC 1823. The question however does not stop at that. The further question is whether the impugned criteria laid down by the non-petitioners Nos. 1 and 2 are encroachment on the legislative sphere of the Parliament. The Parliament has enacted the Indian Medical Council Act and under Section 33 of the Act, the Medical Council has been empowered to frame regulations for achieving the objects for laying down uniform standards in the under-graduate and post-graduate medical studies. The argument of Mr. V. S. Dave that the Medical Council is not empowered to frame regulations under Section 33 is misconceived when one looks to Section 20 of the Indian Medical Council Act. The question which requires to be considered is whether the non-petitioners Nos. 1 and 2 have altered the criteria laid down by the Medical Council. It will be here appropriate to reproduce the criteria laid down by the Medical Council under its regulation framed under Section 33 of the Act. The criteria read as under:—

"Criteria for the selection of candidates:

(a) Students for post-graduate training should be selected strictly on merit judged on the test of academic record in the under-graduate course.

(b) The candidates should have obtained full registration i.e. they must have completed satisfactorily one year of compulsory rotation internship after passing the final M.B.B.S. examination and must have full registration with the State Medical Council.

(c) They must subsequently have done one year's housemanship prior to admission to the M. S. course. Housemanship should be for one year in the same subject or at least six months in the same department and the reading period in an allied department. Alternatively

(i) Must have worked as a full-time post-graduate student in the department concerned before taking up the M.D./M.S./Diploma courses in a manner equivalent to housemanship requirements.

(ii) or worked in hospitals approved by the Council for internship training for a period of three years.

(iii) or worked in State Medical Service or Armed Forces Medical Service or other equivalent service for a period of five years.

(d) Other conditions being equal weightage may be given to persons who have worked in rural areas or the Armed Forces Medical Services for at least two years."

From the perusal of the criteria extracted above it will appear that two modes have been prescribed in the regu-

lation for selection to the post-graduate training. According to the alternative mode the basis for selection is that the student should have worked as a Full-time Post-graduate student in the department concerned hospital approved by the Medical Council for internship training for three years or in the State Medical service or Armed Forces Medical service etc. It will thus appear that the academic record of the student in the under-graduate course is not the sole basis for selection to the post-graduate training. I am here of course concerned with the first mode of selection to the post-graduate training.

13. Controversy has been raised that the expression 'under-graduate course' envisages the aggregate marks obtained by the candidate at all the three University examinations of the M.B.B.S. and not only in the final M.B.B.S. examination. It is submitted that if this interpretation is accepted then the impugned criteria are in derogation of the regulation of the Medical Council as the impugned criteria assess merit on the basis of academic record of students in the final M.B.B.S. examination only. In order to examine the validity of this contention it will be appropriate to make a reference to the various subjects in which the candidates have to undertake the examination in various parts of the M.B.B.S. course. Ordinance 271 of the University Hand Book lays down that every candidate for the First M.B.B.S. Examination is to pass in the subjects— (i) Anatomy, (ii) Physiology including allied and cognate subjects. Further Ordinance 271 provides that every candidate for the second M.B.B.S. examination is to pass in the subjects— (1) Pathology and Bacteriology, (2) Pharmacology including pharmacy— Therapeutics and Toxicology and (3) Forensic medicine. Further more the Ordinance No. 274 requires a candidate to pass the final M.B.B.S. examination in the subjects (1) Medicine including Therapeutics, (2) Preventive and Social Medicine, (3) Surgery including Diseases of Ear, Nose and Throat, (4) Obstetrics and Gynaecology and (5) Ophthalmology. From the perusal of the various courses it will at once appear that the subjects prescribed in the final M.B.B.S. examination under Ordinance 274 are of comprehensive character and of wider amplitude embracing in their fold the knowledge of all the subjects prescribed for the examination of First M.B.B.S. and Second M.B.B.S. examination which have been put in the head of "Basic Sciences" in the recommendations of the Medical Council for the post-graduate course. The merit in the final M.B.B.S. examination postulates the knowledge and proficiency, and power of application of the knowledge derived

from the "Basic Sciences" viz. the subjects prescribed in the First M.B.B.S. and Second M.B.B.S. examinations. The impugned criteria also assess merit on the academic record of the under-graduate course and not on other extraneous considerations. This criteria therefore cannot be taken to be in derogation of the criteria laid down by the Medical Council and, therefore, in my view there is no substantial alteration or modification of the criteria laid down by the Medical Council by the State or its functionaries.

14. Even assuming for a moment that there is departure from the criteria laid down by the Medical Council, the question is whether the criteria are bad in law on that account. The answer to this question depends upon the further question whether the criteria laid down under the Regulation are of a mandatory character. In this connection it will be appropriate to refer to Sections 19-A and 20 of the Indian Medical Council Act. They read as under:—

"S. 19-A. Minimum standards of medical education— (1) The Council may prescribe the minimum standards of medical education required for granting recognised medical qualifications (other than post-graduate medical qualifications) by Universities or Medical Institutions in India.

(2) Copies of the draft regulations and of all subsequent amendments thereof shall be furnished by the Council to all State Governments and the Council shall, before submitting the regulations or amendment thereof, as the case may be, to the Central Government for sanction, take into consideration the comments of any State Government received within three months from the furnishing of copies aforesaid.

(3) The Committee shall from time to time report to the Council on the efficacy of the regulations and may recommend to the Council such amendments thereof as it may think fit.

"20. Post-graduate Medical Education Committee for assisting Council in matters relating to post-graduate medical education:— (1) The Council may prescribe standards of post-graduate medical education for the guidance of Universities, and may advise Universities in the matter of securing uniform standards for post-graduate medical education throughout India and for this purpose the Central Government may constitute from among the members of the Council a Post-graduate Medical Education Committee (hereinafter referred to as the Post-Graduate Committee).

*Inserted by the Indian Medical Council (Amendment) Act, 1964 (24 of 1964), Section 11 (11-6-1964).

(2) The Post-graduate Committee shall consist of nine members all of whom shall be persons possessing post-graduate medical qualifications and experience of teaching or examining post-graduate students of medicine.

(3) Six of the members of the Post-graduate Committee shall be nominated by the Central Government and the remaining three members shall be elected by the Council from amongst its members.

(4) For the purpose of considering post-graduate studies in a subject, the Post-graduate Committee may co-opt, as and when necessary, one or more members qualified to assist it in that subject.

(5) The views and recommendations of the Post-graduate Committee on all matters shall be placed before the Council; and if the Council does not agree with the views expressed or the recommendations made by the Post-graduate Committee on any matter, the Council shall forward them together with its observations to the Central Government for decision."

If we look into Section 19-A it will appear that the Medical Council has been empowered to prescribe the minimum standard of medical education required for granting recognised medical qualification other than post-graduate medical qualification by Universities or medical institutions in India. The expression 'minimum standard of medical education' occurring in Section 19-A is of great significance as it positively indicates the mandatory character of this section and the educational institutions are bound to observe the minimum standards as required by Section 19-A. Whereas if we look to Section 20 then it will at once appear that the Medical Council is authorised to prescribe standards of post-graduate medical education for the guidance of University and for their advice, in the matter of securing uniform standards. To my mind the regulations framed by the Medical Council for the post-graduation medical education are of advisory nature and appear to be for the guidance of the educational institution. There is no mandate in Section 20 given to the educational institutions to observe the minimum standards as has been given in Sec. 19-A. On the contrary in Section 19-A, the post-graduate studies have been excluded from the criteria of minimum standards to be observed by the institutions conducting post-graduate training. On a combined reading of Section 19-A and Section 20 of the Act, to my mind, the regulation regarding selection to post-graduate training is therefore not of a mandatory character. It is true that the object behind the regulation and the Indian Medical

Council Act is to secure uniform standards for post-graduate education but the object is not undermined by adopting the impugned criteria as it has not been said that the standard of training for the Resident House Officer, Registrar, etc. will be in any manner different. The impugned criteria in fact and in substance are broadly in accord with the criteria laid down by the Medical Council and it is therefore futile to impugn them as bad in law.

15. Furthermore, it is not disputed that there are five medical colleges in Rajasthan. All the five medical colleges have been judging the merit assessed on the basis of the aggregate marks obtained in the final M.B.B.S. examination. It is true that the medical colleges at Udaipur and Jodhpur have also been adding the marks of the subject concerned for which choice is given but that is a minor alteration and the real basis of the selection is merits judged on the basis of the academic record of the final M.B.B.S. examination. It is also evident from the affidavit of Mr. M. L. Gupta, the then Principal of S. M. S. Medical College (which has not been controverted by the opposite side) that various colleges in the country — (1) The Grant Medical College, Bombay; (2) M. L. N. Medical College Allahabad; (3) C. M. C. Medical College, Ludhiana; (4) Medical College, Kanpur; (5) Medical College Meerut; and (6) R. G. Kar Medical College Calcutta have been adjudging the merit on the basis of the aggregate marks obtained at the final M.B.B.S. examination for post-graduate medical training and no objection has been ever raised by the Medical Council of India despite inspection by its officials. The regulation has been interpreted by the various medical colleges including the colleges of Rajasthan in the manner that the merit be judged on the basis of aggregate marks of the final M.B.B.S. examination. This interpretation cannot be ruled out as wholly unreasonable. On the other hand it is a reasonable and plausible one. Reference in this connection may be made to Principal Patna College v. K. S. Raman, AIR 1966 SC 767 wherein it has been laid down that where the question involved is one of interpreting a regulation framed by the statutory body the High Court should ordinarily be reluctant to issue writ of certiorari where it is plain that the regulation in question is capable of two constructions and it would generally not be expedient for the High Court to reverse a decision of the educational body on the ground that the construction placed by such body on the relevant regulation appears to the High Court less reasonable than the alternative construction. Even assuming that the construction on the regulation suggested by

the learned counsel for the petitioner may be one of the possible constructions and even more reasonable but that by itself is not sufficient for warranting this court to interfere with the decision of the educational body or the State Government who incurs the financial liability to run the educational institutions: vide *Chitralekha v. State of Mysore*, AIR 1964 SC 1823.

16. Moreover selection for the training to the post-graduate medical course has already been made in the four medical colleges of Rajasthan long ago on merit based on the academic record of the final M.B.B.S. examination and course of study has also commenced in those colleges. Now to issue direction to adopt a different criteria as suggested by the learned counsel will, instead of promoting uniformity of standards, would entail different standards in the colleges of the same State and may tend to upset the selections of the students in the other medical colleges of Rajasthan. That course will not at all subserve the public interest and may lead to great public inconvenience. It is well to remember that the High Court while exercising its power under Article 226 does not sit as a court of appeal to review the decisions of the administrative body. Its powers are of discretionary nature. The interpretation put on the impugned criteria is broadly in accord with the regulation of the Medical Council and appears to be a reasonable one. In this view of the matter also, it will be not expedient to interfere with the interpretation put by the medical colleges of Rajasthan on the criteria laid down in the regulation of the Medical Council.

17. Lastly it was contended that the non-petitioners Nos. 1 and 2 have no power to review their order dated 18th of April, 1975, contained in Annexure I. Indisputably order dated 18th of April, 1975 is of an administrative character. There is no statutory prohibition against a review of the administrative order. The administrative authority has ample power to review or revise its own order in absence of any statutory restriction. The argument that the petitioner has acquired right under order dated 18th of April, 1975 is not at all acceptable to me. The petitioner has filed two application forms expressing his choice in both of them for particular subjects within the time prescribed. In one application form, the petitioner has shown his merit on the basis of aggregate marks obtained in all the three University examinations of the M.B.B.S. In the another application form the petitioner has shown his merit on the basis of aggregate marks obtained by him in the final M.B.B.S. examination. As stated ear-

lier both the application forms have been submitted within the time prescribed. There is, therefore, no question of prejudice or detriment to the petitioner on account of the review of the order dated 18th of April, 1975. The decision in *G. Latha v. B. Saroja*, (1970) 2 Andh WR 165 is, therefore not applicable to the facts of this case and is wholly distinguishable. The petitioner has not acquired any right under order dated 18th of April, 1975 much less vested right and it is, therefore, futile on his part to raise the plea of estoppel against the non-petitioners Nos. 1 and 2 on the authority of *G. Latha v. B. Saroja*, (1970) 2 Andh WR 165. In any event I am not at all disposed to invoke the extraordinary jurisdiction under Article 226 of the Constitution in the facts of this case.

18. In the result, there is no force in this writ petition and the same is dismissed. Looking to the particular facts and circumstances of the case the parties are left to bear their own costs.

Petition dismissed.

AIR 1976 RAJASTHAN 40

KALYAN DUTTA, J.

Moti Lal and others, Appellants v. Sardar Mal and others, Respondents.

Second Appeal No. 23 of 1967, D/- 8-9-1975.*

(A) Civil P. C. (1908), S. 100 — Findings of fact — Interference with — Circumstances under which findings can be set aside.

If the findings of fact given by the first appellate court are based upon an appreciation of all the relevant evidence, the High Court would be reluctant in upsetting them. It is only when the finding is based on no evidence at all or where the evidence is disbelieved for no reason or if any substantial error or defect in procedure has crept in, then interference with concurrent findings of fact is called for in second appeal. AIR 1951 SC 193; AIR 1959 SC 57; AIR 1959 SC 1204 and AIR 1963 SC 302, Rel. on. (Para 7)

(B) Evidence Act (1872), Ss. 101, 102, 103, 104 and 114 — Adoption — Proof — Onus — Presumption.

After a lapse of several years, it is likely that the evidence of adoption may not be available and it may become difficult to find any witness who had eye-witnessed the ceremony of actual giving and taking in adoption. In such cases if the

* (Against judgment of Lehar Singh Mehta Dist. J., Jodhpur, in First Appeals Nos. 25 and 137 of 1962, D/- 8-7-1966.)

party alleging adoption adduces some evidence of the factum of adoption, it may be regarded as sufficient to shift the burden on the other side to prove that the adoption did not take place. In such cases of old adoption, a presumption in favour of the validity of the adoption is naturally drawn from the status of the adopted son in the adopting family and its recognition by the members of the family for a number of years. AIR 1955 Raj 65; AIR 1936 PC 304; AIR 1925 PC 201; (1870) 14 Moo Ind App 67 (PC) and AIR 1923 Cal 18, Rel. on. (Para 8)

(C) Evidence Act (1872), S. 32 — Words "before the question in dispute was raised" — Meaning — Words do not refer to particular legal proceeding where statement is produced in evidence.

From a bare reading of sub-section (5) of S. 32, it appears that declaration of relationship by blood, marriage or adoption must have been made by a person who is dead or who cannot be found etc. as mentioned in the opening part of the section before the dispute in relation to which they are proved was raised. The words "before the question in issue was raised" do not merely mean before the commencement of the particular legal proceedings in which such a statement is produced in evidence but even before the actual controversy regarding the subject-matter of the declaration has arisen. AIR 1968 SC 947, Rel. on. (Para 9)

(D) Evidence Act (1872), S. 76 — Contents of document — Proof — Certified copy — Admissibility. (Registration Act (1908), S. 57).

A certified copy of a registered copy is admissible to prove the contents of the original document only when conditions for the introduction of the secondary evidence are fulfilled. It is true that if a certified copy has been admitted into evidence without any objection having been raised by the other party, that no case is made out for the introduction of the secondary evidence, the appellate court would not permit its admissibility to be questioned before it on that ground. AIR 1963 Raj 234 and 1969 Raj LW 107, Rel. on. (Para 12)

(E) Civil P. C. (1908), O. 16, R. 21, 10, 11 and 12 — Scope — Words 'required to give evidence' — Meaning — Voluntary witness keeping away after examination-in-chief — Effect. (Evidence Act (1872), S. 114).

From a bare reading of the language of R. 21 of O. 16 it appears that the words "required to give evidence" used therein clearly indicate that the provisions as to witnesses shall apply to any party to a suit if he is required to give evidence or to produce documents by the other side or by court. But if he voluntarily appears

in the witness box to give evidence in his own favour and deliberately keeps himself away after examination-in-chief and before cross-examination, the provisions as to witnesses cannot be made applicable to him and the court is empowered to procure his attendance by resorting to Rules 10, 11 and 12 of O. XVI, C.P.C. The proper course to be followed by the court in such a case is to reject the testimony of such party, if cross-examination is evaded or deliberately prevented by such party. In such a case if the person evades cross-examination a presumption should ordinarily be drawn against a party who having a knowledge of the facts in dispute does not subject himself to examination or cross-examination, because non-appearance of a party in witness-box would be a strong circumstance to discredit the truth of his case. The presumption does not however apply when the plaintiff has already appeared in the witness-box and has given evidence in the case on issues the burden of which lay upon him. An adverse inference may be drawn against him to the extent that he could not rebut the evidence adduced by the defendants on the issues which they were required to prove. It does not mean that his former statement on the issues, on which he was required to lead evidence in the first instance, should also be rejected on the ground that he did not submit himself to further cross-examination after his subsequent examination-in-chief was over. (Para 13)

(F) Evidence Act (1872), S. 90 — Will — Proof — Will more than 30 years old produced from proper custody — Presumption that it was executed by testator when he was in sound disposing state of mind can be raised. AIR 1961 Mad 262; AIR 1947 PC 15 and AIR 1962 Andh Pra 29, Rel. on. (Para 15)

(G) Succession Act (1925), S. 119 — Will—Devisee given vested interests subject to life interest of testator's wife — Devisee dying before obtaining possession of properties bequeathed — Effect — Vested interest of devisee not defeated — His representatives entitled to the bequest. AIR 1963 SC 1703 and AIR 1938 Oudh 69, Rel. on. (Para 17)

(H) Hindu Law — Adoption — Relation back — Principle — Exceptions. (Hindu Adoptions and Maintenance Act (1956), S. 13).

An adopted son is entitled to take the interest of the adoptive father as on the date of his death. This principle of relation back is based on a legal fiction that there should be no gap or break in the continuance of the line of adoptive father. This theory of relation back is however, subject to certain exceptions. One of the limitations is that if the property by in-

heritance passes to a collateral and the adopted son is adopted after the death of the collateral, the adoption cannot divest the estate of the collateral which had gone to his heir by inheritance. Another exception to which the principle of relation back is subject is that the adopted son would be bound by any lawful alienation effected by a male or female heir after the death of the adoptive father and before the date of adoption. AIR 1954 SC 379; AIR 1950 Bom 360 (FB); AIR 1943 PC 196 and AIR 1962 SC 59. Rel. on; AIR 1946 Nag 203, Dist. (Para 22)

Cases Referred: Chronological Paras

AIR 1974 SC 878 = (1974) 3 SCR 474	21
1969 Raj LW 107 = ILR (1968) 18 Raj 1212	12
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AIR 1962 SC 59 = (1962) 2 SCR 813	22
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AIR 1961 Mad 262 = 74 Mad LW 261	15
AIR 1959 SC 57 = 1958 Andh LT 834	7
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AIR 1959 SC 504 = (1959) Supp (1) SCR 698	11
AIR 1959 SC 1204 = (1960) 1 SCR 271	7
AIR 1955 Raj 45 = ILR (1955) 5 Raj 191	7
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AIR 1928 Pat 113 = 9 Pat LT 180	7
AIR 1927 PC 139 = 54 Ind App 248	21
AIR 1925 PC 201 = 53 Mad LJ 853	8
AIR 1923 Cal 18 = 35 Cal LJ 434	8
AIR 1915 PC 37 = 43 Ind App 20	21
AIR 1914 PC 67 = 41 Ind App 314	19
(1870) 14 Moo Ind App 67 = 2 Sar 666 (PC)	8

P. C. Mathur, for Appellants; M. M. Vyas, for Respondents.

JUDGMENT:— This second appeal is directed against the judgment and decree of the learned District Judge, Jodhpur, dated 8th July, 1966, by which the two appeals Nos. 25 of 1962 and 137 of 1962,

filed by the defendants against the preliminary decree and the final decree passed in a suit for redemption by the Additional Civil Judge, Jodhpur, were dismissed with costs and the cross-objections filed by Sardar Mal and his son Sujan Mal were partly accepted and the amount of mesne profits at the rate of Rs. 60 p.m. with effect from the date of final decree till the date of the judgment of the learned District Judge, was added in the decree as payable by the defendants to the plaintiffs.

2. The relevant facts giving rise to the suit for redemption, out of which this appeal arises, may be described as follows:—

3. Sardar Mal and his son Sujan Mal filed a suit for redemption of a shop in dispute situated in Sire Bazar, Jodhpur, on the basis of a mortgage-deed (Ex. 25) executed by Mst. Bugi widow of Ladu Ram in favour of Chunni Lal Baheti on Falgun Sudi 10 Samvat-year 1957 (28-2-1901). The suit was filed against Manak Lal and Moti Lal sons of Chunni Lal and their mother Mst. Dhapi Bai alias Tulsi Bai. The allegations in the plaint were that one Ladu Ram owned and possessed a shop situated in Sire Bazar, Jodhpur. He died in Samvat-year 1956 leaving behind his widow Mst. Bugi and his two married daughters Mst. Sayar Kanwar and Mst. Udi. He had two sons Narain Das and Ranchor Das. During the lifetime of Laduram, Ranchor Das went in adoption to another family at Laskar and Narain Das went away from his house and was not heard of thereafter by his parents and others, who would naturally have heard of him, if he had been alive. After Ladu Ram's death, his widow Mst. Bugi took Sardar Mal plaintiff in adoption and kept him with her but she could not execute an adoption-deed in his favour. She went to Laskar for bringing back the will executed in favour of Ranchor Das but in Laskar she fell sick and died in the month of Baisakh Samvat-year 1971. Before her death, she, however, directed her daughter Sire Kanwar and close relative Goru Ram Jajoo to execute a deed of adoption in favour of Sardar Mal on her behalf and get it duly registered. In pursuance of her directions the daughters of Mst. Bugi executed a deed of adoption in favour of Sardar Mal Jajoo and got it duly registered by the then registering authority. Since then Sardar Mal was being treated as an adopted son of Ladu Ram. The alternative case of the plaintiff Sardar Mal was that if for any reason his adoption is not considered to be valid in the eye of law, he became owner of the properties of Ladu Ram, because Ladu Ram's nearest reversioner Goru Ram relinquished his claim to Ladu Ram's property in his favour on 24-1-1922 and on

Ashad Sudi 9, Samvat year 1979 by executing a will in his favour. Similarly Kanhaiya Lal son of Ranchor Das also relinquished his claim, if any, to Ladu Ram's property in his favour by executing a registered deed of relinquishment on 2nd July, 1936.

4. On 15th January, 1954, the defendants put forward a plea that the old mortgage-deed of Samvat-year 1957 was substituted by another mortgage-deed of Samvat-year 1968 and that the plaintiffs' suit was not maintainable on the basis of the old mortgage. Sardar Mal plaintiff, therefore, amended his plaint and based his suit upon the substituted mortgage-deed dated 17th December, 1911, which was executed by Mst. Bugi in favour of Chunnilal, father of Motilal and Maniklal defendants for a sum of Rs. 4,000. The defendants thereupon submitted a written statement, wherein the mortgage was admitted but the factum and validity of adoption of Sardar Mal by Mst. Bugi was challenged. The defendants further alleged that Goru Ram was not the nearest reversioner of Ladu Ram and that he did not execute any will in favour of Sardar Mal in respect of the property of Ladu Ram. Likewise they denied that Kanhaiya Lal had executed any deed of relinquishment of his right to the property of Ladu Ram in favour of Sardar Mal. Alternatively, it was pleaded that if any such deed of relinquishment as alleged by the plaintiffs is proved to have been executed, it was registered at Pali and it was not valid as the property affected thereby was situated at Jodhpur and not at Pali. The defendants further pleaded that Ladu Ram and his wife executed a will on 25th January, 1896, in favour of their son Ranchor Das, who had gone in adoption to Ramdeo Jajoo resident of Laskar, Cwalior. By virtue of this will, the entire property belonging to Ladu Ram and Bugi was bequeathed to Ranchor Das, who only could be the true owner of Ladu Ram's property after the death of Mst. Bugi in Samvat-year 1971. The case of the defendants, therefore, was that after the death of Ranchor Das, his son Kanhaiya Lal became the owner of Ladu Ram's property and as during the pendency of the suit Kanhaiya Lal sold away the equity of redemption to the defendants for Rs. 1,500, on 30th January, 1954, the defendants became the full owners of the property in dispute of which they were already mortgagees. Hence their contention was that the shop in dispute could not be redeemed. The plaintiffs on the other hand, prayed that a decree for redemption of the property in dispute may be passed upon payment of whatever sum is found to have been borrowed for legal necessity by Mst. Bugi and that excessive interest may be reduced and

mesne profits be awarded to them with effect from the date of notice Ex. 16, dated 15th March, 1945. The defendants asked for better particulars. The plaintiffs thereupon furnished better particulars on 29th April, 1957, wherein it was alleged that a sum of Rs. 1,250, only out of the mortgage money of Rs. 4,000, was paid to Mst. Bugi for legal necessity and that interest may be calculated on the sum that may be found due.

5. The learned Additional Civil Judge, Jodhpur, framed the following issues upon the pleadings of the parties:—

1. Whether the plaintiff No. 1 Sardar Mal is the adopted son of Ladu Ram? If so, whether his adoption is valid?

2. Whether Sardar Mal is the next reversioner and heir to Ladu Ram? If so, what is its effect on the suit?

3. Whether Rs. 1,250, only were paid to Mst. Bugi out of the mortgage money amounting to Rs. 4,000, mentioned in the mortgage-deed?

4. Whether Mst. Bugi executed another mortgage deed in Samvat-year 1968 for Rs. 4,000, without consideration and there being novation of contract, the suit on the basis of the former mortgage-deed is not maintainable (deleted vide order dated 12-8-1957)?

5. Whether the plaintiffs are entitled to more than Rs. 1,251, as interest in case a decree for redemption of the mortgage property is passed (deleted vide order of the court dated 29-10-61)?

6. Whether Gauru Ram bequeathed the disputed shop in favour of the plaintiffs? If so, whether he had a right to do so?

7. Whether Kanhaiyalal of Laskar relinquished his rights in the disputed shop in favour of the plaintiff? Whether he had right to do so and whether the deed registered at Pali is legally valid?

8. In case issue No. 7 is decided in favour of the plaintiffs, whether Kanhaiyalal of Laskar had a right to sell the shop in question (in favour of the defendants) in the face of his having relinquished the rights (in favour of the plaintiff)?

9. Whether the sale effected by Kanhaiya Lal in favour of the defendants is without consideration? If so, what is its effect on the suit?

10. Whether the said sale by Kanhaiya Lal in favour of the defendants being effected during the pendency of the present suit is ineffective against the plaintiffs?

11. Whether the defendants spent Rs. 141, in getting shutters and electric fittings and other repairs to the suit property? If so, whether they are entitled to recover the amount from the plaintiff?

12. Whether the plaintiff is entitled to get the mesne profits from the defendants? If so, how much?

13. What relief the plaintiff is entitled to get?

14. Whether the amount of mortgage money in excess of Rs. 1,250, was paid to Mst. Bugi by the mortgagee for her legal necessity (this issue was framed on 14-9-61)?

Thereafter he recorded the evidence of the parties. The plaintiffs produced 12 witnesses in support of their claim. Besides oral evidence, they produced 25 documents. The defendants examined 17 witnesses and also produced a good number of documents. The learned Additional Civil Judge considered the entire evidence and decreed the plaintiffs' suit for redemption upon payment of Rs. 3,814.87. Aggrieved by the preliminary and final decrees passed by the Additional Civil Judge, the defendants preferred appeals Nos. 25 and 137 of 1962 in the court of the learned District Judge, Jodhpur. The plaintiffs also filed cross-objections. The learned District Judge dismissed both the appeals with costs and partly allowed the cross-objections filed by Sardar Mal as stated above. Hence this second appeal and cross-objections.

6. During the course of hearing arguments advanced by the learned counsel for the parties, it came to my notice that the trial court did not frame a distinct issue in respect of the will alleged to have been executed by Ladu Ram and his wife Mst. Bugi on Magh Sudi 10 Samvat-year 1952 (corresponding to 25th Jan., 1896) in favour of their son Ranchor Das, who had gone in adoption to some other family at Laskar Gwalior. As the parties were at variance on this proposition of fact and as it appeared that the issues framed by the trial court were not comprehensive enough to cover the important question whether this will was duly executed by Ladu Ram and Mst. Bugi in a sound disposing state of mind and whether this will was revoked later on by Mst. Bugi during her lifetime, I thought it proper to frame the following new issues upon the pleadings of the parties:—

1. Whether Ladu Ram and Mst. Bugi duly executed will Ex. DW 5A/1 on Magh Sudi 10 Smvt. 1952 in favour of Ranchor Das in respect of the property in dispute in sound disposing state of minds?

2. If so, whether this will was revoked by Mst. Bugi during her lifetime?

3. Whether this will stood revoked by reason of Sardar Mal plaintiff being adopted to Ladu Ram by Mst. Bugi after Ladu Ram's death?

After framing the aforesaid new issues, I remitted the same to the trial

court for recording additional evidence of the parties on these issues and to return the evidence to this Court together with its finding thereon and the reasons therefor. The learned Additional Civil Judge recorded the evidence of the parties on these issues and upon consideration thereof arrived at a conclusion that the will Ex. DW 5A/1 was executed by Ladu Ram and Mst. Bugi in sound disposing state of mind on Magh Sudi 10 Smvt. 1952 and that it was not revoked by Mst. Bugi during her lifetime. He further held upon evidence that the will executed by Ladu Ram and Mst. Bugi does not stand revoked by reason of Sardar Mal plaintiff having been adopted to Ladu Ram by Mst. Bugi after Ladu Ram's death. The evidence recorded by the Additional Civil Judge and his findings on the new issues formed part of the record in the suit. Sardar Mal plaintiff no doubt presented a memorandum of objections to the findings of the learned Civil Judge. The objections were heard at the time of hearing of the appeal.

7. I have perused the record and heard the arguments advanced by the learned counsel for the parties. Firstly, it has been contended on behalf of the appellants that the learned District Judge committed an error in holding that Sardar Mal had been taken in adoption to Ladu Ram by the latter's widow Mst. Bugi on Asad Sudi 9 Samvat-year 1968 (corresponding to 23rd June, 1912). Note: In the erstwhile Jodhpur State every new Samvat year commenced on Shravan Sudi 1. According to the submission of the learned counsel for the appellants, the decision of issue of adoption of Sardar Mal is based partly on evidence which is insufficient in law to support it and partly on evidence, which is per se inadmissible and could not possibly be received under any provision of the Evidence Act. It was further argued that it is the duty of this Court to interfere and to do justice in the case, because the findings of both the courts below on the issue of Sardar Mal's adoption are given relying upon inadmissible evidence or by ignoring important evidence e.g. registered deed of adoption executed by the daughters of Ladu Ram. In support of his above contention, the learned counsel for the appellants placed reliance on the following authorities: Gokul Pandey v. Baldeo Sukul, AIR 1928 Pat 113, Kishanlal v. Sohan Lal, ILR (1955) 5 Raj 191 = (AIR 1955 Raj 45), Maheswar v. Malana Bewa, AIR 1964 Orissa 174 and K. V. Sabbaraju v. C. Subbaraju, AIR 1968 SC 947.

The learned counsel appearing on behalf of the respondents, on the other hand, urged that the question whether or not Sardar Mal had been adopted to Ladu

Ram by Mst. Bugi was purely a question of fact and that both the courts below arrived at a conclusion upon consideration of the entire documentary and oral evidence adduced by the parties that Sardar Mal had been adopted to Ladu Ram by the latter's widow Mst. Bugi. Such a concurrent finding of fact cannot be disturbed in second appeal by this Court simply for the reason that the first appellate court relied upon some documentary evidence also in support of such finding. In support of his above proposition, the learned counsel for the respondents invited my attention to the following authorities of the Supreme Court: *Ajjan Singh v. Kartar Singh*, AIR 1951 SC 193, *D. Pattabhiramaswamy v. S. Hanumayya*, AIR 1959 SC 57, *Paras Nath v. Mohani Dasi*, AIR 1959 SC 1204 and *Ramachandra v. Ramalingam*, AIR 1963 SC 302. I have carefully gone through these authorities. The principle laid down in these decisions is that the High Court is not empowered to interfere with a pure finding of fact in second appeal on the ground of its being erroneous unless there is a substantial error or defect in the procedure provided by the Civil Procedure Code or by any other law for the time being in force, which may have produced error or defect in the decision of the case upon merits. The observations made by their Lordships of the Supreme Court in *D. Pattabhiramaswamy v. B. Hanumayya*, (AIR 1959 SC 57) (supra) are quoted below:—

"Nor does the fact that the finding of the first appellate Court is based upon some documentary evidence makes it any the less a finding of fact (see ILR 11 Lah 199 = (AIR 1930 PC 91)). But, notwithstanding such clear and authoritative pronouncements on the scope of the provisions of Section 100, Civil Procedure Code, some learned Judges of the High Courts are disposing of second appeals as if they were first appeals. This introduces, apart from the fact that the High Court assumes and exercises a jurisdiction which it does not possess, a gambling element in the litigation and confusion in the mind of the litigant public."

It is, therefore, a settled law that if the findings of fact given by the first appellate court are based upon an appreciation of all the relevant evidence, the High Court would be reluctant in upsetting them. It is only when the finding is based on no evidence at all or where the evidence is disbelieved for no reason or if any substantial error or defect in procedure has crept in, then interference with the concurrent findings of fact is called for in second appeal.

In the present case, the learned District Judge considered all the evidence documentary as well as oral led by the

parties on the issue of adoption and thereafter arrived at a finding that the adoption of Sardar Mal had taken place and such a finding of fact by the court of the first appeal is final. There is reliable evidence of Sardar Mal, P.W. 3, Amba Lal, P.W. 6 and Devi Lal, P.W. 9 on the record to prove the adoption. Sardar Mal's statement on oath is that his real father Laxman Das gave him in adoption and Mst. Bugi widow of Ladu Ram, deceased, took him in adoption. He was made to sit in his adoptive mother's lap by his father Laxman Das and in this manner the ceremony of giving and taking was performed in the presence of respectable persons of his community. Thereafter coconuts were distributed amongst the persons present at the time of the ceremony and a turban was tied over his head. The evidence of Sardar Mal finds corroboration from the testimonies of P.W. 6 Amba Lal and P.W. 9 Devi Lal in all essential particulars. P.W. 6 Amba Lal, who is an old man of about 77 years of age, has stated on oath that he played the role of a priest at the time of adoption. According to his version, Sardar Mal sat in the lap of Mst. Bugi. He was made to sit in her lap by his father Laxman Das. This witness claimed to have recited 'Mantras' and performed 'Pooja' of Ganesh deity. He saw that a turban was tied over the head of Sardar Mal by Mst. Bugi. According to him, coconuts were distributed amongst the persons who had eye-witnessed the ceremony of adoption. He put a mark of vermilion on the forehead of Sardar Mal at that time.

Likewise, Devi Lal claimed to have attended the ceremony of adoption along with his father Jai Shanker. He also proved the ceremony of giving and taking in adoption. Both the courts below relied upon the direct evidence of these witnesses in proof of adoption after taking into consideration all the possible criticism made against their testimonies by the learned counsel for the appellants. Hence, it cannot be safely held that the finding of fact recorded by the court below is against the weight of evidence or that it is based on no evidence or that it is believed for no reason at all. Apart from this direct evidence in proof of adoption, the learned District Judge has taken into consideration the evidence of P.W. 7 Shivraj Maheshwari and P.W. 10 Ratan Lal Maheshwari, from which it was established that Maheshwari community, to which Ladu Ram deceased belonged, recognised Sardar Mal as son of Ladu Ram by extending invitations to him in the name of Ladu Ram's son Sardar Mal. The learned District Judge further held upon evidence of D.W. 1 Nath Mal and D.W. 9 Jagan Nath that after adoption Sardar Mal has been in continuous pos-

session of Ladu Ram's property since Samvat-year 1968 and rightly observed that if Sardar Mal had not been adopted to Ladu Ram by the latter's widow Mst. Bugi, he would not have been permitted by Bugi or by her two daughters to occupy Ladu Ram's house, because in Marwar the right of a daughter to succeed to the property of her father in the absence of his collaterals had been recognised.

8. It has been laid down in several cases that after a lapse of long years, it is likely that the evidence of adoption may not be available and it may become difficult to find any witness who had eye-witnessed the ceremony of actual giving and taking in adoption. In such cases if the party alleging adoption adduces some evidence of the factum of adoption, it may be regarded as sufficient to shift the burden on the other side to prove that the adoption did not take place. In such cases of old adoption, a presumption in favour of the validity of the adoption is naturally drawn from the status of the adopted son in the adopting family and its recognition by the members of the family for a number of years. Reference in this connection may be made to the following authorities wherein due weight has been given to all the inferences and presumptions which may arise from such status of the adopted person and its recognition: *Nand Kishore v. Brij Behari*, ILR (1954) 4 Raj 822 = (AIR 1955 Raj 65), *Mt. Bindu Kuer v. Lalita Prasad*, AIR 1936 PC 304, *Seetharama Chandra Row v. Kanchumarthi Raju*, AIR 1925 PC 201, *Eajendro Nath v. Jogendro Nath*, (1870) 14 Moo Ind App 67 (PC) and *Kailash Chandra Nag v. Bejoy Chandra Nag*, AIR 1923 Cal 18.

9. The learned District Judge has relied upon certain documents also in support of his finding on the issue of adoption. The first document is Ex. 1 dated 1-2-1951. It is an application filed by Laxman Das before the Patta Court, Jodhpur, along with his affidavit Ex. 2 dated 1-2-51, wherein he stated that Sardar Mal had been taken in adoption by the widow of Ladu Ram in her lifetime and that he being the natural father of Sardar Mal had given the latter in adoption about 40 years ago. Another document Ex. 3 dated 16-11-43 is the statement of Laxman Das, who, as stated earlier, was the real father of Sardar Mal. In this statement also Laxman Das deposed to the fact of his son Sardar Mal having been adopted by Ladu Ram's widow during her lifetime. Ex. 4 dated 30-9-24 is the copy of an order-sheet and Ex. 5 is the copy of the judgment of the Kotwali, Jodhpur, which reveal that the escheat proceedings regarding the property of Goru Ram were start-

ed and it was decided that Goru Ram's property was not liable to escheat and that it would go to Sardar Mal as he was the heir of Ladu Ram and Goru Ram was the nearest relative of Ladu Ram. Another document Ex. 7 dated 23-4-1945 is the copy of the objections filed by Moti Lal and Manak Lal appellants. The objections raised were that the disputed shop belonged to their ancestors and not to Ladu Ram. Ex. 8 dated 9-1-1943 is the copy of the statement of Motilal and Ex. 9 is the copy of the deposition of Manak Lal, who stated therein that they were the owners of the shop in dispute. Document Ex. 10 dated 5-5-45 is the copy of the objection petition of Sardar Mal, wherein he claimed to be an adopted son of Ladu Ram. Ex. 14 is the will made by Goru Ram on 22-7-1923. Ex. 15 is the letters of administration of this will granted to Sardar Mal. There are recitals in the will that Sardar Mal was taken in adoption by the widow of Ladu Ram and was kept by her as her son. The will was proved by the evidence of Sardar Mal, P.W. 3, and that of attesting witness, namely, Ram Chandra P.W. 5. The learned District Judge relied upon the recitals in this will relating to the adoption of Sardar Mal.

Another document relied upon by the learned District Judge is Ex. 23 dated 13-7-1943, which is the statement of Jai Narayan Jajoo, wherein it was stated that Sardar Mal was the adopted son of Mst. Bugi. Similar is the statement Ex. 24 of Kirpa Krishna, who stated that Sardar Mal was in possession of the property of Ladu Ram deceased on account of having been adopted to him and that invitations were issued to Sardar Mal in the community on account of being Ladu Ram's son. The other document relied upon by the learned District Judge is Ex. 12, which is a relinquishment deed executed by Kanhaiyalal son of Ranchor Das in favour of Sardar Mal. In this document Kanhaiyalal admitted in clear and definite terms that Sardar Mal was adopted to Ladu Ram by Ladu Ram's widow during her lifetime and that Kanhaiya Lal had no right to the properties of Ladu Ram. The learned District Judge admitted this document into evidence because it contained an admission of Kanhaiya Lal from whom the appellants have derived their title in the subject-matter of the suit. According to the learned District Judge, the admission was made by Kanhaiya Lal against his pecuniary interest and, therefore, it was binding on his successors in interest. Before me it was objected that the documents were inadmissible in evidence, because the statements made therein relating to the existence of relationship by adoption between Sardar Mal and Ladu Ram were made after the dispute relating

to Sardar Mal's adoption had arisen. My attention was invited to sub-sections (3) and (5) of Section 32 of the Evidence Act, which read as follows:—

"(3) Or against interest of maker.— When the statement is against the pecuniary or proprietary interest of the person making it, or when, if true, it would expose him or would have exposed him to a criminal prosecution or to a suit for damages.

(4)

(5) Or relates to existence of relationship.— When the statement relates to the existence of any relationship (by blood, marriage or adoption) between persons as to whose relationship (by blood, marriage or adoption) the person making the statement had special means of knowledge, and when the statement was made before the question in dispute was raised."

From a bare reading of sub-sec. (5) of Section 32, it appears that declaration of relationship of blood, marriage or adoption must have been made by a person who is dead or who cannot be found etc. as mentioned in the opening part of the section before the dispute in relation to which they are proved was raised. In *K. V. Subbaraju v. C. Subbaraju* (AIR 1968 SC 947) (supra) the Supreme Court also observed that the statement on which reliance is placed must have been made before the question in dispute was raised and that the words "before the question in issue was raised" do not merely mean before the commencement of the particular legal proceedings in which such a statement is produced in evidence but even before the actual controversy regarding the subject-matter of the declaration has arisen. In this view of the legal position, the aforesaid documents Exs. 1, 2, 3, 4, 5, 7, 8, 9, 10, 14, 15, 23 and 24 were clearly inadmissible in evidence because the dispute relating to the adoption of Sardar Mal had been raised in escheat proceedings of Ladu Ram's property in the year 1921 vide Missal No. 93/10-3-21 referred to in Ex. 6 and because the statements contained in these documents relating to the factum of adoption of Sardar Mal were made either in the escheat proceedings of Ladu Ram's property or after the existence of such dispute. As regards Ex. 12, it may be observed that it contained statement of Kanhaiya Lal against his pecuniary or proprietary interest in the property in dispute. Kanhaiya Lal is dead as is evident from the statement of Sardar Mal. Sardar Mal stated in his cross-examination that Kanhaiya Lal died about four or five years before he gave his statement in the trial court. In this document Ex. 12, Kanhaiya Lal admitted that the property in dispute be-

longed to Sardar Mal and that he had no title or interest in it. It will not be out of place to mention that the appellants purchased the rights to redeem the disputed property from Kanhaiya Lal vide registered sale-deed Ex. A-1. The learned District Judge, therefore, committed no error in receiving this document into evidence, under sub-sec. (3) of Section 32 of the Evidence Act, although it could not be admitted in evidence under sub-section (5) of Section 32, because the statement relating to the existence of relationship by adoption between Sardar Mal and Ladu Ram was not made before the question in dispute was raised.

10. The next question that arises for determination is whether even after the exclusion of the aforesaid documentary evidence from consideration there is evidence on the record which is sufficient in law to support the decision of both the courts below on the issue of Sardar Mal's adoption. I have stated earlier that both the courts below have rightly held upon evidence that Sardar Mal was taken in adoption to Ladu Ram by Mst. Bugi during her lifetime. The oral evidence adduced in support of adoption is sufficient to sustain a finding that Sardar Mal was validly adopted by Ladu Ram's widow after Ladu Ram's death.

11. The learned counsel appearing on behalf of the appellants strenuously urged that as the effect of adoption is to change the course of succession and to transfer properties of the adoptive father to persons who are strangers or remote relations in comparison to the nearest relatives, the evidence led in support of adoption should be such as may leave no room for doubt about its truth. In support of his above proposition he relied upon an authority of the Supreme Court reported as *Kishorilal v. Mt. Chaltibai*, AIR 1959 SC 504. On the strength of this authority, the learned counsel further contended that the evidence led by Sardar Mal to support his adoption is not free from suspicion. In this connection, he invited my attention to Ex. DW 13-A/1, a registered deed of adoption executed by the daughters of Ladu Ram and attested by Goru Ram. Relying upon this document, the learned counsel wants to show that Sardar Mal was never adopted by Ladu Ram's wife Mst. Bugi during the lifetime of the latter and that he was subsequently taken in adoption by Ladu Ram's daughters who had no authority under the law to take him in adoption to their father Ladu Ram deceased. The learned District Judge excluded this deed of adoption from consideration on the ground that this is a copy of a copy of original document which cannot be used as secondary evidence of the original

document and that the conditions specified in Section 65 of the Evidence Act for leading secondary evidence were not satisfied. The contention of the learned counsel for the appellants is that the learned District Judge committed an error in not taking this document into consideration. According to him, this document was mentioned in para. No. 2 of the plaint and it was not produced by Sardar Mal or his brother in whose possession it could naturally be. The defendants, therefore, summoned Chand Behari Lal, Record Clerk of the Registration and Stamps Department, Jodhpur, to produce permanent file book No. 1-A in which this deed was copied out at the time of its registration by the registering authority. Chand Behari Lal, D.W. 13, stated on oath that Ex. D.W. 13-A/1 is the true copy of the entries made in the registration book No. 1 relating to this adoption deed.

12. I have considered the above contention. It may be observed that sub-sec. (1) of Section 57 of the Registration Act provides that subject to the provisions of Section 62 copies of entries in Books Nos. 1 and 2 and indexes relating to book No. 1 shall be given to all persons applying for such copies. Sub-Sec. (5) further enacts that all copies given under this section shall be signed and sealed by the registering officer and shall be admissible for the purpose of proving the contents of the original documents. In the present case the defendants could not produce a copy of entries made in book No. 1 relating to this adoption deed. The copy produced and exhibited in the case was not signed and sealed by the registering officer. What the defendants did was to get Chand Behari Lal, Records Clerk, Registration and Stamps Department summoned through the court and to get a true copy in book No. 1 of DW 13A/1 produced by him in the court. A copy signed and sealed by the registering officer and given under Section 57 of the Registration Act is no doubt admissible to prove the contents of the original document, but a copy which is not signed and sealed by the registering officer is clearly inadmissible in proof of the contents of the original document. Apart from this, a certified copy of a registered copy is admissible to prove the contents of the original document only when conditions for the introduction of the secondary evidence are fulfilled. It is undoubtedly true that if a certified copy has been admitted into evidence without any objection having been raised by the other party, that no case is made out for the introduction of the secondary evidence, the appellate court would not permit its admissibility to be questioned before it on that ground. Reference in this connection may be made to Govind Ram v. Abdul

Wahab, 1963 Raj LW 453 = (AIR 1963 Raj 234), and Narayan v. Chamber of Commerce Ltd., Kishangarh, 1969 Raj LW 107. From the evidence of Chand Behari Lal, D.W. 13, it does not appear that the certified copy of the entry relating to this adoption-deed in book No. 1 was produced in the court and was got exhibited by the defendants. Document Ex. DW 13-A/1, not being a certified copy under sub-section (5) of Section 57 of the Registration Act or Section 76 of the Evidence Act was rightly held inadmissible in evidence by the learned District Judge. Even if it is held that this document Ex. DW 13-A/1 is admissible in evidence, it cannot be used in evidence against Sardar Mal because, the latter was not a party to this deed. From a bare look into this adoption-deed it appears that it was executed by the daughters of Ladu Ram. When this document was produced for registration, the registering authority made a note on it that Mst. Udi one of the alleged executants presented an application that she had not affixed her thumb impression on it in token of the execution and that the thumb impression put on it was not really her thumb impression and that neither she had any authority to take Sardar Mal in adoption to Ladu Ram, nor had she adopted him to her father. Under these circumstances, the learned District Judge was right in ignoring this piece of documentary evidence.

13. The second contention put forward by the learned counsel for the appellants is that Sardar Mal plaintiff subjected himself to examination on those issues, the burden of proving which lay on the defendants. After his examination-in-chief was over, he was partly cross-examined by the learned counsel for the defendants on 18th July, 1961. As the court time was over and the cross-examination was not complete, the trial court adjourned the case to the next day for further cross-examination. On the next day Sardar Mal Jajoo did not care to enter into the witness box again and deliberately kept himself away, although relevant record containing his previous contradictory statements on the matter in controversy had been summoned by the defendants for the purpose of contradicting him thereby. The learned counsel for the defendants requested the trial court to compel Sardar Mal's attendance in the court for further cross-examination by resorting to Rules 10, 11 and 12 of O. XVI, C.P.C. The trial court passed an order upon the application of the defendants that the statement given by Sardar Mal on 18th July, 1961 could not be admissible against the defendants, because the latter had no full opportunity of testing its truthfulness by cross-examination, and that an adverse inference could be drawn

from the failure of the plaintiffs to subject Sardar Mal himself to further cross-examination. The contention of the learned counsel for the appellants before me is that the trial court ought to have enforced the attendance of the plaintiff for the purpose of cross-examination by having recourse to Rules 10, 11 and 12 of Order XVI of the Code of Civil Procedure. In support of his above proposition, the learned counsel invited my attention to Rule 21 of Order XVI, C.P.C. which reads as follows:—

"Where any party to a suit is required to give evidence or to produce a document, the provisions as to witnesses shall apply to him so far as they are applicable."

From a bare reading of the language of this rule it appears that the words 'required to give evidence' used therein clearly indicate that the provisions as to witnesses shall apply to any party to a suit if he is required to give evidence or to produce documents by the other side or by court. But if he voluntarily appears in the witness-box to give evidence in his own favour and deliberately keeps himself away after examination-in-chief and before cross-examination, the provisions as to witnesses cannot be made applicable to him and the court is empowered to procure his attendance by resorting to Rules 10, 11 and 12 of Order XVI, C.P.C. The proper course to be followed by the court in such a case is to reject the testimony of such party, if cross-examination is evaded or deliberately prevented by such party. In this case also the trial court has rejected the statement of Sardar Mal dated 18th July, 1961, by passing an order that his statement would not be admissible in evidence against the defendant. The learned counsel further contended that an adverse inference against Sardar Mal must have been drawn by the courts below for his failure to reappear in the court for further cross-examination. The above contention is devoid of substance in the peculiar circumstances of this case. A presumption should ordinarily be drawn against a party who having a knowledge of the facts in dispute does not subject himself to examination or cross-examination, because non-appearance of a party in witness-box would be a strong circumstance to discredit the truth of his case, but the presumption does not apply when the plaintiff has already appeared in witness-box and has given evidence in the case on issues the burden of which lay upon him.

Sardar Mal submitted himself to examination-in-proof of the issues including the issue of adoption, the burden to prove which lay upon him. He was cross-examined at length by the defendants. He

again appeared in the witness-box to rebut the evidence led by the defendants on the issues, the onus to prove which lay on the defendants. When his examination-in-chief was over, he was partly cross-examined on 18th July, 1961 and as the case was adjourned to the next day, he evaded further cross-examination. At the most it could be said that his subsequent statement given in rebuttal of the issues, the burden to prove which lay on the defendants, could not be held admissible in evidence against the defendants. An adverse inference may be drawn against him to the extent that he could not rebut the evidence adduced by the defendants on the issues which they were required to prove. It does not mean that his former statement on the issues, on which he was required to lead evidence in the first instance, should also be rejected on the ground that he did not submit himself to further cross-examination after his subsequent examination-in-chief was over. Consequently, I have no hesitation in holding that both the courts below rightly held that the evidence produced in support of the adoption of Sardar Mal is highly satisfactory and free from all suspicion or fraud and that no interference with the findings of the courts below is justified on any reasonable score.

14. Next it has been contended on behalf of the appellants that even if adoption of Sardar Mal to Ladu Ram deceased is taken to be proved, it does not confer any right on Sardar Mal to redeem the disputed property belonging to Ladu Ram, deceased. In support of his above contention, the learned counsel invited my attention to the will Ex. DW5/1, which was alleged to have been executed by Ladu Ram during his lifetime. It is argued by the learned counsel that by this will Ladu Ram bequeathed his properties in dispute to his son Ranchor Das, who had already gone in adoption to some other family at Laskar Gwalior. According to the learned counsel the properties under the will vested in Ranchor Das on the death of the testator and that Ladu Ram's widow got a limited interest only in the properties of her husband and that even if she adopted Sardar Mal to his deceased husband, the latter could not legally question the disposition of such property by Ranchor Das's son Kanhaiya Lal in favour of the defendants. The learned counsel appearing on behalf of the defendants, on the other hand, contended that the will produced by the defendants' witness (D.W. 5) is not a genuine will and that it has not been duly proved by the defendants. He further submitted that even if this will is proved to have been executed by Ladu Ram in favour of Ranchor Das, it being a joint will made by him and his wife was revoked by his widow Mst. Bugi

during her lifetime. Alternatively, it was pleaded that this will if taken to be proved, further stands revoked by Sardar Mal's adoption to Ladu Ram, because the properties under the will did not vest in Ranchor Das on the death of one of the testators and because the will was a contingent one in the sense that it was to take effect on the non-happening of some uncertain event, i.e. it was to take effect only if Ladu Ram's another son Narayan Das, who had gone away from the family, did not return to the family. I have given my anxious consideration to the rival contentions.

15. The first question which arises for decision is whether the will said to have been executed by Ladu Ram and his wife Mst. Bugi is or is not a genuine will and whether the formalities required by law for the execution of a valid will were observed. The will Ex. DW5/1 was executed by Ladu Ram and Mst. Bugi on 25th January, 1896. From a bare look into the will it appears that it was signed by Ladu Ram. Mst. Bugi affixed a mark thereon in token of its execution by her. It was attested by Vaid Chunni Lal, Mathura Das, Sankhlecha Hira Chand, Mundra Baldeo Das and Megh Raj. The scribe of the will was Jagan Nath. It is evident from the endorsement on this will itself that it was presented for the first time on 17th December, 1923, before Kotwal, Jodhpur City, to be placed on the record of Patta proceedings initiated at the instance of Sardar Mal Jajoo and thereafter it was produced before the registering authority on 29th March, 1936, in connection with files Nos. 36 and 37 pending in the Registration Department of the then Jodhpur State. A copy of this will was kept with the file of the said Department. Again, it was produced in a case instituted by Jai Kishan (plaintiff) against Sardar Mal for possession of the disputed house. In that suit also a copy of this will was kept on record. In the present suit D.W. 5 Jai Kishan was summoned at the instance of the defendant to give evidence and to produce this will in the court. D.W. 5 Jai Kishan came into possession of this will at the time when the disputed property of Ladu Ram was sold away to him by Kanhaiya Lal in whose father's name Ladu Ram and Mst. Bugi had made this will and who claimed to be the owner of the shop in dispute under the will after the death of his father Ranchor Das. All the attesting witnesses and the scribe of this will were dead when the defendants were required to prove this will. The defendants, however, produced Dau Das, D.W. 6, whose father Mathura Das was one of the attesters of the will. He identified the signatures of his father on the will as he

claimed to have been acquainted with them.

Another witness produced by the defendants is Jai Narayan, D.W. 8, who stated in his deposition that the will Ex. DW5/1 is in the handwriting of his maternal grand-father Jagan Nath who used to live in the house of Ladu Ram testator. Likewise, D.W. 9 Jagan Nath identified the signatures marked C to D on the will Ex. DW5/1 to be the signatures of his father Chunni Lal as he was well acquainted with them. This will is a document more than 30 years old. It is produced from the custody of D.W. 5 Jai Kishan, which is a proper custody as it is proved to have had a legitimate origin. Ex facie, this will appears to have been duly executed and properly attested and is on its face free from any suspicion of fraud. It may, therefore, safely be presumed under the express provisions of Section 90 of the Evidence Act that it had been signed and written by a person whose signatures it bears and in whose handwriting it purports to be and that it was duly executed and attested by the persons by whom it purports to be executed and attested. The will being more than 30 years old and produced from proper custody may be presumed to have been duly executed by the testator when he was in a sound disposing state of mind. Reference in this connection may be made to the following authorities wherein presumption in favour of the disposing power of the testator was made under Section 90 of the Evidence Act: *Dhanna Pal v. Govinda Raja*, AIR 1961 Mad 262, *Munnalal v. Kashibai*, AIR 1947 PC 15 and *Venkata Rama Rao v. Bhaskararao*, AIR 1962 Andh Pra 29. The learned Additional Civil Judge, to whom additional issue No. 1 was referred by this Court for taking additional evidence thereon, gave a finding that the will was executed by Ladu Ram and Mst. Bugi while they were in a sound disposing state of mind. The learned Additional Civil Judge has assigned reasons therefor and I absolutely see no reason to take a different view.

16. It was contended on behalf of the respondents that there is no reliable proof on the record that all the formalities required by law under Section 63 of the Indian Succession Act to be observed in execution and attestation of a will had been properly observed in this case and that in the absence of any such proof, this will cannot be presumed to have been duly executed and attested. The above contention is not acceptable, because no retrospective effect can be given to the Indian Succession Act of 1925 which does not apply to a will executed before it came into operation. The will was executed on 25th January, 1896, in

the former State of Marwar in respect of immovable properties situated at Jodhpur (outside the jurisdiction of the Hindu Wills Act, 1865). Section 50 of the Indian Succession Act, 1865, corresponding to Section 63 of the Indian Succession Act, 1925, did not apply to such a will as it was not in force in the former State of Marwar. Consequently, the will cannot be brushed aside on the ground that the formalities required to be observed under Section 63 of the Indian Succession Act in respect of execution and attestation of a will had not been properly observed.

17. Another ground on which this will is subjected to sharp criticism by the learned counsel for the respondents is that this will being executed by Ladu Ram and his wife is a joint will, which was made to take effect after the death of both the testators and that such a will was revocable at any time by either of them or by the survivor. It was further urged that as Mst. Bugi, one of the testators, had revoked the will during her lifetime, the properties under the will, could not legally vest in Ranchor Das after the death of Bugi. The above contention can easily be repelled, because the will is not a joint will made by two or more testators. In Halsbury's Laws of England (Hailsham's Edition, Vol. 34, p. 17, para. 12), relied upon by the Supreme Court in *K. Govindan v. T. T. Lakshmi Amma*, AIR 1959 SC 71, joint will is described as follows:—

"A joint will is a will made by two or more testators contained in a single document duly executed by each testator disposing either of their separate properties or of their joint properties. It is not, however, recognised in the English law as a single will. It operates on the death of each testator as his will disposing of his own separate property and is in effect two or more wills."

It can, therefore, hardly be a matter for doubt or dispute that a will becomes a joint will only if it is made by two or more testators in a single document duly executed by each of them disposing of either their separate properties or their joint properties in the instant case the properties willed away were ancestral properties of Ladu Ram, to which Mst. Bugi had no right during the lifetime of her husband. The words used in the will

"... जिणसु मारी जायगा । बापोतो ने दुकान । बापोती है, तीणरा मालक मोने सो वरस पुगो पछे थे हो दूसरा रो दावो है नहीं ।..."

give a clear indication that the house and the shop willed away were ancestral properties of Ladu Ram. While describing the properties in the will, it was further mentioned as follows:—

... विगत जायदाद गैर मनकुला मोरुसी है तीणरा मालक थे हो दूसरो दावो नही ।

जायगा । बापोती रो पुंगलपाडे में मुन्दडा रो गली में दिखणाद खडकी रो उचा बारणा री अबोर बी मणीयोडी है तिणरा मालक थे छो ।

दुकान । पुंगलपाडे रे नाका से बजार रे नाके घर सु जावतो डावी बाजू है सो दुकान अबार थी सणीयोडी दुखंडी है तीणरा मालक थे छो ।

गर भीकरी जेवर बासण वगैर लेन देन रा मालक थे छो, दुजा रो दावो नी ।

ईण भात जायदात मारुसी गैर मनकुला वा मनकुला है परंतु इण जायदात ऊपर इण मुजब सु देणो है सु थे दे सो ने कागद दस्ताअवज थे उदा ले सो "

The referred to above recitals in the will do not reveal that any of the properties willed away stood in the name of Mst. Bugi or were acquired by her with her Stridhan money or belonged to her or were joint properties of her and her husband. There is no material on the record to prove that she disposed of her own separate or joint property by way of this will. Hence the will not being a joint will may be construed as a will made by Ladu Ram only in respect of his ancestral properties mentioned therein. It is no doubt true that Mst. Bugi could dispose of by will her separate or Stridhan properties. In the ancestral property of Ladu Ram she was entitled to a life interest only after the death of her husband, which she could not alienate by her own act during her own lifetime. A perusal of the document makes it clear that Mst. Bugi was only given a life interest in the properties and absolute interest was given to Ranchor Das, the words

" तीणरा मालक मोने सो वरस पुगो पछे थे हो, दुसरो रो दावो है नहीं । "

may be construed as making a reference only to the period of determination of life interest given to Mst. Bugi, or the postponement of possession of the thing bequeathed. They do not indicate an intention on the part of Ladu Ram testator to postpone or suspend the operation of the bequest made in favour of Ranchor Das till the death of his widow. Reference in this connection may be made to Section 119 of the Indian Succession Act, which reads as follows:—

"Date of vesting of legacy when payment or possession postponed.—

Where by the terms of a bequest the legatee is not entitled to immediate possession of the thing bequeathed a right to

receive it at the proper time shall, unless a contrary intention appears by the will become vested in the legatee on the testator's death, and shall pass to the legatee's representatives if he dies before that time and without having received the legacy, and in such cases the legacy is from the testator's death said to be vested in interest.

Explanation.— An intention that a legacy to any person shall not become vested in interest in him is not to be inferred merely from a provision whereby the payment or possession of the thing bequeathed is postponed, or whereby a prior interest therein is bequeathed to some other person, or whereby the income arising from the fund bequeathed is directed to be accumulated until the time of payment arrives, or from a provision that, if a particular event shall happen the legacy shall go over to another person.”

Ranchor Das, in my opinion, took a vested interest in the property, subject to the life interest given to Mst. Bugi. A vested interest is not even defeated by the death of the devisee before he obtains possession and his representatives will be entitled to its benefit. In the instant case Ranchor Das died after the death of Bugi. Hence his representative Kanhaiya Lal was entitled to the bequest made in his favour by Ladu Ram testator vide: Pearey Lal v. Rameshwar Das, AIR 1963 SC 1703 and Sri Ram v. Abdul Rahim Khan, AIR 1938 Oudh 69.

18. Apart from this, there is no proof that this will was revoked by Ladu Ram during his lifetime by express declaration either oral or written. It is alleged by the respondents that this will was revoked by Mst. Bugi during her lifetime. As stated earlier, the will being not a joint will, and the properties disposed of under it being ancestral, to which Mst. Bugi had no right during the lifetime of her husband, this will became irrevocable after the death of Ladu Ram testator. Even if it is presumed to be a joint will, it did not remain revoked after the death of one of the testators, i.e. Ladu Ram because the survivor, i.e. Mst. Bugi took advantage of the provisions made by her husband and received benefits under the will. Hence even if it is taken to be true that Mst. Bugi had revoked the will during her lifetime, such revocation was not valid in the eye of law. The respondents could not produce or cause to be produced any will made by Bugi alone in favour of Ranchor Das, although it was argued before me that a will was executed in favour of Ranchor Das by Mst. Bugi during her lifetime and it was subsequently revoked by her. As there is no reliable evidence to substantiate the above

plea taken by the respondents, I feel persuaded to hold upon evidence that no other will except the will Ex. DW5/1 was executed by Ladu Ram and Mst. Bugi.

19. The learned counsel for the respondents, however, contended that even if it is taken to be proved that Ladu Ram willed away the properties referred to in his will to his son Ranchor Das, who had gone in adoption to some other family and that after the death of Ranchor Das his son Kanhaiya Lal became full-fledged owner thereof, the plaintiffs' right to redeem the property in question is not lost, because Kanhaiya Lal relinquished his right or interest, if any, in the disputed property in favour of Sardar Mal by way of a registered deed of relinquishment Ex. 12 dated 2nd July, 1936. In support of his above proposition, the learned counsel invited my attention to the following words used in Ex. 12 by its executant:—

“ अब मैं बिना किसी दबाव के नीज अपनी खुद कुशी होस हवास दुस्ती के साथ बगैर नसे पुज्य दादीजी के आखरी मरजी के माफक यह तहरीर सरदार मल जी जाजू के हक में लिखकर फारगती कर देता हूँ कि जीसकी मालीयत करीब रु. ३०००) हजार है मेरा वो मेरी औलाद वारसो का हक आज तक नहीं है और नही होगा और आप जाजू लादुराम जी वो गोरुराम जी की जायदाद वाके सहर जोधपुर और पाली के मकानात दुकानात पर बाकायदा मालीक वो काबीज हो जीसी तहरे हमेशा बने रहोगे मैंने अपना हक कुल तरक कर दिया है लिहाजा यह लिखावट तुम सरदारमल जी को लिख दी सो सही है और वक्त जरूरत के सनद रहे । ”

According to the learned counsel, these words are indicative of an intention on the part of the executant of the deed of relinquishment to bring about a definite change of legal relation to the property. In this document the executant declared that he and his heirs would henceforth have no title, right or interest in the properties willed away by Ladu Ram to his father and that Sardar Mal would have full rights of ownership therein. According to the learned counsel, this deed extinguished the right, title or interest vested in Kanhaiya Lal and purported to create right, title or interest in Sardar Mal. It does not contain a mere statement of a fact that the properties belonged to Sardar Mal, but it is a document in which the executant relinquished his right, title or interest in the properties of Ladu Ram in favour of Sardar Mal. The learned counsel appearing on behalf of

the appellants has assailed this document on various grounds. His first contention is that this document was presented for registration in the office of Sub-Registrar, Pali, within whose Sub-District the entire property or some portion thereof, to which this document relates, was not situated. In support of his above contention, he invited my attention to the provisions of Section 28 of the Marwar Registration Act, which corresponds to the provisions contained in Section 28 of the Indian Registration Act. According to his submission, this section provided that if no part of the property, to which document Ex. 12 relates, was situated within the Sub-District where it was registered, the registration is void. In this connection, he referred to the following authorities: *Harendra Lal v. Haridasi Debi*, AIR 1914 PC 67 and *Collector, Gorakhpur v. Ram Sundar*, AIR 1934 PC 157 wherein registration was held void on the ground that the document was registered at a place in which no part of the immovable property, which was subject-matter of the property, was situated. The above contention is not devoid of any substance. From a bare perusal of the contents of the relinquishment deed Ex. 12 it appears that it relates to those properties of Ladu Ram, which were willed away by Ladu Ram to the executant's father Ranchor Das. Kanhaiya Lal could relinquish his right, title or interest in those properties of Ladu Ram only which his father Ranchor Das had got under the will. Those properties mentioned in the will of Ladu Ram are situated in Jodhpur City. Hence the document Ex. 12 should have been presented for registration in the office of Sub-Registrar at Jodhpur within whose Sub-District his properties, to which such document related, were situated. As this document was registered at a place where no part of those immovable properties, which were the subject-matter of the document, were situated, the registration was void. The contention of the learned counsel for the respondents that the document Ex. 12 related to the entire properties of Ladu Ram including his property at Pali is not acceptable, because under the will of Ladu Ram, Ranchor Das and, after his death, his son Kanhaiya Lal were not entitled to claim any right, title or interest in the other properties of Ladu Ram. The learned counsel for the appellants prayed to this Court by way of an application that additional evidence may be taken under Order 41, Rule 27, C.P.C. to the effect that Ladu Ram had properties at Pali also. Along with his application, he has produced certain documents to show that in reality Ladu Ram owned and possessed immovable properties at Pali. These documents were not produced in the trial

court or before the first appellate court by the plaintiff. He cannot be permitted to adduce additional evidence on this point at this belated stage to fill up the gaps or lacunae in his evidence on issues Nos. 7 to 10. It cannot be said that he is taken by surprise. He knew it well that the defendants have raised an objection in their written statements that the document Ex. 12 relied upon by him was void on account of having been registered in the office of the Sub-Registrar, Pali, within whose Sub-District whole or some portion of the property, to which this document relates, was not situated. The prayer of the learned counsel for the appellants for allowing him to produce additional evidence on this point is rejected.

20. The learned counsel for the appellants further contended that the trial court rightly held that Kanhaiya Lal did not relinquish his title, right or interest in the property of Ladu Ram by this deed Ex. 12. According to his submission, it is a document in which the executant declared that Mst. Bugi had taken Sardar Mal in adoption with the concurrence of Ranchor Das and Goru Ram and that Mst. Bugi revoked her will dated 25th January, 1896 (corresponding to Magh Sudi 10 Samvat-year 1952), which was executed in favour of Ranchor Das and that while going to Laskar she instructed her daughters to execute a deed of formal adoption in favour of Sardar Mal in case she died at Laskar, because she had already adopted Sardar Mal, to her husband and that Sardar Mal had been in possession of Ladu Ram's property being his adopted son and that Kanhaiya Lal had no right to the property of Ladu Ram and that Sardar Mal would continue to own the properties of Ladu Ram as heretofore. The above contention has some force. The document, in my opinion, does not cause a change of legal relation to the property. It contains a mere statement of fact that Sardar Mal had been adopted by Mst. Bugi to her husband and that he had been in possession of the properties of Ladu Ram, to which Kanhaiya Lal and his heirs had no right, title or interest. The trial court rightly held that it required no registration because it did not purport or operate to extinguish whether in present or in future any right, title or interest in the property of Ladu Ram. Hence it cannot be said that by this deed Kanhaiya Lal relinquished his right, title or interest in those properties of Ladu Ram which were bequeathed to his father Ranchor Das.

21. Another contention put forward by the learned counsel for the appellants is that after Ladu Ram's death, the disputed property vested in Ranchor Das under the will and that the subse-

quent adoption of Sardar Mal, if taken to be proved, had no effect of divesting the estate in the hands of Ranchor Das. In support of his above contention, the learned counsel placed reliance on Krishna Murthi v. Krishna Murthi, AIR 1927 PC 139, Jivaji Annaji v. Hanmant Ramchandra, AIR 1950 Bom 369 (FB) and Udhaio Sambh v. Bhaskar Jaikrishna, AIR 1946 Nag 203. The learned counsel for the respondents, on the other hand, urged that the rights of Sardar Mal being adopted son of Ladu Ram relate back to the date of Ladu Ram's death and by a legal fiction Sardar Mal must be deemed to have been in existence as the son of Ladu Ram at the time of latter's death. He further submitted that since the will executed by Ladu Ram operated from the date of his death and since the rights of the adopted son related back to the date of the adoptive father's death, the will so far as it dealt with the disputed coparcenary property was inoperative and the property passed to the adopted son by survivorship. In support of his above proposition, he referred me to Venkatanarayana v. Subbammal, AIR 1915 PC 37, Srinivas v. Narayan, AIR 1954 SC 379, Raghunath v. Ganesh, AIR 1964 SC 234 and Shripad v. Dattaram, AIR 1974 SC 878.

22. I have perused all the authorities cited by the learned counsel for the parties. In the present case Ladu Ram was the sole surviving coparcener. He was entitled to dispose of or bequeath the joint family property as if it was his separate property. It is proved that he made a will of the disputed ancestral properties in favour of his son Ranchor Das, who had gone in adoption to some other family at Laskar (Gwalior) during the testator's lifetime. The pertinent question that arises for consideration is whether Sardar Mal, who was subsequently adopted by the testator's widow Mst. Bugi after his death, could divest the devisee of the property given to him by the will. There is an authority of the Supreme Court—Srinivas v. Narayan, AIR 1954 SC 379 (supra) for the proposition that the adopted son is entitled to take the interest of the adoptive father as on the date of his death. This principle of relation back is based on a legal fiction that there should be no gap or break in the continuance of the line of the adoptive father. In para. 17 of the referred-to-above decision, their Lordships of the Supreme Court observed as follows after a review of the several cases on this point:—

"Thus far, the scope of the principle of relation back is clear. It applies only when the claim made by the adopted son relates to the estate of his adoptive father. This estate may be definite and ascertain-

ed as when he is the sole and absolute owner of the properties, or it may be fluctuating as when he is a member of a joint Hindu family, in which the interest of the coparceners is liable to increase by death or decrease by birth. In either case, it is the interest of the adoptive father which the adopted son is declared entitled to take as on the date of his death. The point for determination now is whether this doctrine of relation back can be applied when the claim made by the adopted son relates not to the estate of his adoptive father but of a collateral. The theory on which this doctrine is based is that there should be no hiatus in the continuity of the line of the adoptive father. That, by its very nature, can apply only to him and not to his collaterals."

The theory of relation back is, however, subject to certain exceptions. One of the limitations is that if the property by inheritance passes to a collateral and the adopted son is adopted after the death of the collateral, the adoption cannot divest the estate of the collateral which had gone to his heir by inheritance. Their Lordships of the Supreme Court approved the view of the Full Bench of the Bombay High Court in Jivaji Annaji v. Hanumant Ramchandra (AIR 1950 Bom 360 (FB)) (supra) on this point and dissented from the contrary view taken by the Privy Council in Anant Bhikappa v. Shankar Ramchandra, AIR 1943 PC 196. This question again came up for reconsideration before the Supreme Court in Krishnamurthi v. Dhruwaraj, AIR 1962 SC 59. Their Lordships of the Supreme Court summarised the principles deducible from their decision in Srinivas v. Narayan (AIR 1954 SC 379) (supra) and held as follows:—

"It has been overlooked that the heir of a collateral succeeding to the sole surviving coparcener inherits the property absolutely, but subject to defeasance, and that the right in the property devolves on his heir, who must consequently take that property absolutely, but still subject to defeasance, as no better title could have been inherited so long as there was the possibility of the defeasance of the absolute title by a widow of the family of the last surviving coparcener adding a member to the coparcenary by adopting a son to her deceased husband and in overlooking what was stated in this connection by this Court in Srinivas Krishnarao Kango's case, 1955-1 SCR 1 = (AIR 1954 SC 379), (sic) though not as a decision, but as a reasoning to come to a decision in that case."

Another exception to which the principle of relation back is subject is that the adopted son would be bound by any lawful alienation effected by a male of

female heir after the death of the adoptive father and before the date of adoption. In the present case the disputed properties owned by Ladu Ram were ancestral. In the will itself it was stated by Ladu Ram, testator in clear and definite terms that the property which he was going to bequeath were 'Bapoti' ancestral in his hands. The words "जायगा । बापोती ने दुकान एक बापोती" indicate that the properties descended upon Ladu Ram in such a manner that his natural or adopted son, acquired certain rights in it as against him. As the properties were inherited by Ladu Ram as unobstructed properties, his male issue, if he had any in his lifetime, would have acquired an interest in such properties from the moment of his birth and would have become a coparcener with his father Ladu Ram as soon as he was born. What happened in the instant case was that Ladu Ram died having no male issue at the time of his death. After his death, his widow Mst. Bugi validly adopted a son, namely, Sardar Mal to him. The effect of the subsequent adoption was that the right of the adopted son related back to the date of his adoptive father Ladu Ram's death and the adopted son must be deemed, by a legal fiction, to have been in existence as the son of Ladu Ram at the time of latter's death.

On the principle of relation back the adopted son became entitled to claim a coparcenary interest in the ancestral properties of Ladu Ram as if they were still joint. The contention of the learned counsel for the appellants that after the death of the sole surviving coparcener, the coparcenary came to an end is not acceptable, because a son was subsequently adopted to Ladu Ram by his widow and because such an adoption created a coparcenary interest in the ancestral properties of Ladu Ram by a legal fiction of relation back of the rights of the adopted son. Consequently, I am of the view that when Ladu Ram, who was the sole surviving coparcener governed by Mitakshara law died and his widow Mst. Bugi validly adopted a son to him after his death, a coparcenary interest in the ancestral property was immediately created by an adoption on the basis of the principle of relation back and such interest was co-extensive with that which Ladu Ram had at the time of his death, and that the adopted son became entitled to the estate of his adoptive father in the hands of Ranchor Das to whom it was willed away by Ladu Ram.

The authority of the Nagpur High Court *Udhao Sambha v. Bhaskar Jai-krishna* (AIR 1946 Nag 203) (supra) relied upon by the learned counsel for the appellants is distinguishable on facts because the facts in that case were that a

last surviving male member of a joint Hindu family bequeathed the family property by will and after his death, the widow of another coparcener adopted a son. The question that arose before Hon'ble Bose, J. in the referred-to-above case was whether the adoption displaced the will and the legacies which vested on the testator's death in 1931. Hon'ble Bose J., who decided the case, was of the view that the adopted son could not deprive the legatees of the properties which were bequeathed to them by Narayan. In the present case the widow of another coparcenary has not adopted a son after the death of the last surviving male member of the joint Hindu family. In *Shrinivas v. Narayan* (AIR 1954 SC 379) (supra) their Lordships clearly held that the relation back of the right of the adopted son is only quoad of the estate of the adoptive father and that this legal fiction cannot be extended so as to lead to unjust results. The will in the present case operated from the date of Ladu Ram testator's death. In my humble opinion, the will, in so far as it related to the coparcenary property, was inoperative, because a coparcenary subsequently came into existence by a legal fiction of relation back after the death of Ladu Ram on account of a son being validly adopted to Ladu Ram by his widow Mst. Bugi after his death. In such a case, the properties of Ladu Ram passed to the adopted son by survivorship and they could not pass to Ranchor Das under a will of Ladu Ram.

23. The result of the above discussion is that Ranchor Das was not entitled to the properties given to him by the will and that Sardar Mal, being validly adopted by Mst. Bugi, was entitled to claim the disputed properties as on the death of the adoptive father by reason of the principle of relation back.

24. Sardar Mal based his claim to the disputed properties of Ladu Ram on the basis of a will Ex. 14 which was executed in his favour by one Goru Ram on Asadh Sudi 9 Smvt. year 1979. By this will, Goru Ram bequeathed the disputed properties to Sardar Mal who, after the testator's death, obtained letters of administration concerning this will from the court of the District Judge, Jodhpur, on 31-7-1951. It was alleged by Sardar Mal that Goru Ram was the nearest reversioner of Ladu Ram and that if his adoption to Ladu Ram is not considered to be a valid one, he is entitled to get the properties of Ladu Ram because they were willed away to him by the nearest reversioner Goru Ram. As I have already held that Sardar Mal was validly adopted to Ladu Ram, it is not necessary for me to examine the alternative basis of Sardar Mal's claim to the disputed properties

of Ladu Ram. There is an admission in the will Ex. 14 itself that Mst. Bugi took Sardar Mal in adoption. In view of this admission, it is difficult to hold that Goru Ram succeeded to the estate of Ladu Ram after the latter's death as his nearest reversioner.

25. Sardar Mal has filed a cross-objection that future mesne profits ought to have been awarded to him by the learned District Judge, Jodhpur, on account of the failure of the appellants to deliver possession of the disputed properties to him after the final decree in the redemption suit. The learned District Judge disallowed the claim of Sardar Mal for future mesne profits on the following ground, which is quoted in his own words:—

"Since a very serious and complicated question of adoption of Sardar Mal is involved in the matter and the mortgagees contested the validity of the adoption in a bona fide manner, as has been observed by the trial Judge, I am not prepared to grant future mesne profit with effect from the date of this judgment."

The relief of future mesne profits is a discretionary one and in suitable cases it is open to the court to refuse to exercise this discretion. In the present case, it cannot be said that the learned District Judge has exercised the discretion arbitrarily or in a wrong manner. The reason given by him for disallowing future mesne profits appears to be correct in the circumstances of the case. The cross-objection is, therefore, liable to be dismissed.

26. The result of the above discussion is that the appeal filed by Motilal and others fails and is hereby dismissed with costs. The cross-objection also has no force and is hereby dismissed.

Appeal dismissed.

AIR 1976 RAJASTHAN 56

V. P. TYAGI, J.

M/s. General Auto Agencies, Appellant v. Hazari Singh, Respondent.

First Appeal No. 1 of 1975. D/- 26-8-1975.*

(A) Rajasthan Premises (Control of Rents and Eviction) Act (17 of 1950), Section 19-A — Landlord refusing to accept rent sent by tenant through money orders — Tenant must take proceedings under S. 19-A for deposit of rent with Court —

*(Against judgment and decree of M. R. Mitruka, Addl. Dist. J. No. 2, Jaipur in C. O. S. No. 101 of 1970 and 11 of 1972, D/- 21-9-1974.)

His failure to do so would make him a defaulter and if arrears mount for 6 months or more it would be a ground for his ejectment. AIR 1975 Raj 196, Rel. on. (Para 11)

(B) Rajasthan Premises (Control of Rent and Eviction) Act (17 of 1950), Section 13 (4) — Suit for eviction on ground of non-payment of arrears of rent — Requirements of S. 13 (4) to get protection from eviction — Deposit of arrears on first day of hearing — Compliance of.

In order to get protection from eviction S. 13 (4) envisages three contingencies: (i) that the tenant should make the deposit on the first day of hearing, (ii) or he should make such a deposit on or before such date as the Court may, on an application made to it, fix in this behalf, and (iii) or if the time is extended by the Court then within that extended time provided that it does not exceed two months.

(Para 15)

The expression 'the first day of hearing' means that day which is fixed by the Court for the return of summons for settlement of issues. It is immaterial whether issues could be settled or not on that day for one reason or other. Where therefore the defendant tenant who was in arrears of rent for 27 months, appeared in court in response to a summons for the settlement of issues, and without depositing the arrears of rent with interest in Court on that day or without applying for extension of time to make the deposit raised an objection that he was not supplied with the copy of plaint along with the summons, and actually deposited the arrears on the next day of hearing, he must be treated as a defaulter not entitled to protection of S. 13 (4). 1969 Raj LW 525 and 1969 Raj LW 315, Rel. on.

(Paras 19, 20)

(C) T. P. Act (1882), S. 106 — Notice of termination of tenancy — Interpretation of — Expression "hereby terminates."

Held that the expression 'hereby terminates', used in the notice of termination of tenancy cannot be read to mean 'terminated forthwith'. The notice in the light of its unambiguous language can be interpreted to mean that the counsel of the landlord indicated to the defendant that his client wanted to synchronise the act of termination of tenancy with the act of the delivering of the vacant possession thereof. The language used was intended to terminate the tenancy either on 31st of October or on the day on which the tenant considered that his month of tenancy expired. (Para 25)

(D) Civil P. C. (1908), O. 30, R. 10 — Suit against a proprietary concern having more than one proprietor in its trade name through its employee — Maintainability.

Order 30, Rule 10 is not only applicable to a suit against one person carrying on business in assumed name but also where it is brought against a proprietary concern having more than one proprietor and doing business in the assumed name as members of a joint family. AIR 1941 Pat 596 and AIR 1962 Pat 360 and AIR 1956 Orissa 186 and AIR 1960 Ker 75, Foll.; AIR 1936 Mad 707 and (1947) 51 Cal WN 563, Not Foll. (Para 38)

Even if the plaint did not mention the name of the proprietor, the suit brought against the proprietary concern in its assumed name through its Manager could be continued and, therefore, it is neither a case of misdescription or misjoinder of the parties within the meaning of Order 1, R. 10. The suit cannot be thrown out when no prejudice has been caused to the defendant by simply adding the name of the Manager. (Para 39)

Cases Referred: Chronological Paras

AIR 1975 Raj 196 = 1974 WLN 270	11
AIR 1974 Pat 117	39
AIR 1971 All 302 = 1971 All WR (HC)	121
	34, 25
1969 Raj LW 315 = 1969 Ren CR 823	19
1969 Raj LW 525 = 1969 WLN 257	19
AIR 1963 All 581 = 1963 All LJ 567	24
AIR 1962 Pat 360 = 1962 BLJR 475	31,
	36
AIR 1960 Ker 75 = 1959 Ker LT 966	31,
	37
AIR 1956 Orissa 186	31
(1947) 51 Cal WN 563 = ILR (1948) 1 Cal	29, 30
81	
AIR 1944 Cal 138 = 48 Cal WN 203	34
AIR 1941 Pat 596 = 22 Pat LT 682	30,
	31, 33, 34
AIR 1936 Mad 707 = ILR (1937) Mad 28	29, 33, 34

S. C. Bhandari, for Appellant; H. M. Pareekh and B. C. Mehta, for Respondent.

JUDGMENT:— This is defendant's first appeal against the judgment and the decree of the learned Additional District Judge No. 2, Jaipur City dated 21st September, 1974.

2. There is a building situated on the Mirza Ismail Road, Jaipur known as Bhagwat Bhawan. A part of this building was rented out to defendant M/s. General Auto Agencies for the rent of Rs. 425 per month. According to the plaintiff this part of the building was sold by the owners of the building to the plaintiff on 7th November, 1963, for Rs. 48,499. Shri Mangilal the proprietor of the building who sold it to the plaintiff wrote to the defendant on 7th December, 1968 that the premises had been purchased by the plaintiff, and, therefore, rent may henceforth be paid to the plaintiff. This notice was received by the defendant firm on 13th December, 1968 and it is alleged that thereafter the

defendant started paying rent at the rate of Rs. 425 per month to the plaintiff and continued to pay it till February, 1969. It appears that the plaintiff did not accept the rent after February, 1969 and the money orders sent by the defendant to the plaintiff towards the payment of the rent was refused by the plaintiff. A notice (Ex. 5) was served on the defendant by the plaintiff on 3rd October, 1969 intimating him that the tenancy was terminated and that the defendant should hand over the vacant possession of the premises to the plaintiff. It was also mentioned in the notice that the plaintiff required the premises for his personal bona fide need for residential purpose as well as for carrying on the business of Chemical Limes produced by the plaintiff. This notice did not bring the desired effect on the defendant and the defendant did not hand over the vacant possession to the plaintiff. The plaintiff was, therefore, compelled to bring the present suit for ejectment of the tenant as well as for the arrears of rent.

3. It may be mentioned that the suit was filed against General Auto Agencies through its manager Shri Bhanwar Lal Bordia.

4. A written statement was filed on behalf of Shri Bordia accepting that the suit premises were rented out to General Auto Agencies but he is not a tenant as the General Auto Agencies was a proprietorship firm of one Shri Sobhagmal Lodha who died before the suit was instituted by the plaintiff. He further stated that he was a mere servant of the firm and, therefore, the plaintiff should have filed a suit against the proprietors of the firm. It was also alleged that M/s. General Auto Agencies was neither a partnership firm nor a body corporate and therefore it was not a juristic person hence a suit against M/s. General Auto Agencies was not maintainable. The bona fide and the reasonable need of the plaintiff for getting the premises vacated was also denied by the defendant. It was also averred that the premises rented out to M/s. General Auto Agencies were sold by the legal heirs of Mangilal in three bits. Besides the premises sold to the plaintiff, two pieces of land which were also the part of the defendant's tenancy were sold out to two different persons and unless all the three owners of the leased out property join to terminate the tenancy, the plaintiff alone cannot claim that the tenancy of the defendant was terminated by him and as such a notice Ex. 5 which should have been given by all the three owners of the leased out property was bad in law.

5. The defendant denied that he was a defaulter. On the first day of hear-

ing i.e. on 21st April, 1970 the defendant brought to the notice of the court that he was not served with the correct copy of the plaint, and therefore, the court directed the plaintiff to supply the true copy of the plaint to the defendant and fixed 21st May, 1970 as the next date of hearing. On 21st May, 1970, the defendant tendered on behalf of the proprietors of the M/s. General Auto Agencies Rupees 12,225 as the arrears of rent and the interest on the amount for 27 months for which the rent had not been paid and claimed that the defendant in view of this deposit being made, could not be ejected by treating him as a defaulter.

6. The trial Court framed as many as 6 issues. The plaintiff came in the witness-box to prove his bona fide need for getting the vacant possession of the premises and in support of his plea he examined Dr. R. K. Sharma P.W. 2 in whose house the plaintiff used to live as a tenant and paid rent @ Rs. 525 per month. Kalyan Singh P.W. 3; Ramratan P.W. 4 and Mohan Singh P.W. 5 were also brought in the witness-box. Bhanwar Lal Bordia the manager of the defendant concern along with Mool Singh D.W. 2 and Gopi Chand D.W. 3 were examined on behalf of the defendant.

7. The learned Judge after considering the evidence produced on behalf of both the parties, recorded a finding that the premises were required by the plaintiff for his bona fide and reasonable necessity for residence and business purposes. The learned Judge also found the defendant as a defaulter. The issue relating to the maintainability of the suit against M/s. General Auto Agencies was also decided by the trial Court in favour of the plaintiff. As regards the defect in notice Ex. 5 the learned Judge held that the defendant could not establish that the premises rented out to the defendant by Mangilal or his predecessor-in-title included those pieces of land which were sold by the heirs of late Mangilal by executing sale-deed Ex. A/10 dated 29th September, 1968 and thus passed a decree of ejectment against the defendant and also for the mesne profits pendente lite @ Rs. 425 per month till the vacant possession was handed over to the plaintiff.

8. The defendant has filed this appeal against the said decree. Mr. S. C. Bhandari appearing on behalf of the defendant-appellant urged the following points before me:

(1) That the suit was not maintainable as it was filed against M/s. General Auto Agencies which was not a juristic person,

(2) That the defendant could not be declared as a defaulter after depositing Rs. 12,225 as arrears of rent for 27 months

on the first date of hearing after he was properly served with the correct copy of the plaint by the court,

(3) That the notice being defective did not lay a valid foundation for filing the suit for ejectment and, therefore, the suit should have been dismissed on that ground, and

(4) That the plaintiff failed to prove his bona fide and reasonable necessity for getting a decree of eviction in his favour.

9. Let me examine these points one by one. I will first of all take up the question of reasonable and bona fide necessity of the plaintiff.

10. Hazari Singh is the manufacturer of lime at Moondewa. He generally used to reside at Jodhpur but for some time past he shifted to Jaipur and took the house of Dr. R. K. Sharma P.W. 2 in Bapunagar on a rental of Rs. 525 per month. This fact is also not denied that the plaintiff is carrying on his business for the sale of lime in the name and style M/s. Chemical Limes and that he had opened his office in the rented premises in Bapu Nagar. The suit premises were purchased from the owners of the building on 7th November, 1968, and the sale-deed Ex. 1 mentions that the plaintiff had invested this huge amount to acquire properties for his personal use i.e. for residential as well as commercial purposes. It is established from the testimony of Dr. R. K. Sharma P.W. 2 that the plaintiff at the time when he served the defendant with notice Ex. 5 was living in a rented house belonging to Dr. Sharma and that Dr. Sharma was in need of the accommodation for his residential purposes and he had served a notice on the plaintiff to vacate his house so that he (Dr. Sharma) could shift to his own house. There is a document Ex. 8 on the record a letter from Allied Products Agencies which shows that the plaintiff was in correspondence with the said agencies to acquire the agency rights for the sale of their products. But those rights could not be secured by the plaintiff till he had a show-room at his disposal to display the products of the said agencies. The author of the letter Ex. 8 has not come in the witness-box to prove it. It simply shows that the plaintiff was on the look out to obtain the agencies for the manufactured goods of Allied products. But that letter alone in itself is not sufficient to establish that the plaintiff's need for getting the agencies of the allied products constituted a reasonable and bona fide necessity. That could be one of the factors which might have prompted the plaintiff to see that he may get the possession of the premises purchased by him from his tenants. Mr. Bhandari urged that except letter Ex. 8 no further correspondence has been

brought on the record to show that the plaintiff was really after the agency of the Allied products and, therefore, it should be taken that the letter was written by the plaintiff to M/s. Allied Products Agency in order to create evidence to create a plea of bona fide necessity. Learned counsel for the plaintiff respondent on the other hand urged that even if the factor of procuring the agency for the Allied Products Agency is taken out of consideration, the need of the plaintiff to get the vacant possession of the premises purchased by him is otherwise established and it is that the plaintiff was in dire necessity of getting a house for himself and that he was carrying on his business of Chemical limes in the rented house situate in a non-commercial area i.e. Bapu Nagar therefore he wanted to shift that office immediately to the central place of business i.e. of Mirza Ismail Road, D.W. 2 Shri Moolsingh the ex-owner of the premises from whom the plaintiff had purchased the building, has stated in his cross-examination that the plaintiff had told him that he required the property for his own use. There was a pressure on the plaintiff from his own landlord who wanted his house to be evicted because he was himself living in a hotel and therefore the plaintiff, who had already purchased a building for his residential purpose as well for his business, naturally looked forward to see that such a building is handed over to him for his necessities. P.W. 4 Ramratan who works as a property agent for getting the deal of sale materialised, has lent support to the plaintiff's version that he needed the premises for his business as well residential purposes. The defendant on the other hand has examined D.W. 1 Bheronlal the manager of the concern but his testimony when weighed in the background of the depositions made by the plaintiff's witnesses, does not establish that the premises were not required by the plaintiff for his reasonable requirement. The plaintiff had no suitable alternative accommodation where he could shift from the rented house which was urgently required by the landlord and he could not perhaps find a better situation than the house purchased by him for carrying out his business of M/s. Chemical Lime and, therefore, his assertion that he needed the premises for his personal and bona fide use assumes considerable weight. Under these circumstances I do not find that the finding of the trial court on this issue needs interference at the hands of this Court.

11. As regards the question of default the following facts brought on the record are necessary to be considered. It is not denied that the defendant paid to the plaintiff the rent of the premises • @ Rs. 425 per month upto February, 1969

and thereafter the amount of rent for four months remitted by the defendant by money orders was not accepted by the plaintiff. The defendant-appellant has produced documents Ex. A/1, Ex. A/2, Ex. A/3 and Ex. A/4 to prove that the rent was sent by money orders but the money orders were refused by the plaintiff. The plaintiff says that he did not refuse any money order. But in view of the endorsement on these documents that the money orders were refused by the addressee it is difficult for me to accept the contention of the plaintiff. But the fact whether the refusal of the money orders by the plaintiff absolves the defendant of his duty to continue to pay the rent to the plaintiff and can the defendant now say that since four money orders were refused by the plaintiff, he cannot be deemed to be defaulter. In this connection my attention has been drawn to a new section (Section 19-A) of the Rajasthan Premises (Control of Rent and Eviction) Act, 1950, hereinafter called 'the Act', which casts a duty on the tenant to deposit such rent with the court if the landlord refused to accept the rent tendered by the tenant. Such a deposit with the court shall be taken to be a full discharge of the duty from the liability to pay rent to the landlord. It is admitted by the parties that the defendant tenant did not take any proceedings to deposit the amount of rent under Section 19-A with the court. *Lodha J. in Sobhraj v. Bhanwar Lal*, 1974 WLN 270 = (AIR 1975 Raj 196) has observed:

"If the tenant wants to escape from the liability of being ejected on the ground of rent having not been paid or tendered for six months he must make the deposit as provided under Sec. 19-A even though the tender of rent by the tenant to the landlord has been refused once. If he does not do so and rests content by merely tendering the rent once which has been refused by the landlord he shall be deemed to have committed default in payment of rent due, and if such arrears mount for six months or more it would certainly become a ground for the landlord to seek ejectment on that basis."

12. On the day when the suit was filed by the plaintiff for ejectment and arrears of rent, the rent for 27 months was due from the tenant and, therefore, the plaintiff had a right to file a suit for ejectment on the basis of default under the provisions of the Act.

13. The case of the defendant in this connection further is that after the suit was filed by the plaintiff, he was served with a summons to appear before the court on 21st April, 1971 but with that summons it is said proper copy of the plaint was not handed over to the defendant and, therefore, when the defendant

put in his appearance before the court he lodged a grievance with the court that he should have been served with a proper copy of the plaint along with the summons. The court directed the plaintiff to hand over to the defendant the true copy of the plaint and fixed 21st May, 1971 as the next date of hearing. On that date the defendant deposited the arrears of rent along with the interest accrued thereon under the provisions of Section 13 (4) of the Act. It is said that the plaintiff accepted the rent and interest on that rent and filed a receipt in the court. The question is whether in these circumstances the plaintiff is entitled to get a decree for eviction on the ground of default?

14. Sub-section (4) of Section 13 of the Act reads as follows:

"(4) In a suit for eviction on the ground set forth in clause (a) of sub-section (1), with or without any of the other grounds referred to in that sub-section, the tenant shall, on the first day of hearing or on or before such date as the court may, on an application made to it, fix in this behalf, or within such time, not exceeding two months, as may be extended by the court, deposit in court or pay to the landlord an amount calculated at the rate of rent at which it was last paid, for the period for which the tenant may have made default including the period subsequent thereto up to the end of the month previous to that in which the deposit or payment is made together with interest on such amount calculated at the rate of six per cent. per annum from the date when any such amount was payable upto the date of deposit and shall thereafter continue to deposit or pay, month by month, by the fifteenth of each succeeding month a sum equivalent to the rent at that rate."

15. The requirement of this sub-section is that on the first day of hearing or on or before such date as the court may on an application made to it, fix in this behalf, or within such time, not exceeding two months, as may be extended by the court, the tenant can deposit arrears of rent along with interest calculated at the rate of 6 per cent. per annum in the court. There are three contingencies which have been envisaged by the legislature for making the deposit or arrears of rent in this sub-section and they are, (i) that the tenant should make the deposit on the first day of hearing, (ii) or he should make such a deposit on or before such date as the court may, on an application made to it, fix in this behalf, and (iii) or if the time is extended by the court then within that extended time provided that it does not exceed two months.

16. It is admitted by the parties that the defendant did not make any ap-

plication for the extension of time to enable him to deposit the arrears of rent nor did he make any application under sub-section (5) of Section 13 to determine the amount of rent payable by the tenant. The only question therefore that remains to be decided is whether the depositing of the arrears of rent on 21st May, 1971 which was the next date of hearing after the first day of hearing, can it be said that the defendant had complied with the requirement of sub-section (4) of Section 13 of the Act.

17. It is admitted by the defendant that he was served with the summons issued by the court to appear before it on 21st April, 1971 and in compliance thereof he did put in his appearance before the court. But instead of depositing the amount of arrears of rent with the court he simply expressed his grievance that he was not served with the complete copy of the plaint. The court however directed the plaintiff to supply the true copy of the plaint to the defendant and it was done by the plaintiff before the next date of hearing i.e. 21st May, 1971.

18. Learned counsel for the plaintiff respondent urged that the mandate of sub-section (4) of Section 13 is that the tenant if he wants to avail of the another opportunity provided by the law to wash away his default, must deposit the arrears of rent along with the interest calculated @ 6 per cent. on the first day of hearing if he did not seek the extension of time for making such deposit in the court. The question is how the expression 'first day of hearing' is to be interpreted and whether in the circumstances of this case 21st April, 1971 shall be taken to be the first day of hearing or 21st May, 1971 to which date the case was adjourned, shall be taken as the first day of hearing.

19. This Court in *Mangal Ram v. Smt. Chandravati Devi*, 1969 Raj LW 525, *Suraj Bhan v. Chandra Prakash*, 1969 Raj LW 315 and *Mangal Ram v. Smt. Chandravati Devi*, 1969 WLN 257 (Raj.) has interpreted the expression 'first day of hearing' and has laid down that this expression means first date fixed for return of summons or settlement of issues. I looked into the summons which was served on the defendant. The summons was issued to the defendant for the settlement of issues and was served on him before 21st April, 1971. The defendant appeared before the court in compliance with the mandate contained in the summons. The defendant did not make any application for the extension of time for making deposit of the arrears of rent before the court. If the defendant was keen to avail of the opportunity provided by the law under Section 13 (4) of the Act, then it

was necessary for the defendant when he appeared before the court for the settlement of issues either to deposit the amount or to seek extension of time

20. Learned counsel appearing on behalf of the appellant urged that if the summons did not carry with it the complete copy of the plaint then its service shall not be deemed to be a proper service in the eye of law. It is however not denied that the summons was issued for the settlement of issues. But according to him the issues could not be settled unless the pleadings were properly filed by the parties and as the defendant was not served with the complete copy of the plaint, he was not in a position to file his written statement and hence the issues could not be settled. I regret I cannot accept this argument of Mr. Bhandari because Section 13 (4) as interpreted by this Court on various occasions requires the payment of arrears of rent to be made on the first day of hearing i.e. when the defendant is required to appear before the court for the purpose of settling the issues. It is immaterial whether the issues were or could be settled or not on that date. If for one reason or the other the issues could not be settled on that day then it cannot be said that that day was not fixed for the settlement of issues. The 'first day of hearing' has been interpreted by this Court as that day which is fixed by the court for the return of summons for settlement of issues and, therefore, in my opinion the 'first day of hearing' in the circumstances of this case was 21st April, 1971. Since the defendant did not strictly comply with the requirement of Section 13 (4) and did not deposit the arrears of rent with the interest on the first day of hearing, his subsequent depositing of the amount would not take him out of the expression 'defaulter'. Or 21st April, 1971 the defendant was a defaulter and as he did not deposit the amount according to the provisions of Section 13 (4) on that day he cannot now say that the decree of ejectment could not be passed against him on the basis of being a defaulter.

21. Mr. Bhandari then urged that notice Ex. 5 served by the plaintiff is not in conformity with the requirement of Section 106 of the Transfer of Property Act as the plaintiff by that notice terminated the tenancy forthwith, therefore he could not seek ejectment of the defendant without properly terminating his tenancy. It may be observed at the very outset that this objection was never taken by the defendant in his written statement nor did he incorporate this ground in his memorandum of appeal but addressed the court on this point in his opening address without taking leave of the court. When

the learned counsel for the respondent stood for a reply and raised the objection that the defendant appellant was not entitled to take up a new point which he never pleaded in his written statement nor was taken in the memorandum of appeal, Mr. Bhandari filed an application praying that he may be permitted to argue this question which was only a question of law. This application was filed when the learned counsel for the respondent was on his legs to address the court and replying to the arguments of Mr. Bhandari who had already closed his opening arguments. In these circumstances I feel Mr. Bhandari does not deserve leniency to deal with his prayer to allow him to argue this question, but since Mr. Bhandari already addressed the full-fledged arguments on this point without obtaining leave of the Court, I permitted learned counsel for the respondent to meet this point also as it is purely a question of law.

22. In order to decide this objection it will be convenient to look to the relevant portion of the language of notice Ex. 5 on which reliance has been placed by Mr. Bhandari. Para. 6 of the notice reads as follows:—

"That the premises mentioned above let out to you on rent are required reasonably and bona fide for the personal necessity of residence and business for which my client has purchased the premises mentioned above. My client does not want to keep you his tenant any longer and hereby terminates your tenancy by this notice and requests you to vacate the premises by the end of October, 1969 i.e. by the midnight of 31st October, 1969 or on such day on which you consider that your month of tenancy comes to an end."

23. Mr. Bhandari wants this Court to give a meaning to the expression 'hereby terminates' that the tenancy was terminated forthwith when a notice was served on the defendant. While learned counsel for the respondent argued that this paragraph may be read as a whole and it clearly conveys to the defendant that the intention of the plaintiff was to terminate the tenancy from the last day when the month of tenancy comes to an end and, therefore, the expression 'hereby terminates' cannot be read to mean that the tenancy was terminated forthwith.

24. Mr. Bhandari argued that the court should draw a distinction between the terminating of tenancy and calling upon the tenant to deliver possession and urged that in the notice Ex. 5 the plaintiff terminated the tenancy by sending this notice and then made a request to hand

over the possession of the property to the plaintiff by 31st October or on the last day of the month of the tenancy. In this connection reliance has been placed by Mr. Bhandari on *Hakim Ziaul Islam v. Mohd. Rafi*, AIR 1971 All 302 and drew my attention to the observations made by Desai C. J. in *Ahmad Ali v. Mohammad Jamal Uddin*, AIR 1963 All 581 wherein learned C. J. has observed as follows:—

"There is undoubtedly a distinction between terminating the tenancy at once and calling upon the tenant to deliver possession after 30 days and terminating tenancy after 40 days in the former case the relationship of landlord and tenant comes to an end at once and the tenant is given a right to remain in possession for 30 days either as a licensee or as a tenant on sufferance, whereas in the later case he remains a tenant for 30 days."

25. Learned counsel for the respondent urged that there could not be any quarrel with the law laid down by Desai C. J. because according to Mr. Pareekh if the tenancy is terminated forthwith then the relationship of a tenant with his landlord comes immediately to an end and thereafter if the landlord requires the tenant to hand over the possession of the demised premises after some time then for that period the position of the tenant is that of a licensee or of a tenant on sufferance.

In *Hakim Ziaul Islam v. Mohd. Rafi* AIR 1971 All 302 I find that the notice indicated that the landlord wanted to terminate the tenancy immediately. This authority can help the appellant only if I hold that in the present case the counsel who had drafted the notice on behalf of the plaintiff indicated to the defendant the intention of his client to terminate the relationship of the landlord and the tenant immediately. The notice however, does not state that the tenancy was terminated forthwith. The expression 'hereby terminates' cannot be read to mean 'terminated forthwith'. The word 'hereby' means that the tenancy was terminated by that notice. The sentence when read as a whole makes it abundantly clear that the request was made by the landlord for the delivery of possession of the demised property either by the end of 31st October, 1969 or on such day on which the tenant considered that his month of tenancy came to an end. The notice in the light of its unambiguous language can be interpreted to mean that the counsel of the landlord indicated to the defendant that his client wanted to synchronise the act of termination of tenancy with the act of the delivering of vacant possession thereof. In my opinion the language used by the counsel for the plaintiff was intended to terminate the tenancy either on 31st of

October or on the day on which the tenant considered that his month of tenancy expired. The notice Ex. 5 does not in any manner carry the idea that the landlord was keen to terminate the tenancy of the defendant immediately on the receipt of the notice. I, therefore, do not find any life in this argument also.

26. The defect of notice is a subject-matter of issue No. 4 which reads as follows:—

"Whether the plaintiff is one of three purchasers of the disputed property and so he was not entitled to terminate the tenancy and the notice given by him is not valid. If so, to what effect?"

27. The validity of the notice is also challenged on the ground that the plaintiff alone was not competent to terminate the tenancy when the part of the land demised was sold by the previous landlord to two other persons who did not join the plaintiff to terminate the tenancy of the defendant. Mr. Bhandari could not point out any material on the record to show that the pieces of land sold out to two other persons were also leased out to the defendant along with the premises which were sold out to the plaintiff. On the contrary I find that after the suit premises were sold out to the plaintiff, the previous landlord sent a letter to the defendant on 7th December, 1968 asking him to pay the rent in future to the plaintiff. In pursuance of that letter the defendant for some time paid the entire rent to the plaintiff. Shri Gopichand D.W. 3 who had purchased the land for his minor ward which is said to be leased out to the defendant, has come in the witness-box but he does not say that the defendant was his tenant in respect of that land. Defendant did not pay a single pie as rent to the other purchasers. It is true that after the suit was filed the defendant somehow managed to get a letter issued by the previous owner of the suit premises to the defendant saying that he was the tenant of the two other purchasers of the plots of land which once constituted a portion of the Bhagwant Bhawan. But nobody is prepared to say that the property which was sold to the plaintiff was leased out to the defendant along with the parcels of the land sold out to the other two purchasers simultaneously or that the lease granted to the defendant by the previous owner of Bhagwant Bhawan was one in respect of all the properties covered by the 3 different sale-deeds, one in favour of the plaintiff and the other sale-deeds Ex. A-10 and Ex. A-11. In this view of the matter I find it difficult to accept the contention of Mr. Bhandari that all the three purchasers must have joined together to terminate the tenancy of the defendant otherwise

tenancy was not validly terminated by notice Ex. 5.

28. Now remains the question of the maintainability of suit against General Auto Agency which according to Mr. Bhandari is not a juristic person.

29. The suit is filed against M/s. General Auto Agency, M. I. Road, Jaipur through its manager Shri Bhanwar Lal Bordia. The plaintiff is silent on this point whether the concern M/s. General Auto Agency is a partnership firm or it is a body corporate and as such it could be sued under Order 30, C.P.C. in the manner in which the present suit has been filed. Mr. Bordia while filing his written statement brought certain facts on the record which go to show that M/s. General Auto Agencies was a proprietary concern of Shri Sobhagmal Lodha but Mr. Lodha died before the suit was actually instituted. He did not disclose in his written statement the name or the names of the proprietors of the concern. He simply stated that he is a servant of the proprietors. Beyond this he did not furnish any information as to who manages the concern. The main contention of Mr. Bhandari is that if the plaintiff has preferred to sue a concern by its trade name then it is the duty of the plaintiff to show as to how and under what law the suit is maintainable against the trade name of a concern which is not a juristic person. He further urged that if there are more than one proprietor of the concern then Order 30, Rule 10 would not apply to such a concern. According to Mr. Bhandari the provisions of Order 30, Rule 10 can be attracted only when the suit is filed against a concern that has only one proprietor and it is only in that case that it can be sued by its trade name. In support of this contention reliance has been placed by him on two authorities, i.e. *M. A. Chidambaram Chettiar v. National City Bank of New York*, AIR 1936 Mad 707 and *Re. Arbn. Munshilal and Sons v. Modi Bros.*, (1947) 51 Cal WN 563. In Chettiar's case the suit was brought under Order 30, Rule 10, C.P.C. against the business which was described in the plaint as 'R.M. P.M. Chettiar firm carrying on business at Rangoon'. In the execution of the decree the property of the four minors owning that business was attached. An objection was raised that the suit could not be filed under Rule 10 of Order 30 C.P.C. which provision was not applicable to the concern owned by more than one proprietor. The learned Judges relying on certain English authorities observed as follows:—

"R. 10. O. 30 stands in marked contrast with R. 1. The latter rule applies to "any two or more persons", whereas Rule 10 refers to "any person carrying on

business". There is no reason to depart from the view taken in the English cases and we must hold that Rule 10 is applicable only to the case of a single individual. In this case, the so-called assumed name is said to be the name of the business owned by the four minors and the rule is, in our opinion, utterly inapplicable."

30. The view expressed by the Madras High Court with regard to the applicability of Rule 10, Order 30 is endorsed by Das J. in *Re. Arbn. Munshilal and Sons v. Modi Bros.*, (1947) 51 Cal WN 563. The learned Judge while scrutinising the genesis of Rule 10, Order 30 observed that this provision is introduced in C.P.C. on the analogy of the English Rule 11, Order 48-A which replaced the old Rule 7 of Order 9. After a long discussion and considering various English authorities the learned Judge arrived at a conclusion that Rule 10 would be attracted only when the business is carried on by a single proprietor in his trading name. While laying down this law the learned Judge did take note of the observations of Fazl Ali J. in *Alekh Chandra v. Krishna Chandra Gajapati Narayan Deo*, AIR 1941 Pat 596 but he did not agree with the view expressed by Fazl Ali J.

31. Mr. Pareekh appearing on behalf of the respondent on the other hand relied on the authorities of the Patna, Orissa and Kerala High Courts in *Alekh Chandra v. Krishna Chandra Gajapati Narayan Deo*, AIR 1941 Pat 596, *Rameshwar Prasad Golwara v. Keshab Prasad Bhagat*, AIR 1962 Pat 360, *Harishanker Lath v. General Merchants Ltd.*, AIR 1956 Orissa 186 and *Tulsidas Mulji v. Ebrahimjee*, AIR 1960 Ker 75 and urged that the defendant Bhanwar Lal Bordia has deliberately withheld the information as to who were the proprietors of the concern known as M/s. General Auto Agencies. In his written statement he has given only this much information that this was a proprietary firm; the proprietor Shri Sobhagmal Lodha died long before the suit was instituted. He however did not disclose the name or names of the present proprietor or proprietors of the firm. He has however stated that he is the servant of the "proprietor" which expression indicates that there are more than one proprietor of the firm M/s. General Auto Agencies who are carrying on their business in the assumed name. In his statement when he came in the witness-box, Shri Bordia stated that Sobhagmal Lodha had created a trust and the trustees are carrying on the business of this concern but he purposely did not give any detail about the names and the addresses of the trustees.

32. Trustees cannot call themselves to be the proprietors of the firm in the ordinary sense the expression proprietor connotes. Shri Bordia in his written statement has stated that he was a servant of the proprietors. This indicates that the business of this concern has gone to the hands of more than one proprietor; such proprietors could not be anybody else except heirs of Shri Sobhagmal Lodha. If that be so, then this business must be carried on by the heirs of Sobhagmal Lodha as joint Hindu family business inherited from their ancestor. It is in this light that I have to consider the contention of Mr. Bhandari and see whether if the business carried on by a joint Hindu family then could it be sued in its trade name under the provisions of Rule 10, Order 30.

33. Fazl Ali J. in AIR 1941 Pat 296 while considering the Madras authority AIR 1936 Mad 707 wherein it was held that Order 30, Rule 10 can apply only to the trade name where the business is carried on by single individual, observed as follows:—

"With that view I agree subject to this qualification only that there is nothing to prevent this rule being applicable to those cases where more persons than one carry on business in an assumed name, though strictly speaking they are not partners. Such a case cannot arise in England, but in India the members of a joint family who do not form a contractual partnership in the strict sense of the term do often carry business in an assumed name."

34. In Jamunadhar Poddar Firm v. Jamunaram Bhakat, AIR 1944 Cal 138 cited by Mr. Pareek the court discussed the case law on the subject at length and observed as follows:—

"A business can be carried on either by one person, either in his own name or in an assumed name, or by a number of persons in association. In the last mentioned case the association of those persons would ordinarily in England be a partnership firm concern. There is no such concern in England, the like of which we have here in the case of a joint Hindu trading family, of a group of persons trading together but not constituting a firm. In view of that fact it would, in our judgment be not right to follow blindly the dicta of Judges of the English Courts where they say that Rule 11 of O. 48-A relates to the case of a single individual. On this point we fully endorse the view expressed by the Patna High Court in AIR 1941 Pat 596. Differing from the decisions of the Madras High Court in ILR (1937) Mad 28 = (AIR 1936 Mad 707), we agree with that decision of the Patna High Court. No convincing reasons have

been given in the judgment of the Madras High Court. The contrast between the language of Rules 1 and 10 of Order 30 made therein does not carry the matter far, and we do not agree with the observations that here in India "there is no reason to depart from the view taken in English cases" on the scope of that rule."

35. The learned Judges in this connection further observed,

"Order 30, Rule 10 uses the words 'any person'. The singular number is there, but the word 'person' must be given the meaning assigned to it by Section 3 (39), General Clauses Act. Unless there is something repugnant in the context or in the subject, the term 'person' will include any association or body of individuals whether incorporated or not." We do not find either anything in the context of subject which would lead us to hold that Rule 10 contemplates the case of a single individual only, and not of many individuals. Of course, where more than one individual trade under a firm name or under any other assumed name and form a partnership resting on contract, the case would come under Rule 1 of Order 30, but where they do not form a partnership we do not see any convincing reason why they should not come within Rule 10."

36. In Rameshwar Prasad Golwara v. Keshab Prasad Bhagat, AIR 1962 Pat 360 the learned Judge after discussing the scope of Rule 10, Order 30 laid down the law as follows:—

"It is to be noticed that Rule 1 essentially deals with a case of partnership which cannot be constituted by a single individual; there must be two or more persons to constitute a partnership. While, on the other hand, Rule 10 is wide enough to cover within its ambit a single person carrying on a business in a name or style other than his own name, two or more persons carrying on business in a name or style other than their own name either as a group of persons or as members of a joint Hindu family. There is nothing repugnant in the subject or context to exclude the application of the principles of law embodied in Section 13 of the General Clauses Act nor is there anything in my opinion, to enable me to hold that the definition of the word 'person' given in Section 3 (42) is not applicable to the same word used in Rule 10 of Order 30 of the Code."

37. The Kerala High Court in Tulsidas Mulji v. Ebrahimjee, AIR 1960 Ker 75 after considering various authorities of different High Courts also laid down,

"There is nothing to prevent Rule 10 of Order 30 being applicable to those cases where more persons than one carry on

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